

EXHIBIT A

ABBREVIATIONS AND DEFINITIONS

Unless otherwise specified, wherever the following abbreviations or terms are used in this Agreement and the Technical Provisions, they shall have the meanings set forth below:

ADA	Americans with Disabilities Act
CCI	Construction Cost Index
CFR	Code of Federal Regulations
NTP	Notice to Proceed
PCO	Potential Change Order
RFP	Request for Detailed Proposals
TAC	Texas Administrative Code
TxDOT	Texas Department of Transportation

Acceleration Costs shall mean those fully documented increased costs reasonably incurred by Fabricator (that is, costs over and above what Fabricator would otherwise have incurred) which are directly and solely attributable to increasing the rate at which the Work is performed in an attempt to complete necessary elements of the Work earlier than otherwise anticipated, such as for additional equipment, additional crews, lost productivity, overtime and shift premiums, increased supervision and any unexpected material, equipment or crew movement necessary for re-sequencing in connection with acceleration efforts.

Act shall have the meaning set forth in Recital B of this Agreement.

Affiliate shall mean: (1) any Person which directly or indirectly through one or more intermediaries controls, or is controlled by, or is under common control with, Fabricator; and (2) any Person for which 10% or more of the equity interest in such Person is held directly or indirectly, beneficially or of record by Fabricator or any Affiliate of Fabricator under clause (1) of this definition. For purposes of this definition the term “control” means the possession, directly or indirectly, of the power to cause the direction of the management of a Person, whether through voting securities, by contract, family relationship or otherwise.

Agreement shall mean that certain Comprehensive Development Agreement, to which this Exhibit A is attached, executed by TxDOT and Fabricator, including any and all amendments thereto.

Business Day shall mean days on which TxDOT is officially open for business.

Change Order shall mean a written order issued by TxDOT to Fabricator delineating changes in the requirements of the Contract Documents in accordance with Section 11 of this Agreement and establishing, if appropriate, an adjustment to the Price and/or the Delivery Deadline.

Claim shall mean a separate demand by Fabricator, which is disputed by TxDOT, for a time extension under this Agreement, or payment of money or damages arising from work done on behalf of Fabricator in connection with this Agreement.

Contract Documents shall mean this Agreement, including all exhibits, and the other documents listed in Section 1.2 of this Agreement, including all amendments to the foregoing and all Change Orders issued.

Day shall mean calendar days unless otherwise expressly specified.

Delivery means the delivery of the Work by Fabricator to TxDOT.

Delivery Deadline shall mean the date which TxDOT requires delivery of the Work for the Initial Order, or with respect to any additional order, the date which TxDOT requires delivery of the Work for such additional order, by Fabricator under the Agreement.

Delivery Schedule shall mean the detailed delivery schedule for the design, fabrication and delivery of the Work, provided in Exhibit B of the Agreement, which shall be supplemented from time to time for any additional orders placed by TxDOT under the Agreement.

Design Documents shall mean all drawings (including plans, profiles, cross-sections, notes, elevations, sections, details and diagrams), specifications, reports, studies, calculations, electronic files, records and submittals necessary for, or related to, the design of the Project in accordance with the Contract Documents and applicable Law.

Design/Mobilization Costs shall mean the one-time, fixed, lump sum amount set forth in Line 1 of Form G to compensate Fabricator for all costs associated with achieving design approval and mobilizing for fabrication of the toll booths.

Deviations shall mean any change, deviation, modification or alteration from the requirements of the Contract Documents or applicable Law.

Error shall mean an error, omission, inconsistency, inaccuracy, deficiency or other defect.

Event of Default shall have the meaning set forth in Section 13 of this Agreement.

Fabricator shall mean _____, a _____, together with its partners, members, joint venturers, employees, agents, officers, directors, shareholders, representatives, consultants, successors and assigns.

Fabricator-Related Entities shall mean (i) Fabricator, (ii) partners, joint venturers and/or members in or with Fabricator, (iii) Subcontractors (including Suppliers), (iv) any other Persons performing any of the Work, (v) any other Persons for whom Fabricator may be legally or contractually responsible, and (vi) the employees, agents, officers, directors, shareholders, representatives, consultants, successors, assigns and invitees of any of the foregoing.

Final Acceptance shall mean the occurrence of all of the events and satisfaction of all of the conditions set forth in Section 17 of this Agreement.

Final Acceptance Date shall mean the date that TxDOT issues Final Acceptance of the Work.

Final Design Documents shall mean all the complete and TxDOT approved final design and fabrication drawings (including plans, profiles, notes, details and diagrams), specifications, reports, studies, calculations, electronic files, records, and submittals needed by Fabricator to design and fabricate the Work and satisfying the requirements presented in the Specification.

Force Majeure Event shall mean any of the events listed in clauses (a) and (b) below, subject to the exclusions listed in clauses (i) through (v) below, which materially and adversely affects Fabricator's obligations, provided such events are beyond the control of the Fabricator-Related Entities and are not due to an act, omission, negligence, recklessness, willful misconduct, breach of contract or Law of any of the Fabricator-Related Entities, and further provided that such events (or the effects of such events) could not have been avoided by the exercise of caution, due diligence, or reasonable efforts by Fabricator:

- (a) Any earthquake, tornado, hurricane or other natural disaster; or
- (b) Any epidemic, blockade, rebellion, war, riot, act of sabotage or civil commotion;

The term "**Force Majeure Event**" shall be limited to the matters listed above and specifically excludes from its definition the following matters which might otherwise be considered a force majeure event:

- (i) any fire or other physical destruction or damage, or delays to the Work which occur by action of the elements, including lightning, explosion, drought, rain, flood, snow, storm, except as specified in clause (a) above;

- (ii) except as provided in clause (b) above, malicious or other acts intended to cause loss or damage or other similar occurrence, including vandalism or theft;
- (iii) any strike, labor dispute, work slowdown, work stoppage, secondary boycott, walkout or other similar occurrence;
- (iv) the suspension, termination, interruption, denial, failure to obtain, non-renewal or change in any requirements of any required licensing;
- (v) any matters not caused by TxDOT or beyond the control of TxDOT and not listed in clauses (a) and (b) above.

Indemnified Parties shall mean TxDOT, the State and their respective successors, assigns, officeholders, officers, directors, agents, representatives, consultants and employees.

Initial Mainline Frame Unit Price shall mean the unit price for mainline toll booth frames set forth in Section 10 of this Agreement, as it may be modified from time to time in accordance with the express provisions of this Agreement. The Initial Mainline Frame Unit Price shall remain the same, on a per unit basis, for any additional mainline toll booth frames required by TxDOT during the Initial Term.

Initial Order shall mean the number of toll booths specified in Recital A of this Agreement.

Initial Order Price shall mean the price for the Initial Order set forth in Section 10 of this Agreement, as it may be modified from time to time in accordance with the express provisions of this Agreement.

Initial Per Mainline Unit Price shall mean the unit price for mainline toll booths set forth in Section 10 of this Agreement, as it may be modified from time to time in accordance with the express provisions of this Agreement. The Initial Per Mainline Unit Price shall remain the same, on a per unit basis, for any additional mainline toll booths required by TxDOT during the Initial Term.

Initial Per Ramp Unit Price shall mean the unit price for ramp toll booths set forth in Section 10 of this Agreement, as it may be modified from time to time in accordance with the express provisions of this Agreement. The Initial Per Ramp Unit Price shall remain the same, on a per unit basis, for any additional ramp toll booths required by TxDOT during the Initial Term.

Initial Ramp Frame Unit Price shall mean the unit price for ramp toll booth frames set forth in Section 10 of this Agreement, as it may be modified from time to time in accordance with the express provisions of this Agreement. The Initial Ramp Frame

Unit Price shall remain the same, on a per unit basis, for any additional ramp toll booth frames required by TxDOT during the Initial Term.

Initial Ramp Toll Booth ACM Platform Unit Price shall mean the unit price for ramp toll booth ACM platforms set forth in Section 10 of this Agreement, as it may be modified from time to time in accordance with the express provisions of this Agreement. The Initial Ramp Toll Booth ACM Platform Unit Price shall remain the same, on a per unit basis, for any additional ramp toll booth ACM Platforms required by TxDOT during the Initial Term.

Initial Scope of Work shall mean the initial Work contemplated in Recital A of this Agreement and any additional toll booths TxDOT orders prior to expiration of the Initial Term.

Initial Term shall mean a period of five years, beginning on the date of the Agreement and expiring at midnight on the fifth anniversary of the date of the Agreement.

Law or **Laws** shall mean any statute, law, regulation, ordinance, rule, judgment, order, decree, permit, concession, grant, franchise, license, agreement, directive, guideline, policy requirement or other governmental restriction or any similar form of decision of or determination by, or any interpretation or administration of any of the foregoing by, any governmental entity, which is applicable in any manner to the design, fabrication and/or installation of the Work, whether now or hereafter in effect.

Lien shall mean any pledge, lien, security interest or other charge or encumbrance of any kind, or any other type of preferential arrangement (including any agreement to give any of the foregoing, any conditional sale or other title retention agreement, any lease in the nature of a security instrument and the filing of or agreement to file any financing statement under the Uniform Commercial Code of any jurisdiction).

Liquidated Damages shall have the meaning set forth in Section 14 of this Agreement.

Losses shall mean any loss, damage (including personal injury, property damage and natural resource damages), injury, liability, cost, expense (including attorneys' fees and expenses (including those incurred in connection with the enforcement of any provision of this Agreement)), fee, charge, demand, investigation, proceeding, action, suit, claim, judgment, penalty, fine or Third Party Claims.

Major Subcontractor shall mean any Subcontractor that assembles or manufactures any toll booths for the Project.

Nonconforming Work shall mean Work that TxDOT determines does not conform to the requirements of the Contract Documents, applicable Law or the Final Design Documents.

Notice of Partial Termination for Convenience shall mean written notice issued by TxDOT to Fabricator terminating part of the Work of Fabricator for convenience.

