

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 §27.92, Financial Terms, relating to Toll Projects to be codified under Title 43, Texas Administrative Code, Part 1.

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

IT IS THEREFORE ORDERED by the commission that the amendments to §27.92 are proposed for adoption and are authorized for publication in the *Texas Register* for the purpose of receiving public comments.

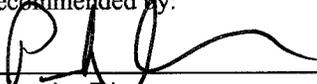
The executive director is directed to take the necessary steps to implement the actions as ordered in this minute order, pursuant to the requirements of the Administrative Procedure Act, Government Code, Chapter 2001.

Submitted and reviewed by:



General Counsel

Recommended by:



Executive Director

113086 APR 26 12

Minute Date
Number Passed

1 Proposed Preamble

2 The Texas Department of Transportation (department) proposes
3 amendments to §27.92, concerning Determination of Terms for
4 Certain Toll Projects.

5

6 EXPLANATION OF PROPOSED AMENDMENTS

7 Transportation Code, §228.013, which was added by Senate Bill
8 1420, 82nd Legislature, Regular Session, 2011, requires, for
9 certain department toll projects in which a private entity has a
10 financial interest in the project's performance, that the
11 distribution of the project's financial risk, the method of
12 financing for the project, and the tolling structure and
13 methodology be determined by a committee comprised of
14 representatives from the department, any local toll project
15 entity for the area in which the project is located, the
16 applicable metropolitan planning organization, and each
17 municipality or county that provides revenue or right of way for
18 the project. Section 27.92(b), Financial Terms, provides the
19 requirements for the formation and membership of the committee.
20 Under the current rules, there is no restriction on whom an
21 entity with appointment powers may appoint as the entity's
22 representative on the committee. If an entity appoints a
23 consultant to serve on the committee as the entity's
24 representative, the consultant's membership presents a potential
25 conflict of interest, or the appearance of a conflict of

1 interest, because it presents a situation in which the
2 consultant may have a significant financial or personal
3 interest, or the consultant's firm may have a significant
4 financial interest, in the results of a determination made by
5 the committee that could affect the consultant's decision on a
6 matter before the committee. The resulting potential or
7 apparent conflict of interest could put the integrity of the
8 process in question.

9
10 The amendments to §27.92(b) resolve the issue by requiring a
11 committee member to be an elected official or a full-time
12 employee of the entity that appoints the member. This change
13 prohibits the service of a consultant on the committee which
14 eliminates the potential or apparent conflict of interest.
15 Removing the potential conflict helps preserve the integrity of
16 the process for making financial decisions about the affected
17 department toll projects and promotes fairness and enhances
18 confidence in the process.

19
20 FISCAL NOTE

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

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2 Bob Jackson, General Counsel, has certified that there will be
3 no significant impact on local economies or overall employment
4 as a result of enforcing or administering the amendments.

5
6 PUBLIC BENEFIT AND COST

7 Mr. Jackson has also determined that for each year of the first
8 five years in which the sections are in effect, the public
9 benefit anticipated as a result of enforcing or administering
10 the amendments will be the preservation of the integrity of the
11 process for making financial decisions about certain department
12 toll projects. There are no anticipated economic costs for
13 persons required to comply with the sections as proposed. There
14 will be no adverse economic effect on small businesses.

15
16 SUBMITTAL OF COMMENTS

17 Written comments on the proposed amendments to §27.92 may be
18 submitted to Bob Jackson, General Counsel, Texas Department of
19 Transportation, 125 East 11th Street, Austin, Texas 78701-2483.
20 The deadline for receipt of comments is 5:00 p.m. on June 11,
21 2012. In accordance with Transportation Code, §201.810(a)(5), a
22 person who submits comments must disclose, in writing with the
23 comments, whether the person does business with the department,
24 may benefit monetarily from the proposed amendments, or is an
25 employee of the department.

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2 STATUTORY AUTHORITY

3 The amendments are proposed under Transportation Code, §201.101,
4 which provides the Texas Transportation Commission (commission)
5 with the authority to establish rules for the conduct of the
6 work of the department, and more specifically, Transportation
7 Code, §223.209, which requires the commission to adopt rules,
8 procedures, and guidelines governing selection of a developer
9 for a comprehensive development agreement and negotiations to
10 promote fairness, obtain private participants in projects, and
11 promote confidence among those participants.

12

13 CROSS REFERENCE TO STATUTE

14 Transportation Code, §223.209 and §228.013.

1 SUBCHAPTER H. DETERMINATION OF TERMS FOR CERTAIN TOLL PROJECTS

2 §27.92. Financial Terms.

3 (a) Applicability. This subchapter applies only to a
4 department toll project that will be developed under a
5 concession agreement or an availability payment contract, and
6 for which:

7 (1) funds allocated to a metropolitan planning
8 organization are expected to be used to pay for project costs;

9 (2) local funds are expected to be used to pay for
10 project costs; or

11 (3) property of a city or county is expected to be used
12 as project right of way or a city or county is expected to pay
13 for the acquisition of right of way for the project.

