

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 §15.52, Agreements, relating to federal, state, and local participation 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 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 §15.52 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:

Scott D. Bump
Director, General Services Division

Recommended by:

Arnoldo Sany
Executive Director

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Minute Number Date Passed

1 Proposed Preamble

2 The Texas Department of Transportation (department) proposes
3 amendments to §15.52, Agreements, concerning federal, state, and
4 local participation.

5

6 EXPLANATION OF PROPOSED AMENDMENTS

7 Amendments to §15.52 expand the application of the rule and
8 modify the current prohibition that prevents the department from
9 entering agreements required by §15.52 (cost participation
10 agreements) that provide for local governments to improve
11 freeway mainlanes of the state highway system. Currently, cost
12 participation agreements are not required for situations in
13 which a local government or reservoir agency voluntarily
14 provides financial assistance for a highway improvement project.
15 This amendment requires the department and the local government
16 or reservoir agency to enter into a cost participation agreement
17 in such cases. In addition, the amendment would allow the
18 executive director, or designee, to enter cost participation
19 agreements that include the local government's performance of
20 certain maintenance activities on the freeway mainlanes of the
21 state highway system that do not alter the physical character of
22 the roadway surface, such as sweeping and debris removal.

23

24 The change to §15.52(8)(B) adds new clause (ii) that clarifies
25 the meaning of the phrase "projects that improve the freeway

1 mainlanes on the state highway system" as used in paragraph
2 (8)(B) as not including maintenance activities that do not alter
3 the physical character of the roadway surface, such as sweeping
4 and debris removal. The amendments redesignate existing clauses
5 (ii) - (iv) as (iii) - (v), respectively.

6

7 FISCAL NOTE

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

13

14 Scott Burford, Director, General Services Division, has
15 certified that there will be no significant impact on local
16 economies or overall employment as a result of enforcing or
17 administering the amendments.

18

19 PUBLIC BENEFIT AND COST

20 Mr. Burford has also determined that for each year of the first
21 five years the section is in effect, the public benefit
22 anticipated as a result of enforcing or administering the
23 amendments will be more efficient use of limited state resources
24 and improved safety for the traveling public. There are no
25 anticipated economic costs for persons required to comply with

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

3

4 SUBMITTAL OF COMMENTS

5 Written comments on the proposed amendments to §15.52 may be
6 submitted to Scott Burford, Director, General Services Division,
7 Texas Department of Transportation, 125 East 11th Street,
8 Austin, Texas 78701-2483. The deadline for receipt of comments
9 is 5:00 p.m. on January 31, 2011.

10

11 STATUTORY AUTHORITY

12 The amendments are proposed under Transportation Code, §201.101,
13 which provides the Texas Transportation Commission with the
14 authority to establish rules for the conduct of the work of the
15 department.

16

17 CROSS REFERENCE TO STATUTE

18 None.

1 SUBCHAPTER E. FEDERAL, STATE, AND LOCAL PARTICIPATION

2 §15.52. Agreements. When a local government or reservoir
3 agency will be [~~is responsible for~~] providing financial
4 assistance for a highway improvement project, the department and
5 the local government or reservoir agency shall enter into an
6 agreement before any work is performed. The agreement will
7 include, but not be limited to, the following provisions of this
8 section.

9 (1) Right of entry. If the local government or reservoir
10 agency is the owner of the project site, it shall permit the
11 department or its authorized representative access to occupy the
12 site to perform all activities required to execute the work.

13 (2) Right of way and/or utility relocation/adjustments.
14 The local government will provide all necessary right of way and
15 utility relocation/adjustments, whether publicly or privately
16 owned, in accordance with §15.55 of this subchapter (relating to
17 Construction Cost Participation). When specified, the reservoir
18 agency will provide all necessary right of way and
19 utility/relocation adjustments, whether publicly or privately
20 owned. Existing utilities will be relocated and/or adjusted
21 with respect to location and type of installation in accordance
22 with the requirements of the department as specified in §21.21
23 of this title (relating to State Participation in Relocation,

1 Adjustment, and/or Removal) and §21.31 et seq. of this title
2 (relating to Utility Accommodation).

3 (3) Funding arrangement. The agreement will specify the
4 type of funding share arrangement agreed upon by the department
5 and the local government. The funding share arrangement shall
6 include any adjustments required by §15.55 of this subchapter.
7 The funding arrangement agreed upon by the department and the
8 reservoir agency will be as specified under §15.54(e) of this
9 subchapter (relating to Construction).

10 (A) Standard. The local government is responsible for
11 all, or a specified percentage as shown in Appendix A of §15.55
12 of this subchapter [~~title (relating to Construction Cost~~
13 ~~Participation)~~], of the direct costs incurred by the department
14 for preliminary engineering, construction engineering,
15 construction, and right of way as well as the direct cost for
16 any work included which is ineligible for federal or state
17 participation. When specified, the reservoir agency is
18 responsible for all of the direct costs incurred by the
19 department for preliminary engineering, construction
20 engineering, construction, and right of way as well as the
21 direct cost for any work included which is ineligible for
22 federal or state participation.

