

TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

Page 1 of 1

ALL Districts

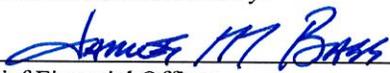
The Texas Transportation Commission (commission) finds it necessary to propose amendments to §5.52, Definitions, §5.58, Calculation of Pass-Through Fares and Tolls, and §5.59, Project Development by Public or Private Entity, and new §5.61, Solicitation of Private Proposals, all relating to Pass-Through Fares and Tolls, to be codified under Title 43, Texas Administrative Code, Part 1.

The preamble and the proposed amendments and new section, attached to this minute order as Exhibits A and B, are incorporated by reference as though set forth verbatim in this minute order, except that they are subject to technical corrections and revisions, approved by the general counsel, necessary for compliance with state or federal law or for acceptance by the Secretary of State for filing and publication in the *Texas Register*.

IT IS THEREFORE ORDERED by the commission that the amendments to §5.52, §5.58, and §5.59, and new §5.61 are proposed for adoption and are authorized for publication in the *Texas Register* for the purpose of receiving public comments.

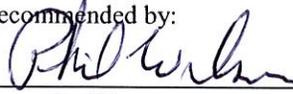
The executive director is directed to take the necessary steps to implement the actions as ordered in this minute order, pursuant to the requirements of the Administrative Procedure Act, Government Code, Chapter 2001.

Submitted and reviewed by:



Chief Financial Officer

Recommended by:



Executive Director

113590 MAY 30 13

Minute Number Date Passed

Proposed Preamble

The Texas Department of Transportation (department) proposes amendments to §5.52, Definitions, §5.58, Calculation of Pass-Through Fares and Tolls, and §5.59, Project Development by Public or Private Entity, and new §5.61, Solicitation of Private Proposals, all concerning Pass-Through Fares and Tolls.

EXPLANATION OF PROPOSED AMENDMENTS AND NEW SECTION

Transportation Code, §222.104(b) authorizes the department to enter into an agreement with a public or private entity that provides for the payment of pass-through tolls to the public or private entity as reimbursement for the design, development, financing, construction, maintenance, or operation of a toll or non-toll facility on the state highway system by the public or private entity.

The amendments will allow the department to solicit private pass-through proposals for highway projects in circumstances other than a program call issued under §5.54, and will allow the department to make payments to the private developer from any available source, including project revenues and money in the state highway fund, in order to reimburse a private entity's project-related costs, including financing costs, and to pay a return on any private investment. The payment amounts may be adjusted based on the private developer's compliance with

1 performance requirements in the pass-through agreement,
2 including the availability of the highway for use by the
3 traveling public, and because of increased operations and
4 maintenance costs.

5
6 The amendments will authorize the department to solicit private
7 proposals using a two-step procurement process (issuance of a
8 request for qualifications and issuance of a request for
9 proposals from qualified proposers), and using a one-step
10 procurement process in which a request for proposals is issued
11 to prequalified proposers, including proposers qualified under a
12 comprehensive development agreement procurement that is
13 converted by the Texas Transportation Commission (commission) to
14 a procurement for a pass-through agreement.

15
16 Amendments to §5.52 revise the definition of certain terms used
17 in §§5.51-5.60.

18
19 Amendments to §5.58 authorize the commission, for a highway
20 project designed, developed, financed, constructed, maintained,
21 or operated under a pass-through agreement procured under new
22 §5.61, to approve payment of a level of pass-through tolls that
23 exceeds the department's estimate to perform the work proposed
24 to be performed under the agreement, and to approve the payment
25 of pass-through tolls to reimburse the private entity's project-

1 related costs, including financing costs, and to pay a return on
2 any private investment.

3

4 Under the existing program, the department can only reimburse a
5 private entity what it would cost the department to construct
6 the project if a pass-through toll agreement was not used.

7 There are critical highway improvement projects the department
8 cannot currently construct because there is insufficient funding
9 or other financing methods available to do so. There exists the
10 potential to use a pass-through toll agreement to obtain private
11 financing of these priority projects. In order to obtain
12 private financing, the department will need to reimburse the
13 private entity's financing costs and to pay a reasonable return
14 on investment, which is prohibited under the existing program.

15 The commission may approve the payment of pass-through tolls
16 from any available source, including money in the state highway
17 fund and project revenues, but not from funds derived from the
18 issuance of bonds under Transportation Code, §201.943. Payments
19 are subject to the availability of funds appropriated by the
20 legislature that can be used for that purpose. In order to
21 comply with applicable legal requirements, the amount of money
22 that can be paid from money in the state highway fund may not
23 exceed the amount that is eligible to be paid from those funds
24 under state law, and that is incurred or is reasonably
25 anticipated to be incurred by the private entity during the term

1 of the pass-through agreement.
2
3 Amendments to §5.58 authorize the pass-through toll to vary
4 based on the availability of the highway for use by the
5 traveling public and the private entity's compliance with any
6 other performance requirements included in the pass-through
7 agreement. These amendments will allow the amount the
8 department agrees to pay to the private entity under a pass-
9 through agreement to be reduced if the private entity fails to
10 comply with performance measures included in the agreement. The
11 pass-through toll may be adjusted because of increasing
12 operations and maintenance costs, which may occur if the amount
13 of traffic on the highway is substantially above the traffic
14 projections made prior to entering into the pass-through
15 agreement. Amendments to §5.58 recognize that there may not be
16 a minimum payment amount specified in the pass-through
17 agreement, and that the department may make milestone payments
18 and annual, monthly, or other periodic payments to compensate
19 the public or private entity with whom it enters into a pass-
20 through agreement. Amendments to §5.58 provide that the
21 agreement, like other agreements the department enters into, may
22 provide for the payment of compensation to the private entity as
23 a result of a compensation event or relief event, as defined in
24 the agreement.
25

