TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

ALL Districts

The Texas Transportation Commission (commission) finds it necessary to propose amendments to §5.53, proposal, §5.54, commission approval to negotiate, §5.55, proposals from private entities, §5.56, final approval, and §5.58, project development by public or private entity, to be codified under Title 43, Texas Administrative Code, Part 1.

The preamble and the proposed amendments, attached to this minute order as Exhibits A and B, are incorporated by reference as though set forth at length verbatim in this minute order.

IT IS THEREFORE ORDERED by the commission that the amendments to §5.53, §5.54, §5.55, §5.56, and §5.58 are proposed for adoption and are authorized for publication in the *Texas Register* for the purpose of receiving public comments.

The executive director is directed to take the necessary steps to implement the actions as ordered in this minute order, pursuant to the requirements of the Administrative Procedure Act, Government Code, Chapter 2001.

Submitted and reviewed by:

for Director, Design Division

Recommended by:

Interim Executive Director

111073 SEP 2707

Minute Number

Date Passed

1 Proposed Preamble

2 The Texas Department of Transportation (department) proposes
3 amendments to §5.53, proposal, §5.54, commission approval to
4 negotiate, §5.55, proposals from private entities, §5.56, final
5 approval, and §5.58, project development by public or private
6 entity.
7
8 EXPLANATION OF PROPOSED AMENDMENTS
9 The amendments clarify provisions of Transportation Code,
10 §222.104 and implement new Transportation Code, §222.105,
11 §222.106, and §222.107, as added by Senate Bill 1266, 80th Texas
12 Legislature, 2007. Those newly enacted sections provide that a
13 municipality or a county may designate a contiguous geographic
14 area in its jurisdiction as a transportation reinvestment zone
15 to promote transportation projects in the area as pass-through
16 projects financed as described in Transportation Code, §222.104
17 under a pass-through agreement. The amendments provide that the
18 creation of such a transportation reinvestment zone is
19 considered by the department in determining the viability of a
20 project proposed by a public entity and whether to enter into a
21 pass-through agreement with a public entity. The amendments
22 also clarify the other criteria that the department may consider
23 when evaluating a proposal from a private entity.
24
25 Additionally, the amendments make grammatical and other

nonsubstantive changes and renumber existing provisions.

Amendments to §5.53(a), Proposal requirements, prescribe additional materials and information that must be included in a proposal submitted to the department for a proposed pass-through project under Transportation Code, §222.104, and clarify existing proposal requirements. The additional information required includes a statement of a proposing public entity's intentions with regard to the creation of a transportation reinvestment zone under Transportation Code, §222.106 or §222.107. The amendments will ensure that the department has the information necessary to determine the viability and potential public benefit of a proposed pass-through project. The amendments also make nonsubstantive changes, such as adding headings to each subsection of §5.53, to clarify the requirements of the section and to conform the section to other sections within the subchapter.

Amendments to §5.54, Commission Approval to Negotiate, add to the list of factors that the commission considers when determining whether to authorize the executive director to negotiate a pass-through agreement with a public entity whether a public entity proposer has or intends to designate a transportation reinvestment zone under Transportation Code, §222.106 or §222.107. Because funds generated by a

transportation reinvestment zone may only be used to fund pass-through projects, the creation of a transportation reinvestment zone is indicative of a public entity's ability to make payments under a pass-through agreement, the presence of local support for a pass-through project, and, thus, the likelihood of success of the project.

Amendments to §5.55(c) clarify that the department may prescribe in a request for competing proposals to private entities additional evaluation criteria as the department deems necessary. This amendment will ensure that the department may tailor evaluation criteria to a specific project.

Amendments to §§5.55(g) and (h) clarify that the executive director directs the negotiation of pass-through agreements to provide consistency within the subchapter.

