

TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

Page 1 of 1

ALL Districts

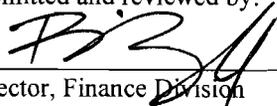
The Texas Transportation Commission (commission) finds it necessary to adopt amendments to §§6.1 - 6.3, §6.11, §6.12, §§6.21 - 6.23, §6.31, §6.32, and §§6.41 - 6.43, the repeal of §6.4, §6.5, §6.24, and §§6.44 - 6.46, and new §6.4, §6.13, §6.24, §6.25, §6.33, and §§6.44 - 6.46, all relating to the state infrastructure bank, to be codified under Title 43, Texas Administrative Code, Part 1.

The preamble and the adopted amendments, attached to this minute order as Exhibits A - F, 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 §§6.1 - 6.3, §6.11, §6.12, §§6.21 - 6.23, §6.31, §6.32, and §§6.41 - 6.43, the repeal of §6.4, §6.5, §6.24, and §§6.44 - 6.46, and new §6.4, §6.13, §6.24, §6.25, §6.33, and §§6.44 - 6.46 are adopted and are authorized for filing with the Office of the Secretary of State.

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:



Director, Finance Division

Recommended by:



Executive Director
112429 SEP 30 10

Minute
Number

Date
Passed

Adoption Preamble

1
2 The Texas Department of Transportation (department) adopts
3 amendments to §6.1, Purpose, §6.2, Definitions, and §6.3,
4 General Policies, the repeal of §6.4, Applicability, new §6.4,
5 Separate Subaccounts, and the repeal of §6.5, Separate
6 Subaccounts; amendments to §6.11, Eligible Entities, and §6.12,
7 Eligible Properties, and new §6.13, Eligibility for Financial
8 Assistance from General Obligation Bond Proceeds; amendments to
9 §6.21, Department Contact, §6.22, Requested Financial
10 Assistance, and §6.23, Application Procedure, the repeal of
11 §6.24, Suspension of Applications, new §6.24, Limitation on
12 Applications - Loans from General Obligation Bond Proceeds, and
13 new §6.25, Suspension of Applications; amendments to §6.31,
14 Department Action, and §6.32, Commission Action, and new §6.33,
15 Commission Action - Loans from General Obligation Bond Proceeds;
16 amendments to §6.41, Executive Director, §6.42, Performance of
17 Work, and §6.43 Design, Construction, and Procurement Standards,
18 the repeal of §6.44, Maintenance and Operations, and new §6.44,
19 Design and Construction - Loans from General Obligation Bond
20 Proceeds, the repeal of §6.45, Financial and Credit
21 Requirements, and new §6.45, Maintenance, the repeal of §6.46,
22 Other Requirements, and new §6.46, Financial and Credit
23 Requirements, all concerning the State Infrastructure Bank. The
24 amendments to §6.41, §6.42, and new §6.13, §6.33, and §6.44 are
25 adopted with changes to the proposed text as published in the
26 July 9, 2010 issue of the *Texas Register* (35 TexReg 6033). The

1 amendments to §§6.1 - 6.3, §6.11, §6.12, §§6.21 - 6.23, §6.31,
2 §6.32, and §6.43, the repeal of §6.4, §6.5, §6.24, and §§6.44 -
3 6.46, and new §6.4, §6.24, §6.25, §6.45, and §6.46, are adopted
4 without changes to the proposed text and will not be
5 republished.

6

7 EXPLANATION OF ADOPTED AMENDMENTS, REPEALS, AND NEW SECTIONS

8 A rules advisory committee was appointed by the Texas
9 Transportation Commission (commission) in September 2009. The
10 committee met three times, once in April and twice in May of
11 2010. Members representing the Alamo Regional Mobility
12 Authority, the Central Texas Regional Mobility Authority, The
13 Harris County Toll Road Authority, the North Texas Tollway
14 Authority, the Texas Association of Counties, the Texas
15 Municipal League, the Texas Water Development Board and a Texas
16 public international bridge operator attended at least one of
17 the meetings. The rules are believed to reflect the consensus
18 agreement of the committee members, although four of these eight
19 representatives did not vote on the final version of the rules.
20 Of the other four representatives, two of them voted in favor of
21 the rules, one representative voted in favor except for one
22 provision, and one representative wished to be shown as not
23 taking a position on the rules.

24

25 Transportation Code, Chapter 222, Subchapter D establishes the
26 state infrastructure bank (bank) and authorizes the commission

1 to provide financial assistance from money in the bank for
2 qualified projects. The bank has been functioning since 1998
3 and was capitalized with federal funds and money from the state
4 highway fund.

5
6 The Texas Constitution, Article 3, Section 49-p and
7 Transportation Code, §222.004 authorize the commission to issue
8 general obligation bonds for the purpose of paying all or part
9 of the cost of highway improvement projects, and the General
10 Appropriations Act, as amended by House Bill 1, 81st
11 Legislature, First Called Session, 2009, appropriated \$1 billion
12 of proceeds of the general obligation bonds to be used to
13 capitalize the bank for the purpose of making loans to public
14 entities.

15
16 The capitalization of the bank with general obligation bond
17 proceeds requires revisions to the rules governing financial
18 assistance from the bank because the purposes for which the
19 proceeds of the general obligation bonds can be used is limited,
20 the size of loans from the proceeds is contemplated to be
21 substantially larger than those made from existing sources, and
22 proceeds from the repayment of loans are expected to be used to
23 secure revenue bonds, the proceeds of which can be used to make
24 additional loans.

25
26 Additionally, revisions to the existing sections are made to

1 reflect changes in the department's practices and procedures
2 since the rules were initially adopted and to clarify some of
3 the existing provisions.

4
5 Amendments to §6.1, Purpose, clarify that there may be legal
6 restrictions on the use of money deposited in the bank. As a
7 result of the changes made by the amendment of the chapter, not
8 all of the funds deposited into the bank can legally be used for
9 all of the purposes set out in §6.1(a).

10

11 Amendments to §6.2, Definitions, update the "design manual"
12 definition to reflect the names of the publications currently
13 used by the department, and add definitions for "environmental
14 permits, issues, and commitments (EPIC)," "general obligation
15 bonds," and "program call." The definition of "financial
16 assistance" is amended to clarify that financial assistance does
17 not include all of the types of assistance listed in the
18 definition for all sources of money. The definition of "Unified
19 Transportation Program, Construct and Develop designations" is
20 deleted as it is not used in Chapter 6.

21

22 Amendments to §6.3, General Policies, update the requirements
23 for the bank to maintain an investment grade rating to be
24 consistent with current federal law. Existing subsection (f),
25 relating to the timing of repayment of financial assistance, is
26 deleted and placed in §6.41, Financial Assistance Agreements,

1 since it is more appropriately a contract term rather than a
2 general policy, and becomes subsection (b) of that section.

3

4 Existing §6.4, Applicability, is repealed because the section is
5 time sensitive and the period of its application has passed.

6

7 §6.5, Separate Subaccounts, is repealed and readopted as new
8 §6.4, with clarifying changes in the language. The change
9 provides for the creation of an additional subaccount
10 capitalized with proceeds of the general obligation bonds and
11 Secondary Funds derived from the repayments of loans made from
12 general obligation bond proceeds. The additional subaccount is
13 needed to keep these funds separate from federal and state
14 highway funds because the purposes for and the limitations on
15 these types of funds are distinct from the other funds due to
16 constitutional restrictions on the use of general obligation
17 funds.

18

19 Amendments to §6.11, Eligible Entities, clarify that eligibility
20 to apply for financial assistance is limited by other provisions
21 of Chapter 6.

22

23 Amendments of §6.12, Eligible Projects, provide for an exception
24 from the eligibility criteria because, as addressed in new
25 §6.13, financial assistance from general obligation bond
26 proceeds is subject to additional limitations. Further changes

1 clarify that, for a transit project, financial assistance is
2 limited to bank funds that may be lawfully expended for that
3 purpose.

4
5 New §6.13, Eligibility for Financial Assistance from General
6 Obligation Bond Proceeds, creates limits, categories, and
7 methods regarding loans from the bank. New §6.13(a) limits the
8 use of general obligation bond proceeds to public entities of
9 direct loans to pay costs of highway improvement projects on or
10 off of the state highway system, as is required by
11 Transportation Code, §222.004. New §6.13(b) establishes the
12 categories of loans that may be made: 1) loans of sufficient
13 credit quality to allow secondary funds to be the security for
14 revenue bonds issued under Transportation Code, §222.075; and 2)
15 loans of lesser credit quality, if the loan is anticipated to be
16 refinanced by the applicant within three years of completion of
17 the project, the loan is a part and represents not more than 20
18 percent of a much larger financing that would not be feasible
19 unless the loan is made on a subordinate basis, or the loan is
20 in the amount of \$4 million or less. The commission intends
21 that bank loans from general obligation bond proceeds "revolve"
22 as soon as reasonably feasible, or be "leveraged" to the maximum
23 extent feasible. New §6.13(b) provides two methods of leverage:
24 1) loans where the repayments of the loans are security for
25 revenue bonds; and 2) loans that are smaller parts of larger
26 financings that could not be completed without those loans.

1 Section 6.13(b) provides one method for revolving loans: loans
2 that are anticipated to be refinanced within three years of
3 completion of the project. New §6.13(c) limits the use of
4 repayments of loans to making new loans or securing revenue
5 bonds issued for the purpose of funding highway improvement
6 projects, because repayments of general obligation bonds are
7 considered to be legally limited to these uses. New §6.13(d)
8 requires that senior or parity debt, except for TIFIA loans,
9 payable from the same revenue that would secure the loan from
10 the bank, have an investment grade rating, because having an
11 investment grade rating on such a debt is a good indication of
12 the credit quality of the revenue source and, conversely, the
13 absence of an investment grade rating may indicate the revenue
14 source is of low credit quality. TIFIA loans are excluded as
15 they are frequently not rated as a matter of U.S. Department of
16 Transportation policy.

17

18 Amendments to §6.21, Department Contact, specify that the
19 director of the department's finance division, or the director's
20 designee, is the contact within the department for potential
21 applicants for financial assistance because the finance division
22 is responsible for administering the state infrastructure bank
23 program.

24

25 Amendments to §6.22, Requested Financial Assistance, clarify
26 that the form of financial assistance that may be provided by

1 the bank is limited in accordance with other law and as set out
2 by Chapter 6. The existing rule incorrectly implies that there
3 is no limitation on the forms of financial assistance available.
4
5 Amendments to §6.23, Application Procedure, add to the
6 information that must be submitted with the application. The
7 requirements for additional information were added because a
8 more sophisticated analysis of the ability of an applicant to
9 repay is needed for the potentially large loans that will be
10 made from the bank using general obligation bond proceeds, and
11 the additional information is necessary to make such an
12 analysis. Section 6.23(a)(5) requires submission of the most
13 recent official statement for any outstanding debt of the
14 applicant payable from the revenue proposed to be used to repay
15 the financial assistance along with financial documents related
16 to that debt. Section 6.23(b)(1) makes mandatory, unless the
17 requirement is waived by the executive director as provided by
18 §6.23(c), the submission of a financial feasibility study that,
19 under the existing rules, need not be submitted unless
20 requested. Section 6.23(b)(1)(C) is amended to clarify and
21 modify what the pro forma analysis is required to show and to
22 add a requirement for a preliminary traffic and revenue study
23 for toll road projects so that the provision, as amended, will
24 help ensure the information received will be of the type and in
25 the form that is needed to enable the department to effectively
26 analyze financial feasibility. Section 6.23(b)(1)(G) is amended

1 to limit interest rate subsidies to economically disadvantaged
2 counties, cities within economically disadvantaged counties, or
3 another public entity that has within its boundary at least one
4 entire disadvantaged county. Section 6.23(b)(2) requires the
5 submission of the applicant's most recent annual budget, the
6 five most recent comprehensive annual reports or audits of the
7 applicant, the applicant's current capital planning document
8 that addresses uses of the revenue proposed to be used for
9 repayment of the financial assistance, and additional
10 information on any known environmental, social, economic, or
11 cultural resource issues, plus an explanation of the status of
12 obtaining environmental approvals. Section 6.23(c)(1) adds
13 whether the source of the financial assistance will be general
14 obligation bond proceeds as a factor the executive director is
15 to consider in deciding whether to waive submission of any item
16 of data required by the §6.23, because, if these proceeds are
17 the source, it is more likely that the information will be
18 needed.

