PASS-THROUGH TOLL PROGRAM CALL AGREEMENTS

Description

This minute order authorizes the executive director or designee to add a provision that limits the liability of each party in the event of a cost overrun or underrun into all pass-through toll agreements to be negotiated with those public entities whose proposals under the February 26, 2009 pass-through toll program call were selected by the commission on October 29, 2009 and December 17, 2009.

Background

On February 26, 2009, the commission, by Minute Order 111710, approved a call for submission of projects under the pass-through toll financing program. On September 24, 2009 the commission authorized the negotiation of financial terms of a pass-through toll agreement with each of the public entities selected. On October 29, 2009 and December 17, 2009 the commission authorized the pass-through toll agreement listed in Exhibit A

Pass-through toll agreements for most of those projects have not yet been executed. The department recommends that all remaining pass-through toll agreements to be negotiated and executed with the selected public entities contain a provision that limits the liability of each party in the event of a cost overrun or underrun. A cost overrun and underrun provision will allow either party to request a re-negotiation of the financial terms of reimbursement as described in the executed agreement if the actual cost of construction will be more or less by a pre-determined percentage than the initial estimated cost of construction: Fifteen percent if the estimated cost of construction is less than $25 million, and ten percent if the estimated cost of construction is $25 million or more. If the parties are unable to agree to a change in the financial terms, the requesting party may choose to terminate the agreement. If the agreement is terminated under this provision, all actual costs of the project that are otherwise eligible under the agreement and incurred by the selected public entity prior to the date of termination will be reimbursed by the department.

The cost overrun and underrun provision will also provide that upon completion of each project, and regardless of whether the financial terms are amended under the above paragraph, the actual cost of construction of the project will be determined. If the actual cost of construction is less than the estimated cost of construction, the difference will be returned to the department, or upon written request of the other party, the excess amount may be applied to other mutually acceptable state highway projects located in the public entity's jurisdiction.

Criteria

Under 43 TAC §5.58(b)(3)(A), the commission may authorize the department to include a provision in pass-through toll agreements that allows the parties to increase or decrease the department's liability under a pass-through toll agreement in the event of cost overruns and underruns.

Problem/Condition

The primary purpose of the pass-through toll program is to provide reimbursement to a local government for the development and construction of a specific facility on the state highway system. The local government is able to select and advance a project that otherwise would take much longer to develop. A failure to make allowances for significant cost overruns increases the risk to the local government and a failure to account for significant cost underruns diverts limited funding in the pass-through toll program to the local government and its developer for non-state highway purposes.

Other Comments

None.

Alternate Solutions/Actions

None.

TEXAS TRANSPORTATION COMMISSION

ALL Counties | **MINUTE ORDER** |

ALL Districts

On February 26, 2009 by Minute Order 111710 the Texas Transportation Commission (commission) approved a program call for highway projects to be developed on the state highway system under a pass-through toll agreement.

On September 24, 2009 by Minute Order 111977 the commission authorized the executive director or his designee to negotiate the financial terms of a pass-through toll agreement (agreement) with each of those public entities whose proposals under the program call were selected by the commission in that minute order as providing the best value to the state. On October 29, 2009 by Minute Order 112016 and on December 17, 2009 by Minute Order 112074 the commission authorized the executive director or his designee to negotiate and execute a pass-through toll agreement with each of the public entities set forth in Exhibit A (selected public entities) for the construction of their respective projects as identified in the exhibit. The agreements will provide for payment of pass-through tolls by the Texas Department of Transportation (department) to the selected public entities as reimbursement for the construction of facilities on the state highway system in accordance with §222.104(b), Transportation Code, and Title 43 Texas Administrative Code §§5.51-5.60 (rules).

In accordance with §5.58(b)(3)(A) of the rules, the commission finds that it is in the public interest to require all pass-through toll agreements negotiated with the selected public entities to contain a provision that limits the liability of each party in the event of a cost overrun or underrun (cost overrun and underrun provision). The cost overrun and underrun provision will contain the following terms:

(1) A selected public entity will have the contractual right to request an increase in the total amount of reimbursement and a change in the payment terms as described in the executed agreement if the actual cost of construction of a project will exceed by a pre-determined percentage the estimated cost of construction that was approved by the department for the same project. Similarly, the department will have the contractual right to request a decrease in the total amount of reimbursement and a change in the payment terms as described in the executed agreement if the actual cost of construction of a project will be less by a pre-determined percentage than the estimated cost of construction that was approved by the department for the same project. If the requesting party is unable to negotiate a mutually acceptable change in the financial terms described in the agreement, the requesting party may choose to terminate the agreement.

(2) The pre-determined percentage to be used for determining when a party to the agreement may request a change will be based on the following:

(A) If the estimated cost of construction that was approved by the department upon execution of the agreement is less than $25 million, the pre-determined percentage is 15 percent.

(B) If the estimated cost of construction that was approved by the department upon execution of the agreement is $25 million or more, the pre-determined percentage is 10 percent.

(3) If the agreement is terminated under this provision, all actual costs of the project that are otherwise eligible under the agreement and incurred by the selected public entity prior to the date of termination will be reimbursed by the department.

(4) Construction costs shall have the same meaning as described in the program call.