Notice of Termination for Convenience shall mean written notice issued by TxDOT to Fabricator terminating the Work of Fabricator for convenience.

Notice to Proceed shall mean the written notice issued by TxDOT to Fabricator authorizing Fabricator to proceed with Work.

Option Orders shall mean any Work required to be performed to design, manufacture and deliver additional toll booths ordered by TxDOT under this Agreement during the Option Term.

Option Order Prices shall mean the per unit price for the Option Orders as is renegotiated and agreed upon by the Parties prior to the expiration of the Initial Term.

Option Term shall mean a period of five years, beginning on expiration of the Initial Term and expiring at midnight on the tenth anniversary of the date of the Agreement.

Party shall mean Fabricator or TxDOT, as the context may require, and “**Parties**” shall mean Fabricator and TxDOT, collectively.

Payment shall mean payment by TxDOT of the lump sum Price.

Payment Bond shall have the meaning set forth in Section 7 of this Agreement, a copy of which is attached to this Agreement as Exhibit E.

Performance Bond shall have the meaning set forth in Section 7 of this Agreement, a copy of which is attached to this Agreement as Exhibit D.

Person shall mean any individual, corporation, joint venture, limited liability company, company, voluntary association, partnership, trust, unincorporated organization or Governmental Entity.

Plans shall mean the Toll Booth Conceptual Drawings that are included as Attachment A to this Agreement.

Price shall mean and refer to either the Initial Order Price or the Subsequent Order Price, as the case may be.

Project Site(s) shall mean those certain turnpike sites where the toll booths are installed.

Proposal shall mean the proposal submitted on June 21, 2004 by Fabricator to TxDOT in response to the RDP.

Proposal Date shall mean June 21, 2004.

Request for Change Proposal shall mean a written notice issued by TxDOT to Fabricator under Section 11.2 of this Agreement, advising Fabricator that TxDOT may issue a TxDOT-Directed Change or wishes to evaluate whether to initiate such a change pursuant to Section 11.2 of this Agreement.

Request for Detailed Proposals shall mean the Request for Detailed Proposals issued by TxDOT on May 14, 2004 with respect to the Work, including all attachments thereto and any subsequent addenda.

RFP Documents shall mean all of the information and materials supplied to Fabricator in connection with the issuance of the RFP, including Instructions to Proposers, the Contract Documents and any addenda issued in connection therewith.

Rules shall have the meaning set forth in Recital B of this Agreement.

Specification shall mean the Texas Department of Transportation Toll Booth Procurement Specification set forth in Attachment B to this Agreement, and all document(s) describing and setting forth the requirements, scope, plans and specifications of the Initial Scope of Work, as may be amended for the Subsequent Orders.

State shall mean the State of Texas.

Subcontract shall mean any agreement by Fabricator with any other Person, Subcontractor or Supplier to perform any part of the Work or provide any materials, equipment or supplies for any part of the Work, or any such agreement at a lower tier, between a Subcontractor and its lower tier Subcontractor or a Supplier and its lower tier Supplier, at all tiers.

Subcontractor shall mean any Person with whom Fabricator has entered into any Subcontract to perform any part of the Work or provide any materials, equipment or supplies for the Work on behalf of Fabricator and any other Person with whom any Subcontractor has further subcontracted any part of the Work, at all tiers.

Supplier shall mean any Person not performing the design or fabrication services for the toll booths which supplies machinery, equipment, materials, hardware, software, systems or any other appurtenance to the Work to Fabricator or to any Subcontractor in connection with the performance of the Work. Persons who merely transport, pick up, deliver or carry materials, personnel, parts or equipment or any other items or persons to or from the fabrication site shall not be deemed to be performing Work at the fabrication site.

Surety shall mean each properly licensed surety company, insurance company or other Person approved by TxDOT, which has issued any Payment Bond or Performance Bond.

Term shall mean a period of time commencing on the date of the Agreement and expiring at midnight on the tenth anniversary of the date of the Agreement.

Third Party Claims shall mean any and all claims, disputes, disagreements, causes of action, demands, suits, actions, judgments, investigations or proceedings brought by a Person that is not a Party with respect to damages, injuries, liabilities, obligations, losses, costs, penalties, fines or expenses (including attorneys' fees and expenses) sustained or incurred by such Person.

TxDOT shall mean the Texas Department of Transportation, and any entity succeeding to the powers, authorities and responsibilities of TxDOT invoked by or under the Contract Documents.

TxDOT-Caused Delays shall mean unavoidable delays arising from the following matters and no others, but only to the extent that they (i) materially adversely affect the Delivery Deadline, (ii) are not mitigated by or susceptible to handling by a work around, and (iii) are not due to an act, omission, negligence, recklessness, willful misconduct, breach of contract or violation of Law of or by any of the Fabricator-Related Entities:

- (a) TxDOT-Directed Changes;
- (b) failure or inability of TxDOT to provide responses to proposed schedules, plans, design documents, and other submittals and matters for which response is required, within the time periods (if any) indicated in the Contract Documents, or other failure of TxDOT to act within a reasonable time period with respect to actions which it is required to take under this Agreement, following delivery of written notice from Fabricator requesting such action in accordance with the terms and requirements of this Agreement;

Any suspension of Work arising from litigation shall not be considered a TxDOT-Caused Delay despite the fact that TxDOT may specifically direct Fabricator to suspend the Work.

TxDOT-Directed Changes shall mean any changes in the scope of the Work or terms and conditions of the Contract Documents (including changes in the standards applicable to the Work) that increase Fabricator's costs by more than \$5,000, which TxDOT has directed Fabricator to perform as described in Section 11 of this Agreement.

TxDOT-Standard Specifications shall mean the Texas Department of Transportation 1993 Standard Specification Book.

Warranty shall have the meaning set forth in Section 9.1 of this Agreement.

Warranty Bond shall have the meaning set forth in Section 7.1 of this Agreement.

Work shall mean all of the Initial Scope of Work or the Subsequent Orders, as applicable, required to be furnished and provided by Fabricator under the Contract Documents, including all administrative, design, engineering, support services, procurement, professional, manufacturing, supply, construction, supervision, management, testing, verification, labor, materials, equipment, maintenance, documentation and other duties and services to be furnished and provided by Fabricator as required by the Contract Documents, including all efforts necessary or appropriate to achieve Final Acceptance except for those efforts which such Contract Documents expressly specify will be performed by Persons other than the Fabricator-Related Entities. In the event of Subsequent Orders, the term “Work” shall apply to the Subsequent Work in the same manner as it applies to the Initial Scope of Work, except as otherwise set forth in amendments to the Contract Documents related to such Subsequent Orders.

[END OF DEFINITIONS]

EXHIBIT B

Table 1 below outlines anticipated quantities and delivery dates for frames and for mainlane plaza toll booths, ramp plaza toll booths, and ACM platforms required for the turnpike projects currently under construction near Austin, Texas. Additional toll booths for future candidate toll roads in Texas may be required as requested by TxDOT in accordance with the terms of the CDA. The anticipated quantities and delivery dates are subject to change prior to execution of a CDA.

Table 1							
Roadway	Section	Location	Type	Quantity		Frame Delivery Date	Booth / Platform Delivery Date
				Booth	ACM Platform		
Loop 1	1	RN03	Ramp	1		5/02/2005	1/02/2006
	1	RS04	Ramp	1		1/03/2005	1/02/2006
	2	T9	Ramp	1		11/01/2004	1/02/2006
	2	ML1	Mainlane	16		11/01/2004	1/02/2006
SH 45N	4A	RE014B	Ramp	1		12/01/2004	1/02/2006
	4A	RW014B	Ramp	1		12/01/2004	1/02/2006
	4B	RE024B	Ramp	1		12/01/2004	1/02/2006
	4B	RW024B	Ramp	1		12/01/2004	1/02/2006
	5	RE02	Ramp	1		7/01/2005	10/03/2005
	5	RW02	Ramp	1		7/01/2005	10/03/2005
	6	ML2	Mainlane	6		7/01/2005	10/03/2005
	7	RE03	Ramp	1		11/01/2004	3/01/2006
	7	RW04	Ramp	1		12/01/2004	3/01/2006
	7	RE05	Ramp	1		12/01/2004	3/01/2006
	7	RW06	Ramp	1		12/01/2004	3/01/2006
8	ML3	Mainlane	10		5/02/2005	3/01/2006	
SH 130	2	R24	Ramp		1	11/01/2004	12/16/2005
	2	R25	Ramp		1	11/01/2004	12/16/2005
	3	R26	Ramp		1	11/01/2004	12/16/2005
	3	R27	Ramp		1	11/01/2004	12/16/2005
	4	R28	Ramp	1		11/01/2004	12/16/2005
	4	R29	Ramp	1		11/01/2004	12/16/2005
	4	ML5	Mainlane	6		11/01/2004	12/16/2005
	5	R32	Ramp	1		11/01/2004	6/24/2005
	5	R33	Ramp	1		11/01/2004	6/24/2005
	6	R34	Ramp	1		11/01/2004	6/24/2005
	6	R35	Ramp	1		11/01/2004	6/24/2005
	8	R36	Ramp	1		11/01/2004	6/24/2005
	8	R37	Ramp	1		11/01/2004	6/24/2005
	8	ML6	Mainlane	8		11/01/2004	6/24/2005
	9	R40	Ramp		1	11/01/2004	6/24/2005
	9	R41	Ramp		1	11/01/2004	6/24/2005

Table 1 (continued)

