

SH 249 EXTENSION PROJECT DRAFT DESIGN-BUILD AGREEMENT TERM SHEET

This document provides background information and summarizes the major terms of the Design-Build Agreement (“DBA”) for the design and construction of the SH 249 Extension (“Project”), which may be entered into by the Texas Department of Transportation (“TxDOT”) and a firm (“Design-Build Contractor”) to be selected based on responses to a Request for Proposals (“RFP”). This document is intended as a general description of the anticipated major contract terms of the DBA, and is not a restatement or interpretation of the DBA requirements. There are numerous details, exceptions and qualifications associated with the anticipated provisions described below which can only be ascertained by reviewing the DBA itself.

DESCRIPTION OF PROJECT

The Project scope includes the design, construction and maintenance of approximately 24 miles of a new tolled facility consisting of up to four new toll lanes (two in each direction) from FM 1774 in Pinehurst, Texas (Montgomery County) to FM 1774 in Todd Mission, Texas in Grimes County (Segment 1), and two new toll lanes (one in each direction) with periodic passing lanes (Super 2 configuration) from FM 1774 in Todd Mission, Texas to SH 105 near Navasota, Texas in Grimes County (Segment 2). Except as otherwise specified, all other work for design and construction (the “Work”) will be the responsibility of the Design-Build Contractor. See the RFQ for further details regarding the Project.

The parties intend for the DBA to be a fixed price, lump sum contract obligating the Design-Build Contractor to complete the Work by the deadlines set forth in the DBA and in a manner satisfactory to TxDOT, for the agreed price (the “Price”), subject only to certain specified limited exceptions.

CONTRACT OVERVIEW	
Design-Build Contractor & Agreement Date	To be determined. TxDOT currently anticipates executing the DBA in August 2016.
Scope of Work	<p>DBA requires the Design-Build Contractor to design and construct (with quality and durability) the Project. The Design-Build Contractor's Work includes the obligation to furnish a complete design for the Project meeting all DBA requirements, to construct the Project as designed and in accordance with all requirements, and otherwise to comply with all DBA requirements.</p> <p>See <u>Exhibit A</u> of the Request for Qualifications ("RFQ") for further details regarding the Scope of Work.</p>
Notices to Proceed	<p>TxDOT anticipates issuing Notice to Proceed 1 ("NTP1") concurrently with execution of the DBA. Issuance of NTP1 authorizes the Design-Build Contractor to perform the portion of the Work necessary to obtain TxDOT's approval of the Project Management Plan and to enter the Project Right of Way ("ROW") TxDOT owns in order to conduct surveys and site investigations, including geotechnical, hazardous materials and utilities investigations.</p> <p>Notice to Proceed 2 ("NTP2"), authorizing performance of the remainder of the Work, is conditioned upon approval by TxDOT of the Project Management Plan prepared by the Design-Build Contractor. For planning purposes, TxDOT anticipates issuing NTP2 within 90 days after issuance of NTP1.</p> <p>The Price will remain valid without escalation until 180 days after the Proposal Due Date. If NTP1 is not issued within 180 days after the Proposal Due Date and the Design-Build Contractor does not, in whole or in part, cause the delay, the Price will be subject to escalation (based on the ENR Construction Cost Index) until issuance of NTP1. If NTP1 is not issued within 365 days from the Effective Date, the Design-Build Contractor may terminate the DBA.</p>
Contract Documents	The Contract Documents include the DBA and exhibits (including federal requirements), Technical Provisions, design documents, specifications, plans, and all amendments to the foregoing and all Change Orders issued.
Contract Documents (Proposal)	The Proposal (to the extent that it is consistent with or exceeds the requirements of the other Contract Documents) will also be a Contract Document, such that commitments made by the Design-Build Contractor in the Proposal relating to the Work that meet or exceed other contract requirements will be binding.

