

TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

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ALL Districts

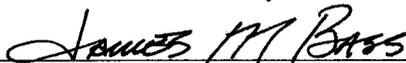
The Texas Transportation Commission (commission) finds it necessary to propose amendments to §15.86, Conflict of Interest and §15.90, Reports and Audits, and new §15.95, Toll Project Corporations, relating to Transportation Corporations, to be codified under Title 43, Texas Administrative Code, Part 1.

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

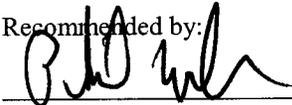
IT IS THEREFORE ORDERED by the commission that the amendments to §15.86 and §15.90 and new §15.95 are proposed for adoption and are authorized for publication in the *Texas Register* for the purpose of receiving public comments.

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

Submitted and reviewed by:


Chief Financial Officer

Recommended by:


Executive Director

112934 DEC 15 11

Minute Number Date Passed

1 Proposed Preamble

2 The Texas Department of Transportation (department) proposes
3 amendments to §15.86, Conflict of Interest and §15.90, Reports
4 and Audits, and new §15.95, Toll Project Corporations, all
5 concerning Transportation Corporations.

6

7 EXPLANATION OF PROPOSED AMENDMENTS AND NEW SECTION

8 The department is currently undertaking competitive procurements
9 for public-private partnership agreements for the portion of the
10 Grand Parkway project in Harris and Montgomery counties and the
11 I-35E project in Dallas and Denton counties. Those projects
12 could potentially be developed under design-build contracts and
13 financed in part through the issuance of toll revenue bonds,
14 notes, or other obligations. New §15.95 authorizes the
15 commission to create a transportation corporation for the
16 purpose of developing, financing, designing, constructing,
17 reconstructing, expanding, operating, or maintaining a
18 department toll project. The corporation could contract
19 directly for those services, or could be assigned existing
20 department contracts. A toll equity loan commitment to pay for
21 eligible project costs could be made to a corporation, which
22 could allow the corporation to issue more debt than could
23 otherwise be issued, and at a lower cost. This will allow the
24 corporation to construct additional needed projects.

25

26 The amendments to §15.86 make certain changes relating to the

1 eligibility of a person to act as a director of a transportation
2 corporation as a result of legislation moving the responsibility
3 for the regulation of automobile dealers to the Texas Department
4 of Motor Vehicles. The amendments to §15.90 make certain
5 changes relating to the reports to be submitted to the
6 department and the commission by a transportation corporation,
7 and to the content and timing of the submission of the required
8 annual financial audit of a transportation corporation. The
9 amendments to §15.90 are intended to make the reporting process
10 more efficient while providing the commission and the department
11 with the information needed to ensure the proper operation of a
12 transportation corporation and development of department
13 projects.

14
15 Section 15.86 is amended to remove the prohibition on a person
16 serving as a director of a transportation corporation if that
17 person or the person's spouse is an officer, employee, or paid
18 consultant of a Texas trade association of automobile dealers.
19 The commission and the department no longer regulate automobile
20 dealers.

21
22 Section 15.90 is amended to remove the requirement for a
23 transportation corporation to submit a quarterly financial
24 report to the department. The information in that report is
25 provided to the department in the annual financial audit.
26 Section 15.90 is also amended to require the semi-annual project

1 status report to be submitted quarterly during the construction
2 of a project. Section 15.90 is amended to no longer require the
3 corporation to appear before the commission annually to report
4 on its condition, status of projects, and activities during the
5 preceding 12 months. That information would have to be
6 submitted in a written report to the commission, and the
7 commission could require the corporation to appear before the
8 commission to discuss the report.

9
10 Section 15.90 is amended to require the annual financial audit
11 to be submitted within 120 days after the end of the state
12 fiscal year, rather than 90 days, and to require the audit to
13 include a statement regarding the transportation corporation's
14 compliance with the Public Funds Investment Act, as applicable.

15
16 New §15.95 authorizes the creation of a corporation for the
17 purpose of acting for or on behalf of the commission by
18 developing, financing, designing, constructing, reconstructing,
19 expanding, operating, or maintaining a toll project, as defined
20 by Transportation Code, §201.001, or a system of toll projects.
21 The creation, dissolution, and all powers, duties, and functions
22 of a corporation are governed by the Transportation Corporation
23 Act, and by the Nonprofit Corporations Act, as provided in the
24 Transportation Corporation Act. The other sections of the
25 department's rules relating to transportation corporations do
26 not apply, except as provided by §15.95.