Roadway	Section	Location	Type	Quantity		Frame Delivery Date	Booth / Platform Delivery Date
				Booth	ACM Platform		
SH 130	11	R42-I	Ramp		1	4/01/2005	3/24/2006
	11	R43-I	Ramp		1	4/01/2005	3/24/2006
	11	R44	Ramp		1	4/01/2005	3/24/2006
	11	R47	Ramp		1	4/01/2005	3/24/2006
	12	ML7	Mainlane	6		4/01/2005	3/24/2006
	12	R45	Ramp	1		4/01/2005	3/24/2006
	12	R48	Ramp	1		4/01/2005	3/24/2006
	12	R49	Ramp		1	4/01/2005	3/24/2006
	12	R50	Ramp		1	4/01/2005	3/24/2006
	14	R51	Ramp		1	4/01/2005	8/23/2006
	14	R52	Ramp		1	4/01/2005	8/23/2006
	14	ML8	Mainlane	4		4/01/2005	8/23/2006
	14	R53	Ramp	1		4/01/2005	8/23/2006
	14	R54	Ramp	1		4/01/2005	8/23/2006
	15	R55	Ramp		1	4/01/2005	8/23/2006
	15	R56	Ramp		1	4/01/2005	8/23/2006
	15	R57	Ramp		1	4/01/2005	8/23/2006
	15	R58	Ramp		1	4/01/2005	8/23/2006
SH 45 SE	N/A	ML11	Mainlane	6		4/01/2005	11/23/2006
	N/A	EB-5	Ramp	1		4/01/2005	11/23/2006
	N/A	WB-3	Ramp	1		4/01/2005	11/23/2006
	N/A	EB-9	Ramp		1	4/01/2005	11/23/2006
	N/A	WB-7	Ramp		1	4/01/2005	11/23/2006
Spares	N/A	N/A	Mainlane	2		N/A	11/23/2006
	N/A	N/A	Ramp	1		N/A	11/23/2006

Table 2 below outlines the toll booth heater types.

Table 2					
Roadway	Section	Location	Type	Booth	Heater Type
Loop 1	1	RN03	Ramp	1	Gas
	1	RS04	Ramp	1	Gas
	2	T9	Ramp	1	Electric
	2	ML1	Mainlane	16	Electric
SH 45N	4A	RE014B	Ramp	1	Gas
	4A	RW014B	Ramp	1	Gas
	4B	RE024B	Ramp	1	Gas
	4B	RW024B	Ramp	1	Gas
	5	RE02	Ramp	1	Gas
	5	RW02	Ramp	1	Gas
	6	ML2	Mainlane	6	Electric
	7	RE03	Ramp	1	Electric
	7	RW04	Ramp	1	Electric
	7	RE05	Ramp	1	Electric
	7	RW06	Ramp	1	Electric
8	ML3	Mainlane	10	Electric	
SH 130	2	R24	Ramp	None	None
	2	R25	Ramp	None	None
	3	R26	Ramp	None	None
	3	R27	Ramp	None	None
	4	R28	Ramp	1	Electric
	4	R29	Ramp	1	Electric
	4	ML5	Mainlane	6	Electric
	5	R32	Ramp	1	Electric
	5	R33	Ramp	1	Electric
	6	R34	Ramp	1	Electric
	6	R35	Ramp	1	Electric
	8	R36	Ramp	1	Electric
	8	R37	Ramp	1	Electric
	8	ML6	Mainlane	8	Electric
	9	R40	Ramp	None	None
9	R41	Ramp	None	None	

Table 2 (continued)

Roadway	Section	Location	Type	Booth	Heater Type
SH 130	11	R42-I	Ramp	None	None
	11	R43-I	Ramp	None	None
	11	R44	Ramp	None	None
	11	R47	Ramp	None	None
	12	ML7	Mainlane	6	Electric
	12	R45	Ramp	1	Electric
	12	R48	Ramp	1	Electric
	12	R49	Ramp	None	None
	12	R50	Ramp	None	None
	14	R51	Ramp	None	None
	14	R52	Ramp	None	None
	14	ML8	Mainlane	4	Electric
	14	R53	Ramp	1	Electric
	14	R54	Ramp	1	Electric
	15	R55	Ramp	None	None
	15	R56	Ramp	None	None
	15	R57	Ramp	None	None
	15	R58	Ramp	None	None
SH 45 SE	N/A	ML11	Mainlane	6	Electric
	N/A	EB-5	Ramp	1	Electric
	N/A	WB-3	Ramp	1	Electric
	N/A	EB-9	Ramp	None	None
	N/A	WB-7	Ramp	None	None
SPARES	N/A	N/A	Mainlane	2	Electric
	N/A	N/A	Ramp	1	Electric

EXHIBIT C

SBE PROGRAM REQUIREMENTS

Small Business Enterprise (SBE) Program

Title 43, Texas Administrative Code, Chapter 9

Subchapter D. Business Opportunity Programs

I. Definitions (§9.51)

The following words and terms shall have the following meanings, unless the context clearly indicates otherwise.

(1) Business opportunity programs section (CSTB) of the Construction Division - The TxDOT office that certifies DBEs and SBEs and administers the DBE, HUB, and SBE programs.

(2) Commission - The Texas Transportation Commission.

(3) DBE certification - The process governed by 49 CFR Part 26 which verifies an applicant's eligibility to be a DBE.

(4) DBE, HUB, or SBE participation goal - A number representing participation in contracts and purchasing by a DBE, HUB, or SBE firm determined by a percentage of the total cost of the contract or purchase.

(5) Department - The Texas Department of Transportation or TxDOT.

(6) Disadvantaged Business Enterprise (DBE) - As defined in 49 CFR §26.5, a for profit small business concern which is at least 51% owned by one or more socially and economically disadvantaged individuals, or in the case of a publicly owned business, at least 51% of the stock of which is owned by one or more socially and economically disadvantaged individuals, and whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

(7) Good faith efforts - Efforts to achieve a DBE, HUB, or SBE goal that, by their scope, intensity, and appropriateness to the objectives, can reasonably be expected to fulfill the program requirements, even if they are not fully successful.

(8) Historically Underutilized Business (HUB) - Any business so certified by the Texas Building and Procurement Commission.

(9) Liquidated damages - Project-related damages to TxDOT's DBE/HUB/SBE programs separate from those costs associated with construction engineering costs.

(10) Race-neutral DBE or HUB participation - Any participation by a DBE or HUB through customary competitive procurement procedures.

(11) Small Business Enterprise (SBE) - A firm (including its affiliates) whose annual gross receipts do not exceed the U.S. Small Business Administration's size standards for four consecutive years. The U.S. Small Business Administration's size standards are categorized by four-digit Standard Industrial Classification (SIC) codes as stated in 13 CFR §121.201. A firm must meet the size standard for the SIC code designated by the principal business of the firm. TxDOT considers those firms that meet these size standards to be disadvantaged.

(12) Socially and economically disadvantaged individuals - As defined in 49 CFR §26.5, individuals who are United States citizens or lawfully admitted permanent residents and who TxDOT finds to be socially and economically disadvantaged on a case-by-case basis or who are members of the following groups which are rebuttably presumed to be socially and economically disadvantaged:

(A) Black Americans which includes persons having origins in any of the Black racial groups of Africa;

(B) Hispanic Americans which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;

(C) Native Americans which includes persons who are American Indian, Eskimo, Aleut, or native Hawaiian;

(D) Asian-Pacific Americans which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, Philippines, Brunei, Samoa, Guam, the Commonwealth of the Northern Marianas or the United States Trust Territories of the Pacific Islands (Republic of Palau), Macao, Fiji, Tonga, Kirbati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong;

(E) Subcontinent Asian-Americans which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal, or Sri Lanka; or

(F) women.

II. Policy (§9.52)

It is the policy of TxDOT to:

(1) ensure that DBEs, HUBs, and SBEs shall have an equal opportunity to participate in the performance of contracts;

- (2) create a level playing field on which DBEs, HUBs, and SBEs can compete fairly for contracts and subcontracts;
- (3) ensure nondiscrimination on the basis of race, color, national origin, or gender in the award and administration of contracts;
- (4) ensure that the DBE program is narrowly tailored in accordance with applicable law;
- (5) ensure that only firms that fully meet 49 CFR Part 26 eligibility standards are permitted to participate as DBEs;
- (6) help remove barriers to the participation of DBEs, HUBs, and SBEs in TxDOT contracts;
- (7) assist in the development of firms that can compete successfully in the market place outside the DBE, HUB, and SBE programs; and
- (8) develop and maintain a program in order to facilitate contracting opportunities for small businesses.

III. SBE Program Requirements

(a) **Applicability.** The SBE program is applicable to all highway construction and maintenance contracts funded entirely with state and local funds. The Work is considered highway construction (the construction of a turnpike project) under the Law.

(b) **SBE goals.** The commission will establish overall annual SBE participation goals. Individual contract goals may be assigned as necessary to achieve the overall goal.

(1) **Annual goals.** The commission will establish annual agency SBE contracting goals based on the availability of certified SBEs. TxDOT will make a good faith effort to meet or exceed this annual goal.

(2) **Contract goals.** Individual contracts may be assigned SBE goals based on the availability of qualified SBEs, work site location, dollar value of the contract, and type of work items specified in the contract. TxDOT may assign individual contract goals for SBE participation in state and locally funded highway construction and maintenance contracts as necessary to cumulatively meet the annual SBE goals.

(c) **Contractor obligation.** TxDOT contracts, as listed in subsection (a) of this section, that are funded entirely with state and local funds will include a contract provision addressing SBE requirements.

(1) A contract without an assigned goal, will include provisions that:

(A) encourage the use of historically underutilized businesses and small business enterprises in subcontracting and material supply activities; and

(B) prohibit discrimination.

(2) A contract with an assigned goal will include provisions that will require the contractor to satisfy the following stipulations.

(A) Commitments. Following award of the Agreement, the Fabricator will strive to meet the assigned contract goal as procurement opportunities present themselves on the Project. Following award of the Agreement and during both the design and fabrication portions of the Project, the Fabricator must furnish a commitment agreement (Attachment A) for each certified SBE that will be used to meet the contract goal. The commitment agreement must include:

- (i) the items of work to be performed;
- (ii) the quantities of work or material;
- (iii) the unit measure, unit price, and total cost for each item;
- (iv) the total amount of the SBE commitment; and
- (v) the original signatures of the Fabricator and the proposed SBE.