PRICE, SECURITY & PAYMENTS	
Price	<p>This is a lump sum contract, to be paid based on progress.</p> <p>The only changes to Price are via change order or value engineering.</p>
BONDS: Proposal, Performance, Payment, Retainage & Warranty	<p>A Proposal Bond in the amount of \$15 million will remain in place as security for performance of the Design-Build Contractor's obligations. Upon receipt of Payment and Performance bonds meeting the requirements of the DBA (and other documents required for NTP1), the Proposal Bond will be released.</p> <p>Payment and Performance Bonds in the amount of \$15 million will be required as security for the Design-Build Contractor's obligations as a condition for issuance of NTP1.</p> <p>A Performance Bond in an amount at least equal to \$410 million will be required on or before NTP2 and will be released upon Final Acceptance and the receipt of the Warranty Bond.</p> <p>A Payment Bond in an amount at least equal to \$410 million will be required on or before NTP2 and will be released upon: (a) receipt of (i) evidence that all claims against the Payment Bond have been fully paid and (ii) unconditional releases of Liens and stop notices, or (b) expiration of the statutory period for filing a claim against the Payment Bond if no claims have been filed.</p> <p>Retainage Bond in the amount of 4% of the Price will be required (on or before NTP2) as a guaranty for the protection of any claimants and TxDOT for overpayments, Liquidated Damages, and other deductions or damages owed by the Design-Build Contractor.</p> <p>Warranty Bond in the amount of 20% of the Price is required (as a condition to Final Acceptance) to guarantee performance of the Work required to be performed during the Warranty period.</p> <p>If the Price is increased in connection with a Change Order, TxDOT may, in its sole discretion, require a corresponding proportionate increase in the amount of each bond.</p>
Guaranty	<p>TxDOT may, in its discretion based upon the review of the Financial Information provided in the RFQ and RFP, specify that an acceptable parent company or other affiliate company act as a Guarantor to the Design-Build Contractor by providing a guarantee with respect to the Design-Builder's financial capabilities in a form acceptable to TxDOT.</p>
Value Engineering	<p>TxDOT and the Design-Build Contractor will share equally in any net savings resulting from value engineering proposals by the Design-Build Contractor.</p>

Mobilization	The Design-Build Contractor will be entitled to payment for mobilization in installments, in an amount equal to the bid item price for mobilization, not to exceed 10% of the Price.
Payment Obligations & Progress Payment Limitations	TxDOT will make payments based on progress as evidenced by a monthly Draw Request submitted by the Design-Build Contractor. Invoices must conform strictly with the format prescribed by the DBA. The DBA will include a Maximum Payment Schedule (from Design-Build Contractor's Proposal) that establishes the cap on cumulative progress payments at particular times. If the Design-Build Contractor falls behind schedule, no progress payments will be paid until a recovery schedule is approved in writing.
COMPLETION DEADLINES, SCHEDULE AND DELAY	
Completion Deadlines	<p>The deadline for Substantial Completion of the Project will be the date set forth in the Proposal (which may be constrained in accordance with the RFP). The entire Project must be opened to traffic and ready to collect tolls on or before such deadline.</p> <p>The Final Acceptance deadline is 120 days after Substantial Completion.</p> <p>Extensions of completion deadlines are allowed only under limited circumstances. (See Change Order section below.)</p>
Schedule	The Design-Build Contractor must perform the Work in accordance with an approved comprehensive critical path schedule. The baseline schedule will be the schedule submitted with the Proposal and any changes must be approved by TxDOT as a condition to NTP2. The schedule will be updated monthly during the Project and used for payment, planning and monitoring progress of the Work. If the Design-Build Contractor falls behind schedule, a recovery schedule to regain lost time is required or TxDOT may withhold payments.
Delay	Liquidated Damages will be assessed for delays in meeting the deadlines for Substantial Completion and Final Acceptance. TxDOT will have the right to terminate the DBA if Substantial Completion or Final Acceptance of the Project is delayed for more than a year. (See Liquidated Damages section below.)