19

20 New §6.24, Limitation on Applications - Loans from General
21 Obligation Bond Proceeds, adds a "program call" by which the
22 commission specifies the periods during which the department
23 will accept applications, requires that the department publish a
24 notice in the *Texas Register* soliciting applications, and
25 specifying that the notice shall contain: the period for
26 accepting applications, the estimated available amount of funds

1 in the bank, the conditions for the submission of applications,
2 and any other information the commission or the department
3 considers appropriate. This section is needed to ensure that
4 qualified applicants have an equal opportunity to have their
5 application considered by the commission in an orderly fashion,
6 rather than on a first-come, first-served basis that is
7 appropriate for the smaller loans made from sources other than
8 general obligation bond proceeds.

9
10 Current §6.24 is repealed and the language of that section is
11 readopted without change as §6.25 because of the addition of the
12 new §6.24.

13
14 Amendments to §6.31, Department Action, add a requirement that
15 the department advise an applicant of any required information
16 that is missing from the application and set out periods for
17 analysis of an application by the department. The analysis must
18 be completed in 30 days after the application process is
19 completed, but the executive director may extend the time by up
20 to 45 additional days if more time for analysis is needed. The
21 executive director may further extend the time if additional
22 time is needed because of the receipt of a substantial number of
23 applications within a short period of time. These changes are
24 made to provide definite time lines and an established process
25 for reviewing applications and to retain some flexibility when
26 extending the time is reasonable.

1
2 The amendments change the heading of §6.32 to "Commission Action
3 - Financial Assistance from Other Than General Obligation Bond
4 Proceeds" to clarify that the section does not apply to
5 financial assistance provided from the proceeds of general
6 obligation bonds, which is now covered by the new §6.33.

7
8 New §6.33, Commission Action - Loans from General Obligation
9 Bond Proceeds, sets out the requirements for preliminary and
10 final approval of such a loan. These new provisions establish
11 parameters and procedures for commission action on loans from
12 general obligation bond proceeds and are needed because the
13 existing parameters and procedures for providing financial
14 assistance from the bank are not appropriate for the larger,
15 more complex loans anticipated to be made from general
16 obligation bond proceeds.

17
18 New §6.33(a) sets out the factors to be considered by the
19 commission and the requirements that must be met prior to
20 granting preliminary approval, and, subject to §6.33(a)(4), the
21 minimum amount of bank capital to be allocated to each category
22 if there is insufficient capital to fund all of the qualifying
23 loan applications.

24
25 Under §6.33(a)(1), the commission, prior to granting preliminary
26 approval, will consider the need for and benefits of the

1 proposed project, the availability of funding from all sources,
2 the percentage of the project cost that will be covered by the
3 requested loan, the financial feasibility of the project, the
4 potential for leveraging the loan, including using secondary
5 funds as security for revenue bonds issued under Transportation
6 Code, §222.075, potential social, economic, and environmental
7 impacts of the project, the interoperability of the toll
8 collection system if the loan is for a toll project, evidence of
9 public support, and the applicant's experience.

10

11 New §6.33(a)(2) provides a framework for the allocation of bank
12 capital, and is intended to provide a basis for allocation if
13 there are insufficient funds to make loans to all applicants
14 with qualified projects. However, in order to give the
15 commission and the department additional flexibility in
16 allocating loan amounts for preliminary approval, §6.33(a)(3)
17 states that the minimum allocations are target allocations and
18 that the department may recommend and the commission may approve
19 applications that are not within the target allocations based on
20 the considerations set forth in §6.33(a)(1) if there are
21 insufficient applications in one of the categories or if the
22 department or the commission determines that a different
23 allocation is warranted. The target allocations for each
24 program call as provided for in §6.33(a)(2) are: (A) not less
25 than 25 percent to loans of sufficient credit quality to be the
26 security for, and source of repayment of, revenue bonds issued

1 under Transportation Code, §222.075, as determined by the
2 executive director; (B) not less than 25 percent to loans of
3 credit quality below that described in (A), as determined by the
4 executive director, such as loans that are subordinated to
5 existing or proposed debt for a project or of an applicant, if,
6 as determined by the commission, the loan is anticipated to be
7 refinanced by the applicant within three years of completion of
8 the project, or the loan is a part and represents not more than
9 20 percent of a larger financing that would not be feasible
10 unless the loan is made on a subordinate basis; and (C) of the
11 amount allocated subparagraph (A) or (B), not less than 10
12 percent shall be allocated to loans of \$4 million or less.

13

14 New §6.33(a)(4) sets out the minimum requirements for granting
15 of preliminary approval by the commission, including, to the
16 extent applicable, that the project is consistent with the
17 Statewide Transportation Plan, with the metropolitan
18 transportation plan developed by an MPO, the Statewide
19 Transportation Improvement Program, with the conforming plan and
20 Transportation Improvement Program for the MPO in which the
21 project is located, and with the State Implementation Plan; that
22 the project will improve the efficiency of the state's
23 transportation systems and expand the availability of funding
24 for transportation projects or reduce direct state costs; and
25 that the application shows that the project and the applicant
26 are likely to have sufficient revenues to assure repayment of

1 the loan. These provisions are consistent with requirements for
2 other department financial assistance programs.

3

4 New §6.33(a)(5) provides that, by granting preliminary approval,
5 the commission authorizes the executive director to take
6 specified actions that are necessary for the application to
7 receive final approval for funding of the loan, and without
8 which the commission would have insufficient basis for granting
9 final approval. The executive director will evaluate the
10 project and identify any adverse features, negotiate the amount,
11 type, and timing of loan disbursements, negotiate an interest
12 rate, repayment schedule, collateral securing the loan, and
13 default provisions, and negotiate provisions for subordination
14 of the loan to other debt of the project if authorized to do so
15 by the commission in the preliminary approval.

16

17 Under new §6.33(a)(6) if the executive director is seeking
18 changes to the limits, scope, design, or other aspects of the
19 project, the executive director must consider the applicant's
20 past experience with similar projects and whether the project is
21 intended to become part of the state highway system or otherwise
22 be subject to the jurisdiction of the department.

23

24 New §6.33(b) requires an applicant to complete the environmental
25 review, because delays in obtaining the required environmental
26 approvals delay the construction of a project and delay the use

1 of encumbered loan proceeds. For a toll project, §6.33(b)
2 requires an applicant to obtain an investment grade traffic and
3 revenue report for the project, because the ability of an
4 applicant to repay the loan will depend on toll revenues, making
5 a more sophisticated report important to the final approval.
6 Section 6.33(b)(2) gives the executive director the authority to
7 waive a requirement of subsection (b)(1) if the executive
8 director determines that the requirement is inapplicable or
9 unnecessary due to the nature of the requested assistance.
10
11 New §6.33(c) provides that the commission may grant final
12 approval after completion of negotiations and compliance with
13 the requirements of §6.33, if it determines that making the loan
14 will prudently provide for the protection of public funds and
15 the project will provide for all reasonable and feasible
16 measures to avoid, minimize, or mitigate environmental impacts.
17 Because the commission may desire to grant final approval only
18 if certain conditions are met or if certain changes are made to
19 the project, new §6.33(d) provides that the commission may make
20 its preliminary approval contingent on the applicant's making
21 changes or performing other acts, or establishing certain
22 conditions necessary to provide for the adequacy of any required
23 repayments and may make its final approval subject to the
24 applicant's fulfilling specified conditions precedent to the
25 release of loan funds. Since the financial viability of a toll
26 road project can be determined in advance only through a traffic

1 and revenue study and accurate cost information, §6.33(e)
2 provides that the commission may make its preliminary or final
3 approval contingent on the department's receiving an updated
4 traffic and revenue report and updated cost information showing
5 no changes have occurred that materially and adversely affect
6 the financial status of the project or the applicant.

7
8 Amendments to §6.41, Executive Director, change the section
9 title to Financial Assistance Agreements, designate the current
10 section as subsection (b), move language relating to financial
11 assistance from current §6.3, and add provisions that are
12 permissible for or required in financial assistance agreements.

13
14 New §6.41(a) provides that an agreement evidencing a loan or
15 other financial assistance may be in the form of a contract or
16 similar document, or may be in the form of a bond, note, or
17 other obligation issued by the applicant.

18
19 The language of current §6.3(f) is added as subsection (c). The
20 subsection requires repayment at the earliest possible time,
21 with an added exception allowing the commission to defer the
22 initial repayment of financial assistance for up to five years
23 after the date of initial funding of financial assistance to
24 give additional flexibility to make loans that meet the needs of
25 applicants.

26

1 New §6.41(d) requires interest to be paid semiannually on
2 February 1 and August 1, and principal to be paid on February 1.
3 New §6.41(e) allows prepayments without penalty on any February
4 1 or August 1 after the date specified in the financial
5 assistance agreement. These provisions allow repayments and
6 prepayments in a manner that is not as administratively complex
7 or inefficient as accepting those payments on any date.

8
9 New §6.41(f) adds terms for assistance from general obligation
10 bond proceeds, including requirements for a certified copy of
11 the resolution of the applicant, certificates relating to
12 federal tax and securities law and state law as specified by the
13 executive director, and, if requested by the executive director,
14 a bond counsel opinion and a certificate that the applicant will
15 make reasonable efforts to obtain the approval of the financial
16 assistance agreement by the Office of the Attorney General's
17 Public Finance Division, because these terms are necessary for
18 the loans to be eligible to secure revenue bonds.

19
20 New §6.41(g) requires the department to provide necessary,
21 reasonable, and customary assurances in the financial assistance
22 agreement if the assurances are consistent with the agreement
23 and are necessary for the applicant to obtain funding from other
24 sources.

25
26 Amendments to §6.42, Performance of Work, clarify that the

1 department and the applicant may agree for the department to
2 provide all or part of the work on a project. Section
3 6.42(a)(3) is amended to provide that disputes arising after the
4 execution of a financial assistance agreement concerning the
5 department's actions and decisions regarding the project may be
6 addressed and resolved as provided in the financial assistance
7 agreement. The provisions of §6.42(b) relating to work performed
8 by the applicant are deleted and replaced by new paragraphs (1)
9 - (7), which require the applicant to comply with applicable
10 state and federal law and the agreement; to maintain, with some
11 exceptions, its books and records in accordance with generally
12 accepted accounting principles; to have, for loans of greater
13 than \$1 million, a full audit and provide a copy of the report
14 to the department; to retain or cause the auditor to retain all
15 work papers and reports for at least four years and make them
16 available to the department; to retain all original project
17 files until the later of the time that the project is completed,
18 financial assistance has been repaid, or legally required
19 retention periods have passed, unless the department agrees to a
20 shorter period; and to maintain the project accordance with
21 §6.45 if it will become part of the state highway system and the
22 department will assume jurisdiction, and transfer the specified
23 information to the department when it assumes jurisdiction.
24 These changes are made to bring these provisions in line with
25 current department requirements in other programs in which the
26 department provides financial assistance to other governmental

1 entities. For loans of \$1 million or less, the previous
2 requirements in §6.42(b)(3) and (4) are retained and placed in
3 new §6.42(b)(4). With respect to the audit requirement of
4 §6.42(b)(3), it should be noted that, for a county that has
5 appointed an operating board and established a separate toll
6 operating entity under Transportation Code, Chapter 284, the
7 audit requirement applies to the toll operating entity rather
8 than to the county.