23 (B) Fixed price. A fixed price funding arrangement,

1 based on the estimated cost of the work for which the funds are
2 received, may be used if requested by the local government for
3 projects that include state participation.

4 (i) Determination of lump sum. A local government is
5 responsible for the lump sum price not subject to adjustment
6 except:

7 (I) in the event of changed site conditions;

8 (II) if work requested by the local government is
9 ineligible for federal participation; or

10 (III) as mutually agreed upon by the department and
11 the local government.

12 (ii) Approval. In approving a request for a fixed
13 price, the executive director will consider:

14 (I) requests by the local government to include
15 work which is ineligible for federal or state participation;

16 (II) need for expeditious project completion;

17 (III) type of work proposed and the ability to
18 accurately estimate its cost; and

19 (IV) any other considerations relating to the
20 benefit of the state, the traveling public, and the operations
21 of the department.

22 (C) Incremental.

23 (i) The department may approve a local government to

1 make periodic payments of its funding share only if:

2 (I) the incremental payments sought are based on
3 the estimated cost for the work for which the funds are received
4 and payment is made in accordance with the schedule established
5 in the funding agreement; and

6 (II) the local government does not have a
7 delinquent obligation to the department, as defined in §5.10 of
8 this title (relating to Collection of Debts).

9 (ii) In approving a request for incremental payments,
10 the executive director will consider:

11 (I) inability of the local government to pay its
12 total funding share prior to the department's scheduled date for
13 contract letting, based upon population level, bonded
14 indebtedness, tax base, and tax rate;

15 (II) past payment performance;

16 (III) need for expeditious project completion;

17 (IV) whether the project is located in a local
18 government that consists of all or a portion of an economically
19 disadvantaged county; and

20 (V) any other considerations relating to the
21 benefit of the state, the public, and the operations of the
22 department.

23 (D) Off-State Highway System Bridge Program. For

1 projects funded in the Off-State Highway System Bridge Program,
2 the local government is responsible for the specified
3 percentage, as shown in Appendix A to §15.55 of this subchapter,
4 of the estimated direct costs for preliminary engineering,
5 construction engineering, and construction, and the actual
6 direct costs for right of way and eligible utilities. The
7 estimated direct costs are based on the department's estimate of
8 the eligible work at the time of the agreement. The local
9 government is responsible for the direct cost of any project
10 cost item or portion of a cost item that is not eligible for
11 federal participation under the Federal Highway Bridge
12 Replacement and Rehabilitation Program under 23 U.S.C. §144 and
13 23 C.F.R. §650 Subpart D. The local government is also
14 responsible for any cost resulting from changes made at the
15 request of the local government, either during preliminary
16 engineering or construction.

17 (4) Interest. The department will not pay interest on
18 funds provided by the local government or the reservoir agency.
19 Funds provided by the local government or the reservoir agency
20 will be deposited into, and retained in, the state treasury.

21 (5) Amendments. In the case of significantly changed
22 site conditions or other mutually agreed upon changes in the
23 scope of work authorized in the agreement, the department and

1 the local government or reservoir agency will amend the funding
2 agreement, setting forth the reason for the change and
3 establishing the revised participation to be provided by the
4 local government or reservoir agency.

5 (6) Payment provision. The agreement will establish the
6 conditions for payment by the local government or reservoir
7 agency, including, but not limited to, the method of payment and
8 the time of payment.

9 (A) Standard.

10 (i) Upon execution of the agreement or at a later
11 date, if requested by the local government and as approved by
12 the executive director, the local government or reservoir agency
13 will pay, as a minimum, its funding share for the estimated cost
14 of right of way and preliminary engineering for the project.

15 Prior to the department's scheduled date for contract letting,
16 the local government or reservoir agency will remit to the
17 department an amount equal to the remainder of the local
18 government's or reservoir agency's funding share for the
19 project.

20 (ii) After the project is completed the final cost
21 will be determined by the department, based on its standard
22 accounting procedures. If it is found that the amount received
23 is insufficient to pay the local government's or reservoir

1 agency's funding share, then the department shall notify the
2 local government or reservoir agency which shall transmit the
3 required amount to the department. If it is found that the
4 amount received is in excess of the local government's or
5 reservoir agency's funding share, the excess funds paid by the
6 local government or reservoir agency shall be returned.

7 (B) Fixed price. When a fixed price funding
8 arrangement is used, the lump sum price is not subject to
9 adjustment except as provided for in paragraph (3)(B) of this
10 section.

11 (C) Incremental. After an incrementally paid project
12 is completed, the final cost will be determined by the
13 department based on its standard accounting procedures. If it
14 is found that the amount received is insufficient to pay the
15 local government's funding share, then the department shall
16 notify the local government which shall transmit the required
17 amount to the department. If it is found that the amount
18 received is in excess of the local government's funding share,
19 the excess funds paid by the local government shall be returned.