1 Amendments to §5.59 recognize that there are restrictions in
2 state and federal law as to when a contractor may conduct the
3 environmental review and public involvement for a project.
4 Amendments to §5.59 authorize the commission, for a project
5 designed, developed, financed, constructed, maintained, or
6 operated under a pass-through agreement procured under new
7 §5.61, to approve the use of criteria or other requirements
8 applicable to a particular item of work that differ from the
9 requirements of §5.59. There are certain requirements in this
10 section that typically are not used in agreements for privately
11 financed projects. For example, the department has typically
12 included performance specifications in such an agreement, rather
13 than using prescriptive specifications. The use of performance
14 specifications or other requirements that differ from those
15 prescribed by §5.59 may only be approved if the executive
16 director of the department determines that the alternative
17 requirements are sufficient to ensure the quality and durability
18 of the finished product for the intended use and the safety of
19 the traveling public. Amendments to §5.59 also authorize the
20 executive director to approve a design exception if the proposed
21 design is at least equivalent in quality and safety to the
22 particular criteria.

23

24 New §5.61 authorizes the department to solicit private proposals
25 for a pass-through agreement with a private entity for the

1 design, development, financing, construction, maintenance, or
2 operation of a highway project. New §5.61 provides that the
3 requirements of §§5.53-5.57 and §5.59 that conflict with new
4 §5.61 do not apply to a proposal submitted under §5.61. Those
5 requirements are superseded by the requirements of §5.61.

6
7 New §5.61 prescribes requirements applicable to a procurement
8 under that section, including requirements for commission
9 approval of the issuance of a request for qualifications (RFQ)
10 and request for proposals (RFP), required and authorized
11 provisions in an RFQ or RFP, including evaluation criteria
12 established for the project, the process for providing notice of
13 the issuance of an RFQ, the process for evaluating and ranking
14 qualifications submittals and proposals, shortlisting proposers,
15 and selecting the proposal determined to provide the best value,
16 and requirements for commission approval of the department's
17 recommendation and award of a pass-through agreement.

18
19 New §5.61 provides that if authorized by the commission, the
20 department may utilize a one-step process for the procurement of
21 a pass-through agreement under which an RFP is issued to
22 prequalified private entities. This includes private entities
23 that are prequalified by being shortlisted under a comprehensive
24 development agreement procurement that is converted by the
25 commission to a procurement under this section. This process

1 will facilitate the department's ability to attract meaningful
2 proposals and generate competition in procurements for certain
3 projects. New §5.61 authorizes the department to make payments
4 to unsuccessful proposers that submit responsive proposals in
5 exchange for the work product in the proposal that can be used
6 by the department in the performance of its functions, and
7 establishes criteria to be considered by the commission in
8 approving a payment.

9
10 New §5.61 provides requirements for the department's negotiation
11 of a pass-through agreement with the selected proposer, provides
12 rights reserved by the department in administering the
13 subchapter, provides procedures for a proposer's submission of
14 questions or requests for clarification regarding a procurement,
15 and prescribes procedures for submission of a protest regarding
16 a procurement. New §5.61 provides that a pass-through agreement
17 procured under that section may provide for the payment of
18 compensation as a result of the termination of the agreement.
19 Similar payments are made as a result of the termination of
20 other highway construction contracts entered into by the
21 department. This includes compensation for the purchase by the
22 department, under the terms and conditions established in the
23 agreement, of the interest of the private entity in the
24 agreement and related property.

25

1 FISCAL NOTE

2 James Bass, Chief Financial Officer, has determined that for
3 each of the first five years the amendments and new section as
4 proposed are in effect, there will be fiscal implications for
5 state or local governments as a result of enforcing or
6 administering the amendments and new section. Those fiscal
7 implications cannot be quantified with any certainty, as it
8 depends on the number of pass-through agreements entered into
9 under §5.61, and the amount of pass-through payments to be made
10 under those agreements.

11
12 James Bass, Chief Financial Officer, has certified that there
13 will be no significant impact on local economies or overall
14 employment as a result of enforcing or administering the
15 amendments and new section.

16
17 PUBLIC BENEFIT AND COST

18 Mr. Bass has also determined that for each year of the first
19 five years in which the sections are in effect, the public
20 benefit anticipated as a result of enforcing or administering
21 the amendments and new section will be to facilitate the timely
22 financing and development of critical highway improvement
23 projects that could not otherwise be developed on a timely basis
24 because of insufficient highway funds. There are no anticipated
25 economic costs for persons required to comply with the sections

1 as proposed. There will be no adverse economic effect on small
2 businesses.

3

4 SUBMITTAL OF COMMENTS

5 Written comments on the proposed amendments to §5.52, §5.58, and
6 §5.59, and on new §5.61 may be submitted to Robin Carter, Office
7 of General Counsel, Texas Department of Transportation, 125 East
8 11th Street, Austin, Texas 78701-2483 or to
9 RuleComments@txdot.gov with the subject line "5.52-5.61." The
10 deadline for receipt of comments is 5:00 p.m. on July 15, 2013.
11 In accordance with Transportation Code, §201.811(a)(5), a person
12 who submits comments must disclose, in writing with the
13 comments, whether the person does business with the department,
14 may benefit monetarily from the proposed amendments and new
15 section, or is an employee of the department.