9
10 The amendments change the heading of §6.43 to "Design,
11 Construction, and Procurement Standards - Financial Assistance
12 from Other Than General Obligation Bond Proceeds" to indicate
13 that the section does not apply to financial assistance provided
14 from the proceeds of general obligation bonds, which is now
15 covered by the new §6.44.

16
17 Current §6.44, Maintenance and Operations, is repealed and
18 replaced with a new §6.44. New §6.44, Design and Construction -
19 Loans from General Obligation Bond Proceeds, sets out the
20 requirements for the design and construction of a project. New
21 §6.44(a) makes the applicant solely responsible for the design
22 and construction of the project, except to the extent the
23 department provides the work. New §6.44(b) requires project
24 plans and specifications to be in compliance with the design
25 manuals or American Association of State Highway and
26 Transportation Officials standards, unless an exception is

1 approved by the executive director after determining that the
2 particular criteria could not reasonably be met and that the
3 proposed design is a prudent engineering solution, or that the
4 deviation meets some other design criteria acceptable to the
5 department.

6
7 New §6.44(c) requires, for projects that will change access to
8 an interstate highway, that the applicant submit data necessary
9 for the department to request Federal Highway Administration
10 approval, and, when the design is 30 percent complete, that the
11 applicant submit design details including a completed design
12 summary report form; a design schematic; typical sections
13 showing dimensions, cross slopes, location of profile grade
14 line, pavement thickness and composition, and right of way
15 lines; bridge, retaining, and sound wall layouts; hydraulic
16 studies; anticipated handling of traffic during construction;
17 the structural capacity of each bridge; and the location and
18 text of mainlane guide signs. Section 6.44(c) further requires
19 that all plans, specifications, and estimates conform to the
20 latest version of the department's standard specifications, and,
21 if applicable, alternative specifications approved by the
22 executive director. Subsection (c) additionally requires that
23 the applicant must submit for approval final design plans and
24 contract administration procedures in accordance with the
25 financial assistance agreement, including seven copies of the
26 plans, specifications, and engineer's estimate (PS&E) with

1 summarized or highlighted revisions, showing the locations and
2 descriptions of all EPIC, and a proposal for bidding in
3 compliance with state and federal requirements. Subsection (c)
4 further requires that the applicant oversee construction
5 inspection and oversight, that all contract revisions comply
6 with the latest versions of applicable national or state
7 administration criteria and manuals, that as-build plans be
8 filed with the department, that all materials be delivered
9 electronically, if available, that the applicant provide or
10 obtain all required permits, plans, and other documentation, and
11 that all work on state right of way be done pursuant to written
12 agreement with the department. These added provisions are
13 appropriate for the larger loans anticipated to be made from
14 general obligation bond proceeds, and are consistent with
15 current department requirements in other programs in which the
16 department provides financial assistance to other governmental
17 entities.

18
19 Current §6.45, Financial and Credit Requirements, is repealed
20 and replaced with a new §6.45. New §6.45, Maintenance, allows
21 the department to require minimum maintenance standards, and
22 requires that all bridges be maintained in compliance with
23 applicable requirements and that the department perform safety
24 inspections of the bridges. New §6.45(c) requires the
25 department, in determining minimum maintenance standards, to
26 consider the applicant's past experience and whether the project

1 is intended to be subject to the jurisdiction of the department.
2 The new provisions are needed to have maintenance requirements
3 that are consistent with current department requirements in
4 other programs in which the department provides financial
5 assistance to other governmental entities.

6
7 Current §6.46, Other Requirements, is repealed as unnecessary
8 because the requirements of the section are addressed in other
9 sections and is replaced with a new §6.46. New §6.46, Financial
10 and Credit Requirements, requires an applicant to repay
11 financial assistance in accordance with the financial assistance
12 agreement; to submit annual and supplemental operating and
13 capital budgets within 30 days of their adoption; to submit to
14 the department, for all debt payable from the same revenue that
15 is to repay the financial assistance, annual financial
16 information and notices of material events within 30 days after
17 their submission to Electronic Municipal Market Access System
18 (EMMA) of the Municipal Securities Rulemaking Board, or advise
19 the department in writing that the submission to EMMA has been
20 made and provide in that writing the associated CUSIP number;
21 and to abide by provisions governing default. These provisions
22 are similar to those of the repealed §6.45, but are updated to
23 be consistent with current department requirements in other
24 programs in which the department provides financial assistance
25 to other governmental entities

26

1 COMMENTS

2 Comments on the proposed amendments, repeals, and new sections
3 were received from the North Texas Tollway Authority (NTTA).

4

5 Comment: NTTA recommended that environmental remediation and
6 mitigation be added to the list of eligible costs in Section
7 6.13(a).

8

9 Response: Texas Constitution, Article 3, Section 49-p and
10 Transportation Code, §222.004 generally limit the commission to
11 issuing general obligation bonds for the purpose of paying all
12 or part of the cost of highway improvement projects. Section
13 6.13(a) has been amended to clarify that other costs directly
14 resulting from the construction or reconstruction of a highway
15 improvement project may be paid for from the proceeds of these
16 bonds.

17

18 Comment: NTTA recommended that Section 6.13(b)(1) be modified
19 to provide that SIB loans may not be sold, assigned, or
20 otherwise conveyed to third parties, and that only the proceeds
21 from the repayment of loans, and not the loans themselves, may
22 be used to secure revenue bonds.

23

24 Response: The department does not have the authority to sell,
25 assign, or otherwise convey loans to third parties, but wants to
26 retain the flexibility to consider the sale of loans should the

1 department obtain that authority. No change will be made.
2 Section 6.13(b)(1) has been amended to provide that general
3 obligation bond proceeds may be used for a loan of sufficient
4 credit quality to allow secondary funds, including funds derived
5 from the repayment of a loan and investment income generated
6 from secondary funds deposited to the credit of the SIB, to be
7 the security for, and source of repayment of, revenue bonds
8 issued under Transportation Code, §222.075.

9
10 Comment: NTTA recommended that Section 6.13(c)(2) be modified
11 to provide that the proceeds of revenue bonds issued under
12 Transportation Code, §222.075 may only be used for the same
13 purposes of general obligation bond proceeds under Section
14 6.13(a).

15
16 Response: The General Appropriations Act, as amended by House
17 Bill 1, 81st Legislature, First Called Session, 2009,
18 appropriated \$1 billion of proceeds of the general obligation
19 bonds to be used to capitalize the bank for the purpose of
20 making loans to public entities. The limitation on making loans
21 to public entities for highway improvement projects by its terms
22 only applied to the proceeds of general obligation bonds, and
23 not to the proceeds of revenue bonds issued under Transportation
24 Code, §222.075. Section 6.13(c)(2) has been amended to limit
25 the use of repayments of loans to making new loans or securing
26 revenue bonds issued for the purpose of funding highway

1 improvement projects. Repayments of general obligation bonds
2 are considered to be legally limited to securing revenue bonds
3 for which the proceeds will also be used to fund highway
4 improvement projects.

5
6 Comment: NTTA recommended that Section 6.31(b) include a time
7 limit in the event the executive director needs additional time
8 to evaluate applications beyond the 75 days permitted in the
9 rule.

10
11 Response: The department recognizes the need to provide, to the
12 extent possible, certainty to applicants as to when a decision
13 on an application will be made. Once the program to provide
14 loans from the proceeds of general obligation bonds has been
15 established, the department will reevaluate the time limits to
16 evaluate an application, and make changes where appropriate. No
17 change will be made at this time.

18
19 Comment: NTTA notes that Section 6.33(a)(1)(E) permits the
20 commission to consider the potential for leveraging the loan in
21 making a decision to approve an eligible project. NTTA would
22 like to see language providing that leveraging the loan does not
23 include selling, assigning, or otherwise conveying the loan to
24 third parties, and that TxDOT may use the proceeds from the
25 repayment of loans, but not the loans themselves, to secure
26 revenue bonds.

1

2 Response: The department does not have the authority to sell,
3 assign, or otherwise convey loans to third parties, but wants to
4 retain the flexibility to consider the sale of loans should the
5 department obtain that authority. No change will be made.

6 Section 6.33(a)(1)(e) has been amended to provide that prior to
7 granting preliminary approval of an eligible project, the
8 commission will consider the potential for leveraging the loan,
9 such as by using secondary funds, including funds derived from
10 the repayment of a loan and investment income generated from
11 secondary funds deposited to the credit of the SIB, to be the
12 security for revenue bonds issued under Transportation Code,
13 §222.075.

14

15 Comment: NTTA notes that Section 6.42(a)(3) states that the
16 department's actions and decisions regarding a project for which
17 TxDOT is performing work shall not be contestable by the
18 applicant. NTTA suggests this provision apply only prior to the
19 execution of a financial assistance agreement. NTTA states that
20 disputes arising after execution of a financial assistance
21 agreement should be addressed in accordance with the terms of
22 the agreement, including any dispute resolution provisions.

23

24 Response: Section 6.42(a)(3) has been amended to provide that
25 disputes arising after the execution of a financial assistance
26 agreement concerning the department's actions and decisions

1 regarding the project may be addressed and resolved as provided
2 in the financial assistance agreement.

3

4 In addition to the changes to the proposed rules described
5 above, the cross reference in §6.42(b)(4)(B) was corrected and a
6 grammatical change was made in the last sentence of §6.44(b)(2).

7

8 STATUTORY AUTHORITY

9 The amendments, repeals, and new sections are adopted under
10 Transportation Code, §201.101, which provides the commission
11 with the authority to establish rules for the conduct of the
12 work of the department, and more specifically, Transportation
13 Code, §222.004, which authorizes the commission to issue general
14 obligation bonds for the purpose of paying all or part of the
15 cost of highway improvement projects, and Transportation Code,
16 §222.077, which authorizes the commission to adopt rules to
17 implement Transportation Code, Chapter 222, Subchapter D
18 relating to the state infrastructure bank.

19

20 CROSS REFERENCE TO STATUTE

21 Transportation Code, §222.004 and Chapter 222, Subchapter D.

1 SUBCHAPTER A. GENERAL PROVISIONS

2 §6.1. Purpose.

3 (a) Transportation Code, Chapter 222, Subchapter D,
4 establishes a state infrastructure bank as an account within the
5 state highway fund, to be administered by the Texas
6 Transportation Commission. Consistent with applicable legal
7 restrictions on its use, the [~~The~~] commission shall use money
8 deposited in the bank to:

9 (1) encourage public and private investment in
10 transportation facilities both within and outside of the state
11 highway system, including facilities that contribute to the
12 multimodal and intermodal transportation capabilities of the
13 state; and

14 (2) develop financing techniques designed to:

15 (A) expand the availability of funding for
16 transportation projects and to reduce direct state costs;

17 (B) maximize private and local participation in
18 financing projects; and

19 (C) improve the efficiency of the state transportation
20 system.