CONTRACT RIGHTS & RESPONSIBILITIES

<p>Right of Way and Railroad Agreements</p>	<p>TxDOT will acquire as much ROW as possible for the Project. On a date specified in the RFP, which will be prior to the Proposal due date, TxDOT will cease acquisition of ROW and provide a final list of ROW acquisition requirements for use in developing Proposals to be submitted in response to the RFP. The Design-Build Contractor shall be responsible for performing acquisition services, including associated costs, for all required ROW not yet acquired by TxDOT; provided that TxDOT will be responsible for the purchase price for such ROW. The Design-Build Contractor will be responsible for the costs (including purchase price) for any additional ROW to accommodate the Design-Build Contractor's design. TxDOT is responsible for the acquisition cost if additional parcels are necessary due to a TxDOT-Directed Change, Option Work, or Force Majeure Event. The Design-Build Contractor is responsible for the acquisition cost for parcels acquired for any other reason.</p> <p>The Design-Build Contractor is responsible for the cost of any temporary construction easements or other temporary property interests.</p> <p>TxDOT will advance the required railroad coordination up to a date that will be identified in the RFP. The Design-Build Contractor will be responsible for completing all remaining railroad coordination efforts from the date specified in the RFP.</p>
<p>Design and Construction</p>	<p>The Design-Build Contractor is responsible for design and construction in accordance with the Contract Documents.</p>
<p>Design Liability</p>	<p>The Design-Build Contractor assumes full responsibility and liability with respect to design of the Project, including correction of any errors, omissions, inconsistencies or other defects in the Schematic Design affecting constructability.</p>
<p>QA/QC</p>	<p>The Design-Build Contractor is required to establish and implement a comprehensive, TxDOT-approved quality assurance ("QA") and quality control ("QC") program. Quality acceptance during construction will be provided by independent quality acceptance firm(s) retained by the Design-Build Contractor.</p>

Design and Construction Oversight	TxDOT will have the right at all times to monitor, inspect, sample, measure, attend, observe or conduct tests and investigations, and conduct any other oversight respecting any part or aspect of the Project or the Work, to the extent necessary or advisable to: (a) comply with the Federal Highway Administration (“FHWA”), U.S. Army Corps of Engineers (“USACE”) or other applicable federal agency requirements, and (b) verify the Design-Build Contractor’s compliance with the Contract Documents. The Design-Build Contractor at all times will coordinate and cooperate, and require its Subcontractors to coordinate and cooperate, with TxDOT and its Authorized Representative to facilitate TxDOT’s oversight activities.
Standards	The Design-Build Contractor must design and construct the Project in general conformity with the Schematic Design, in accordance with all professional engineering principles and construction practices generally accepted in the State as standard in the industry, in a good and workmanlike manner, free from defects and in accordance with the terms and conditions set forth in the Contract Documents, including the Technical Provisions. The Design-Build Contractor will be required to obtain TxDOT approval to make modifications to the specified components of the Basic Configuration.
Warranties	<p>The Warranty Term for the Project will commence upon Substantial Completion of the Project. A general warranty of the work in favor of TxDOT will remain in effect until one year after Final Acceptance, except that warranties for elements of the Project that will be owned by Persons other than TxDOT (such as Utility Owners) will commence as of the date of acceptance thereof by such Persons and will end one year thereafter. Extended Warranties will apply to repaired, replaced or corrected Work, not to exceed two years after Final Acceptance (with respect to the general warranty).</p> <p>The Warranties apply notwithstanding maintenance work performed by the Maintenance Contractor during the Warranty period.</p>

ENVIRONMENTAL & PERFORMANCE RISKS	
Permits & Approvals	<p>TxDOT is currently in the process of obtaining a Record of Decision and a Finding of No Significant Impact (“FONSI”) in connection with the Project (TxDOT-Provided Approval). TxDOT is also pursuing a Section 404 Individual Permit for impacts to Segment 1. Wetland and stream mitigation is required for impacts within Segment 1. Segment 1 stream and wetland mitigation efforts are to be completed by Montgomery County and reimbursed by TxDOT. It is currently anticipated that the required Individual Permit will be approved by December 2015. Section 404 impacts and responsibilities regarding Segment 2 permitting and mitigation requirements will be determined during the RFP phase. Segment 1 Section 404 impacts and mitigation requirements are being coordinated through the USACE Galveston District. Any Section 404 impacts and required mitigation for Segment 2 would be coordinated through the USACE Ft. Worth District.</p> <p>The Design-Build Contractor will be responsible for obtaining all other permits and government approvals.</p>
New Environmental Approvals	<p>The Design-Build Contractor is responsible for obtaining all new environmental approvals or changes to existing approvals. If a new or revised environmental approval becomes necessary for any reason other than for a TxDOT-Directed Change or Force Majeure Event, the Design-Build Contractor will bear full responsibility for all costs and delays.</p>
Environmental Compliance	<p>The Design-Build Contractor shall be responsible for performance of all environmental mitigation measures and compliance with all other conditions and requirements of the Contract Documents and Environmental Approvals, including TxDOT-Provided Approvals and similar Governmental Approvals for the Project.</p>
CONTRACT CHANGES & COSTS OUTSIDE THE CONTRACT	
Change Orders	<p>A TxDOT signed Change Order or Directive Letter is required for any increase to Price or time extension. TxDOT may issue unilateral Change Orders. The Design-Build Contractor will prepare a scope of work, cost estimate, delay analysis and other information for each Request for Change Order. Change Orders requesting a time extension must also provide an alternative Change Order form including an acceleration schedule. Change Orders are subject to strict requirements (including notice & delivery). No Change Order is allowed where Design-Build Contractor is entitled to added funds or time for matters that are also covered by insurance.</p>