16

17 STATUTORY AUTHORITY

18 The amendments and new section are proposed under Transportation
19 Code, §201.101, which provides the commission with the authority
20 to establish rules for the conduct of the work of the
21 department, and more specifically, Transportation Code,
22 §222.104, which provides the commission with the authority to
23 adopt rules necessary to implement that section.

24

25 CROSS REFERENCE TO STATUTE

1 Transportation Code, §222.104.

1 SUBCHAPTER E. PASS-THROUGH FARES AND TOLLS

2 §5.52. Definitions. The following words and terms, when used
3 in this subchapter, shall have the following meanings, unless
4 the context clearly indicates otherwise.

5 (1) Commission--The Texas Transportation Commission.

6 (2) Department--The Texas Department of Transportation.

7 (3) Department estimate--An estimate of what it would
8 cost the department to perform the work proposed by the public
9 or private entity, whether the work is proposed to be performed
10 by the department or whether it is proposed to be performed by
11 the public or private entity. The estimate is developed or
12 updated by the department after receipt of a public or private
13 entity's request and prior to the time the department executes
14 an agreement with the public or private entity.

15 (4) Environmental Permits, Issues, and Commitments
16 (EPIC)--Any permit, issue, coordination, commitment, or
17 mitigation obtained to satisfy social, economic, or
18 environmental impacts of a project, including sole source
19 aquifer coordination, wetland permits, stormwater permits,
20 traffic noise abatement, threatened or endangered species
21 coordination, archeological permits, and any mitigation or other
22 commitment associated with any of those issues.

23 (5) Executive director--The executive director of the

1 department or the executive director's designee not below
2 district engineer, division director, or office director.

3 (6) Highway--Includes any facility convenient or
4 necessary to the operation of a highway.

5 (7) Operation--Includes maintenance.

6 (8) Pass-through agreement--A pass-through toll agreement
7 or a pass-through agreement entered under the terms of this
8 subchapter by the department and a public or private entity.

9 (9) Pass-through fare--A dollar amount, including a
10 surcharge or user fee for freight shipments, that is tied to a
11 measure of actual or projected usage of a railway and is used
12 under this subchapter as a means of calculating payments made by
13 one entity to another to provide reimbursement for some or all
14 of the costs of acquiring, designing, developing, financing,
15 constructing, relocating, maintaining, or operating a passenger
16 or freight railway.

17 (10) Pass-through toll--A dollar amount that is tied to a
18 measure of actual or projected usage of a highway and is used
19 under this subchapter as a means of calculating payments made by
20 one entity to another to provide reimbursement for some or all
21 of the costs of designing, developing, financing, constructing,
22 maintaining, or operating a highway on the state highway system.

23 (11) Public or private entity--Any entity authorized by

1 law to enter into a pass-through agreement with the department
2 under this subchapter for the acquisition, design, development,
3 financing, construction, relocation, maintenance, or operation
4 of a highway or railway.

5 (12) Railway--Includes both passenger and freight
6 railways and any facility convenient or necessary to the
7 operation of a railway.

8

9 §5.58. Calculation of Pass-Through Fares and Tolls.

10 (a) Pass-through fares.

11 (1) Amount to be reimbursed.

12 (A) General. The commission shall establish the level
13 of pass-through fares or shall establish parameters within which
14 the department may negotiate the level of pass-through fares. In
15 establishing the level of pass-through fares or parameters
16 within which the department may negotiate the level of pass-
17 through fares, the commission shall consider whether:

18 (i) the project's estimated benefits to mobility
19 warrant a pass-through fare at a level that is more or less than
20 the department's estimate of project costs;

21 (ii) the project will result in a significant
22 economic gain or loss to the entity responsible for its
23 development;

1 (iii) the public or private entity proposes to share
2 in the cost of the project; and

3 (iv) the state or the public or private entity will
4 benefit, and to what extent, if the project is built sooner than
5 would be the case in the absence of a pass-through agreement.

6 (B) Limits on pass-through fare levels.

7 (i) The commission will not approve payment by the
8 department of a level of pass-through fares that exceeds the
9 department's estimate, except as permitted by this subparagraph.
10 The commission may approve the department's payment of a level
11 of pass-through fares that exceeds the department's current
12 estimate, but only by the difference between the department's
13 current estimate and the department's estimate for the time when
14 the project would likely have been completed in the absence of a
15 pass-through agreement.

16 (ii) In determining the level of pass-through fares,
17 the commission will not consider any financing cost incurred by
18 the public or private entity.

19 (2) Payment schedule and method.

20 (A) Payment schedule. The schedule of pass-through fare
21 payments will be calculated based on the department's traffic
22 projections for the railway and a number and frequency of
23 payments to be negotiated between the department and the public

1 or private entity. The payment schedule may include a maximum
2 and a minimum periodic amount to be paid annually or in total.

3 (B) Variable payments. The pass-through fare may vary
4 on any basis that reasonably reflects the value of improvements,
5 the nature of the railway traffic, or benefits to the highway
6 system, including:

7 (i) number, type, and class of passengers;

8 (ii) type of freight;

9 (iii) tonnage of freight;

10 (iv) number or type of cars;

11 (v) mileage traveled; or

12 (vi) characteristics of track.