1
2 Section 15.95 requires a corporation to submit to the executive
3 director for approval a contract for the financing, development,
4 design, construction, reconstruction, expansion, operation, or
5 maintenance of a project before the execution of the contract.
6 A corporation is also required to submit to the executive
7 director for approval all procurement documents associated with
8 such a contract before the issuance of those documents. A
9 corporation may not issue a request for qualifications or
10 request for proposals for the construction, reconstruction,
11 expansion, operation, or maintenance of a project until the
12 corporation is authorized to do so by the commission.

13
14 Section 15.95 provides that a corporation may enter into an
15 agreement with the department that identifies the
16 responsibilities of each party for the development, financing,
17 design, construction, reconstruction, expansion, operation, or
18 maintenance of a project, and that defines the support to be
19 provided to the corporation by the department. This would
20 include the department's obligations in connection with
21 providing a corporation a toll equity loan, such as oversight
22 and inspection of construction, operations, and maintenance.

23
24 Section 15.95 provides that a corporation may assign a contract,
25 including a contract described in §15.95(c), to another party
26 for the benefit of a creditor, including the holders of bonds,

1 notes, or other obligations issued by the corporation, and
2 provides that the department may assign to a corporation a
3 department contract for the design, construction,
4 reconstruction, expansion, operation, or maintenance of a
5 project for which the corporation was created.

6
7 Section 15.95 provides that a corporation may borrow money and
8 the department may lend money to a corporation pursuant to state
9 law, including making a loan to a corporation under
10 Transportation Code, §222.103 to pay for or reimburse project
11 costs. Section 15.95 requires a loan made by the department to
12 be approved by the commission, but provides that such a loan is
13 not subject to 43 TAC Chapter 27, Subchapter E, which relates to
14 Financial Assistance for Toll Facilities.

15
16 Section 15.95 provides that only a full-time, permanent employee
17 of the department may be appointed or serve as a director or a
18 corporation, provides that §15.86 applies to the directors and
19 employees of a corporation created under §15.95, and provides
20 that §15.90 applies to a corporation created under §15.95.

21
22 FISCAL NOTE
23 James Bass, Chief Financial Officer, has determined that for
24 each of the first five years the amendments and new section as
25 proposed are in effect, there will be no fiscal implications for
26 state or local governments as a result of enforcing or

1 administering the amendments and new section.

2

3 Mr. Bass has certified that there will be no significant impact
4 on local economies or overall employment as a result of
5 enforcing or administering the amendments and new section.

6

7 PUBLIC BENEFIT AND COST

8 Mr. Bass has also determined that for each year of the first
9 five years the amendments and new section are in effect, the
10 public benefit anticipated as a result of enforcing or
11 administering the amendments and new section will be, for any
12 toll project developed by a transportation corporation with the
13 support of a toll equity loan from the department, the lowering
14 of the cost of financing the project and the resultant lowering
15 of the total cost of the project to the state. There are no
16 anticipated economic costs for persons required to comply with
17 the sections as proposed. There will be no adverse economic
18 effect on small businesses.

19

20 SUBMITTAL OF COMMENTS

21 Written comments on the proposed amendments to §15.86 and §15.90
22 and new §15.95 may be submitted to James Bass, Chief Financial
23 Officer, Texas Department of Transportation, 125 East 11th
24 Street, Austin, Texas 78701-2483. The deadline for receipt of
25 comments is 5:00 p.m. on January 30, 2012.

26

1 STATUTORY AUTHORITY

2 The amendments and new section are proposed under Transportation
3 Code, §201.101, which provides the commission with the authority
4 to establish rules for the conduct of the work of the
5 department, and more specifically, Transportation Code,
6 §431.023, which authorizes the commission to approve the
7 creation of a transportation corporation.

8

9 CROSS REFERENCE TO STATUTE

10 Transportation Code, Chapter 431.

1 SUBCHAPTER H. TRANSPORTATION CORPORATIONS

2 §15.86. Conflict of Interest.