Differing Site Conditions	Change Orders for additional costs due to Differing Site Conditions will be allowed for (a) subsurface or latent conditions encountered at certain TxDOT identified boring holes which differ materially from the conditions indicated in the geotechnical reports for such boring holes, (b) subsurface or surface physical conditions of an unusual nature, differing materially from those ordinarily encountered in the area. The Design-Build Contractor will be responsible for a certain amount of additional costs for Differing Site Conditions up to a specified amount for all such costs. The Design-Build Contractor will not be allowed any time extension or delay damages for delays due to Differing Site Conditions.
Deviations	The Design-Build Contractor may deviate from the Schematic Design as it deems advisable, provided that it obtains prior written approval by TxDOT and/or an approved Change Order with respect to any deviation from the Basic Configuration. Changes in the Work that have no net cost effect on the Price may be approved in writing by TxDOT as a Deviation without requiring a Change Order.
Nonconforming Work	TxDOT may, but is not obligated to, accept any Nonconforming Work without requiring it to be fully corrected, in which case the Price will be decreased. TxDOT may require Nonconforming Work to be remedied or removed/replaced at the Design-Build Contractor's cost and without time extension, and may deduct the cost of doing so from the Price if the Design-Build Contractor fails to correct the Nonconforming Work as required. Acceptance of Nonconforming Work by TxDOT does not relieve the Design-Build Contractor of any Warranty requirements.
TxDOT-Directed Changes	The Design-Build Contractor will be entitled to a Change Order providing for Price adjustment and/or a time extension for: Change in the scope of the Work directed by TxDOT. Suspensions of the Work on the critical path by TxDOT for its convenience for more than 96 hours per suspension. Any new environmental approvals necessitated by a TxDOT-Directed Change.

<p>Hazardous Materials</p>	<p>The Design-Build Contractor is not entitled to any increase in price or time with respect to: (a) immaterial quantities, (b) Hazardous Materials that could have been avoided by reasonable design modifications or construction techniques, (c) costs that could have been avoided, (d) Hazardous Materials on Additional Properties designated by the Design-Build Contractor, or (e) Hazardous Materials encountered during the demolition of buildings, fixtures or other improvements within the Site.</p> <p>Subject to certain conditions identified in the DBA, the Design-Build Contractor is entitled to a Price increase for direct costs that are in excess of specified thresholds due to discovery of Hazardous Materials within the Schematic ROW.</p> <p>If Design-Build Contractor encounters Hazardous Materials for which the Design-Build Contractor is entitled compensation, and Hazardous Materials Management of such Hazardous Materials results in delays to the Critical Path, then the Design-Build Contractor will bear 100% of the risk of such Delay up to a certain number of days per location to be specified in the DBA. TxDOT shall assume the risk for Hazardous Materials Delays in excess of a certain number of days to be specified in the DBA. The Design-Build Contractor is not entitled to an extension of any Completion Deadline for investigation or characterization of Hazardous Materials.</p> <p>The Design-Build Contractor is not entitled to an increase in price for remediation costs resulting from its own acts or omissions, or Hazardous Materials brought onto the Site by the Design-Build Contractor.</p>
<p>Utilities</p>	<p>The Design-Build Contractor is responsible for performing all necessary utility adjustment work and is not entitled to a Change Order for performance of adjustment work that was initially anticipated to be performed by a Utility Owner.</p> <p>The Design-Build Contractor is not entitled to any time extensions on account of delays attributable to utilities, except for delays affecting the Critical Path due to (a) New Utilities (not existing as of the Proposal date) requiring adjustment and (b) uncooperative utility owners that do not enter into adjustment agreements.</p> <p>The Design-Build Contractor is entitled to a price increase for (a) an Unidentified Utility located within the Schematic ROW to the extent that the Design-Build Contractor's costs increase by more than an amount specified in the DBA per utility, and (b) a New Utility (i.e., a Utility installed in the Schematic ROW after the proposal due date that was not known by the Design-Build Contractor).</p>