13 (3) Allocation of risk.

14 (A) Cost overruns and underruns. Unless otherwise
15 authorized by the commission and incorporated in a pass-through
16 agreement by the department, the department's liability under a
17 pass-through agreement shall be neither increased nor decreased
18 by cost overruns or underruns. Pass-through fare payments by the
19 department shall not be increased if there is a cost overrun or
20 decreased if there is a cost underrun unless an adjustment is
21 specifically authorized by the commission and incorporated in a
22 pass-through agreement by the department.

23 (B) Traffic volume. If traffic volume exceeds or falls

1 below expectations, the pass-through fare will not be adjusted.
2 Payments shall not exceed the maximum annual amount specified in
3 the pass-through agreement and shall not be below the minimum
4 annual amount specified in the pass-through agreement. The pass-
5 through agreement shall provide that if required, payments shall
6 continue until the total of all payments equals the total pass-
7 through fare amount specified by the commission in approving the
8 pass-through fare.

9 (b) Pass-through tolls.

10 (1) Level of pass-through tolls.

11 (A) General. The commission shall establish the level
12 of pass-through tolls or shall establish parameters within which
13 the department may negotiate the level of pass-through tolls. In
14 establishing the level of pass-through tolls or parameters
15 within which the department may negotiate the level of pass-
16 through tolls, the commission shall consider whether:

17 (i) the project's estimated benefits to mobility
18 warrant a pass-through toll at a level that is more or less than
19 the department's estimate of project costs;

20 (ii) the project will result in a significant
21 economic gain or loss to the entity responsible for its
22 development;

23 (iii) the public or private entity proposes to share

1 in the cost of the project; and

2 (iv) the state or the public or private entity will
3 benefit, and to what extent, if the project is built sooner than
4 would be the case in the absence of a pass-through agreement.

5 (B) Limits on pass-through toll levels.

6 (i) Except as provided by this clause or except for a
7 highway project designed, developed, financed, constructed,
8 maintained, or operated under an agreement procured under §5.61
9 of this subchapter (relating to Solicitation of Private
10 Proposals), the [The] commission will not approve payment by the
11 department of a level of pass-through tolls that exceeds the
12 department's estimate[~~, except as permitted by this~~
13 subparagraph]. The commission may approve the department's
14 payment of a level of pass-through tolls that exceeds the
15 department's current estimate, but only by the difference
16 between the department's current estimate and the department's
17 estimate for the time when the project would likely have been
18 completed in the absence of a pass-through agreement.

19 (ii) In determining the level of pass-through tolls,
20 the commission will not consider any financing cost incurred by
21 the public or private entity. This clause does not apply to a
22 highway project financed under an agreement procured under §5.61
23 of this subchapter.

1 (2) Payment schedule and method.

2 (A) Payment schedule. The schedule of pass-through toll
3 payments will be calculated based on the department's traffic
4 projections for the highway made prior to entering into the
5 pass-through agreement and a number and frequency of payments to
6 be negotiated between the department and the public or private
7 entity. The department may make milestone payments and annual,
8 monthly, or other periodic payments to compensate the public or
9 private entity with whom it enters into a pass-through agreement
10 [~~payment schedule may include a maximum and a minimum annual~~
11 ~~amount to be paid periodically or in total~~].

12 (B) Variable payments. The level of the pass-through
13 toll may vary on any basis that reasonably reflects the value or
14 cost of improvements or services, the nature of the highway, or
15 benefits to other aspects of the highway system, including:

16 (i) the number of vehicles using the highway;

17 (ii) the number of vehicle-miles traveled on the
18 highway;

19 (iii) the condition of the highway; [~~and~~]

20 (iv) the availability of the highway for use by the
21 traveling public;

22 (v) compliance with any other performance
23 requirements included in the pass-through agreement;

1 (vi) increasing operations and maintenance costs; and

2 (vii) [~~iv~~] whether the highway is tolled.

3 (3) Allocation of risk.

4 (A) Cost overruns and underruns. Unless otherwise
5 authorized by the commission and incorporated in a pass-through
6 agreement by the department, the department's liability under a
7 pass-through agreement shall be neither increased nor decreased
8 by cost overruns or underruns.

9 (i) Projects developed by the public or private
10 entity. If the project is being developed by the public or
11 private entity, the pass-through toll payments by the department
12 shall not be increased if there is a cost overrun or decreased
13 if there is a cost underrun unless an adjustment is specifically
14 authorized by the commission and incorporated in a pass-through
15 agreement by the department.

16 (ii) Projects developed by the department. If the
17 project is being developed by the department, the pass-through
18 agreement shall provide that the pass-through toll or the
19 maximum amount payable, or both, shall be adjusted to reflect
20 the department's actual costs unless the commission specifically
21 directs that the department shall bear the risk of cost overruns
22 or underruns.