(B) Good faith effort. If the Fabricator is unable to meet the SBE goal, the Fabricator must document the good faith efforts taken to meet the SBE goal and to obtain SBE participation. TxDOT will consider as good faith efforts all documented explanations that are submitted and that describe the Fabricator's failure to meet a SBE goal or obtain SBE participation, including:

- (i) advertising in general circulation, trade association, and/or minority/women focus media concerning subcontracting opportunities;
- (ii) providing written notice to at least five qualified SBEs allowing sufficient time for SBEs to participate effectively;
- (iii) dividing the Work into reasonable portions in accordance with standard industry practices;
- (iv) documenting reasons for rejection or meeting with the rejected SBE to discuss the rejection;
- (v) providing qualified SBEs with adequate information about bonding, insurance, plans, specifications, scope of work, and the requirements of the Agreement;
- (vi) negotiating in good faith with qualified SBEs, not rejecting qualified SBEs who are also the lowest responsive bidder; and
- (vii) using the services of available minorities and women, community organizations, contractor groups, local, state, and federal business assistance offices, and other organizations that provide support services to SBEs.

(3) Reporting.

(A) The Fabricator must submit monthly progress reports (Attachment B) that includes, but is not limited to, identification of the SBE by name and vendor number. The report must indicate the actual amount paid to each SBE. When required by TxDOT, the Fabricator must attach proof of payment including, but not limited to, copies of canceled checks.

(B) The Fabricator must submit a final report (Attachment C) that shows the total paid to each SBE.

(4) Credit for expenditures. The Fabricator will receive credit for all payments actually made to a SBE for Work performed and costs incurred in accordance with the Agreement, including all subcontracted Work.

(5) Subcontracting.

(A) A SBE contractor or subcontractor may not subcontract more than 75% of a contract. The SBE shall perform not less than 25% of the value of the contract Work with:

- (i) assistance of employees employed and paid directly by the SBE;
- (ii) employees leased from a licensed employee leasing company; and
- (iii) equipment owned or rented directly by the SBE.

(B) The Fabricator may not furnish work crews to a SBE subcontractor.

(C) A SBE may lease equipment consistent with standard industry practice. A SBE may lease equipment from the Fabricator if a rental agreement, separate from the subcontract specifying the terms of the lease arrangement, is approved by TxDOT prior to the SBE starting the work.

(i) If the equipment is of a specialized nature, the lease may include the operator. If the practice is generally acceptable within the industry, the operator may remain on the lessor's payroll. The operation of the equipment shall be subject to the full control of the SBE, for a short term, and involve a specialized piece of heavy equipment readily available at the job site.

(ii) For equipment that is not specialized, the SBE shall provide the operator and be responsible for all payroll and labor compliance requirements.

(d) SBE certification.

(1) DBE/HUB eligibility. DBEs and HUBs are eligible as SBEs for this program without submitting a SBE application if they meet the requirements in paragraph (2)(B) and (C) of this subsection. Firms denied automatic SBE certification under this subsection may appeal under the procedures described in paragraph (6) of this subsection.

(2) Non-DBE/HUB eligibility. Other firms seeking certification as a SBE must submit an application to TxDOT, on a form prescribed by TxDOT, affirming under penalty of perjury that the business qualifies as a SBE.

(A) If requested by TxDOT, the applicant must provide any and all materials and information necessary to demonstrate eligibility as a SBE.

(B) At least 51% of the assets and interest and/or classes of stock and equitable securities must be owned by one or more persons who are United States citizens or lawfully admitted permanent residents.

(C) A person/business entity who intentionally applies as a SBE for award of purchasing or public works contracts and who knowingly does not meet the definition of a SBE commits a felony of the third degree.

(3) Certification procedure. TxDOT shall certify the applicant as a SBE or provide the applicant with written justification of its denial of certification within 90 days after the date TxDOT receives a satisfactorily completed application from the applicant.

(4) Review and evaluation. TxDOT will review and evaluate applications. TxDOT may reject an application if:

(A) the application is not satisfactorily completed;

(B) the applicant does not meet the requirements of the definition of SBE;

(C) the application contains false information; or

(D) the applicant does not provide required information.

(5) Certification renewals.

(A) SBE certifications are valid for two years.

(B) To be recertified as a SBE, a firm must submit a written application in accordance with paragraph (2) of this subsection.

(6) Denial or withdrawal of certification.

(A) An applicant who withdraws its application may reapply at any time.

(B) TxDOT will notify an applicant in writing if certification is to be denied and will set forth reasons for the denial.

(C) An applicant may answer TxDOT's notice of denial within 15 working days from the date of the denial.

(i) If the applicant does not answer within the 15-day period, the denial of certification is final.

(ii) If an applicant answers within the 15-day period, and the response resolves eligibility deficiencies, TxDOT will certify the applicant.

(iii) If an applicant answers within the 15-day period, but does not resolve eligibility deficiencies, TxDOT will deny certification.

(7) Certification challenges.

(A) Third party challenges.

(i) A third party may challenge the eligibility of a certified firm or a firm seeking to be certified as a SBE.

(ii) A challenge must be made in writing, signed and dated by the challenger, and set forth the factual basis for the challenge.

(iii) After receiving a written challenge, TxDOT will determine if there is reason to believe that the challenged party is in fact not eligible on the basis of the information provided by the challenging party.

(iv) To the extent allowed by applicable law, the identity of complainants will be kept confidential at the complainant's election. Complainants will be advised that if confidentiality hinders the investigation, the result may be closure of the investigation.

(v) TxDOT will review the challenged firm's record, any material provided by the firm and the complainant, and other available information. All parties to the complaint must cooperate with the review.

(vi) If TxDOT determines that there is reasonable cause to believe that the firm is ineligible, TxDOT will provide a written notice to the firm proposing to find the firm ineligible, setting forth the reasons for the proposed determination, and offering the firm the opportunity to present information and arguments in writing.

(vii) If TxDOT determines that there is not reasonable cause to believe that the firm is ineligible, TxDOT will notify the complainant in writing of the determination and the reason for it.

(B) Department challenges. If TxDOT receives information on changes to a firm or other information that provides reasonable cause to believe that the firm is ineligible, TxDOT will provide a written notice to the firm proposing ineligibility and the reasons for it. The firm will be given an opportunity to present information and arguments in writing.

(8) SBE directory. TxDOT will maintain and make available to interested parties a directory of certified SBEs.

IV. Contract Compliance (§9.56)

(a) Monitoring. TxDOT will monitor Fabricator compliance by:

(1) reviewing Fabricator reports; and

(2) making on-site visits to the project and/or the offices of the Fabricator or a subcontractor.

(b) Contractor representative. The Fabricator must designate an employee to serve as a SBE contact person during the contract. The Fabricator must inform TxDOT of the representative's name, title, and telephone number no later than five days after the Agreement is signed. The SBE representative is responsible for submitting reports, maintaining records, and documenting good faith efforts to use SBEs.

(c) Withholding or reducing payments. The Fabricator must not withhold or reduce payments to any SBE firm without a reason that is accepted as standard industry practice.

(d) Performance. A SBE contractor or subcontractor must comply with the terms of the contract or subcontract for which it was selected. Work products, services, and commodities must meet contract specifications whether performed by a contractor or subcontractor.

(e) SBE subcontractor termination. The Fabricator must not terminate a SBE subcontractor submitted on a commitment agreement without the prior written consent of TxDOT.

(f) Records. The Fabricator must retain all records specified in the Agreement provisions for three years after final payment is made under the Agreement, or until any investigation, audit, examination, or other review undertaken during the three years is completed. The records must be made available to representatives of TxDOT and other agencies for inspection, audit, examination, investigation, or other review at all reasonable times during the retention period.

(g) Compliance conference. The following process is made available to the Fabricator whenever a finding of noncompliance with SBE special provisions is made by TxDOT. The Fabricator may be given an opportunity to remedy the violation before TxDOT issues sanctions.

(1) A letter will be sent to the Fabricator notifying the Fabricator that it is not in compliance with the SBE special provision in the Agreement.

(2) The Fabricator may respond in writing. If the written response does not resolve the issues, TxDOT will invite the Fabricator to attend an informal compliance conference, within 15 calendar days from the date of the written response, to discuss the issues.

(3) The Fabricator will be given 15 calendar days from the date of the conference to submit additional information to resolve the issues.

(4) TxDOT will make a final determination regarding compliance within 15 calendar days from the conference or from receipt of any additional information.

(5) If a determination of noncompliance has been made by TxDOT, the Fabricator will be given an opportunity to submit a voluntary written corrective action plan to correct the violations.

(6) When the Fabricator fails to take corrective actions, TxDOT may issue a notice requiring the Fabricator to:

(A) show cause for noncompliance; and

(B) provide reasons why enforcement proceedings should not be instituted.

(7) TxDOT may impose sanctions, pursuant to subsection (h) of this section, for failure to show cause why enforcement proceedings should not be instituted.

(h) Sanctions.

(1) TxDOT may issue sanctions to the Fabricator as a result of not complying with the SBE requirements of the Agreement.

(2) The Fabricator's failure to comply with the requirements of this SBE Program will constitute a material breach of the Agreement.

(3) TxDOT will impose sanctions if the Fabricator:

(A) is found to have discriminated against a SBE firm;

(B) has failed to meet the SBE contract goal and has failed to demonstrate a good faith effort to meet the goal; or

(C) has not kept SBE commitments and the department has not approved good faith efforts or a substitution of the SBE firm.

(4) TxDOT may impose any of the following sanctions:

(A) letter of reprimand;

(B) liquidated damages computed up to the amount of goal dollars not met;

(C) contract termination; and/or

(D) other remedies available by law.