Force Majeure Events	The Design-Build Contractor will be entitled to additional time and/or compensation for <u>specified</u> Force Majeure Events (provided they are beyond the Design-Build Contractor's control and not due to act or omission by Design-Build Contractor or its contractors, etc.) which materially and adversely affect the Design-Build Contractor's obligations and which could not have been avoided by the exercise of caution, due diligence, or reasonable efforts by the Design-Build Contractor.
Matters Not Eligible for Change Orders	The Design-Build Contractor is responsible for all risks not specifically accepted by TxDOT; examples of specific exclusions will be identified in the DBA.
BUSINESS RISKS	
Insurance	<p>The Design-Build Contractor is required to provide insurance coverage to be specified in the DBA, which must include at a minimum: commercial general liability, workers' compensation and employer's liability; bodily injury/property damage and comprehensive business auto liability, professional liability coverage, builder's risk, and pollution liability. Subcontractor insurance requirements are also to be specified in the DBA.</p> <p>TxDOT and their members, directors, officers, employees, agents and Project consultants must be additional insureds, except on the professional liability policy.</p>
Design-Build Contractor Defaults	<p>The following are examples of Design-Build Contractor Defaults:</p> <p>Failure to begin Work within 30 days following issuance of NTP1, or failure to commence and diligently perform the Construction Work;</p> <p>Failure to complete the Work by the applicable Completion Deadline(s);</p> <p>Failure to perform the Work in accordance with the Contract Documents,</p> <p>Suspending or ceasing the Work or failure to continuously and diligently prosecute the Work;</p> <p>Failure to obtain or maintain any insurance, bonds, guarantees, letters of credit (if any) or other performance security as and when required under the DBA;</p> <p>Voluntary or involuntary assignment or transfer of all or any portion of the DBA; without TxDOT's prior written consent;</p> <p>Failure to make payment when due for labor or equipment or failure to make payment to TxDOT when due of any amounts owing to TxDOT;</p> <p>Failure to timely observe or perform any other material obligation, term or condition under the DBA;</p>

	<p>Material misrepresentation by the Design-Build Contractor; Voluntary or involuntary bankruptcy or insolvency; and Default under the Comprehensive Maintenance Agreement.</p>
Cure of Design-Build Contractor Defaults	<p>The Design-Build Contractor will have an opportunity to cure certain Design-Build Contractor Defaults, as described in the DBA documents.</p>
TxDOT Remedies for Design-Build Contractor Default	<p>TxDOT will have the right to exercise one or more of the following remedies in the event of an uncured Design-Build Contractor Default:</p> <p>Right to terminate;</p> <p>Right to deduct amounts (including interest) payable to TxDOT from amounts owing to the Design-Build Contractor;</p> <p>Right to recover damages;</p> <p>Right to take immediate action in the event of emergency or danger;</p> <p>Right to make demand upon, draw on, enforce and collect any bonds, letters of credit (if any), guaranty, or other performance security available to TxDOT for Design-Build Contractor Default; and</p> <p>Other remedies as provided by Law.</p>
Design-Build Contractor's Right to Stop Work	<p>The Design-Build Contractor has the right to stop Work if TxDOT fails to make an undisputed payment due within fifteen business days after TxDOT's receipt of written notice of nonpayment from the Design-Build Contractor. If such nonpayment continues for more than 180 days, upon written notice from the Design-Build Contractor to TxDOT, the nonpayment may be deemed a Termination for Convenience.</p>
Suspension	<p>TxDOT may order the Design-Build Contractor to suspend all or any part of the Work for the period of time that TxDOT deems appropriate. Such suspension for convenience will be considered a TxDOT-Directed Change, except for brief suspensions (not exceeding 48 hours each up to a total of 96 hours), for which the Design-Build Contractor will be entitled to a time extension but not compensation.</p>
Termination	<p>The Design-Build Contractor may terminate the DBA if NTP1 is not issued by TxDOT on or before 365 days after the Effective Date. After issuance of NTP1, the Design-Build Contractor has no unilateral right to terminate, except in the event of non-payment after a specified period, or a suspension of work for more than one year.</p> <p>TxDOT may terminate the DBA for convenience or for the Design-Build Contractor's default.</p>