23 (B) Traffic volume. If traffic volume exceeds or falls

1 below projections [~~expectations~~], the pass-through toll will not
2 be adjusted. [~~Payments shall not exceed the maximum annual~~
3 ~~amount specified in the pass-through agreement and shall not be~~
4 ~~below the minimum annual amount specified in the pass-through~~
5 ~~agreement. The pass-through agreement shall provide that if~~
6 ~~required, payments shall continue until the total of all~~
7 ~~payments equals the total pass-through toll amount specified by~~
8 ~~the commission in approving the pass-through toll.]~~

9 (C) Maximum and minimum amounts. The pass-through
10 agreement may include a maximum amount, a minimum amount, or a
11 maximum and minimum amount, to be paid in intervals or in total
12 for the specified period. The payments may be made periodically
13 as defined in the pass-through agreement. Payments shall not
14 exceed the maximum amount, if any, specified in the pass-through
15 agreement and shall not be below the minimum amount, if any,
16 specified in the pass-through agreement. If a pass-through
17 agreement procured under §5.61 of this subchapter specifies a
18 periodic maximum amount calculated based on the level of the
19 pass-through toll and the department's traffic projections for
20 the highway made prior to or at the time of entering into the
21 pass-through agreement, the pass-through agreement may also
22 include any terms and conditions that the commission approves
23 for calculating and making payments in lesser amounts, including

1 downward adjustments based on the availability of the highway
2 for use by the traveling public or compliance with other
3 performance measures set forth in the pass-through agreement.
4 The pass-through agreement may also include any terms and
5 conditions the commission approves for paying compensation to
6 the private entity as a result of a compensation event or relief
7 event, as defined in the agreement.

8 (D) Source of payments. The commission may approve the
9 payment of pass-through tolls from any available source,
10 including money in the state highway fund and the revenues, if
11 any, of a project, but not from funds derived from the issuance
12 of bonds under Transportation Code, §201.943. Payments may be
13 made in connection with a highway project financed under an
14 agreement procured under §5.61 of this subchapter in order to
15 reimburse the private entity's project-related costs, including
16 financing costs, and to pay a return on any private investment.
17 Payments are subject to the availability of funds appropriated
18 by the legislature that may be used for that purpose or other
19 funds that may be used for that purpose. The amount that may be
20 paid from money in the state highway fund may not exceed the
21 amount that is eligible to be paid from those funds under the
22 Texas Constitution and that is incurred or is reasonably
23 anticipated to be incurred by the entity during the term of the

1 pass-through agreement.

2

3 §5.59. Project Development by Public or Private Entity.

4 (a) Social and environmental impact.

5 (1) General. To the extent allowed by law, a [A] public
6 or private entity that is responsible for the construction of a
7 project shall conduct the environmental review and public
8 involvement for the project in the manner prescribed by Chapter
9 2, Subchapter A of this title (relating to Environmental Review
10 and Public Involvement for Transportation Projects). The
11 department may choose to conduct the environmental review and
12 public involvement.

13 (2) Department approval. The department must approve each
14 environmental review under this section before construction of
15 the project begins.

16 (b) Right of way and utilities.

17 (1) Responsibility. This subsection applies when the
18 public or private entity is responsible for the acquisition of
19 right of way or the adjustment of utilities.

20 (2) Right of way procedures.

21 (A) Manual requirements. The acquisition of right of
22 way performed by or on behalf of the public or private entity
23 shall comply with the latest version of each of the department's

1 manuals.

2 (B) Alternative procedures. The department may
3 authorize or require a [A] public or private entity [may request
4 written approval] to use a different accepted procedure for a
5 particular item or phase of work. The use of an alternative
6 procedure is subject to the approval of the Federal Highway
7 Administration. The executive director may approve the use of an
8 alternative procedure if the alternative procedure is determined
9 to be sufficient to discharge the department's state and federal
10 responsibilities in acquiring real property.

11 (3) Utility adjustments. The adjustment, removal, or
12 relocation of utility facilities performed by or on behalf of
13 the public or private entity shall comply with applicable
14 federal and state laws and regulations.

15 (c) Design and construction.

16 (1) Responsibility. This subsection applies when the
17 public or private entity is responsible for the design,
18 construction, and~~[r]~~ operation, as applicable, of each project
19 it undertakes. This responsibility includes ensuring that all
20 EPIC are addressed in project design and carried out during
21 project construction and operation.

22 (2) Design criteria.

23 (A) State criteria. All designs developed by or on

1 behalf of the public or private entity shall comply with the
2 latest version of the department's manuals.

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

5 (I) Roadway Design Manual;

6 (II) Pavement Design Manual;

7 (III) Hydraulic Design Manual;

8 (IV) Texas Manual on Uniform Traffic Control

9 Devices;

10 (V) Bridge Design Manual;

11 (VI) Texas Accessibility Standards;

12 (VII) 16 TAC Chapter 68 relating to Elimination of

13 Architectural Barriers; and

14 (VIII) Americans with Disabilities Act

15 Accessibility Guidelines.

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

20 (B) Alternative criteria. The department may authorize
21 or require a [A] public or private entity [~~may request approval~~]
22 to use different accepted criteria for a particular item of
23 work. Alternative criteria may include the latest version of the

1 AASHTO Policy on Geometric Design of Highways and Streets, the
2 AASHTO Pavement Design Guide, and the AASHTO Bridge Design
3 Specifications. The use of alternative criteria is subject to
4 the approval of the Federal Highway Administration or the
5 Federal Railroad Administration for those projects involving
6 federal funds. The executive director may approve the use of
7 alternative criteria if the alternative criteria are determined
8 to be sufficient to protect the safety of the traveling public
9 and protect the integrity of the transportation system.