Amendments to §5.56(b), Contents of pass-through agreement, prescribe additional items that must be included in a pass-through agreement, including deadlines for key stages of project development, provisions for termination of the agreement, and, for a public entity, a copy of the document designating a transportation reinvestment zone as authorized under Transportation Code, §222.106 or §222.107, if such a designation has been made. The amendments will ensure that a pass-through

agreement entered into by the department will serve the public interest, further local, regional, and state transportation goals, provide assurance that the project will be completed, and prudently provide for the expenditure of public funds.

Amendments to §5.58(c)(2) prescribe additional requirements with which highway projects constructed under a pass-through agreement must comply to ensure that highway projects constructed under a pass-through agreement meet all department standards for highway design and construction in order to ensure the safety of the traveling public. The amendments to paragraphs (7) and (11) of §5.58(c) clarify that final design plans and related documentation must be sent to the department. The amendments to paragraph (9) of §5.58(c) provide that revisions to any construction contract entered into under a pass-through agreement must comply with all department criteria and manuals and be submitted to the department. The amendments also make changes to provide consistency in terminology used throughout the subchapter.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the amendments as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the

amendments. There are no anticipated economic costs for persons required to comply with the sections as proposed.

Mark Marek, Director, Design Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

PUBLIC BENEFIT

Mr. Marek has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be a more efficient administration of the pass-through program that facilitates participation by local public entities and private entities, allows for more opportunities and mechanisms for funding of needed transportation projects, and provides additional oversight of pass-through agreements. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §5.53, §5.54, §5.55, §5.56, and §5.58 may be sent to Mark Marek, Director, Design Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on November 12, 2007.

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §222.104, which provides that the commission may adopt rules to implement the pass-through toll program.

CROSS REFERENCE TO STATUTE

Transportation Code, §222.104, §222.105, §222.106, and §222.107.

SUBCHAPTER E. PASS-THROUGH FARES AND TOLLS

§5.53. Proposal.

(a) Proposal requirements. A public or private entity may submit in writing to the department a proposal for a project or a series of projects to be developed under a pass-through agreement. The proposal must include:

(1) a [~~project location map showing proposed alignments and~~] description of the project, including the project limits, connections with other transportation facilities, and any services to be provided;

(2) an application, on a form provided by the department, that includes all scope and estimate documentation forms and related attachments and any other materials and information required by the application;

(3) [~~(2)~~] a statement of the benefits anticipated to result from completion of the project;

(4) [~~(3)~~] a description of the local public support for the project and any local public opposition;

(5) [~~(4)~~] a proposed project development and implementation schedule, including an estimated date when the project will be open to traffic;

(6) [~~(5)~~] a description of the entity's experience in developing highway projects, if the proposer is a public entity

and if the proposal is for the development of a highway project by that entity;

(7) [~~(6)~~] a description of the entity's experience in developing railway projects, if the proposer is a public entity and if the proposal is for the development of a railway project by that entity;

(8) [~~(7)~~] complete information concerning the experience, expertise, technical competence, and qualifications of the proposer and of each member of the proposer's management team and of other key employees or consultants, including the name, address, and professional designation of each member of the proposer's management team and of other key employees or consultants, and the capability of the proposer to develop the proposed projects, if the proposer is a private entity and if the proposal is for the development of a project by that entity;

(9) [~~(8)~~] complete information sufficient to show the capability of the proposer to make all projected future payments, if the proposal is for the development of a project by the department;

(10) [~~(9)~~] total amount of reimbursement requested and [~~if available, a~~] proposed pass-through payment schedule;

(11) project funding sources and amounts by fiscal year;

(12) [~~(10)~~] for a highway project, a statement indicating

whether the proposer intends for the project to be tolled and, if the proposer intends for a tolled project to be first opened to traffic as a non-tolled highway, the approximate date on which the highway will begin to be tolled; [~~and~~]

(13) [~~(11)~~] a statement indicating whether the proposer intends to enter into a comprehensive development agreement, if the proposer is a private entity and if the proposal is for the development of a project by that entity; and

(14) a statement indicating whether the entity has or intends to designate a contiguous geographic area in the jurisdiction of the entity as a transportation reinvestment zone under Transportation Code, Chapter 222, Subchapter E, if the proposer is a public entity.