21 (b) This chapter specifies the procedures and conditions by
22 which an eligible entity may apply for and obtain financial
23 assistance from the bank.

1

2 §6.2. Definitions. The following words and terms, when used in
3 this chapter, shall have the following meanings, unless the
4 context clearly indicates otherwise.

5 (1) Bank--The state infrastructure bank account in the
6 state highway fund.

7 (2) Commission--The Texas Transportation Commission.

8 (3) Construction--A term as defined by Title 23, United
9 States Code, §101, and which includes preliminary studies
10 required to determine the feasibility of an eligible project.

11 (4) Department--The Texas Department of Transportation.

12 (5) Design manual--The latest editions of and successors
13 to all design manuals available from the department, including
14 the:

15 (A) Roadway Design Manual [~~operations and procedures~~
16 ~~manual of the design division~~];

17 (B) Environmental Affairs Division Operations and
18 Procedures Manual;

19 (C) Pavement Design Manual;

20 (D) [~~(B)~~] Bridge Design Manual [~~bridge operational~~
21 ~~planning manual of the design division~~];

22 (E) Bridge Project Development Manual;

23 (F) Bridge Geotechnical Manual;

1 (G) [(C)] Hydraulic Design Manual [~~hydraulic manual of~~
2 ~~the design division~~];

3 (H) [(D)] Texas Manual on Uniform Traffic Control
4 Devices;

5 (I) Project Development Process Manual;

6 (J) [(E)] standard highway sign designs for Texas; and

7 (K) [(F)] traffic control standard sheets booklet of
8 the traffic operations division.

9 (6) Environmental Permits, Issues, and Commitments
10 (EPIC)--Any permit, issue, coordination, commitment, or
11 mitigation obtained to satisfy social, economic, or
12 environmental impacts of a project, including sole source
13 aquifer coordination, wetland permits, stormwater permits,
14 traffic noise abatement, threatened or endangered species
15 coordination, archeological permits, and any mitigation or other
16 commitment associated with any of those issues.

17 (7) Interoperability--the ability of transponders used or
18 to be used by an applicant to be read and properly processed by
19 the transponder technology used by the department and other
20 governmental and private entities operating toll facilities in
21 this state, and the ability of the transponder technology used
22 or to be used by an applicant to read and properly process
23 information transmitted by transponders used by the department

1 and other governmental and private entities operating toll
2 facilities in this state.

3 (8) [~~(6)~~] Executive director--The executive director of
4 the Texas Department of Transportation, or his or her designee.

5 (9) [~~(7)~~] Expected financing period--The time taken to
6 fully pay any and all liabilities incurred to finance an
7 eligible project, including all extensions of time through
8 refunding or restructuring.

9 (10) [~~(8)~~] Federal Act--Section 350 of the National
10 Highway System Designation Act of 1995 (Public Law Number 104-
11 59) and all rules and regulations adopted under the Act.

12 (11) [~~(9)~~] Federal-aid highway--A term as defined in
13 Title 23, United States Code, §101.

14 (12) [~~(10)~~] Financial assistance--A term which may
15 include [~~includes~~], as applicable:

16 (A) extending credit by direct loan;

17 (B) providing credit enhancements;

18 (C) serving as a capital reserve for bond or debt
19 instrument funding;

20 (D) subsidizing interest rates;

21 (E) insuring the issuance of a letter of credit or
22 credit instrument;

23 (F) financing a purchase or lease agreement in

1 connection with a transit project;

2 (G) providing security for bonds and other debt
3 instruments; or

4 (H) providing methods of leveraging money that have
5 been approved by the United States Secretary of Transportation
6 and which relate to the project for which the assistance is
7 provided.

8 (13) General obligation bonds--Bonds, notes, or other
9 public securities issued by the commission under Transportation
10 Code, §222.004.

11 (14) [~~+11~~] Investment grade rating--Creditworthiness
12 sufficient to qualify a debt as eligible for commercial bank
13 investment under regulations issued by the Comptroller of the
14 Currency. For bonds, these debts are limited to ratings of
15 "AAA," "AA," "A," and "BBB" by Standard and Poor's Rating
16 Services or corresponding ratings used by other rating services.

17 (15) [~~+12~~] Metropolitan planning organization (MPO)--An
18 organization designated in certain urbanized areas to carry out
19 the transportation planning process as required by Title 23,
20 United States Code, §134.

21 (16) Program call--Commission action initiating the
22 period during which applications for loans from general
23 obligation bond proceeds will be accepted as described in §6.24

1 of this chapter (relating to Limitation on Applications - Loans
2 from General Obligation Bond Proceeds).

3 (17) [~~(13)~~] Secondary Funds--A term which includes:

4 (A) the repayment of a loan, including interest,
5 principal, fees, charges, or other assistance that is provided
6 with money deposited to the credit of the bank; and

7 (B) the investment income generated by secondary funds
8 deposited to the credit of the bank.

9 (18) [~~(14)~~] State Act--Transportation Code, Chapter 222,
10 Subchapter D, §222.071 et.seq., relating to a State
11 Infrastructure Bank.

12 (19) [~~(15)~~] Transit project--Capital expenditures
13 eligible for funding under Title 49, United States Code, §§5307,
14 5309, and 5311.

15 [~~(16) Unified Transportation Program, Construct and~~
16 ~~Develop designations That group of transportation programs for~~
17 ~~which the commission has authorized the department to prepare or~~
18 ~~complete plans, specifications, and estimates, or acquire right-~~
19 ~~of-way, or adjust utilities, or be let to contract.]~~

20

21 §6.3. General Policies.

22 (a) All actions of the bank will be in accordance with
23 applicable federal and state law, and applicable rules and

1 regulations.

2 (b) Grant financing will not be considered.

3 (c) The commission will ensure that the bank maintains on a
4 continuing basis an investment grade rating on its debt
5 issuances or has a sufficient level of bond or debt financing
6 instrument insurance to maintain the viability of the bank [~~No~~
7 ~~actions will be knowingly taken which would result in the bank's~~
8 ~~credit rating falling below investment grade].~~

9 [~~(d) If the bank's credit rating falls below investment~~
10 ~~grade, the commission will take actions necessary or appropriate~~
11 ~~to return the bank's credit rating as promptly as practicable to~~
12 ~~investment grade.]~~

13 [~~(e) The federal government shall not be obligated by any~~
14 ~~act of the commission or department under this chapter.]~~

15 [~~(f) Repayment of any financial assistance from the bank~~
16 ~~will commence at the earliest reasonable date consistent with~~
17 ~~applicable federal and state law, rules, and regulations. The~~
18 ~~term for repaying any financial assistance will not exceed 30~~
19 ~~years after the date of the first payment.]~~

20 (d) [~~(g)~~] The Federal Highway Administration, the Federal
21 Transit Administration, and the Comptroller General of the
22 United States, each if applicable, and the Texas State Auditor's
23 Office, and the department, or any of their authorized

1 representatives, shall have the right of access to any books,
2 documents, papers, or other records of the applicant which are
3 pertinent to any agreement, in order to make audits,
4 examinations, excerpts, and transcripts.

5 (e) [~~(h)~~] Federal funds received by the state under the
6 federal act, matching state funds in an amount required by that
7 act, proceeds from bonds issued under the state act, secondary
8 funds, other state funds deposited into the bank by order of the
9 commission, and other money received by the state that is
10 eligible for deposit in the bank, may be deposited into the
11 bank.

12
13 [~~§6.4. Applicability. The requirements of this chapter do not~~
14 ~~apply, and the commission may authorize the bank to provide~~
15 ~~financial assistance, to an eligible project for which an~~
16 ~~innovative financing proposal has been submitted by the~~
17 ~~department and approved by the Federal Highway Administration~~
18 ~~prior to September 1, 1997.~~]

19
20 §6.4 [~~§6.5~~]. Separate Subaccounts.

21 (a) The bank consists of the separate subaccounts specified
22 in this section [~~shall consist of at least two separate~~
23 ~~subaccounts, a highway subaccount and a transit subaccount~~].

1 (b) The bank contains a highway subaccount and a transit
2 subaccount, each of which is capitalized with federal funds or a
3 combination of state and federal funds.

4 (c) [(b)] In addition to the subaccounts described by
5 subsection (b) [under subsection (a)] of this section, the bank
6 contains a subaccount that is [commission may create one or more
7 subaccounts that are] capitalized with only the proceeds of
8 general obligation bonds and secondary funds derived from
9 repayments of loans made from general obligation bond proceeds
10 [state funds only]. This subaccount is [Subaccounts capitalized
11 with state funds only are] not subject to the federal act.

12 (d) The commission may create additional subaccounts
13 capitalized with state funds only. Additional subaccounts
14 capitalized with state funds only are not subject to the federal
15 act.

SUBCHAPTER B. ELIGIBILITY

§6.11. Eligible Entities. As provided by this chapter, a [A]
public or private entity authorized by law to construct,
maintain, or finance an eligible project is eligible to apply
for financial assistance under Subchapter C of this chapter
(relating to Procedures).

§6.12. Eligible Projects.

(a) Except as provided by §6.13 of this subchapter
(relating to Eligibility for Financial Assistance from General
Obligation Bond Proceeds), the [The] following public or private
projects are eligible for financial assistance:

(1) construction of a federal-aid highway, including
required preliminary studies;

(2) a transit project, but only to the extent of funds in
the bank that lawfully may be expended for a transit project; or

(3) for the expenditure of secondary funds, a transit
project including a project eligible for assistance under Title
49, United States Code, §5310, or the planning, development,
construction, maintenance, or operation of a public road,
provided that:

(A) the project is eligible for assistance under Title
23 or Title 49, United States Code; [~~and~~]

1 (B) the department is authorized by state law to
2 provide assistance for the project; and[-]

3 (C) if the project is a transit project, financial
4 assistance is limited to funds in the bank that lawfully may be
5 expended for a transit project.

6 (b) Financial assistance to a private entity shall be
7 limited to an eligible project that:

8 (1) provides transportation services or facilities that
9 provide a demonstrated public benefit; or

10 (2) is constructed or operated in cooperation with a
11 state agency or political subdivision in accordance with an
12 agreement between that state agency or political subdivision and
13 a private entity.

14 (c) Financial assistance to a public or private entity
15 shall be limited, as applicable, to an eligible project that is
16 consistent with the transportation plan developed by the
17 metropolitan planning organization.

18

19 §6.13. Eligibility for Financial Assistance from General
20 Obligation Bond Proceeds.

21 (a) General. General obligation bond proceeds may be used
22 only to provide to public entities direct loans to pay costs of
23 highway improvement projects on or off of the state highway

1 system, including acquisition of the highway, construction,
2 reconstruction, and major maintenance, including any necessary
3 design, the acquisition of rights-of-way, and other costs
4 directly resulting from the construction or reconstruction of a
5 highway improvement project.

6 (b) Loan categories. General obligation bond proceeds may
7 be used for the following categories of loans:

8 (1) a loan of sufficient credit quality to allow
9 secondary funds to be the security for, and source of repayment
10 of, revenue bonds issued under Transportation Code, §222.075, as
11 determined by the executive director;

12 (2) a loan of credit quality below that described in
13 paragraph (1) of this subsection, as determined by the executive
14 director, such as loans that are subordinated to existing or
15 proposed debt for a project or of an applicant, if, as
16 determined by the commission:

17 (A) the loan is anticipated to be refinanced by the
18 applicant within three years of completion of the project;

19 (B) the loan is a part and represents not more than 20
20 percent of a larger financing, and the larger financing would
21 not be feasible unless the loan is made on a subordinate basis;
22 or

23 (C) the loan is in the amount of \$4 million or less.