10 (C) Exceptions to design criteria. A public or private
11 entity may request approval to deviate from the state or
12 alternative criteria for a particular design element on a case-
13 by-case basis. The request for approval shall state the criteria
14 for which an exception is being requested and must include a
15 comprehensive description of the circumstances and engineering
16 analysis supporting the request. The executive director may
17 approve an exception after determining that:

18 (i) the particular criteria could not reasonably be
19 met due to physical, environmental, or other relevant factors
20 and that the proposed design is a prudent engineering solution;
21 or

22 (ii) the proposed design is at least equivalent in
23 quality and safety to the particular criteria.

1 (3) Access to a highway project.

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

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

9 (4) Preliminary design submission and approval. When
10 design is approximately 30% complete or as otherwise provided in
11 a pass-through agreement, the public or private entity shall
12 send the following preliminary design information to the
13 department for review, review and comment, or review and
14 approval, as designated by the department in the pass-through
15 agreement, in accordance with the procedures and timeline
16 established in the pass-through [~~project development~~] agreement
17 [~~described in subsection (d) of this section~~]:

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

21 (B) a design schematic depicting plan, profile, and
22 superelevation information for each roadway or a design
23 schematic depicting plan, profile, and superelevation based on

1 top of railway for each railway line;

2 (C) typical sections showing existing and proposed
3 horizontal dimensions, cross slopes, location of profile grade
4 line, pavement layer thickness and composition, earthen slopes,
5 and right of way lines for each roadway or subballast and
6 ballast layer thickness and composition for each railway line;

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

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

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

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

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

22 (I) for a highway project, the location and text of
23 proposed mainlane guide signs shown on a schematic that includes

1 lane lines or arrows indicating the number of lanes.

2 (5) Highway design and construction specifications.

3 (A) Except as provided in subparagraph (C) of this
4 paragraph, all [~~All~~] plans, specifications, and estimates
5 developed by or on behalf of the public or private entity for a
6 highway project shall conform to the latest version of the
7 department's Standard Specifications for Construction and
8 Maintenance of Highways, Streets, and Bridges, and shall conform
9 to department-required special specifications and special
10 provisions.

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

16 (C) For a project designed, developed, financed,
17 constructed, maintained, or operated under a pass-through
18 agreement procured under §5.61 of this subchapter (relating to
19 Solicitation of Private Proposals), the executive director may
20 approve the use of criteria or other requirements applicable to
21 a particular item of work that differ from the requirements of
22 this section. The criteria or requirements approved by the
23 executive director may include the standard technical provisions

1 and specifications that the department uses for transportation
2 projects delivered under comprehensive development agreements
3 that are procured under Chapter 27, Subchapter A of this title
4 (relating to Comprehensive Development Agreements). In
5 approving the alternative criteria or requirements, the
6 executive director must determine that the alternative criteria
7 or requirements are sufficient to ensure the quality and
8 durability of the finished product for the intended use and the
9 safety of the traveling public.

10 (6) Railway construction specifications.

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

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

21 (7) Submission and approval of final design plans and
22 contract administration procedures. When final plans are
23 complete, the public or private entity shall send [~~the following~~

1 ~~information]~~ to the department for review, review and comment,
2 or review and approval, as designated by the department in the
3 pass-through agreement, in accordance with the procedures and
4 timelines established in the pass-through agreement [~~contract~~
5 ~~described in §5.57(b) of this subchapter~~]:

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

9 (B) revisions to the preliminary design submission
10 previously reviewed [~~approved~~] by the department in a format
11 that is summarized or highlighted for the department;

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

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

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

20 (8) Construction inspection and oversight.

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

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

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

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

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

10 (9) Contract revisions. All revisions to any construction
11 contract entered into under a pass-through agreement under this
12 subchapter shall comply with the latest version of the
13 applicable national or state administration criteria and
14 manuals, and must be submitted to the department for its
15 records. Any revision that affects prior environmental approvals
16 or significantly revises project scope or the geometric design
17 must be submitted to the department for approval prior to
18 beginning the revised construction work. Procedures governing
19 the department's approval, including time limits for department
20 review, shall be included in the agreement described in §5.57(b)
21 of this subchapter (relating to Final Approval).

22 (10) As-built plans. Within six months after final
23 completion of the construction project, the public or private

1 entity shall file with the department a set of the as-built
2 plans incorporating any contract revisions. These plans shall be
3 signed, sealed, and dated by a professional engineer licensed in
4 Texas certifying that the project was constructed in accordance
5 with the plans and specifications.

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

14 (12) State and federal law. The public or private entity
15 shall comply with all federal and state laws and regulations
16 applicable to the project and the state highway system, and
17 shall provide or obtain all applicable permits, plans, and other
18 documentation required by a federal or state entity except for
19 any permits, plans, or other documentation that the department
20 agrees to obtain.

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

1 (e) Federal law. If any federal funds are used in the
2 development or construction of a project under this subchapter,
3 or if the department intends to fund pass-through toll payments
4 with federal funds, the development and construction of the
5 project shall be accomplished in compliance with all applicable
6 federal requirements.

7 (f) Bond financing.

8 (1) Department review. If any public or private entity
9 responsible for financing a portion of a project to be developed
10 under a pass-through agreement intends to sell bonds and use
11 pass-through toll or fare payments from the department as
12 evidence of financial capability to repay the bonds, the entity
13 shall provide the department an opportunity to review and
14 comment on bond offering documents prior to sale of the bonds.