20 (D) Off-State Highway System Bridge Program. For
21 projects funded in the Off-State Highway System Bridge Program,
22 the department will determine the final cost after the project
23 is completed, based on its standard accounting procedures. The

1 department will notify the local government of any amount due
2 for payment of costs related to any ineligible items and for
3 changes made at the request of the local government. The local
4 government shall promptly transmit the required amount to the
5 department. The department will return excess funds paid by the
6 local government if it is found that the amount received is in
7 excess of the local government's funding share required by
8 §15.55(c) of this subchapter.

9 (7) Termination. If the local government or reservoir
10 agency withdraws from the project after the agreement is
11 executed, it shall be responsible for all direct and indirect
12 project costs incurred by the department for the items of work
13 in which the local government or reservoir agency is
14 participating.

15 (8) Responsibilities of the parties.

16 (A) Agreement. The agreement shall identify the
17 responsibilities of each party, including, but not limited to,
18 preparing or providing construction plans, construction
19 performance, advertising for bids, awarding a construction
20 contract, and construction supervision.

21 (B) Local performance and management of highway
22 improvement projects.

23 (i) Request. If requested by a local government and

1 approved by the department, an agreement with the governing body
2 of a local government may provide for:

3 (I) the performance by employees under the direct
4 control of the local government of a highway improvement
5 project, other than a project to improve freeway mainlanes on
6 the state highway system; or

7 (II) outsourcing preliminary project engineering
8 and design for which reimbursement is requested, bid opening,
9 award of construction to a contractor, and construction
10 management by the local government or a consultant hired by the
11 local government of a highway improvement project, other than a
12 project to improve freeway mainlanes on the state highway
13 system.

14 (ii) Maintenance activities. Maintenance activities
15 that do not alter the physical character of the roadway surface,
16 such as sweeping and debris removal, are not projects to improve
17 freeway mainlanes for the purposes of paragraph 8(B)(i) of this
18 section.

19 (iii) [~~(ii)~~] Approval authority. The executive
20 director may authorize a local government to perform an act
21 described in clause (i) of this subparagraph. The executive
22 director may delegate the authority to approve:

23 (I) the performance by employees of the local

1 government of work on any facility not maintained by the
2 department; and

3 (II) the performance by employees of the local
4 government of projects or activities appurtenant to a state
5 highway, including drainage facilities, surveying, traffic
6 counts, driveway construction, landscaping, guardrails and other
7 items incidental to the roadway itself, such as signing,
8 pavement markings, signals, illumination, and traffic management
9 systems.

10 (iv) [~~(iii)~~] Conditions. A local government may
11 perform an act described in clause (i) of this subparagraph only
12 if:

13 (I) the local government commits in the agreement
14 to comply with all federal, state, and department requirements,
15 standards, and specifications, and agrees to forfeit any claim
16 to federal and/or state reimbursement if they fail to comply;

17 (II) the project is authorized by the commission in
18 the current Unified Transportation Program or by a specific
19 minute order;

20 (III) a project on the state highway system
21 performed or managed by a local government is operationally
22 beneficial to the state;

23 (IV) a roadway construction project requested by

1 the local government that is to be on the state highway system,
2 for which local management is proposed, is funded with at least
3 50% of the funds not coming from federal or state highway
4 funding;

5 (V) the local government agrees to pay any cost
6 overruns in addition to its local participation on an off-state
7 highway system bridge program project for which local management
8 is proposed; and

9 (VI) the department reviews and approves all plans,
10 contract awards, and change orders.

11 (v) [~~iv~~] Approval. In approving a request, the
12 executive director or designee will consider:

13 (I) previous experience of the local government in
14 performing the type of work proposed;

15 (II) the capability of the local government to
16 perform the type of work proposed or to award and manage a
17 contract for that work in a timely manner, consistent with
18 federal, state, and department regulations, standards, and
19 specifications;

20 (III) need for expeditious project completion;

21 (IV) department resources available to perform or
22 manage the highway improvement project in an efficient and
23 timely manner;

1 (V) cost effectiveness of local performance of the
2 work as compared to awarding the highway improvement project
3 through the competitive bidding process; and

4 (VI) any other considerations relating to the
5 benefit of the state, the traveling public, and the operations
6 of the department.

7 (9) Acknowledgment. The local government or reservoir
8 agency must acknowledge in the agreement that while not an
9 agent, servant, nor employee of the state, it is responsible for
10 its own acts and deeds and for those of its agents or employees
11 during the performance of the work authorized in the contract.

12 (10) Local regulations. If any existing, future or
13 proposed local ordinance, commissioners court order, rule,
14 policy, or other directive, including, but not limited to,
15 outdoor advertising or storm water drainage facility
16 requirements, that is more restrictive than state or federal
17 regulations, or any other locally proposed change, including,
18 but not limited to, plats or re-plats, results in any increased
19 cost to the department for a highway improvement project, the
20 local government or reservoir agency must commit in the
21 agreement to being responsible for all increased costs
22 associated with the ordinance, order, policy, directive or
23 change.