1 (c) Eligibility - secondary funds. Secondary funds derived
2 from repayments of loans made from general obligation bond
3 proceeds may only be used:

4 (1) to make loans in the same manner and subject to the
5 same provisions of this chapter as loans made from general
6 obligation bond proceeds; or

7 (2) to secure, including as reserves, revenue bonds
8 issued under Transportation Code, §222.075 for the purpose of
9 funding highway improvement projects.

10 (d) Required ratings on other debt. All senior or parity
11 debt payable from the same revenue that would secure the loan,
12 including any senior or parity debt that will be part of the
13 financing of the project for which the loan has been requested,
14 but excluding loans for the project received under the
15 Transportation Infrastructure Finance and Innovation Act or
16 under a successor or similar federal program, must have an
17 investment grade rating.

SUBCHAPTER C. PROCEDURES

1
2 §6.21. Department Contact. The director of the department's
3 finance division, or that director's designee, is the [~~The~~
4 ~~executive director will designate a~~] contact within the
5 department for the purpose of providing information and
6 assistance to potential applicants. Assistance may include non-
7 binding advice, counsel, and consultation regarding all aspects
8 of a possible eligible project. If the executive director
9 determines that the project is otherwise eligible for
10 assistance, that the department is authorized by state law to
11 provide assistance, and that department resources are available,
12 the department may provide engineering and other technical
13 assistance to aid potential applicants in developing an
14 application. Any advice, assistance, or aid provided will not
15 constitute a commitment or liability on the part of the
16 department or the commission. Potential applicants are
17 encouraged to communicate with the contact at the earliest
18 possible date.

19
20 §6.22. Requested Financial Assistance. An applicant may
21 request any form of financial assistance authorized by this
22 chapter, but the form of financial assistance provided from
23 general obligation bond proceeds, money from the state highway

1 fund that is dedicated under state law, and potentially other
2 sources, is limited as provided by this chapter and other law.

3 [~~In general, all requests for financial assistance shall be~~
4 ~~treated as requests for the use of specific sums of money from~~
5 ~~the bank for certain periods of times at stated interest rates~~
6 ~~with scheduled repayments of principal, interest, and any~~
7 ~~appropriate charges or fees.]~~

8

9 §6.23. Application Procedure.

10 (a) Basic application. An eligible entity must submit an
11 application to the executive director in a form prescribed by
12 the department. The application must be accompanied by:

13 (1) an overview of the project, including a description
14 of the project, the total cost of the project, and the proposed
15 use of the requested financial assistance;

16 (2) the amount of money required to supply the requested
17 assistance, including any reserve funds that must be established
18 and held by the bank for the applicant's benefit, but that may
19 not be expended from the bank;

20 (3) any proposed pledge of collateral or security and any
21 prior claim to those items;

22 (4) a description of the need for the project and its
23 potential effect on traffic congestion and mobility; [~~and~~]

1 (5) the most recent official statement for any
2 outstanding debt of the applicant payable from the revenue
3 proposed to be used to repay the financial assistance, along
4 with the financial documents related to that debt, including any
5 master and supplemental resolutions, indentures of trust, and
6 authorizing resolutions, ordinances, or orders, unless
7 previously provided [~~the latest bond rating obtained by the~~
8 ~~applicant when using the sources of revenue to be pledged~~], or
9 if not applicable, other evidence of creditworthiness, provided
10 that the entity may provide any of the information described by
11 this paragraph electronically instead of with the application;

12 (6) official written approval of the project by the
13 governing body of each entity that may become liable for
14 repayment of any financial assistance;

15 (7) a binding commitment that the environmental
16 consequences of the proposed project will be fully considered,
17 and that the proposed project will comply with all applicable
18 local, state, and federal environmental laws, regulations, and
19 requirements;

20 (8) for public roadway projects, a preliminary design
21 study, including:

22 (A) an initial route and potential alignments; and

23 (B) revisions or changes to state highway system

1 facilities necessitated by the project; and

2 (9) for transit projects, a preliminary scope study,
3 including preliminary layouts, architectural drawings, equipment
4 specifications, and other information necessary to describe the
5 project fully and to comply with all requirements of the Federal
6 Transit Administration.

7 (b) Supplemental information and data. Except as provided
8 in subsection (c) of this section, the applicant shall submit
9 the [~~The applicant may be required to submit any or all of the~~
10 ~~following~~] supplemental information and data required by this
11 subsection. [~~if the executive director finds that information or~~
12 ~~data to be relevant to the project and the requested financing.~~
13 ~~In determining the relevance of supplemental information and~~
14 ~~data, the executive director will consider the complexity and~~
15 ~~size of the project, the type of infrastructure or asset~~
16 ~~involved, the type and complexity of financial assistance~~
17 ~~requested, the complexity of the project's and the applicant's~~
18 ~~financial status, and how soon transportation benefits will~~
19 ~~begin.~~]

20 (1) Financial feasibility study. The applicant shall
21 [~~may be required to~~] submit a financial feasibility study that
22 includes [~~, including~~]:

23 (A) a project construction or asset acquisition

1 schedule identifying the timing, amount, and source of all funds
2 [~~cash~~] required;

3 (B) an analysis of the expected financing period of the
4 project;

5 (C) a pro forma annual cash flow analysis [~~based on~~
6 ~~generally accepted accounting principles~~] for the expected
7 financing period of the project showing [~~, including~~]:

8 (i) anticipated revenues to be used in repayment by
9 source, including a preliminary traffic and revenue study,
10 acceptable to the executive director, for toll roads;

11 (ii) anticipated disbursements [~~by category,~~
12 ~~including disbursements~~] for preliminary studies and
13 engineering, construction, EPIC, right of way acquisition,
14 utility adjustments, operations, and maintenance[~~, renewal, and~~
15 ~~replacement~~];

16 [~~(iii) anticipated balances at the close of each~~
17 ~~calendar or fiscal year; and~~]

18 (iii) [~~(iv)~~] funds used to meet the requirements of
19 any sinking funds, reserve funds, and amortization payments; and

20 (iv) loan (debt service) coverage ratios and
21 associated cash flow surpluses or deficits;

22 (D) a description of the methods used in preparing the
23 financial feasibility study, the assumptions contained in the

1 study, and persons responsible for the preparation of the study;

2 (E) the length of time the amounts will be outstanding
3 or obligated;

4 (F) the anticipated interest rates applicable during
5 the term of the financial assistance;

6 (G) any interest rate subsidies requested by: [÷]

7 (i) an economically disadvantaged county, as defined
8 in Transportation Code, §222.053;

9 (ii) a city located wholly or partially within an
10 economically disadvantaged county; or

11 (iii) another public entity within whose boundary is
12 at least one entire disadvantaged county;

13 (H) the expected savings to the applicant resulting
14 from the assistance; and

15 (I) a description of how the requested assistance will:

16 (i) expand the availability of funding for
17 transportation projects;

18 (ii) reduce direct state costs;

19 (iii) maximize private and local participation in
20 financing projects;

21 (iv) improve the efficiency of the state's
22 transportation systems; and

23 (v) accelerate the project's transportation benefits

1 over conventional financing methods.

2 (2) Other financial information. The applicant shall
3 submit the following information, if the information is not
4 provided with the feasibility study:

5 (A) the applicant's most recent annual budget;

6 (B) the five most recent comprehensive financial
7 reports or audits of the applicant;

8 (C) the current capital planning document that
9 addresses uses of the revenue proposed to be used for repayment
10 of the financial assistance;

11 (D) the most recent rating agency report on the credit
12 of the applicant, if any;

13 (3) [~~+2~~] Project impacts. The applicant shall submit
14 [~~may be required to conduct studies analyzing the impact of the~~
15 project, including]:

16 (A) information explaining how the project will be
17 consistent with the Statewide Transportation Plan and, if
18 appropriate, with the metropolitan transportation plan [~~(MTP)~~]
19 developed by an MPO;

20 (B) if the project is in a Clean Air Act non-attainment
21 area, information explaining how the project will be consistent
22 with the Statewide Transportation Improvement Program [~~(STIP)~~],
23 with the conforming plan and Transportation Improvement Program

1 [~~(TIP)~~] for the MPO in which the project is located (if
2 necessary), and with the State Implementation Plan [~~(SIP)~~];

3 (C) a preliminary identification of any known
4 environmental, social, economic, or cultural resource issues,
5 such as hazardous material sites, impacts on wetlands and other
6 water resources, endangered species, parks, neighborhoods,
7 businesses, historic buildings or bridges, and archeological
8 sites; and [~~the economic impact based on a study assessing the~~
9 ~~potential impact of the project on the economy of the region in~~
10 ~~which the project is to be located, including the economies of~~
11 ~~each county in which the project is to be located and of the~~
12 ~~municipalities within those counties;~~]

13 (D) an explanation of the status of obtaining an
14 environmental approval under Chapter 2, Subchapter A of this
15 title (relating to Environmental Review and Public Involvement
16 For Transportation Projects) and of obtaining any other required
17 environmental permits. [~~a preliminary identification of~~
18 ~~potential social, economic, and environmental impacts; and]~~

19 [~~(E) appropriate documentary evidence of community~~
20 ~~involvement in the development of the proposed project and of~~
21 ~~public support for it.]~~

22 (c) Waiver of required information or data. The executive
23 director may waive submission of any individual item of

1 information or data required by this section under either of the
2 following circumstances:

3 (1) the information or data is not relevant to the
4 project, applicant, or financial assistance requested (in
5 determining the relevance of supplemental information and data,
6 the executive director will consider the complexity and size of
7 the project, the type of infrastructure or asset involved, the
8 type and complexity of financial assistance requested, the
9 complexity of the project's and the applicant's financial
10 status, whether the source of the financial assistance will be
11 general obligation bond proceeds, and how soon transportation
12 benefits will begin); or

13 (2) the department already possesses information or data
14 in a format that can be substituted for the required information
15 or data.

16 (d) Requirement of additional information. The executive
17 director may require the applicant to submit explanations and
18 expansions of information or data required by this section. In
19 determining when additional relevant explanations and expansions
20 of information or data will be required, the executive director
21 will consider the complexity and size of the project, the type
22 of infrastructure or asset involved, the type, complexity, and
23 amount of financial assistance requested, and the complexity of

1 the project's and the applicant's financial status.

2

3 §6.24. Limitation on Applications - Loans from General
4 Obligation Bond Proceeds.

5 (a) Program call. The commission shall specify the periods
6 during which the department will accept applications for loans
7 to be funded from general obligation bond proceeds and, for each
8 specific period, prescribe conditions for submission of the
9 applications.

10 (b) Publication of notice. Upon the commission's
11 determination under subsection (a) of this section, the
12 department will publish a notice in the *Texas Register*
13 soliciting applications for loans to be funded from general
14 obligation bond proceeds. The notice will specify:

15 (1) the period during which the department will accept
16 applications under the notice;

17 (2) the estimated amount of funds in the bank that can be
18 allocated to applications submitted under the notice;

19 (3) the conditions for the submission of applications
20 prescribed by the commission; and

21 (4) any other information the commission or department
22 considers appropriate.

23

1 §6.25 [~~§6.24~~]. Suspension of Applications. If the commission
2 determines that bank funding is fully committed or other
3 uncertainties exist which warrant suspension of acceptance of
4 applications, the department may publish a notice in the *Texas*
5 *Register* providing that applications will no longer be accepted.
6 When conditions change, the commission shall publish a notice in
7 the Texas Register that applications are again being accepted.