(b) Public release of proposal. If requested, and unless prohibited by law, the department will release to the public a proposal submitted under this section.

(c) Certain contracting requirements. The private entity and the department may agree to develop a project under a comprehensive development agreement if authorized by other law. For a highway project that is developed by the proposer, notwithstanding any other provision of this subchapter, Chapter 27, Subchapter A, of this title (relating to Comprehensive Development Agreements), applies to the solicitation,

1 advertisement, negotiation, and execution of a comprehensive
2 development agreement. For a railway project that is developed
3 by the proposer, notwithstanding any other provision of this
4 subchapter, Chapter 7, Subchapter B, of this title (relating to
5 Contracts) applies to the solicitation, advertisement
6 negotiation, and execution of a comprehensive development
7 agreement.
8
9 §5.54. Commission Approval To Negotiate. The commission may
10 authorize the executive director to negotiate the financial
11 terms of a potential pass-through agreement under this
12 subchapter or, if the proposer is a private entity, authorize
13 the department to solicit competitive proposals under §5.55 of
14 this subchapter, after considering:
15 (1) financial benefits to the state;
16 (2) local public support for the project;
17 (3) for a highway project, whether the project is in the
18 department's Unified Transportation Program;
19 (4) the extent to which the project will relieve
20 congestion on the state highway system;
21 (5) potential benefits to regional air quality that may
22 be derived from the project;
23 (6) the compatibility of the proposed project with

existing and planned transportation facilities;

(7) the entity's experience in developing highway projects, if the proposer is a public entity and if the proposal is for the development of a highway project by that entity;

(8) the entity's experience in developing railway projects, if the proposer is a public entity and if the proposal is for the development of a railway project by that entity;

(9) the qualifications of the proposer to accomplish the proposed work, if the proposer is a private entity and if the proposal is for the development of a project by that entity; [~~and~~]

(10) the financial capability of the proposer to make all projected pass-through payments, if the proposal is for the development of a project by the department; and

(11) whether the entity has or intends to designate a contiguous geographic area in the jurisdiction of the entity as a transportation reinvestment zone under Transportation Code, Chapter 222, Subchapter E, if the proposer is a public entity.

§5.55. Proposals from Private Entities.

(a) If the commission approves the further evaluation of a proposal of a private entity under §5.54 of this subchapter, the department will publish notice of that decision and provide an

opportunity for the submission of competing proposals.

(b) The department will publish a notice in the Texas Register and in one or more newspapers of general circulation. The notice will state that the department has received a proposal under this subchapter, that it intends to evaluate the proposal, that it may negotiate a pass-through agreement with the proposer based on the proposal, and that it will accept for simultaneous consideration any competing proposals that the department receives in accordance with this subchapter within 45 days of the initial publication of the notice in the Texas Register, or such additional time as authorized by the commission. In determining whether to authorize additional time for submission of competing proposals, the commission will consider the complexity of the proposal.

(c) The notice will summarize the proposed project and identify its proposed location. The notice will also specify the general criteria that will be used to evaluate all proposals and the relative weight given to the criteria. Specific evaluation criteria will be set forth in the request for proposals. The criteria will[~~, at a minimum,~~] include:

(1) the factors listed in §5.54 of this subchapter, to the extent applicable;

(2) the proposer's qualifications, technical competence,

and financial capability; [~~and~~]

(3) an analysis of the proposer's project implementation schedule; and

(4) any other factor deemed appropriate by the department.

(d) A proposal submitted in response to a notice must contain the information required by §5.53 of this subchapter.

(e) The original proposer may submit a revised proposal in response to a notice.

(f) Upon expiration of the 45-day period, or such additional time as authorized by the commission, the department will evaluate the proposal of the original proposer and any properly submitted competing proposals, utilizing the evaluation criteria set forth in the request for proposals.