15 (2) Pass-through agreement. The pass-through agreement or
16 the terms of a solicitation for a pass-through agreement
17 procured under §5.61 of this subchapter must provide that:

18 (A) the department will have at least five business
19 days after the date on which it receives all of the bond
20 offering documents to review those documents; and

21 (B) the public or private entity must obtain department
22 pre-approval of any provision in the bond offering documents
23 that describes the pass-through agreement, the department's

1 obligations under the pass-through agreement, the
2 interrelationship of the department, commission, and state
3 highway fund, and the department's obligation to provide bond
4 investors with updated information on the status of the state
5 highway fund.

6 (3) Business day. For purposes of this subsection,
7 "business day" excludes Saturday, Sunday, a federal holiday, the
8 Friday after Thanksgiving, and December 24 and 26.

9
10 §5.61. Solicitation of Private Proposals.

11 (a) Scope. This section applies only to the procurement of
12 a pass-through agreement with a private entity for the design,
13 development, financing, construction, maintenance, or operation
14 of a highway project.

15 (b) Applicability of other provisions. The requirements of
16 §§5.53-5.56, §5.57(a), §5.59(c)(7)(C), (D), and (c)(9) of this
17 subchapter (relating to Proposal, Participation in the Program,
18 Commission Approval to Negotiate, Proposals from Private
19 Entities, Final Approval, and Project Development by Public or
20 Private Entity, respectively) do not apply to a proposal
21 submitted under this section.

22 (c) Content of pass-through agreement. The requirements
23 for pass-through agreements set forth in §5.57(b) of this

1 subchapter apply to a pass-through agreement procured under this
2 section, except that the department may exclude the requirement
3 for an estimated budget.

4 (d) Request for qualifications - notice. If authorized by
5 the commission to issue a request for qualifications for a
6 project, the department will prepare a request for
7 qualifications under subsection (e) of this section and will
8 publish notice advertising the issuance of the request for
9 qualifications in the *Texas Register*. The department will post
10 the notice and the request for qualifications on the
11 department's Internet website. The department may also furnish
12 the request for qualifications to private entities that the
13 department believes might be interested and qualified to
14 participate in the proposed project.

15 (e) Request for qualifications - content. The request for
16 qualifications will include the criteria for professional
17 experience, technical competence, and capability to complete the
18 proposed project, other information that the department
19 considers relevant or necessary for the project, and the
20 criteria that will be used to evaluate the submittals made in
21 response to the request and the relative weight given to the
22 criteria. At its sole option, the department may furnish
23 conceptual designs, fundamental details, technical studies and

1 reports, or detailed plans of the proposed project in the
2 request for qualifications. The request for qualifications may
3 request one or more conceptual approaches to bring the project
4 to fruition.

5 (f) Request for qualifications - evaluation. The
6 department, after evaluating the submittals received in response
7 to a request for qualifications, will identify the entities that
8 are considered most qualified to submit detailed proposals for a
9 proposed project and approve a short-list that is composed of
10 those entities. The department shall notify each entity that
11 provides a qualification submittal whether or not it is on the
12 short-list of qualified entities.

13 (g) Requests for proposals. If authorized by the
14 commission, the department will issue a request for proposals
15 from all qualified entities on the short-list that requires the
16 submission of detailed documentation regarding the project.
17 Specific evaluation criteria established for the project under
18 subsection (j) of this section and requests for pertinent
19 information will be set forth in the request for proposals. The
20 request for proposals may require the submission of information
21 relating to:

22 (1) the proposer's qualifications and demonstrated
23 technical competence;

- 1 (2) the feasibility of developing the project as
2 proposed;
- 3 (3) detailed engineering or architectural designs;
- 4 (4) the proposer's ability to meet schedules;
- 5 (5) a detailed financial plan, including costing
6 methodology, cost proposals, and project financing approach;
- 7 (6) the amount and period of payments requested and
8 proposed pass-through payment schedule;
- 9 (7) the amount of the project proposed to be delivered
10 for a schedule of periodic payments established by the
11 department; and
- 12 (8) any other information the department considers
13 relevant or necessary.
- 14 (h) Alternative solicitation process. If authorized by the
15 commission, the department may utilize a one-step process for
16 the procurement of a pass-through agreement under this section
17 in which a request for proposals is issued in accordance with
18 subsection (g) of this section to prequalified private entities.
19 Subsections (d), (e), and (f) of this section do not apply for a
20 procurement under this subsection. Private entities may be
21 prequalified using the procedure set forth in §27.7 of this
22 title (relating to Design-Build Contracts), or may be
23 prequalified by being shortlisted under a comprehensive

1 development agreement procurement that is converted by the
2 commission to a procurement for a pass-through agreement under
3 this section.

4 (i) Requests for proposals - payment for work product. The
5 request for proposals may stipulate an amount of money that the
6 department will pay to an unsuccessful proposer that submits a
7 detailed proposal that is responsive to the requirements of the
8 request for proposals, not to exceed the value of any work
9 product contained in the proposal that can, as determined by the
10 department, be used by the department in the performance of its
11 functions. The request for proposals may provide for the payment
12 of a partial amount in the event the procurement is terminated.
13 The commission shall approve the amount of the payment to be
14 stipulated in the request for proposals. In determining whether
15 to approve a payment, the commission shall consider:

16 (1) the effect of a payment on the department's ability
17 to attract meaningful proposals and to generate competition;

18 (2) the work product expected to be included in the
19 proposal and the anticipated value of that work product; and

20 (3) the costs anticipated to be incurred by a private
21 entity in preparing a proposal.