1 SUBCHAPTER D. DEPARTMENT AND COMMISSION ACTION

2 §6.31. Department Action.

3 (a) Review of application [~~Notification~~]. The department
4 will review an [~~the~~] application submitted under Subchapter C of
5 this chapter (relating to Procedures) and advise the applicant
6 of any required information or data that is missing. When the
7 application is complete, the department will so notify the
8 applicant.

9 (b) Analysis. Within 30 days after the date that notice of
10 completion is sent under subsection (a) of this section, the
11 [~~The~~] executive director will perform an analysis of the
12 application and prepare [~~to support~~] findings and
13 recommendations for the commission. The executive director, by
14 notifying the applicant, may extend the 30-day period for up to
15 45 additional days if additional time is needed to analyze the
16 application and prepare the findings and recommendations. If
17 after the extension of the period additional time is still
18 needed because of the receipt of a substantial number of
19 applications within a short period of time, the executive
20 director may extend the time for analysis of the applications
21 and preparation of findings and recommendations for an
22 additional period. If the application is for a loan to be
23 funded from general obligation bond proceeds, the findings and

1 recommendations will address each of the considerations and
2 requirements for preliminary approval specified in §6.33(a)(1)
3 and (4) of this subchapter (relating to Commission Action -
4 Loans from General Obligation Bond Proceeds). [~~The executive~~
5 ~~director will submit the application together with findings and~~
6 ~~recommendations to the commission.~~]

7 (c) Submission to commission. Upon completion of the
8 analysis, the executive director will submit the application
9 together with findings and recommendations to the commission for
10 consideration at the first regular commission meeting held after
11 the 30th day following the day that the executive director gives
12 the submission to the commission.

13

14 §6.32. Commission Action - Financial Assistance from Other Than
15 General Obligation Bond Proceeds.

16 (a) Commission analysis. The commission will consider all
17 relevant information, including the sufficiency of the
18 information, the probable reliability of the projections, and
19 the anticipated financial condition of the applicant and the
20 project.

21 (b) Applications for limited financial assistance.

22 (1) Applications for financial assistance in the amount
23 of \$250,000 or less may be approved by the commission without

1 going through both the preliminary and final approval processes
2 prescribed in subsections (c) and (e) of this section. These
3 applications may be approved by the commission using one final
4 approval process.

5 (2) Applications under this subsection must meet all the
6 requirements and are subject to all the conditions applicable
7 either to preliminary or final approval of financial assistance,
8 except that the negotiation process under subsection (c)(3) of
9 this section may be completed after final approval.

10 (3) The commission may require applications under this
11 subsection to receive preliminary and final approval separately.
12 In making this determination, the commission will consider the
13 complexity and size of the project, the type of infrastructure
14 or asset involved, and the complexity of the project's and the
15 applicant's financial status.

16 (c) Preliminary approval.

17 (1) Considerations. Prior to granting preliminary
18 approval of an eligible project, the commission may consider:

19 (A) whether the project is on the state highway system;

20 (B) the transportation need for and anticipated public
21 benefit of the project;

22 (C) the present and projected financial condition of
23 the bank;

1 (D) potential social, economic, and environmental
2 impacts;

3 (E) conformity with the purposes of the bank;

4 (F) evidence of local public support; and

5 (G) any other relevant consideration.

6 (2) Project requirements. The commission may grant
7 preliminary approval to a project for bank financing if it finds
8 that:

9 (A) the project is consistent with the Statewide
10 Transportation Plan and, if appropriate, with the metropolitan
11 transportation plan [~~MTP~~] developed by an MPO;

12 (B) if the project is in a Clean Air Act non-attainment
13 area, the project will be consistent with the Statewide
14 Transportation Improvement Program [~~STIP~~], with the conforming
15 plan and Transportation Improvement Program [~~TIP~~] for the MPO
16 in which the project is located (if necessary), and with the
17 State Implementation Plan [~~SIP~~];

18 (C) the project will improve the efficiency of the
19 state's transportation systems;

20 (D) the project will expand the availability of funding
21 for transportation projects or reduce direct state costs; and

22 (E) the application shows that the project and the
23 applicant are likely to have sufficient revenues to assure

1 repayment of the financial assistance.

2 (3) Authorized actions. By granting preliminary
3 approval, the commission authorizes the executive director to
4 negotiate:

5 (A) the project's limits, scope, definition, design,
6 and any other factors that may affect [~~effeet~~] the financing of
7 the project;

8 (B) the amount, type, and timing of disbursements of
9 financial assistance;

10 (C) the interest rates, including subsidies;

11 (D) the fees;

12 (E) the charges;

13 (F) the repayment schedules;

14 (G) the term to maturity of any financial assistance;

15 (H) the collateral securing the financial assistance;

16 (I) the appropriate covenants applicable to the
17 financial assistance;

18 (J) the default provisions; and

19 (K) all other provisions necessary to complete an
20 agreement under Subchapter E of this chapter (relating to
21 Financial Assistance Agreements).

22 (d) Social, economic, and environmental impact.

23 (1) Before final approval is granted under subsection (e)

1 of this section, the department or the applicant must complete a
2 study of the social, economic, and environmental impact of the
3 project. The study must meet all requirements for a federal or
4 state project as if the project had been undertaken directly by
5 the department.

6 (2) For a project not on the state highway system, the
7 applicant shall be responsible for completing required studies
8 of social, economic, and environmental impacts, unless the
9 applicant and the department agree otherwise. If the department
10 agrees to be responsible for these studies, then any costs will
11 be charged according to the department's local participation
12 agreement.

13 (3) For a project on the state highway system, the
14 department will be responsible for completing required studies
15 of social, economic, and environmental impacts with any costs to
16 be charged to the project.

17 (e) Final approval. After preliminary approval under
18 subsection (c) of this section, the completion of negotiations
19 under subsection (c)(3) of this section, and the approval of the
20 social, economic, and environmental study required by subsection
21 (d) of this section, the commission may grant final approval if
22 it determines that:

23 (1) providing financial assistance will protect the

1 public's safety and prudently provide for the protection of
2 public funds, while furthering the purposes of this chapter; and

3 (2) the project will provide for all reasonable and
4 feasible measures to avoid, minimize, or mitigate for adverse
5 environmental impacts.

6 (f) Postponement. The commission may postpone final
7 approval if it finds that the current or projected financial
8 condition of the bank warrants this action.

9 (g) Contingencies. The commission may make its preliminary
10 or final approval contingent on further actions by the
11 applicant, including making changes in the application, levying
12 taxes, and maintaining specified conditions necessary to assure
13 repayment.

14 (h) Order of approval or disapproval. Approval or
15 disapproval of financial assistance, whether preliminary or
16 final, will be by written order of the commission and will
17 include the rationale, findings, and conclusions on which
18 approval or disapproval is based. Approval or disapproval will
19 be in the sole discretion of the commission, and nothing in this
20 subchapter is intended to require approval of any financial
21 assistance.

22

23 §6.33 Commission Action - Loans from General Obligation Bond

1 Proceeds.

2 (a) Preliminary approval.

3 (1) Considerations. Prior to granting preliminary
4 approval of an eligible project, the commission will consider:

5 (A) the transportation need for and anticipated public
6 benefit of the project, including factors such as the project's
7 potential ability to accelerate needed transportation facilities
8 or to reduce financial and other burdens on the commission and
9 the department regarding the development, operation, and
10 maintenance of those facilities;

11 (B) availability of funding from all sources;

12 (C) the percentage of the total project cost that is
13 represented by the requested loan;

14 (D) the financial feasibility of the project;

15 (E) the potential for leveraging the loan, including
16 using secondary funds as security for revenue bonds issued under
17 Transportation Code, §222.075;

18 (F) potential social, economic, and environmental
19 impacts of the project;

20 (G) for a toll project, the extent to which the
21 applicant's toll collection system or plan for a toll collection
22 system provides interoperability;

23 (H) evidence of local public support; and

1 (I) the applicant's past experience with similar
2 projects and past performance working in collaboration with the
3 department in the development of similar projects, if
4 applicable.

5 (2) Allocation of bank capital. For each program call,
6 if there is insufficient bank capital to fund all of the
7 qualifying loan applications, the commission shall, subject to
8 paragraph (3) of this subsection, allocate the available bank
9 capital as follows:

10 (A) not less than 25 percent to the category of loan
11 described in §6.13(b)(1) of this chapter (relating to
12 Eligibility for Financial Assistance from General Obligation
13 Bond Proceeds);

14 (B) not less than 25 percent to the category of loan
15 described in §6.13(b)(2) of this chapter; and

16 (C) of the amounts allocated in subparagraphs (A) and
17 (B) of this paragraph, not less than 10 percent of each amount
18 shall be allocated to loans of \$4 million or less within the
19 category.

20 (3) Allocations as targets. The allocations set forth in
21 paragraph (2) of this subsection are target allocations and the
22 department may recommend and the commission may approve
23 applications that are not within the target allocations if

1 applications in one of the categories are insufficient to use
2 the bank capital for that category or if, based on the
3 considerations set forth in paragraph (1) of this subsection,
4 the department or the commission determine that a different
5 allocation is warranted.

6 (4) Project requirements. The commission may grant
7 preliminary approval of a project for financing if it finds
8 that:

9 (A) the project is consistent with the Statewide
10 Transportation Plan and, if appropriate, with the metropolitan
11 transportation plan developed by an MPO;

12 (B) if the project is in a nonattainment area, the
13 project will be consistent with the Statewide Transportation
14 Improvement Program, with the conforming plan and Transportation
15 Improvement Program for the MPO in which the project is located
16 (if necessary), and with the State Implementation Plan;

17 (C) the project will improve the efficiency of the
18 state's transportation systems;

19 (D) the project will expand the availability of funding
20 for transportation projects or reduce direct state costs; and

21 (E) the application shows that the project and the
22 applicant are likely to have sufficient revenues to assure
23 repayment of the loan according to the terms of the agreement.

1 (5) Authorized actions. By granting preliminary
2 approval, the commission authorizes the executive director to:

3 (A) evaluate the project's limits, scope, definition,
4 design, and other features, and identify any that adversely
5 affect the financing of the project, including EPIC, and
6 determine whether to negotiate changes in accordance with
7 paragraph (6) of this subsection;

8 (B) negotiate the amount, type, and timing of
9 disbursements of the loan;

10 (C) negotiate an interest rate, a repayment schedule,
11 collateral securing the loan, including any reserve, and default
12 provisions;

13 (D) negotiate provisions providing for the
14 subordination of loan financing provided under this chapter to
15 any other debt financing for the project, whether the other
16 financing is currently in place or will be incurred concurrently
17 with the loan or after the loan is made, but only if authority
18 to negotiate those provisions is provided to the executive
19 director in the preliminary approval and if subordination is
20 necessary for the project's financial feasibility; and

21 (E) negotiate all other provisions that are necessary
22 to complete an agreement under this chapter.

23 (6) Factors for changes to project's features. In

1 determining the extent to which the executive director will seek
2 changes to the features described in paragraph (5)(A) of this
3 subsection, the executive director will consider:

4 (A) the applicant's past experience with similar
5 projects; and

6 (B) whether the project is intended to become part of
7 the state highway system or otherwise be subject to the
8 jurisdiction of the department.

9 (b) Environmental documents; traffic and revenue report.