(g) The department will rank all proposals after the evaluation described in subsection (f) of this section, and may select the private entity whose proposal provides the best value to the department. The executive director will direct the department's [~~department will~~] attempt to negotiate a pass-through agreement with that proposer.

(h) If an agreement satisfactory to the executive director [~~department~~] cannot be negotiated with the proposer, the department will formally end negotiations with that proposer.

1 The department may reject all proposals or proceed to the next
2 most highly ranked proposal and attempt to negotiate an
3 agreement with that party.
4
5 §5.56. Final Approval.
6 (a) Authorization to negotiate final agreement. The
7 executive director will submit to the commission a summary of
8 the final financial terms of a proposed pass-through agreement.
9 The final financial terms may consist of specific payment terms
10 and schedules or may consist of a range of acceptable
11 parameters. The commission may authorize the executive director
12 to negotiate and execute a final agreement only if it finds
13 that:
14 (1) the project serves the public interest and not merely
15 a private interest;
16 (2) the proposed pass-through agreement is in the best
17 interest of the state;
18 (3) the project is compatible with existing and planned
19 transportation facilities; and
20 (4) the project furthers state, regional, and local
21 transportation plans, programs, policies, and goals.
22 (b) Contents of pass-through agreement. Before any work is
23 done for which reimbursement will be requested through a pass-

through toll or fare, the department and the public or private entity shall execute a pass-through agreement containing, at a minimum, the following:

(1) identification of the scope and nature of the work to be performed;

(2) all financial terms, as applicable, including the levels of pass-through tolls or fares, maximum and minimum periodic payments, and maximum and minimum total payments;

(3) allocation of responsibility for all significant work to be performed, including environmental documentation, right of way acquisition, utility adjustments, engineering, construction, and maintenance;

(4) provision for the collection and use of toll or other revenues, if applicable;

(5) all provisions required by state or federal law;

(6) a map showing the location of the project;

(7) a proposed project schedule;

(8) an estimated budget;

(9) deadlines for key stages of project development;

(10) [~~(9)~~] procedures and timelines for the submission of materials and for approvals; [~~and~~]

(11) [~~(10)~~] for a local government, a copy of the resolution or ordinance authorizing execution of the agreement;

1 (12) provisions for termination of the agreement; and

2 (13) if applicable, a copy of the order, resolution, or

3 ordinance designating a contiguous geographic area in the

4 jurisdiction of a public entity as a transportation reinvestment

5 zone under Transportation Code, Chapter 222, Subchapter E.

6

7 §5.58. Project Development by Public or Private Entity.

8 (a) Social and environmental impact.

9 (1) General. A public or private entity that is

10 responsible for the construction of a project shall conduct the

11 environmental review and public involvement for the project in

12 the manner prescribed by Chapter 2, Subchapter C of this title

13 (relating to Environmental Review and Public Involvement for

14 Transportation Projects). The department may choose to conduct

15 the environmental review and public involvement.

16 (2) Department approval. The department must approve

17 each environmental review under this section before construction

18 of the project begins.

19 (b) Right of way and utilities.

20 (1) Responsibility. This subsection applies when the

21 public or private entity is responsible for the acquisition of

22 right of way or the adjustment of utilities.

23 (2) Right of way procedures.

1 (A) Manual requirements. The acquisition of right of
2 way performed by or on behalf of the public or private entity
3 shall comply with the latest version of each of the department's
4 manuals.
5 (B) Alternative procedures. A public or private entity
6 may request written approval to use a different accepted
7 procedure for a particular item or phase of work. The use of an
8 alternative procedure is subject to the approval of the Federal
9 Highway Administration. The executive director may approve the
10 use of an alternative procedure if the alternative procedure is
11 determined to be sufficient to discharge the department's state
12 and federal responsibilities in acquiring real property.
13 (3) Utility adjustments. The adjustment, removal, or
14 relocation of utility facilities performed by or on behalf of
15 the public or private entity shall comply with applicable
16 federal and state laws and regulations.
17 (c) Design and construction.
18 (1) Responsibility. This subsection applies when the
19 public or private entity is responsible for the design,
20 construction, and, operation, as applicable, of each project it
21 undertakes. This responsibility includes ensuring that all EPIC
22 are addressed in project design and carried out during project
23 construction and operation.