22 (j) Detailed proposal evaluation criteria. The department
23 will evaluate proposals using evaluation criteria the department

1 considers appropriate for the project. The criteria may
2 include:

3 (1) the reasonableness of any financial plan submitted by
4 a proposer;

5 (2) the reasonableness of the project schedule;

6 (3) the amount of pass-through tolls to be paid;

7 (4) the period of payment;

8 (5) any maximum and minimum payment amounts;

9 (6) the amount of the project proposed to be delivered
10 for a schedule of periodic payments established by the
11 department;

12 (7) the reasonableness of assumptions, including those
13 related to ownership, legal liability, law enforcement, and
14 operation and maintenance of the project;

15 (8) financial exposure and benefit to the department;

16 (9) compatibility with other planned or existing
17 transportation facilities;

18 (10) likelihood of obtaining necessary approvals and
19 other support;

20 (11) cost and pricing;

21 (12) scheduling;

22 (13) environmental impact;

23 (14) manpower availability;

1 (15) use of technology;
2 (16) public outreach and communications;
3 (17) project coordination, with attention to efficiency
4 and quality of finished product; and

5 (18) any other criteria, including conformity with
6 department policies, guidelines, and standards, that the
7 department considers appropriate to maximize the overall
8 performance of the project and the resulting benefits to the
9 state.

10 (k) Apparent best value proposal. After evaluation of the
11 proposals under subsection (j) of this section, the department
12 will rank all proposals that are complete and responsive to the
13 request for proposals, and that comply with the requirements of
14 this subchapter. The department may select the private entity
15 whose proposal offers the apparent best value to the department.
16 After award of the pass-through agreement, the department will
17 notify proposers in writing of the department's rankings and
18 will make the rankings available to the public.

19 (l) Selection of entity. The department will submit a
20 recommendation to the commission regarding approval of the
21 proposal determined to provide the apparent best value to the
22 department. The commission may approve or disapprove the
23 recommendation, and if approved, will award the pass-through

1 agreement, subject to the successful completion of negotiations,
2 any necessary federal action, execution by the executive
3 director of the agreement, and satisfaction of any other
4 conditions that are identified in the request for proposals or
5 by the commission.

6 (m) Negotiations with selected entity. If authorized by
7 the commission, the department will attempt to negotiate a pass-
8 through agreement with the apparent best value proposer, or the
9 department may accept the proposal and enter into the agreement
10 without negotiation. If an agreement satisfactory to the
11 department cannot be negotiated with that proposer, or if, in
12 the course of negotiations, it appears that the proposal will
13 not provide the department with the best value, the department
14 will formally end negotiations with that proposer and, in its
15 discretion:

16 (1) reject all proposals;

17 (2) modify the request for proposals and issue that
18 request in accordance with subsection (g) of this section; or

19 (3) proceed to the next most highly ranked proposal and
20 attempt to negotiate a pass-through agreement with the entity
21 that submitted that proposal in accordance with this section.

22 (n) Reservation of rights. The department reserves all
23 rights available to it by law in administering this section,

1 including, without limitation, the right in its sole discretion

2 to:

3 (1) withdraw a request for qualifications or a request
4 for proposals at any time, and issue a new request in accordance
5 with the appropriate provisions of this section;

6 (2) reject any and all qualifications submittals or
7 proposals at any time;

8 (3) terminate the evaluation of any and all
9 qualifications submittals or proposals at any time;

10 (4) suspend, discontinue, or terminate negotiations with
11 any proposer at any time before the execution of the agreement
12 by all parties;

13 (5) negotiate with a proposer without being bound by any
14 provision in its proposal;

15 (6) negotiate with a proposer to include aspects of
16 unsuccessful proposals for that project in the agreement;

17 (7) request or obtain additional information about any
18 qualifications submittal or proposal from any source;

19 (8) modify, issue addenda to, or cancel any request for
20 qualifications or request for proposals; or

21 (9) waive deficiencies in a qualifications submittal or
22 proposal or accept and review a non-conforming qualifications
23 submittal or proposal.

1 (o) Department information. Any information that the
2 department makes available to a proposer is provided as a
3 convenience to the proposer and without representation or
4 warranty of any kind except as expressly specified in the
5 request for qualifications or request for proposals.

6 (p) Procedure for communications. If a proposer has a
7 question or request for clarification regarding this subchapter
8 or any request for qualifications or request for proposals
9 issued by the department, the proposer must submit the question
10 or request for clarification in writing to the person
11 responsible for receiving those submissions, as designated in
12 the request for qualifications or request for proposals, and the
13 department will provide its responses in writing. The proposer
14 shall comply with all requirements in the request for
15 qualifications or request for proposals regulating
16 communications. A proposer may not rely on any oral responses
17 to inquiries.

18 (q) Protest procedures. A protest regarding a procurement
19 conducted under this section may only be made to the extent
20 authorized under §27.6 of this title (relating to Protest
21 Procedures), and in accordance with the procedures prescribed in
22 that section.

23 (r) Termination of pass-through agreement. A pass-through

1 agreement procured under this section may provide for the
2 payment of compensation as a result of the termination of the
3 agreement, including compensation for the purchase by the
4 department, under terms and conditions established in the
5 agreement, of the interest of the private entity in the
6 agreement and related property.