10 (1) Prior to receiving final approval under subsection
11 (c) of this section for the loan of funds for the construction
12 of a project, the applicant shall:

13 (A) complete the environmental review and public
14 involvement requirements in Chapter 2, Subchapter A of this
15 title (relating to Environmental Review and Public Involvement
16 for Transportation Projects); and

17 (B) for a toll project, obtain an investment grade
18 traffic and revenue report for the project from a nationally
19 recognized traffic engineer.

20 (2) The executive director may waive the requirements of
21 paragraph (1)(A) or (B) of this subsection if he or she
22 determines that the study or report is inapplicable or
23 unnecessary due to the nature of the requested assistance.

1 (c) Final approval. After preliminary approval, completion
2 of negotiations, and compliance with this section, the
3 commission may grant final approval if it determines that:

4 (1) making the loan will prudently provide for the
5 protection of public funds; and

6 (2) the project will provide for all reasonable and
7 feasible measures to avoid, minimize, or mitigate adverse
8 environmental impacts.

9 (d) Contingencies - general. The commission may make its
10 preliminary approval contingent on the applicant's making
11 changes, performing other acts, or establishing certain
12 conditions necessary to provide for the adequacy of any required
13 repayments. The commission may make its final approval subject
14 to the applicant's fulfilling specified conditions precedent to
15 the release of loan funds and, if so, the conditions precedent
16 will also be in the financial assistance agreement. The
17 necessity and nature of the changes, acts, or conditions under
18 this subsection will be determined after considering the
19 applicant's past experience with similar projects and past
20 performance working in collaboration with the department in the
21 development of similar projects, especially with regard to the
22 applicant's previous use of the commission's financial
23 assistance.

1 (e) Contingencies - toll projects. The commission may make
2 its preliminary or final approval contingent on the department's
3 receiving updated cost information and an update of the traffic
4 and revenue report required by subsection (b) of this section
5 that together show no changes have occurred that materially and
6 adversely affect the financial status of the project or the
7 applicant. If this contingency is in the final approval it will
8 also be in the financial assistance agreement as a condition
9 precedent to funding the loan.

1 SUBCHAPTER E. FINANCIAL ASSISTANCE AGREEMENTS

2 §6.41. Financial Assistance Agreements [~~Executive Director~~].

3 [~~The executive director will negotiate the terms of agreements~~
4 ~~deemed necessary to comply with any requirements of preliminary~~
5 ~~approval, to protect the public's safety, and to prudently~~
6 ~~provide for the protection of public funds while furthering the~~
7 ~~purposes of this chapter. These agreements shall include, but~~
8 ~~not be limited to, terms provided for in this subchapter, as~~
9 ~~applicable to the nature of the project.~~]

10 (a) Form of agreement. An agreement evidencing a loan or
11 other financial assistance may be in the form of a contract or
12 similar document, or may be in the form of a bond, note, or
13 other obligation issued by the applicant.

14 (b) Negotiation of terms. The executive director will
15 negotiate the terms of agreements deemed necessary to comply
16 with any requirements of preliminary approval, to protect the
17 public's safety, and to prudently provide for the protection of
18 public funds while furthering the purposes of this chapter.
19 These agreements shall include, but not be limited to, terms
20 provided for in this subchapter, as applicable to a particular
21 project.

22 (c) Initial repayment date. Unless the commission defers
23 the beginning of repayment, repayment of any financial

1 assistance from the bank will begin on the earliest reasonable
2 date consistent with applicable federal and state law, rules,
3 and regulations. If approved by the commission, the initial
4 repayment of financial assistance may be deferred to the date
5 specified by the commission, which may not be later than the
6 fifth anniversary of the date of the initial funding of the
7 financial assistance. The term for repaying any financial
8 assistance will not exceed 30 years after the date of the first
9 scheduled payment.

10 (d) Payment dates. Interest shall be paid semiannually, on
11 February 1 and August 1. Principal shall be paid annually on
12 February 1. If a date for payment is not a business day the
13 payment shall be made on the next following business day.

14 (e) Prepayments. Principal and interest may be prepaid
15 without penalty on the first business day of any February or
16 August as provided in, and after the date specified in, the
17 financial assistance agreement.

18 (f) Terms for assistance from general obligation bond
19 proceeds. Agreements for loans from general obligation bond
20 proceeds also must require that the applicant will provide:

21 (1) a certified copy of the resolution of the applicant,
22 in the form specified by the executive director, authorizing
23 execution of the financial assistance agreement and containing,

1 if applicable, covenants relating to the status of the
2 applicant's repayment obligation in relation to federal tax law;

3 (2) any other certification of the applicant concerning
4 federal tax law, federal securities law, and state law in
5 relation to authorization of the financial assistance agreement
6 as specified by the executive director;

7 (3) if requested by the executive director, a bond
8 counsel opinion from a recognized bond counsel in a form
9 satisfactory to the executive director;

10 (4) a certification that the applicant will, if requested
11 by the executive director, cooperate with the department and
12 make all reasonable efforts requested by the department for
13 obtaining the approval of the financial assistance agreement by
14 the Public Finance Division of the Office of the Attorney
15 General of the State of Texas.

16 (g) Assurances. The department will provide in a financial
17 assistance agreement assurances that are reasonably and
18 customarily required by the applicant and that are necessary for
19 obtaining financing for, developing, or operating a particular
20 project, if, in the department's reasonable judgment, the
21 assurances are consistent with the agreement.

22

23 §6.42. Performance of Work.

1 (a) Work performed by the department. The department and
2 the applicant may agree that the department will, consistent
3 with state law, [~~may in its discretion and consistent with state~~
4 ~~law,~~] provide all or part of the work connected with the project
5 in the department's normal course of business. For work
6 performed by the department, the following provisions will
7 apply.

8 (1) The department will account for all costs of the
9 project in the normal course of business in accordance with
10 applicable law. Financial assistance proceeds shall not be used
11 to pay for project costs incurred prior to execution of the
12 financial assistance agreement.

13 (2) The department will make progress payments or set
14 aside funds from the bank on behalf of the applicant as the
15 department deems necessary. Such actions shall bind the
16 applicant to repayment according to the terms of the
17 agreement(s). Interest shall accrue from the date of the
18 payment or setting aside of funds.

19 (3) The department's actions and decisions regarding the
20 project shall not be contestable by the applicant, except as
21 expressly provided in the financial assistance agreement.

22 (4) The applicant shall provide the department, and if
23 applicable, the Federal Highway Administration, and the Federal

1 Transit Administration, or their authorized representatives as
2 applicable, with right of entry or access to all properties or
3 locations necessary to perform activities required to execute
4 the work, inspect the work or aid otherwise in the prompt
5 pursuit of the work.

6 (b) Work performed by applicant. [~~The department may, in~~
7 ~~its discretion and consistent with state law, provide that the~~
8 ~~applicant conduct all or part of the work connected with the~~
9 ~~project.~~]For work performed by the applicant, the following
10 provisions apply.

11 (1) The applicant shall comply with applicable state and
12 federal law, and with all terms and conditions of an applicable
13 agreement. If approval or concurrence of the Federal Highway
14 Administration, the Federal Transit Administration, or any other
15 federal agency is required, the department may require that the
16 applicant seek that approval or concurrence through the
17 department. [~~The applicant shall comply with applicable~~
18 ~~requirements of the federal act, Title 23, United States Code,~~
19 ~~Title 49, United States Code, other applicable state and federal~~
20 ~~law, and all terms and conditions of any agreements. Where~~
21 ~~approval or concurrence of the Federal Highway Administration,~~
22 ~~the Federal Transit Administration, or other federal agency is~~
23 ~~required, the applicant shall seek such action through the~~

1 ~~department. The applicant shall reimburse the department for~~
2 ~~any loss of federal funds to the department resulting from the~~
3 ~~applicant's failure to comply.]~~

4 (2) The applicant shall maintain its books and records in
5 accordance with generally accepted accounting principles in the
6 United States, as promulgated by the Governmental Accounting
7 Standards Board, the Financial Accounting Standards Board, or
8 pursuant to applicable federal or state laws or regulations, and
9 with all other applicable federal and state requirements,
10 subject to any exceptions required by existing bond indentures
11 of the applicant that are applicable to the project, and any
12 exceptions the applicant has historically implemented that have
13 been acceptable to the public debt markets. [~~The applicant shall~~
14 ~~maintain project records and accounts in accordance with~~
15 ~~generally accepted accounting principles, and all applicable~~
16 ~~federal and state requirements.]~~

17 (3) For loans of more than \$1 million, the applicant
18 shall, at the applicant's cost, have a full audit of its books
19 and records performed annually by an independent certified
20 public accountant selected by the applicant and reasonably
21 acceptable to the department. The audit must be conducted in
22 accordance with generally accepted auditing standards
23 promulgated by the Financial Accounting Standards Board, the

1 Governmental Accounting Standards Board, or the standards of the
2 Office of Management and Budget Circular A-133, Audits of
3 States, Local Governments and Non-profit Organizations, as
4 applicable, and with all other applicable federal and state
5 requirements. The applicant shall cause the auditor to provide
6 a full copy of the audit report and any other management letters
7 or auditor's comments directly to the department within a
8 reasonable period of time after they have been provided to the
9 governing body of the applicant. [~~The applicant shall, at the~~
10 ~~applicant's cost and in a format prescribed by the department,~~
11 ~~submit an annual report to the department listing project~~
12 ~~expenditures, providing an accounting of financial assistance~~
13 ~~proceeds, and providing any other information requested by the~~
14 ~~department.~~]

15 (4) For loans of \$1 million or less, the applicant shall:
16 [~~In addition to the annual report, the applicant shall, on~~
17 ~~request of the department and at the applicant's cost, provide a~~
18 ~~report containing the same or similar information as required in~~
19 ~~the annual report under subsection (b)(3) of this section or~~
20 ~~information relating to project expenditures that the applicant~~
21 ~~is required to provide to another local, state, or federal~~
22 ~~agency.~~]

23 (A) at the applicant's cost and in a format prescribed

1 by the department, submit an annual report to the department
2 listing project expenditures, providing an accounting of
3 financial assistance proceeds, and providing any other
4 information requested by the department;

5 (B) on request of the department and at the applicant's
6 cost, provide a report containing the same or similar
7 information as required in the annual report under paragraph
8 (4)(A) of this subsection or information relating to project
9 expenditures that the applicant is required to provide to
10 another local, state, or federal agency;

11 (C) hold all project records, accounts, and supporting
12 documents open for state or federal audits until project
13 completion; and

14 (D) forward to the department, upon completion of the
15 project, all project files and reports as requested by the
16 department.

17 (5) If required to have an audit under paragraph (3) of
18 this subsection, the applicant shall retain, or cause the
19 auditor to retain, all work papers and reports until the fourth
20 anniversary of the date of the audit report, unless the
21 department notifies the applicant in writing of a later date for
22 the end of the retention period. During the retention period,
23 the applicant shall make audit work papers available to the

1 department within 30 days of the date that the department
2 requests those papers. [~~The applicant shall hold all project~~
3 ~~records, accounts, and supporting documents open for state or~~
4 ~~federal audits until project completion.~~]

5 (6) Unless the department in writing provides a shorter
6 period, the applicant shall retain all original project files,
7 records, accounts, and supporting documents until the later of
8 the date that: [~~Upon completion of the project, the applicant~~
9 ~~shall forward to the department all project files and reports as~~
10 ~~requested by the department. The department shall retain these~~
11 ~~files until all financial assistance has been repaid and any~~
12 ~~necessary audits have been performed.~~]

13 (A) project is completed;

14 (B) all financial assistance under this chapter has
15 been repaid, if applicable; or

16 (C) the retention period required by applicable federal
17 and state law ends.