(2) Design criteria.

(A) State criteria. All designs developed by or on behalf of the public or private entity shall comply with the latest version of the department's manuals.

(i) Highway projects. Each highway project shall, at a minimum, comply with the:

(I) Roadway Design Manual;

(II) Pavement Design Manual;

(III) Hydraulic Design Manual;

(IV) Texas Manual on Uniform Traffic Control Devices;

(V) Bridge Design Manual;[~~and~~]

(VI) Texas Accessibility Standards;

(VII) 16 TAC Chapter 68 relating to Elimination of Architectural Barriers; and

(VIII) Americans with Disabilities Act Accessibility Guidelines.

(ii) Railway projects. Each railway project shall comply, at a minimum, with the current version of the American Railway Engineering and Maintenance of Right of Way Association standards.

(B) Alternative criteria. A public or private entity may request approval to use different accepted criteria for a

1 particular item of work. Alternative criteria may include the
2 latest version of the AASHTO Policy on Geometric Design of
3 Highways and Streets, the AASHTO Pavement Design Guide, and the
4 AASHTO Bridge Design Specifications. The use of alternative
5 criteria is subject to the approval of the Federal Highway
6 Administration or the Federal Railroad Administration for those
7 projects involving federal funds. The executive director may
8 approve the use of alternative criteria if the alternative
9 criteria are determined to be sufficient to protect the safety
10 of the traveling public and protect the integrity of the
11 transportation system.
12 (C) Exceptions to design criteria. A public or private
13 entity may request approval to deviate from the state or
14 alternative criteria for a particular design element on a case-
15 by-case basis. The request for approval shall state the
16 criteria for which an exception is being requested and must
17 include a comprehensive description of the circumstances and
18 engineering analysis supporting the request. The executive
19 director may approve an exception after determining that the
20 particular criteria could not reasonably be met due to physical,
21 environmental, or other relevant factors and that the proposed
22 design is a prudent engineering solution.
23 (3) Access to a highway project.

(A) Access management. Access to a highway shall be in compliance with the department's access management policy.

(B) Interstate access. For proposed highway projects that will change the access control line to an interstate highway, the public or private entity shall submit to the department all data necessary for the department to request Federal Highway Administration approval.

(4) Preliminary design submission and approval. When design is approximately 30% complete or as otherwise provided in a pass-through agreement, the public or private entity shall send the following preliminary design information to the department for review and approval in accordance with the procedures and timeline established in the project development agreement described in subsection (d) of this section:

(A) for a highway project, a completed Design Summary Report form as contained in the department's Project Development Process Manual;

(B) a design schematic depicting plan, profile, and superelevation information for each roadway or a design schematic depicting plan, profile, and superelevation based on top of railway for each railway line;

(C) typical sections showing existing and proposed horizontal dimensions, cross slopes, location of profile grade

line, pavement layer thickness and composition, earthen slopes, and right of way lines for each roadway or subballast and ballast layer thickness and composition for each railway line;

(D) bridge, retaining wall, and sound wall layouts;

(E) hydraulic studies and drainage area maps showing the drainage of waterways entering the project and local project drainage;

(F) an explanation of the anticipated handling of existing traffic during construction;

(G) when structures meeting the definition of a bridge as defined by the National Bridge Inspection Standards are proposed, an indication of structural capacity in terms of design loading;

(H) an explanation of how the U.S. Army Corps of Engineers permit requirements, including associated certification requirements of the Texas Commission on Environmental Quality, will be satisfied if the project involves discharges into waters of the United States; and

(I) for a highway project, the location and text of proposed mainlane guide signs shown on a schematic that includes lane lines or arrows indicating the number of lanes.