(5) Factors to be considered in issuing sanctions include, but are not limited to:

(A) the magnitude and the type of the offense;

(B) the degree of the Fabricator's culpability;

(C) any steps taken to rectify the situation;

(D) the Fabricator's record of performance on other projects including, but not limited to:

goals;

(i) annual DBE, HUB, or SBE participation over DBE, HUB, or SBE

(ii) annual DBE, HUB, or SBE participation on projects without goals;

(iii) number of complaints TxDOT has received from DBEs, HUBs, or SBEs; and

(iv) the number of times the Fabricator has been previously sanctioned by TxDOT pursuant to this section; and

(E) whether the Fabricator falsified, misrepresented, or withheld information.

(6) The Fabricator may appeal the department's sanction pursuant to §9.57 of this subchapter.

**Attachment A
Small Business Enterprise (SBE) Program
Commitment Agreement Form**

This commitment is subject to the award and receipt of a signed contract from the Texas Department of Transportation for the subject project.

Project #:	County:	Contract-CSJ:			
Items of work to be performed* (attach a list of work items if more room is required): *All hauling quantities and units of measure should match the bid tab item whenever possible. If listing items by hours, or by lump sum amounts, please provide calculations to substantiate the quantities listed.					
Bid Item #	Item Description	Unit of Measure	Unit Price	Quantity	Total Per Item
Total Commitment Amount (including attachments):			\$		
If the SBE is a material supplier on this project, the following information is required:					
1. Where, and from whom, is the SBE material supplier getting the materials?			1.		
2. Whose equipment will be used to deliver the SBE's material to the project site? Explain in detail any arrangements the SBE has with other distributors, hauling firms, and freight companies.			2.		
3. Is the SBE going to be paid with a joint check for materials supplied? If yes, explain in detail .			3.		
IMPORTANT! The signatures of the prime contractor and the SBE, and the total commitment amount must always be on the same page.					
Prime Contractor:			Name/Title (please print):		
Address:			Signature:		
Phone:			Date:		
SBE:			Name/Title (please print):		
Vendor No.:					
Address:			Signature:		
Phone:			Date:		
Subcontractor, if the SBE will be a second tier sub.			Name/Title (please print):		
Subcontractor:					
Address:			Signature:		
Phone:			Date:		

To insure prompt and efficient handling of your project file we are requesting that all commitments be presented to the Construction Division, Business Opportunity Programs Section using this basic format.

The Texas Department of Transportation maintains the information collected through this form. With few exceptions, you are entitled on request, to be informed about the information that is collected about you. Under Sections 552.021 and 552.023 of the Texas Government Code, you also are entitled to receive and review the information. Under Section 559.004 of the Government Code, you are also entitled to have us correct information about you that is incorrect.

Attachment B
Texas Department of Transportation
SBE Monthly Progress Report

Project: _____	Contract CSJ: _____
County: _____	District: _____
Letting Date: _____	For Month of: (Mo./Yr.): _____
Contractor: _____	Contract Amount: _____
SBE Goal: _____ %	SBE Goal Dollars _____

Vendor number	Name of SBE sub/supplier	*SBE, DBE, HUB, DH	Type of Work	* SBE \$ amt. pd for work performed this period	Amt. pd to SBE to date

* Include payments to all certified SBEs, DBEs, HUBs and DBE/HUBs. Code S=SBE; D=DBE; H=HUB; DH=both.

If using a non-SBE hauling firm that leases from SBE truck owner-operators, payments made to each owner-operator must be reported separately.

Any changes to the SBE commitments previously approved by the department must be reported to the area engineer.

For projects with assigned SBE Goals, submission of this report for periods of negative SBE activity is required. This report is required until all SBE subcontracting or material supply activity is completed.

I hereby certify that the above is a true and correct statement of the amounts paid to the SBE firms listed above.

Signature: _____ Date: _____
Company Official

This report must be sent to the area engineer's office within 15 days following the end of the calendar month.

The Texas Department of Transportation maintains the information collected through this form. With few exceptions, you are entitled on request, to be informed about the information that is collected about you. Under Sections 552.021 and 552.023 of the Texas Government Code, you also are entitled to receive and review the information. Under Section 559.004 of the Government Code, you are also entitled to have us correct information about you that is incorrect.

Attachment C Texas Department of Transportation SBE Final Report

The SBE final report form should be filled out by the contractor and submitted to the appropriate district office upon completion of the project. One copy of the report must be submitted to the area engineer's office. The report should reflect all SBE activity on the project. The report will aid in expediting the final estimate for payment. If the SBE goal requirements were not met, documentation supporting good faith efforts must be submitted.

Project: _____	Contract CSJ: _____
County: _____	Control Project: _____
Letting Date: _____	SBE Goal: _____ %
Contractor: _____	Contract Amount: _____

Vendor number	Name of SBE Sub/Supplier	* SBE, DBE, HUB, or DH	Total \$ amt. pd to SBE to date

* Include all payments to certified SBEs, DBEs, HUBs, and DBE\HUBs. Codes: S=SBE; D=DBE; H=HUB; DH=both.

This is to certify that _____% of the work was completed by Small Business Enterprises as stated above.

By _____ Per: _____
Name of General Contractor Contractor's Signature

Subscribed and sworn to before me, this _____ day of _____, A.D. _____.

Notary Public _____ County

My commission expires: _____.

The Texas Department of Transportation maintains the information collected through this form. With few exceptions, you are entitled on request, to be informed about the information that is collected about you. Under Sections 552.021 and 552.023 of the Texas Government Code, you also are entitled to receive and review the information. Under Section 559.004 of the Government Code, you are also entitled to have us correct information about you that is incorrect.

EXHIBIT D

FORM OF PERFORMANCE BOND

DESIGN AND FABRICATION OF TOLL BOOTHS

Bond No. _____

WHEREAS, the Texas Department of Transportation (“**Obligee**”), has awarded to _____, a _____ (“**Principal**”), a Comprehensive Development Agreement for the Design and Fabrication of Toll Booths, duly executed and delivered as of _____, 2004 (the “**Contract**”), on the terms and conditions set forth therein; and

WHEREAS, upon award of the Contract, Principal is required to furnish a bond guaranteeing the faithful performance of its obligations under the Contract Documents (as defined in the Contract).

NOW, THEREFORE, Principal and the sureties listed on the attached page (the “**Sureties**”), each an admitted surety insurer in the State of Texas, are held and firmly bound unto Obligee in the amount of \$_____ [**100% of the Initial Order Price**] (the “**Bonded Sum**”), for payment of which sum Principal and Sureties jointly and severally firmly bind themselves and their successors and assigns.

THE CONDITION OF THIS OBLIGATION IS SUCH THAT, if Principal shall promptly and faithfully perform all of its obligations under the Contract Documents, including any and all amendments and supplements thereto, then this obligation shall be null and void; otherwise it shall remain in full force and effect. Obligee shall release this bond upon the occurrence of all of the conditions set forth in Section 7.1.1 of the Agreement.

The following terms and conditions shall apply with respect to this bond:

1. The Contract Documents are incorporated by reference herein.
2. This bond specifically guarantees the performance of each and every obligation of Principal under the Contract Documents, as they may be amended and supplemented, including but not limited to, its liability for liquidated damages and warranties as specified in the Contract Documents, but not to exceed the Bonded Sum.
3. The guarantees contained herein shall survive the final completion of the design, fabrication and delivery called for in the Contract Documents with respect to those obligations of Principal which survive such final completion.

4. Whenever Principal shall be, and is declared by Obligees to be, in default under the Contract Documents, provided that Obligees is not then in material default thereunder, Sureties shall promptly:

- a. remedy such default;
- b. complete the Project in accordance with the terms and conditions of the Contract Documents then in effect; or
- c. select a contractor or contractors to complete all Work (as defined in the Contract) for which a notice to proceed has been issued in accordance with the terms and conditions of the Contract Documents then in effect, using a procurement methodology approved by Obligees, arrange for a contract between such contractor or contractors and Obligees, and make available as work progresses (even though there should be a default or a succession of defaults under such contract or contracts of completion arranged under this paragraph), sufficient funds to pay the cost of completion less the unpaid balance of the Initial Order Price (as defined in the Contract); but not exceeding, including other costs and damages for which Surety is liable hereunder, the Bonded Sum.

5. No alteration, modification or supplement to the Contract Documents or the nature of the work to be performed thereunder, including without limitation any extension of time for performance, shall in any way affect the obligations of Surety under this bond, provided that the aggregate dollar amount of changes and additions to the Contract, without the Sureties' prior written consent thereto having been obtained, does not increase the Initial Order Price by more than \$ _____ [**10% of the Initial Order Price**]. Sureties waive notice of any alteration, modification, supplement or extension of time.

6. The Sureties agree to empower a single representative with authority to act on behalf of all of the Sureties with respect to this Bond, so that Obligees will have no obligation to deal with multiple sureties hereunder. All correspondence from Obligees to the Sureties and all claims under this Bond shall be sent to such designated representative. The Sureties also agree to designate a single agent for service of process with respect to any actions on this Bond, which agent shall either be (a) a natural person or (b) a corporation qualified to act as an agent for service of process. The designated representative and agent for service of process may be changed only by delivery of written notice (by personal delivery or by certified mail, return receipt requested) to Obligees designating a single new representative and/or agent, signed by all of the Sureties. The initial representative shall be _____ [name and address], and the initial agent for service of process shall be _____ [name and address].

7. No right of action shall accrue on this bond to or for the use of any entity other than Obligee or its successors and assigns.

IN WITNESS WHEREOF, Principal and Sureties have caused this bond to be executed and delivered as of _____, 2004.