3 (a) Prohibited conduct for directors and employees. Each
4 director or employee of a corporation may not:

5 (1) accept or solicit any gift, favor, or service that
6 might reasonably tend to influence a director or an employee in
7 the discharge of official duties or that the director or
8 employee knows or should know is being offered with the intent
9 to influence the director's or employee's official conduct;

10 (2) accept other employment or engage in a business or
11 professional activity that the director or employee might
12 reasonably expect would require or induce the director or
13 employee to disclose confidential information acquired by reason
14 of the official position;

15 (3) accept other employment or compensation that could
16 reasonably be expected to impair the director's or employee's
17 independence of judgment in the performance of the director's or
18 employee's official duties;

19 (4) make personal investments that could reasonably be
20 expected to create a substantial conflict between the director's
21 or employee's private interest and the interest of the
22 corporation;

23 (5) intentionally or knowingly solicit, accept, or agree

1 to accept any benefit for having exercised the director's or
2 employee's official powers or performed the director's or
3 employee's official duties in favor of another; or

4 (6) have a personal interest in an agreement executed by
5 the corporation.

6 (b) Eligibility of directors and chief administrative
7 officer.

8 (1) A person is not eligible to serve as a director or
9 chief administrative officer of a corporation if the person or
10 the person's spouse:

11 (A) is employed by or participates in the management of
12 a business entity or other organization that is regulated by or
13 receives funds from the department;

14 (B) directly or indirectly owns or controls more than
15 10% interest in a business entity or other organization that is
16 regulated by or receives funds from the department;

17 (C) uses or receives a substantial amount of tangible
18 goods, services, or funds from the department; or

19 (D) is required to register as a lobbyist under
20 Government Code, Chapter 305, because of the person's activities
21 for compensation on behalf of a profession related to the
22 operation of the department.

23 (2) A person is not eligible to serve as a director or

1 chief administrative officer of a corporation if the person is
2 an officer, employee, or paid consultant of a Texas trade
3 association in the field of road construction or maintenance,
4 aviation, or outdoor advertising [~~or a Texas trade association~~
5 ~~of automobile dealers~~], or if the person's spouse is an officer,
6 manager, or paid consultant of a Texas trade association in the
7 field of road construction or maintenance, aviation, or outdoor
8 advertising [~~or a Texas trade association of automobile~~
9 ~~dealers~~].

10 (3) Except as provided in §15.85(b)(3) of this title
11 (relating to Board of Directors), a person is eligible to serve
12 as a director or chief administrative officer of a corporation
13 if the person has received funds from the department as
14 compensation for acquisition of highway right of way.

15

16 §15.90. Reports and Audits.

17 (a) Written reports.

18 [~~(1) Financial report. Except as provided in paragraph~~
19 ~~(4) of this subsection, a corporation shall submit a quarterly~~
20 ~~financial report after the end of each of the state's fiscal~~
21 ~~quarters. The quarterly financial report must include a balance~~
22 ~~sheet as of the end of the quarter and a fiscal year to date~~
23 ~~statement of revenues, expenditures, and changes in fund balance~~

1 ~~prepared in accordance with generally accepted accounting~~
2 ~~practices.]~~

3 (1) [~~(2)~~] Project status report. Except as provided in
4 paragraph (3) [~~(4)~~] of this subsection, for each transportation
5 project, the corporation shall submit a quarterly [~~semi-annual~~]
6 project status report after the end of each of the [~~mid point of~~
7 ~~the~~] state's fiscal quarters during the construction of the
8 project [~~year and after the end of the state's fiscal year~~],
9 that must include, at a minimum:

10 (A) the scope of work authorized by the commission;

11 (B) the work that has been accomplished in that
12 quarter;

13 (C) the anticipated completion date of the project, as
14 well as anticipated completion dates for various segments of the
15 project, if applicable;

16 (D) the status of coordinating activities with other
17 governmental entities and with railroads, utilities and others;

18 (E) project fiscal data, including funds received,
19 expended, available, and projected completion costs; and

20 (F) comments on significant accomplishments, problems,
21 and concerns of the corporation.

22 (2) [~~(3)~~] Certification. Reports submitted under this
23 subsection must be approved by official action of the board and

1 certified as correct by the president of the corporation
2 [~~Corporation~~].

3 (3) [~~(4)~~] Inactivity. If [~~no financial activity has~~
4 ~~taken place or~~] the project status has not changed in the
5 preceding period, the corporation may submit, in lieu of the
6 quarterly [~~financial report and semi-annual~~] project status
7 report, a certification stating that no activity has taken
8 place.

9 (4) [~~(5)~~] Submission dates. Reports or the certification
10 required by this subsection must be submitted to the executive
11 director within 60 days after the end of each of the state's
12 fiscal quarter.