(5) Highway construction specifications.

(A) All plans, specifications, and estimates developed

by or on behalf of the public or private entity for a highway project shall conform to the latest version of the department's Standard Specifications for Construction and Maintenance of Highways, Streets, and Bridges, and shall conform to department-required special specifications and special provisions.

(B) The executive director may approve the use of an alternative specification if the proposed alternative specification is determined to be sufficient to ensure the quality and durability of the finished product for the intended use and the safety of the traveling public.

(6) Railway construction specifications.

(A) All plans, specifications, and estimates developed by or for the public or private entity for a railway project shall conform to all construction and material specifications established in the American Railway Engineering and Maintenance of Right of Way Association standards.

(B) The executive director may approve the use of an alternative specification if the proposed alternative specification is determined to be sufficient to ensure the quality and durability of the finished product for the intended use and the safety of the public and the railway system.

(7) Submission and approval of final design plans and contract administration procedures. When final plans are

complete, the public or private entity shall send the following information to the department [~~executive director~~] for review and approval in accordance with the procedures and timelines established in the contract described in §5.56(b) of this subchapter [~~chapter~~]:

(A) seven copies of the final set of plans, specifications, and engineer's estimate (PS&E) that have been signed and sealed by the responsible engineer;

(B) revisions to the preliminary design submission previously approved by the department in a format that is summarized or highlighted for the department;

(C) a proposal for awarding the construction contract in compliance with applicable state and federal requirements;

(D) contract administration procedures for the construction contract with criteria that comply with the applicable national or state administration criteria and manuals; and

(E) the location and description of all EPIC addressed in construction.

(8) Construction inspection and oversight.

(A) Unless the department agrees in writing to assume responsibility for some or all of the following items, the public or private entity is responsible for:

(i) overseeing all construction operations, including the oversight and follow through with all EPIC;

(ii) assessing contract revisions for potential environmental impacts; and

(iii) obtaining any necessary EPIC required for contract revisions.

(B) The department may inspect the construction of the project at times and in a manner it deems necessary to ensure compliance with this section.

(9) Contract revisions. All revisions to any [~~the~~] construction contract entered into under a pass-through agreement under this subchapter shall comply with the latest version of the applicable national or state administration criteria and manuals, and must be submitted to the department for its records. Any revision that affects prior environmental approvals or significantly revises project scope or the geometric design must be submitted to the department [~~executive director~~] for approval prior to beginning the revised construction work. Procedures governing the department's [~~executive director's~~] approval, including time limits for department review, shall be included in the agreement [~~contract~~] described in §5.56(b) of this subchapter [~~chapter~~].

(10) As-built plans. Within six months after final

completion of the construction project, the public or private entity shall file with the department a set of the as-built plans incorporating any contract revisions. These plans shall be signed, sealed, and dated by a professional engineer licensed in Texas certifying that the project was constructed in accordance with the plans and specifications.

(11) Document and information exchange. The public or private entity agrees to deliver to the department all materials used in the development of the project including aerial photography, computer files, surveying information, engineering reports, environmental documentation, general notes, specifications, [~~and~~] contract provision requirements, and all information necessary for the department to update legacy data systems.

(12) State and federal law. The public or private entity shall comply with all federal and state laws and regulations applicable to the project and the state highway system, and shall provide or obtain all applicable permits, plans, and other documentation required by a federal or state entity.

(d) Contracts. All contracts for the development, construction, or operation of a project shall be awarded in compliance with applicable law.

(e) Federal law. If any federal funds are used in the

development or construction of a project under this subchapter, or if the department intends to fund pass-through toll payments with federal funds, the development and construction of the project shall be accomplished in compliance with all applicable federal requirements.