Principal:

By: _____
Its: _____
(Seal)

Co-Surety:

By: _____
Its: _____
(Seal)

Co-Surety:

By: _____
Its: _____
(Seal)

[ADD APPROPRIATE SURETY ACKNOWLEDGMENTS]

SURETY

or secretary attest

By: _____
Name
Title:
Address:

[To be replaced at award by actual bond]

EXHIBIT E

FORM OF PAYMENT BOND

DESIGN AND FABRICATION OF TOLL BOOTHS

Bond No. _____

WHEREAS, the Texas Department of Transportation (“**Obligee**”), has awarded to _____, a _____ (“**Principal**”), a Comprehensive Development Agreement for the Design and Fabrication of Toll Booths, duly executed and delivered as of _____, 2004 (the “**Agreement**”), on the terms and conditions set forth therein; and

WHEREAS, upon award of the Contract, Principal is required to furnish a bond guaranteeing payment of claims, subcontractors, suppliers, materialmen and mechanics.

NOW, THEREFORE, Principal and the sureties listed on the attached page (the “**Sureties**”), each an admitted surety insurers in the State of Texas, as Sureties, are held and firmly bound unto Obligee in the amount of \$ _____ **[100% of the of the Initial Order Price]** (the “**Bonded Sum**”), for payment of which sum Principal and Sureties jointly and severally firmly bind themselves and their successors and assigns.

THE CONDITION OF THIS OBLIGATION IS SUCH THAT, if Principal shall fail to pay any claims, subcontractors, suppliers, materialmen and mechanics with respect to the Work (as defined in the Contract), then Sureties shall pay for the same in an amount not to exceed the Bonded Sum; otherwise this obligation shall be null and void upon the latest to occur of any of the events set forth in Section 7.1.2 of the Agreement.

The following terms and conditions shall apply with respect to this bond:

1. The Contract Documents (as defined in the Agreement) are incorporated by reference herein.
2. No alteration, modification or supplement to the Contract Documents or the nature of the work to be performed thereunder, including without limitation any extension of time for performance, shall in any way affect the obligations of Sureties under this bond, provided that the aggregate dollar amount of TTA-Directed Changes (as defined in the Contract) without the Sureties’ prior written consent thereto having been obtained, does not increase the Initial Order Price (as defined in the Contract) by more than \$ _____ **[10% of the Initial Order Price]**. Sureties waive notice of any alteration, modification, supplement or extension of time.

3. The Sureties agree to empower a single representative with authority to act on behalf of all of the Sureties with respect to this Bond, so that Oblige will have no obligation to deal with multiple sureties hereunder. All correspondence from Oblige to the Sureties and all claims under this Bond shall be sent to such designated representative. The Sureties also agree to designate a single agent for service of process with respect to any actions on this Bond, which agent shall either be (a) a natural person or (b) a corporation qualified to act as an agent for service of process. The designated representative and agent for service of process may be changed only by delivery of written notice (by personal delivery or by certified mail, return receipt requested) to Oblige designating a single new representative and/or agent, signed by all of the Sureties. The initial representative shall be _____[name and address], and the initial agent for service of process shall be _____[name and address].

4. This bond shall inure to the benefit of the persons identified above so as to give a right of action to such persons and their assigns in any suit brought upon this bond.

IN WITNESS WHEREOF, Principal and Sureties have caused this bond to be executed and delivered as of _____, 2004.

Principal:

By: _____
Its: _____
(Seal)

Co-Surety:

By: _____
Its: _____
(Seal)

Co-Surety:

By: _____
Its: _____
(Seal)

[ADD APPROPRIATE SURETY ACKNOWLEDGMENTS]

[To be replaced at award by actual bond]

EXHIBIT F

TxDOT Standard Specifications Applicable to Insurance Requirements [As modified by Agreement]

As specified in Section 7.2 of the Agreement and prior to the beginning of Work, the Fabricator shall provide TxDOT with TxDOT's Certificate of Insurance covering the below listed insurance coverages:

- A. Workers' Compensation Insurance
Amount – Statutory

- B. Comprehensive General Liability Insurance
Amounts - Bodily Injury \$500,000 each occurrence
 Property Damage \$100,000 each occurrence
 \$100,000 for aggregate

or

Commercial General Liability Insurance
Amount - \$600,000 combined single limit

- C. Comprehensive Automobile Liability Insurance or
Texas Business Auto Policy
Amounts - Bodily Injury \$250,000 each occurrence
 \$500,000 each occurrence
 Property Damage \$100,000 each occurrence

This insurance shall be kept in force until the Work described in this Contract has been completed and accepted by TxDOT. If for any reason insurance coverage is not kept in force, all Work will be stopped until an acceptable Certificate of Insurance is provided to TxDOT.

TxDOT shall be included as an "Additional Insured" by Endorsement to policies issued for coverages listed in B and C above. A "Waiver of Subrogation Endorsement" in favor of TxDOT shall be a part of each policy for coverages listed in A, B and C above.

Fabricator shall be responsible for any deductions stated in the policy.

Fabricator also shall provide TxDOT a written certification that Fabricator is providing workers' compensation insurance coverage for all employees of Fabricator employed on the project.

A Subcontractor shall provide a written certification to Fabricator that the Subcontractor is providing workers' compensation insurance coverage for all employees of the Subcontractor employed on the Project, and Fabricator shall provide TxDOT written certification to this effect.

If Fabricator and a Subcontractor agree in writing for Fabricator to provide workers' compensation insurance coverage for all employees of the Subcontractor employed on the Project, Fabricator shall provide a copy of such agreement to Fabricator's workers' compensation insurance carrier within 10 days of execution, and provide a written certification of said agreement to the Department.

EXHIBIT G

PRICE ADJUSTMENT FOR STEEL MATERIALS

- A. Recent rapid price escalation in the steel industry has created uncertainty among contractors and suppliers regarding future price predictability. This price adjustment provision provides a mechanism to share the risk between TxDOT and the Fabricator related to this potential for price fluctuations with respect to any additional orders placed by TxDOT during the second through fifth years of the Initial Term. The Initial Order Price shall not be subject to adjustment due to any fluctuations in the price of steel. TxDOT shall increase or decrease the Initial per Unit Price for any additional orders as described herein.
- B. TxDOT shall adjust the price for additional orders based on the price of stainless steel for the following items only, defined as the “Indexed Items”:
1. Stainless steel sheet
 2. Stainless steel plate, and
 3. Stainless steel hollow structural sections.
- C. The Benchmark Index (BI) for each of the above is the Bureau of Labor Statistics (BLS), Producer Price Indexes (PPI), April 2004, determined from data published 4 months after initial publication (December 2004), as follows. Seasonally adjusted indexes shall not be used.
1. **Stainless Steel**
BLS PPI Index: 10170455 (Plate and structurals, stainless)
Cost Basis: Supplied by the bidder, at the time of bid, shall be the current price of stainless steel, in dollars per pound, which shall include all mill extras, surcharges and adjustments.
- D. Frequency of Price Adjustment:
- Price adjustments for additional orders will be made for any and all months when, and only when, the Monthly Index (MI) differs by 5.00% or more from the Benchmark Index (BI), for any one of the Indexed Items. The price adjustment will only be applied to those indexed items used on additional orders which meet the 5.00% threshold.

Determine the percent change in any given month as follows:

$$\% \text{ Change} = \left(\frac{\text{MI} - \text{BI}}{\text{BI}} \right) \times 100$$

Where:

MI = Monthly Index from BLS PPI as specified

BI = Benchmark Index from BLS PPI (April 2004) as specified

E. Quantity of material eligible for price adjustment:

The Price Adjustment is applied to quantities shipped during month(s) when a Monthly Index differs from the Benchmark Index by 5.00% or more.

1. For items in the Stainless Steel category, time of shipping is when the steel sheet, plate or hollow structural section is shipped from the steel mill, before fabrication.

F. Determine the Monthly Index 4 months after initial publication to ensure that the data have not been revised. For example, to determine the MI for August 2005, wait until the December 2005 update is published by BLS and then use the data published for the month of August 2005.

G. **Provision for Missing Data:** If either the Benchmark Index or the Monthly Index is unavailable, use the “next higher-level series” for both the Benchmark Index and the Monthly Index.

1. For example, if 10170455 is not available for August 2005, use 101704 for August 2005 for the Monthly Index, and use 101704 for April 2004 for the Benchmark Index to determine any adjustment.
2. Refer to BLS Report 807, “Escalation and Producer Price Indexes: A Guide for Contracting Parties” on the web at <http://bls.gov/ppi/ppiesc.htm> for details on how to use the next higher-level series.

H. **Determining Adjustments:** The Fabricator shall track the Index on a monthly basis and submit a report to TxDOT every month throughout the Initial Term summarizing activity from the start of the project to date. These reports will lag by 4 months because the data will not be considered validated until 4 months after publication by BLS.

Only for additional orders and only months where the Monthly Index varies by 5.00% or more from the Benchmark Index will be eligible for adjustment. When that occurs, the Fabricator shall submit to TxDOT for

review and approval all calculations and supporting data necessary to determine the price adjustment per unit. The adjustment on each item is determined using the formulas below. Adjustments in compensation may be either plus or minus depending on the differences between the Benchmark Index and the Monthly Index.

I. **Upward Ceiling:** The total net payment increase or decrease per unit, for additional orders, shall not exceed 10.00% of the initial order price per unit. . Beyond the 10.00% increase or decrease, the parties reserve the right to renegotiate this clause within its original spirit, which is to protect both parties from the uncertainties associated with fluctuation of steel material prices beyond 5.00%.

J. Adjustment Formula

Price goes up:

$$PA = \left(\left(\frac{MI - BI}{BI} \right) - 0.05 \right) (CB) Q$$

Price goes down:

$$PA = \left(\left(\frac{MI - BI}{BI} \right) + 0.05 \right) (CB) Q$$

Where:

- PA = Payment Adjustment, dollars
- MI = Monthly Index from BLS PPI as specified
- BI = Benchmark Index from BLS PPI (April 2004) as specified
- Q = Quantity of steel materials, in pounds
- CB = Cost Basis for the applicable steel material defined herein in dollars per pound.