(5) Upon completion of each project and regardless of whether the financial terms are amended under paragraph (1), the actual cost of construction of the project will be determined. If the actual cost of construction is less than the estimated cost of construction that was approved by the department for the same project, the difference will be returned to the department, or upon written request of the other party to the agreement, the excess amount may be applied to other mutually acceptable state highway projects located in the public entity's jurisdiction.

IT IS THEREFORE ORDERED that the executive director or his designee is authorized and directed to include in each pass-through toll agreement to be executed with the public entities set forth in Exhibit A a cost overrun and underrun provision that complies with the findings described in this minute order.

Submitted and reviewed by:

Assistant Executive Director for
Engineering Operations

Recommended by:

Executive Director

Minute Number	Date Passed

EXHIBIT A
PASS-THROUGH TOLL PROGRAM CALL PROJECTS

District	County/City Name	Project Description	Total Reimbursement	Reimbursement Rate (per vehicle mile unless otherwise noted)	Minimum Reimbursement Amount per Year	Maximum Reimbursement Amount per Year	Region
HOU	FT. BEND CO.	FM 1093 - Phase I from SH 99 to the east city limits of Fulshear - Construct a pair of one-way frontage roads. FM 1093 - Phase II from SH 99 to the east city limits of Fulshear - Construct a highway section. *(The Fort Bend County Toll Road Authority will fund all of the stages of development, including construction of Phase 2.)* FM 1093 - Phase III from James Lane to FM 359/FM 1093, and then continuing to the east city limits of Fulshear - Construct a "parkway" section.	$39,600,000	$0.08	$1,980,000	$3,960,000	EAST
SAT	BEXAR CO.	FM 1957 from Loop 1604 to 600' west of SH 211 - Reconstruct an existing two-lane roadway to a four-lane suburban facility, with two lanes in each direction and a flush/raised center median. SH 211 from FM 1957 to FM 471 - Construct a two-lane, rural section on new alignment which is part of an ultimate development planned as a fully controlled access facility with frontage roads.	$55,600,000	$0.04	$2,780,000	$5,560,000	SOUTH
HOU	BRAZORIA CO.	SH 36 in City of West Columbia from the northern city limits of West Columbia to south of SH 35 - Construct a four-lane overpass at future SH 35, with access roads, etc. SH 36 in City of Brazoria from North of CR 348 to South of CR 310 - Widen from a two lane to four-lane undivided rural roadway, where necessary, overlay and restripe, and add a two-way left turn lane as warranted. SH 36 at FM 1495 Port Freeport Entrance - Construct a four-lane elevated T intersection at SH 36 and FM 1495, with access roads.	$29,406,000	$0.055	$1,470,300	$2,940,600	EAST

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WAC	CITY of KILLEEN	US 190 from 0.2 miles east of the US 190/FM 3470 interchange to 0.3 miles west of the US 190/FM 2410 interchange - Construct a new interchange at US 190 and Rosewood Drive, etc. FM 2410 from the intersection of FM 2410 and FM 3470 to Roy Reynolds Drive - Widen the existing two lane rural section to a five lane urban section.	$20,150,000	$0.03	$1,007,500	$2,015,000	NORTH
AUS	CITY of AUSTIN	Loop 1/US 290 - Construct direct connectors for Northbound Loop 1 to Eastbound US 290 and Westbound US 290 to Southbound Loop 1.	$10,164,554	* $0.29	$677,637	$1,016,455	SOUTH
FTW	HOOD CO.	US 377 from SW of the SH 144 interchange to NE of Old Acton Highway - Reconstruct a four-lane undivided roadway to a six-lane divided roadway, etc.	$31,000,000	$0.055	$1,550,000	$3,100,000	NORTH
FTW	CITY of HUDSON OAKS	IH 20/US 180 from Center Point Road/IH 20 to the interchange of IH 20, US 180 and Lakeshore Drive - Construct a new frontage road between Center Point Road and Lakeshore Dr and construct intersection improvements at US 180/IH 20 and Lakeshore Dr., etc.	$7,954,000	$0.25	$397,700	$795,400	NORTH
ATL	BOWIE CO.	US 82 from FM 1840 to SH 98 – Reconstruct and widen this existing non-freeway facility to either a two lane section with a two-way left turn lane or to add passing lanes.	$26,200,000	$0.07	$1,310,000	$2,620,000	NORTH
DAL	CITY of MIDLOTHIAN & MIDLOTHIAN DEVELOPMENT AUTHORITY	US 67 at Rail Port Parkway/Miller Road - Construct a grade separated interchange over Rail Port Parkway/Miller Road in Ellis County.	$9,831,000	$0.05	$491,550	$983,100	NORTH
DAL	CITY of MIDLOTHIAN	FM 663 at US 287 Relief Route - Reconstruct and widen the existing bridge and approaches on FM 663 at the interchange with the US 287 Relief Route in the city of Midlothian.	$2,542,192	$0.10	$127,110	$254,220	NORTH

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YKM	CITY of VICTORIA	Loop 463 (Zac Lentz Parkway) from 0.60 miles West of Salem Road to 0.50 miles East of Mockingbird Lane – Construct main lanes, frontage roads, and grade separated structures along Loop 463 (Zac Lentz Parkway) at Salem Road (FM 1315) and Mockingbird Lane.	$17,561,000	$0.12	$878,050	$1,756,100	SOUTH

*** Reimbursement rate is based on a per vehicle rate.**