18 (7) If a project will become a part of the state highway
19 system and the department will assume jurisdiction of the
20 project, the applicant shall ensure that the project, including
21 all its components and appurtenances, is maintained in
22 accordance with §6.45 of this subchapter (relating to
23 Maintenance). The applicant shall transfer all design data,

1 surveys, construction plans, right of way maps, utility permits,
2 and agreements with other entities relating to the project to
3 the department when the department assumes jurisdiction of the
4 project. [~~Financial assistance proceeds shall not be used to pay~~
5 ~~for project costs incurred prior to execution of the financial~~
6 ~~assistance agreement.~~]

7

8 §6.43. Design, Construction, and Procurement Standards -
9 Financial Assistance from Other Than General Obligation Bond
10 Proceeds.

11 (a) Plans and specifications. For federal-aid and state
12 highway improvement projects, plans and specifications must be
13 in compliance with the design manuals and the latest version of
14 the department's standard specifications for construction of
15 highways, streets, and bridges. All construction plans shall be
16 signed and dated by a professional engineer registered in Texas.

17 (b) Change orders. The department may require standards
18 and procedures to be used in making any design change orders.

19 (c) Transit projects. Transit projects must comply with
20 all requirements established under §§31.42-31.47 of this title
21 (relating to Program Administration).

22

23 §6.44. Design and Construction - Loans from General Obligation

1 Bond Proceeds.

2 (a) Responsibility.

3 (1) Except to the extent the department and the applicant
4 have agreed in writing that the department will provide all or
5 part of the work connected with the project, as provided in
6 §6.42 of this subchapter (relating to Performance of Work), the
7 applicant is solely responsible for the design and construction
8 of the project, including:

9 (A) ensuring that all EPIC are addressed in the project
10 design;

11 (B) assessing field changes for potential environmental
12 impacts; and

13 (C) obtaining any necessary EPIC required for field
14 changes.

15 (2) All construction plans must be signed, sealed, and
16 dated by a professional engineer licensed in Texas.

17 (b) Design criteria.

18 (1) Plans and specifications. Project plans and
19 specifications must be in compliance with either the latest
20 version of the design manuals or the latest version of the
21 American Association of State Highway and Transportation
22 Officials (AASHTO) standards, including the AASHTO Policy on
23 Geometric Design of Highways and Streets, the AASHTO Pavement

1 Design Guide, and the AASHTO Bridge Design Specifications.

2 (2) Exceptions to design criteria. An applicant may
3 request approval to deviate from the required design criteria
4 for a particular design element on a case-by-case basis. The
5 request for approval must state the criteria for which an
6 exception is being requested and must include a comprehensive
7 description of the circumstances and engineering analysis
8 supporting the request. The executive director may approve an
9 exception request after determining that the particular criteria
10 could not reasonably be met due to physical, environmental, or
11 other relevant factors and that the proposed design is a prudent
12 engineering solution, or that the deviation meets some other
13 design criteria acceptable to the department. In making a
14 determination under this paragraph, the executive director shall
15 consider whether the project is intended to become part of the
16 state highway system or otherwise be subject to the jurisdiction
17 of the department, and the applicant's experience with similar
18 projects.

19 (c) Project development.

20 (1) Access. For proposed projects that will change the
21 access to an interstate highway, the applicant shall submit to
22 the department all data necessary for the department to request
23 Federal Highway Administration approval.

1 (2) Preliminary design submission and approval. When
2 design is approximately 30 percent complete, the applicant shall
3 send to the department for review and approval in accordance
4 with the procedures and time line established in the financial
5 assistance agreement:

6 (A) a completed design summary report form as contained
7 in the department's Project Development Process Manual or an
8 equivalent document as contained in or authorized by another
9 appropriate department manual;

10 (B) a design schematic depicting plan, profile, and
11 superelevation information for each roadway;

12 (C) typical sections showing existing and proposed
13 horizontal dimensions, cross slopes, location of profile grade
14 line, pavement layer thickness and composition, earthen slopes,
15 and right of way lines;

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

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

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

22 (G) if a structure meeting the definition of a bridge
23 as defined by the National Bridge Inspection Standards is

1 proposed, an indication of structural capacity in terms of
2 design loading;

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

8 (I) the location and text of proposed mainlane guide
9 signs shown on a schematic that includes lane miles or arrows
10 indicating the number of lanes.

11 (3) Construction specifications.

12 (A) All plans, specifications, and estimates developed
13 by or on behalf of the applicant must conform to the latest
14 version of the department's Standard Specifications for
15 Construction and Maintenance of Highways, Streets, and Bridges,
16 and to all alternative specifications applicable under
17 subparagraph (B) of this paragraph.

18 (B) The executive director may approve the use of an
19 alternative specification if the proposed specification is
20 determined to be sufficient to ensure the quality and durability
21 of the finished product for the intended use and the safety of
22 the traveling public. In deciding whether to approve the use of
23 an alternative specification, the executive director shall

1 consider whether the project is intended to become part of the
2 state highway system or otherwise to be subject to the
3 jurisdiction of the department, and the applicant's experience
4 with similar projects.

5 (4) Submission and approval of final design plans and
6 contract administration procedures. When final plans are
7 complete, the applicant shall send to the executive director for
8 review and approval in accordance with the procedures and time
9 line established in the financial assistance agreement:

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

13 (B) summarized or highlighted revisions to information
14 provided with the preliminary design submission;

15 (C) a proposal necessary for bidding the project in
16 compliance with applicable state and federal requirements;

17 (D) contract administration procedures containing
18 criteria that comply with the applicable national or state
19 administration criteria and manuals; and

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

22 (5) Contract bidding and award. The applicant may not
23 advertise the project for receipt of bids until it has received

1 approval of the PS&E from the department. Procedures relating
2 to bidder qualification, bidding, award, and execution of a
3 contract for the development and maintenance of a project that
4 is financed with state or federal funds must comply with:

5 (A) the policies and procedures prescribed in Chapter
6 9, Subchapter B of this title (relating to Highway Improvement
7 Contracts); or

8 (B) policies and procedures that comply with the
9 applicable requirements of federal law and with the applicable
10 requirements of state law that are intended to ensure fair and
11 open competition.

12 (6) Construction inspection and oversight. The applicant
13 shall oversee all construction operations, including the
14 oversight and follow-through with all EPIC. Inspection and
15 project oversight shall be performed in accordance with
16 requirements prescribed in the financial assistance agreement.

17 (7) Contract revisions. All contract revisions must
18 comply with the latest version of the applicable national or
19 state administration criteria and manuals. The applicant shall
20 submit all contract revisions to the department for its records.
21 The applicant shall submit any revision that affects prior
22 environmental approvals or significantly revises the project
23 scope or the geometric design to the executive director and must

1 receive the executive director's approval before the revised
2 construction work may begin. Procedures governing the executive
3 director's approval, including time limits for department
4 review, shall be included in the financial assistance agreement.

5 (8) As-built plans. On completion of construction of the
6 project, the applicant shall file with the department a set of
7 the as-built plans incorporating all contract revisions. The
8 plans must be signed, sealed, and dated by a licensed
9 professional engineer in Texas, who certifies that the project
10 was constructed in accordance with the plans and specifications.

11 (9) Document and information exchange. If available, the
12 applicant shall deliver electronically to the department all
13 materials used in the development of the project including, but
14 not limited to, aerial photography, computer files, surveying
15 information, engineering reports, environmental documentation,
16 general notes, specifications, and contract provision
17 requirements.

18 (10) State and federal law. The applicant shall comply
19 with all federal and state laws and regulations applicable to
20 the project, and shall provide or obtain all applicable permits,
21 plans, and other documentation required by a federal, state, or
22 local governmental entity.

23 (11) Work on state right of way. All work required

1 within the limits of state owned right of way shall be
2 accomplished only pursuant to express written agreement with the
3 department.

4
5 [~~§6.44. Maintenance and Operations.~~]

6 [~~(a) Maintenance. When funds for repayment are derived from~~
7 ~~fees or tolls on the project, or the project or asset is~~
8 ~~collateral for the financial assistance, the department may:]~~

9 [~~(1) require standards and procedures to be used in~~
10 ~~maintenance of the project:]~~

11 [~~(2) monitor.~~]

12 [~~(b) Speed limits. If applicable, speed limits shall be~~
13 ~~posted in accordance with procedures used by the department for~~
14 ~~the state highway system, but in no case shall such limits~~
15 ~~exceed the maximum prima facie speed limits prescribed by state~~
16 ~~law for a public road having the same characteristics.]~~

17
18 §6.45. Maintenance.

19 (a) The department may require minimum specific standards
20 and procedures to be used in maintenance of the project during
21 the term of financial assistance.

22 (b) All structures defined as a bridge by the National
23 Bridge Inspection Standards shall be maintained in compliance

1 with applicable state and federal requirements. The department
2 will perform safety inspections of these structures in
3 accordance with federal requirements.

4 (c) In establishing the standards and procedures described
5 in subsection (a) of this section, if any, or in considering
6 exceptions to the standards and inspection procedures described
7 in subsection (b) of this section, the department shall
8 consider:

9 (1) the applicant's past experience with similar projects
10 (if applicable); and

11 (2) whether the project is intended to become part of the
12 state highway system or otherwise to be subject to the
13 jurisdiction of the department.

14

15 [~~§6.45. Financial and Credit Requirements. The applicant shall~~
16 ~~agree to:~~]

17 [~~(1) provide collateral and security for repayment, or~~
18 ~~other protections as the executive director may deem necessary;~~]

19 [~~(2) repay the financial assistance at specified interest~~
20 ~~rates over specified time periods according to repayment~~
21 ~~schedules and including agreed upon bank fees or compensation;~~]

22 [~~(3) abide by provisions governing default;~~]

23 [~~(4) submit reports and have periodic audits in~~

1 ~~compliance with all applicable federal and state requirements or~~
2 ~~as requested by the department; and]~~

3 ~~[(5) reimburse the department for all costs or losses of~~
4 ~~funds resulting from a failure to perform by the applicant.]~~

5
6 §6.46. Financial and Credit Requirements. An applicant
7 receiving financial assistance under this chapter shall:

8 (1) repay the financial assistance at the specified
9 interest rate over a specified period as provided in the
10 financial assistance agreement;

11 (2) submit to the department within 30 days of the date
12 of their adoption the annual operating and capital budgets
13 adopted by the applicant each fiscal year under a trust
14 agreement or indenture or equivalent document securing bonds
15 issued for a project, and any amended or supplemental operating
16 or capital budget, approved by the governing body of the
17 applicant and certified as correct by its chief administrative
18 officer or chief financial officer;

19 (3) for all debt payable from the same revenue that is to
20 repay the financial assistance, within 30 days after the date of
21 submission to the Electronic Municipal Market Access System
22 (EMMA) of the Municipal Securities Rulemaking Board of annual
23 financial information and notices of material events required to

1 be disclosed under Rule 15c2-12 of the United States Securities
2 and Exchange Commission (17 C.F.R. §240.15c2-12), submit the
3 information or notice to the department or advise the department
4 in writing that the submission to EMMA has been made and provide
5 in that writing the associated CUSIP number; and
6 (4) abide by provisions governing default.

7
8 [~~§6.46. Other Requirements. Depending on the facts and~~
9 ~~circumstances of each project, the applicant, and type of~~
10 ~~financial assistance provided, the executive director may~~
11 ~~require additional terms and conditions necessary to protect the~~
12 ~~public safety, prudently provide for the protection of public~~
13 ~~funds, and further the purposes and requirements of this~~
14 ~~chapter.]~~