EXHIBIT H

TxDOT STANDARD SPECIFICATIONS APPLICABLE TO CHANGES IN WORK [As Modified by Agreement]

1. **Significant Changes in the Character of Work.** TxDOT reserves the right to make, in writing, at any time during the Work, such changes in quantities and such alterations in the Work as are necessary to satisfactorily complete the Project. Such changes in quantities and alterations shall not invalidate the Contract nor release the Surety and Fabricator agrees to perform the Work as altered.

If the alterations or changes in quantities significantly change the character of the Work under the Contract, whether such alterations or changes are in themselves significant changes to the character of the Work or by affecting other Work cause such other Work to become significantly different in character, an adjustment, excluding anticipated profits, will be made to the Contact. The basis for the adjustment shall be agreed upon prior to the performance of the Work. If a basis cannot be agreed upon, then an adjustment will be made either for or against the Fabricator in such amount as TxDOT may determine to be fair and equitable [and Fabricator shall perform the Work as altered and may submit the issue to dispute resolution pursuant to Section 16 of the Agreement.]

If the alterations or changes in quantities do not significantly change the character of the Work to be performed under the Contract, the altered Work will be paid for as provided elsewhere in the Contract.

The term “significant change” shall be construed to apply only to the following circumstances:

- (a) When the character of the Work as altered differs materially in kind or nature from that involved or included in the original Specification; or
- (b) When a change involves at least \$5,000 in additional direct costs incurred by Fabricator, or a reduction of at least \$5,000 of direct costs incurred by Fabricator.

Fabricator shall perform the Work as increased or decreased. Payment to Fabricator for Contract items will be made for the actual quantities of Work done or material furnished at the unit prices set forth in the Proposal, except as provided for significant changes in the character of the Work.

2. **Extra Work.** Work made necessary by changes and alteration of the Plans or Specification or for other reasons for which no prices are provided in the Contract shall be defined as “Extra Work” and shall be performed by Fabricator in accordance with appropriate specifications and as directed. However, before any Extra

Work is begun, a Change Order setting forth the Parties' agreement as to the Price and Delivery Deadline shall be issued by TxDOT, or a Change Order shall be issued by TxDOT to do the work on a "Force Account" basis, as provided under paragraph 4 below. TxDOT may request, and Fabricator shall provide, lump sum quotations for any change in the Work. TxDOT may, at its sole option, elect to accept such lump sum quotation, have Fabricator perform the Work on a "Force Account" basis, not have the Work performed, or have the Work performed by others.

3. Claims and Disputes. In the event that Fabricator requests additional compensation for work not clearly covered in the Contract, Fabricator shall notify TxDOT in writing of its intention to make a claim for a Change Order for additional compensation before beginning such Work, once it has knowledge of such Work. An assessment of damages is required to be a part of this request. If such notice is not given and TxDOT is not provided an opportunity to keep an accurate account of the actual cost of the Work in question, then Fabricator waives its right to file a claim for such Work, unless the circumstances are such that Fabricator could not reasonably have knowledge of the additional cost prior to the performance of the Work. Notice of claim by Fabricator and the documentation of the cost of the work by TxDOT shall not be construed as proof or substantiation of the validity of said claim. Every effort will be made to resolve this dispute at the Project level; however, in the event that it is not resolved, Fabricator may submit the issue to dispute resolution pursuant to Section 16 of the Agreement.

In the event that a claim for delay damages is filed by Fabricator, a notice of potential request for Change Order as stated above will be required as soon as the delay is evident. If the delay claim is substantiated by TxDOT, Fabricator's standby equipment costs will be limited as follows:

- (a) Standby costs will not be allowed during periods when the equipment would have otherwise been in an idle status;
- (b) No more than eight (8) hours of standby will be paid during a 24-hour day, nor more than 40 hours per week, nor more than 176 hours per month; and
- (c) Standby will be paid at 50 percent of the rental rates found in the Rental Rate Blue Book for Construction Equipment and calculated by dividing the monthly rate by 176 and multiplying by the regional adjustment factor and the rate adjustment factor. Operating costs will not be allowed.

4. Force Account. When extra Work is ordered to be performed on a "Force Account" basis, payment for the same will be made as follows:

Fabricator and TxDOT will agree in writing before beginning the Work on the rate of wage which Fabricator will receive for all labor and foremen. Fabricator will be paid said rate for each hour that the labor and foremen are actually engaged in the Work except that in the event that the particular laborers and foremen anticipated to be used in the Work are not available then the individuals involved in the Work will be

reimbursed at the rate shown on the payrolls. Fabricator will receive an additional 25% as compensation based on the total wages paid said laborers and foremen. No charge will be made by Fabricator for organization or overhead expenses. For cost of premiums on public-liability and workers-compensation insurance, Social-Security and unemployment-insurance taxes, an amount equal to 55% of the sum of the labor cost, excluding the 25% compensation provided above, will be paid to Fabricator. The actual cost of the Fabricator's Bond on the extra Work will be paid. No charge for superintendence will be made unless considered necessary and ordered by TxDOT.

Fabricator will receive the actual cost, including freight charges, of the materials used on such work to which cost will be added a sum equal to 25% thereof as compensation. When material invoices indicate a discount may be taken, the actual cost will be the invoice price minus the discount.

For Fabricator-owned machinery, trucks, power tools or other equipment which are necessary for use on force account work, the **Rental Rate Blue Book** as modified by the following will be used to establish hourly rates. Equipment used shall be at the rates in effect for each section of the Blue Book at the time of use.

The following formula shall be used to compute the hourly rates:

$$H = \frac{M \times R1 \times R2}{176} + OP$$

Where

- H = Hourly Rate
- M = Monthly Rate
- R1 = Rate Adjustment Factor
- R2 = Regional Adjustment Factor
- OP = Operating Costs

If Fabricator-owned equipment is not available and equipment is rented from outside sources, the hourly rate will be established by dividing the actual invoice cost by the actual number of hours the equipment is involved in the Work. TxDOT reserves the right to limit the hourly rate to comparable Blue Book rates. When the invoice specifies that the rental rate does not include fuel, lubricants, repairs and servicing, the **Rental Rate Blue Book** hourly operating cost shall be added for each hour the equipment operates.

If a rate has not been established for a particular piece of equipment in the **Rental Rate Blue Book**, TxDOT will allow the Fabricator a reasonable hourly rate, as agreed upon in writing before such Work is begun. This price will include the cost of fuel, lubricants and repairs.

The established equipment hourly rates will be paid for each hour that the equipment is involved in the Work to which will be added 15% as compensation. In the event that the equipment is used intermittently during the Work, full payment for an eight-hour day will be made if the equipment is not idle more than four (4) hours of the

day. If the equipment is idle more than four (4) hours in a day, then payment will be made only for the actual hours worked.

The compensation, as herein provided for, shall be received by Fabricator as payment in full for extra work completed on the "Force Account" basis and will include use of small tools, overhead expense and profit. The Fabricator's representative and TxDOT shall compare records of extra work completed on the "Force Account" basis at the end of each month. Copies of these records will be made upon suitable forms provided for this purpose by TxDOT and signed by both the TxDOT and the Fabricator's representatives, one copy being forwarded to TxDOT and one to Fabricator. All claims for "Extra Work" performed on the "Force Account" basis shall be submitted to TxDOT by Fabricator upon statements to which shall be attached copies of invoices covering the cost of, and the freight charges on, all materials used in such Work, and such statements shall be filed not later than the tenth day of the month following that month in which the Work was actually performed.

EXHIBIT I

DISPUTE RESOLUTION PROCEDURES

Relevant Statutory Provisions

The following is an excerpt from the Texas Transportation Code:

Sec. 201.112. CONTRACT CLAIMS. (a) The commission may by rule establish procedures for the informal resolution of a claim arising out of a contract described by:

- (1) Section 22.018;
- (2) Chapter 223;
- (3) Chapter 361; or
- (4) Chapter 2254, Government Code.

(b) If a person with a claim is dissatisfied with the department's resolution of the claim under the procedures authorized under Subsection (a), the person may request a formal administrative hearing to resolve the claim under Chapter 2001, Government Code.

(c) An administrative law judge's proposal for decision rendered under Chapter 2001, Government Code, shall be submitted to the director for adoption. Notwithstanding any law to the contrary, the director may change a finding of fact or conclusion of law made by the administrative law judge or may vacate or modify an order issued by the administrative law judge. The director shall provide a written statement containing the reason and legal basis for a change made under this subsection.

(d) The director's final order is subject to judicial review under Chapter 2001, Government Code, under the substantial evidence rule.

(e) This section does not waive state immunity from liability.

Contested Case Provisions in Administrative Procedure Act:

<http://www.capitol.state.tx.us/statutes/go/go0200100toc.html>

Relevant Rule Provisions

§9.2. Contract Claim Procedure.

(a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Commission--The three member body appointed by the governor to compose the Texas Transportation Commission.

(2) Committee--The Contract Claim Committee.

(3) Contract claim--A claim for additional compensation, time extension, or any other reason, arising out of a contract between the State of Texas, acting in its own capacity or as an agent of a local government, and a contractor, which is entered into and administered by the Texas Department of Transportation pursuant to Transportation Code, Section 22.018, Section 391.091, Chapter 223, Chapter 361, or Government Code, Chapter 2254, Subchapters A and B.

(4) Contractor--An individual, partnership, corporation, or other business entity that is a party to a written contract with the State of Texas which is entered into and administered by the Texas Department of Transportation pursuant to Transportation Code, Section 22.018, Section 391.091, Chapter 223, Chapter 361, or Government Code, Chapter 2254, Subchapters A and B.

(5) Department--The Texas Department of Transportation.

(6) Department office--The department district, division, or office responsible for the administration of the contract.

(7) Department office director--The chief administrative officer of the responsible department office, such officer to be a district engineer, division director, or office director.

(8) District--One of the 25 districts of the department.

(9) Executive director--The executive director of the Texas Department of Transportation.

(b) Contract claim committee.