14 (b) Formation and membership of committee. For a project
15 subject to Transportation Code, Chapter 373, Subchapter B, the
16 committee shall be formed after the department exercises its
17 option under that subchapter to develop, finance, construct, and
18 operate the project. The membership of a committee shall be
19 determined after the commission authorizes the department to
20 initiate a procurement for a toll project that provides for the
21 potential delivery of the project through a concession agreement
22 or an availability payment contract. To be eligible to serve as
23 a committee member, a person must be an elected official or a

1 full-time employee of the represented entity. A committee

2 consists of the following members:

3 (1) one member appointed by each metropolitan planning
4 organization within whose boundaries all or part of the proposed
5 project may be located;

6 (2) one member appointed by each local toll project
7 entity within whose boundaries all or part of the proposed
8 project may be located;

9 (3) one member appointed by each city and county which
10 has:

11 (A) provided local funds to pay for right of way
12 acquisition or other project costs or to acquire right of way
13 for the project, or has provided property of the city or county
14 for use as project right of way; or

15 (B) submitted to the department an order or resolution
16 adopted by the city council or county commissioners court
17 committing local funds or property to the project; and

18 (4) one member appointed by the executive director to
19 represent the department.

20 (c) Officers. The committee will, subject to the
21 concurrence of the commission, elect a chair and vice-chair by
22 majority vote of the members of the committee.

23 (d) Duties. A committee established under this subchapter

1 shall submit a report to the executive director before the date
2 the department issues a request for qualifications for the toll
3 project, except for a project for which the department and a
4 local toll project entity have agreed on the terms and
5 conditions for the project under Transportation Code, §228.0111,
6 or for which a local toll project entity has waived its option
7 to develop, construct, and operate the project, in which case
8 the report shall be submitted before the date the department
9 issues a request for proposals for the project. If the project
10 is subject to a market valuation agreement, market valuation
11 waiver agreement, or similar agreement entered into under
12 Transportation Code, §228.0111, or a toll project agreement
13 entered into under Transportation Code, §373.006, the report may
14 not include determinations that are inconsistent with the
15 provisions of the agreement that relate to the determinations to
16 be included in the report. A report shall contain the following
17 determinations:

18 (1) the distribution of project financial risk, which is
19 the allocation of revenue risk for a toll project between the
20 department and the private entity with which the department
21 enters into an agreement for the project;

22 (2) the method of financing for the project, which is a
23 determination of whether the project should be funded with

1 private or public funding or a combination of private and public
2 funding; and

3 (3) unless the project is subject to a regional tolling
4 policy, the project's tolling structure and methodology.

5 (e) Failure to submit report. All members of a committee
6 will utilize their best efforts to support the generation of a
7 report. If a committee does not submit a report by the date the
8 department is scheduled to issue a request for qualifications or
9 request for proposals, as applicable, for a project, the
10 department will use any business terms applicable to the project
11 that have been adopted by the metropolitan planning organization
12 and that relate to the determinations to be included in the
13 report.

14 (f) Meetings.

15 (1) Meeting requirements. The department's Office of
16 General Counsel will submit to the Office of the Secretary of
17 State notice of a meeting of the committee at least eight days
18 before the date of the meeting. The notice will provide the
19 date, time, place, and purpose of the meeting. A meeting of a
20 committee will be open to the public. A committee will follow
21 the agenda set for each meeting under paragraph (2) of this
22 subsection.

23 (2) Scheduling of meetings. Meeting dates, times,

1 places, and agendas will be set by the office designated under
2 subsection (g) of this section. Any committee member may
3 suggest an agenda item, provided that the agenda item must be
4 approved by the chair of the committee and the department. A
5 committee's report may only discuss items that are within the
6 committee's jurisdiction. The office designated under
7 subsection (g) of this section will provide notice of the time,
8 date, place, and purpose of meetings to the members, by mail,
9 email, telephone, or any combination of the three, at least
10 eight calendar days before each meeting. All meetings must take
11 place in Texas and must be held in a location that is readily
12 accessible to the general public.

13 (3) Committee action. A quorum of the committee is one
14 half or more of the number of members appointed to the
15 committee. A committee may act only by majority vote of the
16 members present at the meeting and voting.

17 (4) Record. Minutes of all committee meetings shall be
18 prepared and filed with the executive director. The complete
19 proceedings of all committee meetings must also be recorded by
20 electronic means.

21 (5) Public information. All minutes, transcripts, and
22 other records of the committees are records of the department
23 and as such, are subject to disclosure under the provisions of

1 Government Code, Chapter 552.

2 (g) Administrative support. For each committee, the
3 executive director will designate an office or division of the
4 department that will be responsible for providing any necessary
5 administrative support essential to the functions of the
6 committee. The department will provide project information and
7 other information to the committee to assist the committee in
8 carrying out its duties, including the project procurement
9 schedule.

10 (h) Duration. After a committee submits the report
11 described in subsection (d) of this section, the committee
12 ceases to exist. The department may, in its discretion,
13 reconvene a committee if changed circumstances may result in a
14 change in the committee's determinations.