Liquidated Damages	<p><u>Delay:</u> Per day Liquidated Damages in the amount specified in the DBA will be assessed for delay in reaching Substantial Completion by the Completion Deadline, for up to a year of delay. Per day Liquidated Damages in an amount as specified in the DBA will be assessed for delay in Final Acceptance beyond the Final Acceptance Deadline.</p> <p><u>Lane Rentals:</u> TxDOT anticipates that the Design-Build Contractor will be charged lane rental fees for unpermitted lane closures as specified in the DBA.</p> <p><u>Key Personnel:</u> Liquidated Damages will be assessed for unavailability of the Project Manager and other Key Personnel as identified in the DBA.</p>
Indemnification	The Design-Build Contractor shall indemnify, defend and hold harmless TxDOT, State of Texas and their agents/employees for the Design-Build Contractor errors, omissions, negligence, or willful misconduct, breach of the DBA, the Design-Build Contractor release of hazmat, and failure to comply with applicable laws or Governmental Approvals, among other things
OTHER CONTRACT PROVISIONS	
Dispute Resolution	<p>Partnering meetings, for dispute resolution, conducted by a mutually agreed upon facilitator are to include Key Personnel and executives of both parties. Costs of partnering are to be shared equally by the parties.</p> <p>Informal and voluntary dispute resolution alternatives are encouraged and preferred in lieu of the more formal process described in detail in the DBA.</p> <p>If partnering and informal dispute resolution fail to resolve an issue and the Design-Build Contractor elects to pursue a formal Dispute with TxDOT, the Dispute shall be resolved pursuant to Texas Transportation Code Section 201.112 and the dispute resolution procedures established thereunder, as the same may be amended from time to time.</p>
Records and Documentation	The Design-Build Contractor must maintain all records and documents in accordance with Texas State Records Retention Schedule.
Escrow Proposal Documents (“EPD’s”)	The Design-Build Contractor’s detailed Proposal pricing information (EPDs) will be kept at TxDOT’s Procurement office in a locked cabinet with the Design-Build Contractor controlling the keys. EPDs shall be available for joint review by TxDOT, Design-Build Contractor and any dispute resolver(s). Change Order documentation will be added to EPDs. EPDs will be maintained until all of the following shall have occurred: (a) 180 days from the later of Final Acceptance or termination of the DBA; (b) all Claims or Disputes regarding the Work have been settled; and (c) Final Payment has been made and accepted.

DBE Provisions; Subcontractors	<p>TxDOT's Disadvantaged Business Enterprise ("DBE") Program for design-build contracts is based on TxDOT's standard DBE Program with certain modifications to accommodate the design-build approach.</p> <p>After execution of the DBA, the Design-Build Contractor must select subcontractors based on procedures approved by TxDOT.</p>
Flow Down Provisions	<p>The Design-Build Contractor shall be required to include flow down required terms into subcontracts. Subcontracts must be fully assignable to TxDOT. Dispute procedures involving Subcontractors shall contain additional requirements.</p>
Key Personnel	<p>Certain job categories of Key Personnel for the Project are identified. Key Personnel may not be substituted without TxDOT's prior written consent. Liquidated Damages may be assessed for unavailability of certain Key Personnel.</p>
Assignment	<p>The Design-Build Contractor may not assign its interests in the DBA without TxDOT's prior written consent. TxDOT may assign its interests in the DBA:</p> <ul style="list-style-type: none"> (a) without the Design-Build Contractor's consent, to any to any other Person that succeeds to the governmental powers and authority of TxDOT; (b) to Montgomery County Toll Road Authority ("MCTRA"); and (c) to others with prior written consent of the Design-Build Contractor.