13 (b) Annual commission report. Every 12 months, the
14 corporation shall submit to [~~appear before~~] the commission a
15 [~~to~~] report on its current condition, status of projects, and
16 activities undertaken the preceding 12 months, and shall be
17 available to appear before the commission, at the commission's
18 discretion, to discuss the report.

19 (c) Annual audits. The corporation [~~Corporation~~] shall
20 submit reports of an annual financial audit in accordance with
21 this subsection.

22 (1) Submission date. The annual audit shall be submitted
23 to the executive director within 120 [~~90~~] days after the end of

1 the state's fiscal year (August 31).

2 (2) Certification. The audit must be conducted by an
3 independent certified public accountant in accordance with
4 generally accepted auditing standards. The accompanying
5 financial report shall be prepared according to pronouncements
6 by the Government Accounting Standards Board.

7 (3) Content. The audit shall include, at a minimum:

8 (A) an evaluation of the corporation's internal
9 accounting system and controls;

10 (B) a statement regarding the corporation's compliance
11 with the guidelines established by the commission for its
12 operation, including both the positive and negative compliance
13 (summary of all instances of noncompliance, if any, must be
14 included);

15 (C) a statement regarding the corporation's compliance
16 with the Public Funds Investment Act, Government Code, Chapter
17 2256, as applicable;

18 (D) [~~(C)~~] a complete recapitulation of the
19 corporation's income and expenditures as well as assets and
20 liabilities; and

21 (E) [~~(D)~~] an unqualified certification by the certified
22 public accountant.

23 (4) Paperwork retention period. All work papers and

1 reports shall be retained for a minimum of four years from the
2 date of the audit report, unless the certified public accountant
3 is notified by the department in writing, to extend the
4 retention period.

5 (5) Availability of audit work papers. If requested by
6 the department, audit work papers shall be made available to the
7 executive director at the completion of the audit.

8 (d) Other reports. The corporation will provide other
9 reports and information regarding the corporation promptly when
10 requested by the executive director.

11

12 §15.95. Toll Project Corporations.

13 (a) The commission by order may authorize the creation of a
14 corporation under the Act for the purpose of acting for or on
15 behalf of the commission by developing, financing, designing,
16 constructing, reconstructing, expanding, operating, or
17 maintaining a toll project, as defined by Transportation Code,
18 §201.001, or a system of toll projects.

19 (b) The creation, dissolution, and all powers, duties, and
20 functions of a corporation are governed by the Act and the
21 Nonprofit Corporations Act, Business Organizations Code, Chapter
22 22, as provided in the Act. The other sections of this
23 subchapter do not apply, except as provided by this section.

1 (c) A corporation shall submit to the executive director
2 for approval a contract for the development, financing, design,
3 construction, reconstruction, expansion, operation, or
4 maintenance of a project before the execution of the contract.

5 A corporation shall also submit to the executive director for
6 approval all procurement documents associated with such a
7 contract before the issuance of those documents. A corporation
8 may not issue a request for qualifications or request for
9 proposals for the construction, reconstruction, expansion,
10 operation, or maintenance of a project until the corporation is
11 authorized to do so by the commission.

12 (d) A corporation may enter into an agreement with the
13 department that identifies the responsibilities of each party
14 for the development, financing, design, construction,
15 reconstruction, expansion, operation, or maintenance of a
16 project, and that defines the support to be provided to the
17 corporation by the department.

18 (e) A corporation may assign a contract, including a
19 contract described in subsection (c) of this section, to another
20 party for the benefit of a creditor, including the holders of
21 bonds, notes, or other obligations issued by the corporation.
22 The department may assign to a corporation a department contract
23 for the design, construction, reconstruction, expansion,

1 operation, or maintenance of a project for which the corporation
2 was created.

3 (f) A corporation may borrow money and the department may
4 lend money to a corporation pursuant to state law, including
5 making a loan to a corporation under Transportation Code,
6 §222.103 to pay for or reimburse project costs. A loan made by
7 the department under this subsection must be approved by the
8 commission but is not subject to Chapter 27, Subchapter E of
9 this title (relating to Financial Assistance for Toll
10 Facilities).

11 (g) Only a full-time, permanent employee of the department
12 may be appointed or serve as a director of a corporation.

13 (h) Section 15.86 of this subchapter (relating to Conflict
14 of Interest) applies to the directors and employees of a
15 corporation.

16 (i) Section 15.90 of this subchapter (relating to Reports
17 and Audits) applies to a corporation.