(1) The executive director will name the members and chairman of a contract claim committee or committees to serve at his or her pleasure. The chairman may add members to the committee, including one or more district engineers who will be assigned to the committee on a rotating basis, with a preference, if possible, for district engineers of districts that do not have a current contractual relationship with the contractor involved in the contract claim. It will be the responsibility of a committee to gather information, study, and meet informally with contractors, if requested, to resolve

any disputes that may exist between the department office and the contractor, and which result in one or more contract claims.

(2) The commission stresses that, to every extent possible, disputes between a contractor and the engineer or other department employee in charge of a project should be resolved during the course of the contract. If, however, after completion of a contract, or when required for orderly performance prior to completion, resolution of a contract claim is not reached with the department office, the contractor may file a detailed report and contract claim request with the department office director under whose administration the contract was or is being performed, the department's Construction Division, or the committee. Documents filed with the office director or the Construction Division will be transmitted to the committee.

(3) The committee will secure detailed reports and recommendations from the responsible department office, and may confer with any other department office deemed appropriate by the committee.

(4) The committee will then afford the contractor an opportunity for a meeting to informally discuss the disputed matters and to provide the contractor an opportunity to present relevant information and respond to information the committee has received from the department office.

(5) The committee chairman will give written notice of the committee's proposed disposition of the claim to the contractor. If that disposition is acceptable, the contractor shall advise the committee chairman in writing within 20 days of the date such notice is received, and the chairman will forward to the commission an agreed disposition involving payment to the contractor, for a final and binding order on the claim. If the contractor is dissatisfied with the proposal of the committee, the contractor may petition the executive director for a formal administrative hearing to litigate the claim pursuant to the provisions of §§1.21 et seq. of this title (relating to Contested Case Procedure).

(6) Proceedings before the department office director or the committee are in the nature of an attempt to mutually resolve a contract claim without litigation and are not admissible for any purpose in a formal administrative hearing provided in paragraph (5) of this subsection. All oral communications, reports, or other written documentation prepared by department staff in connection with the analysis of a contract claim are part of the attempt to mutually resolve a contract claim without litigation, and are also not admissible for any purpose in a formal administrative hearing provided in paragraph (5) of this subsection.

(7) The administrative law judge's proposal for decision in a formal administrative hearing provided in paragraph (5) of this subsection shall be submitted to the executive director for adoption. The executive director may change a finding of fact or conclusion of law made by the administrative law judge or may vacate or modify an order issued by the administrative law judge. The executive director shall provide a written statement containing the reason and legal basis for any change.

(8) If the contractor fails to submit the petition within 20 days after notice of the committee's recommendation is received, that recommendation will be final, and all further appeal by the contractor shall be barred.

SUBCHAPTER E. PROCEDURES IN CONTESTED CASES

§1.21. Scope and Purpose.

The sections in this subchapter describe the procedures to be followed in contested cases arising under Government Code, Chapter 2001, with the exception of contested cases arising under the Motor Vehicle Commission Code, Texas Civil Statutes, Article 4413(36), or under Transportation Code, Chapter 503, which are governed by 16 TAC Chapter 111. Except as provided in this subchapter, all contested cases shall be governed by the procedural rules of the State Office of Administrative Hearings.

§1.22. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Administrative Law Judge--A person appointed by the State Office of Administrative Hearings to conduct a hearing on matters within the department's jurisdiction.

(2) Contract claim--Any claim arising under a contract governed by Transportation Code, §22.018, by Transportation Code, Chapter 223, or by Government Code, Chapter 2254.

(3) Department--The Texas Department of Transportation.

(4) Executive director--The chief administrative officer of the department or, if permitted by law, the director's designee.

(5) Party--The department or a person named or permitted to participate in a contested case.

(6) Person--An individual, representative, partnership, corporation, association, governmental subdivision, or public or private organization, or any other entity, other than the department.

(7) Petition--The document that initiates a contested case.

(8) Petitioner--A person that files a petition.

§1.23. Filing of Petition.

A person may seek to initiate a contested case by filing an original and four copies of a petition with the executive director at the department's headquarters building in Austin.

§1.24. Content of Petition.

- (a) A petition must include the following:
- (1) the name of the petitioner;
 - (2) the names of all other known persons with an interest in the outcome of the contested case;
 - (3) a concise statement of the facts on which the petitioner relies;
 - (4) a statement of the relief demanded by the petitioner;
 - (5) any other matter required by statute; and
 - (6) the signature of the petitioner or the petitioner's authorized representative.

(b) No document including a settlement offer by the department may be enclosed with the petition, and the petition may not refer to the substance of a settlement offer made by the department.

(c) If the petition concerns a contract claim, a copy of the detailed report and request filed under §9.2(b)(2) of this title (relating to Contract Claim Procedure) must be enclosed with the petition, and the petition must state the date on which the petitioner received written notice of the proposed disposition by the contract claim committee under §9.2(b)(5) of this title. The petition and its attachments may not otherwise refer to the proposed disposition and may not include a copy of the written notice of the proposed disposition.

§1.25. Examination by Executive Director.

(a) The executive director will examine a petition and make a preliminary determination whether the petition states a claim that entitles the petitioner to initiate a contested case and whether the petition meets the procedural requirements of §1.23 and §1.24 of this subchapter and of Government Code, Chapter 2001.

(b) If the executive director finds that the petition does not meet all legal requirements, the executive director will return the petition to the petitioner along with a statement of the reasons for rejecting it. The petitioner will be given at least 10 days in which to file a corrected petition.

(c) If a corrected petition is rejected under this section, the executive director will return the corrected petition to the petitioner along with a statement of the reasons for rejecting it. The petitioner will not be given an opportunity to file another corrected petition.

(d) The executive director's preliminary determination of a petition's legal sufficiency is without prejudice to the department's right to assert in litigation that a contested case should be dismissed for any reason.

§1.26. Initiation of Contested Cases.

(a) If the executive director finds that a petition meets all legal requirements, the department will initiate a contested case in accordance with the rules of the State Office of Administrative Hearings.

(b) The department may initiate a contested case on its own initiative in accordance with the rules of the State Office of Administrative Hearings. Service of the Notice of Hearing shall be accomplished by certified or registered mail to the party's last known address as shown in the department's records.

§1.27. Discovery.

(a) Commissions to take depositions. At the written request of a party, the executive director will issue a written commission directed to officers authorized by statute to take a deposition of a witness.

(b) Subpoenas for the production of documents. At the verified written request of a party, the executive director will issue a subpoena for the production of documents. The written request must identify the documents with as much detail as possible and must include a statement of their relevance to the issues in the case.

(c) Subpoenas for attendance at hearings. At the written request of a party, the executive director will issue a subpoena for the attendance of a witness at a hearing in a contested case. The subpoena may be directed to any person within the department's jurisdiction, without regard to the distance between the location of the witness and the location of the hearing.

(d) Limits on discovery. A commission or subpoena will only be issued on a showing of good cause and receipt of a deposit sufficient to ensure payment of expenses and fees related to the subpoena, including statutory witness fees. A commission or subpoena will not be issued if it appears that it is sought for the purpose of harassment or if it would unduly inconvenience the person to whom it is directed. Issuance of a commission or subpoena will be subject to the provisions of Government Code, Chapter 2001, and the rules of the State Office of Administrative Hearings.

§1.28. Evidence.

The admissibility of evidence in a contested case shall be governed by Government Code, Chapter 2001, and by the rules of the State Office of Administrative Hearings, except that a settlement offer, including any reference to a proceeding conducted under §9.2 of this title (relating to Contract Claim Procedure), shall not be admissible for any purpose.

§1.29. Withdrawal or Amendment of Proposal for Decision.

The administrative law judge may withdraw or amend a proposal for decision at any time before a final order is issued.

§1.30. Filing of Exceptions and Replies.

(a) A party may file exceptions to an administrative law judge's proposal for decision no more than 20 days after service of the proposal for decision. A reply to exceptions must be filed no more than 15 days after the filing of the exceptions.

(b) Exceptions and replies to exceptions must be filed with the executive director at the department's headquarters building in Austin. Copies must be filed simultaneously with the administrative law judge.

(c) A request for an extension of time in which to file exceptions or a reply must be filed with the executive director no later than three days before the date sought to be extended. The request must be served on all parties by facsimile or hand delivery on the date on which it is filed, or if that is not feasible, by overnight delivery service. A request for an extension of time will be granted only in extraordinary circumstances when it is necessary in the interest of justice.

§1.31. Form of Exceptions and Replies.

Exceptions and replies must conform to the following standards.

(1) Exceptions and replies must be typewritten or printed on paper 8-1/2 inches wide by 11 inches long with an inside margin at least one inch wide. Reproductions are acceptable if all copies are legible.

(2) Exceptions and replies must contain:

- (A) the names of all parties;
- (B) a concise statement of the facts and law on which the submitting party relies;
- (C) a statement of the relief desired;
- (D) a certificate of service;

(E) the signature of the submitting party or the submitting party's authorized representative; and

(F) any other matter required by statute.

(3) Each specific exception must be separately numbered, separately set forth, and concisely stated, and it must incorporate all facts and law relating to that specific exception.

§1.32. Motions for rehearing.

(a) A party may file a motion for rehearing no more than 20 days after service of the final order. A reply to a motion for rehearing must be filed no more than 15 days after the filing of the motion.

(b) A request for an extension of time in which to file a motion for rehearing will not be granted.

(c) A motion for rehearing must conform to the standards for exceptions and replies set forth in §1.31 of this subchapter.

§1.33. Extension of time for final order.

When the administrative law judge determines that a final order cannot reasonably be issued within 60 days after the date on which the hearing is finally closed, the administrative law judge shall announce at the conclusion of the hearing that the time for a final order will be extended. The proposal for decision shall include a reference to the announced extension. The extension shall be for a period extending at least 45 days after the issuance of the proposal for decision to ensure enough time for the filing of exceptions and replies. A longer extension shall be granted in matters of unusual complexity.