

TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

Page 1 of 1

ALL Districts

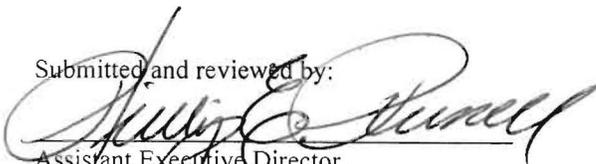
The Texas Transportation Commission (commission) finds it necessary to adopt amendments to §5.53, the repeal of §§5.54-5.59 and simultaneous new §§5.54-5.60 relating to pass-through fares and tolls to be codified under Title 43, Texas Administrative Code, Part 1.

The preamble and the adopted amendments, repeals and new sections, attached to this minute order as Exhibits A - C, 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*.

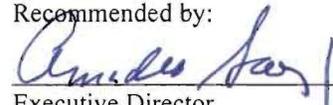
IT IS THEREFORE ORDERED by the commission that the amendments to §5.53, the repeal of §§5.54-5.59 and simultaneous new §§5.54-5.60 are adopted and are authorized for filing with the Office of the Secretary of State.

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:

  
Assistant Executive Director,  
Innovative Project Development

Recommended by:

  
Executive Director

**111669 JAN 29 09**

Minute  
Number

Date  
Passed

Adoption Preamble

The Texas Department of Transportation (department) adopts amendments to §5.53, repeal of §§5.54 - 5.59 and new §§5.54 - 5.60, concerning pass-through fares and tolls. The amendments to §5.53, repeal of §§5.54 - 5.59, and new §§5.54 - 5.60 are adopted without changes to the proposed text as published in the November 14, 2008 issue of the *Texas Register* (33 TexReg 9207) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

Transportation Code, §222.104(b) authorizes the department to enter into an agreement with a public or private entity that provides for the payment of pass-through tolls to the public or private entity as reimbursement for the design, development, financing, construction, maintenance, or operation of a toll or non-toll facility on the state highway system by the public or private entity.

Transportation Code, §222.104(c) authorizes the department to enter into an agreement with a private entity that provides for the payment of pass-through tolls to the department as reimbursement for the department's design, development, financing, construction, maintenance, or operation of a toll or non-toll facility on the state highway system that is financed by the department.

1  
2 Transportation Code, §91.075(b) authorizes the department to  
3 enter into an agreement with a public or private entity that  
4 provides for the payment of pass-through fares to the public or  
5 private entity as reimbursement for the acquisition, design,  
6 development, financing, construction, relocation, maintenance,  
7 or operation of a passenger railway facility or a freight  
8 railway facility by the entity. Title 43, Texas Administrative  
9 Code, Chapter 5, Subchapter E prescribes the policies and  
10 procedures governing the department's implementation of these  
11 statutory provisions.

12  
13 Amendments to §5.53(a), Proposal requirements, clarify the  
14 information, and require additional information, that is to be  
15 provided in a proposal for a project under a pass-through  
16 agreement. Amendments to paragraph (1) add the requirement that  
17 the proposal include the geographic area affected by the  
18 project. Amendments to paragraph (3) provide examples of  
19 anticipated benefits that must be included in the proposal.  
20 Amendments to paragraph (4) require that the proposal contain  
21 documentation that evidences local public support or opposition  
22 for the project. Amendments to paragraph (9) clarify that the  
23 proposal must include financial information sufficient to show  
24 the proposer's financial strength to develop and complete the  
25 project. Amendments to paragraph (10) require that the

1 reimbursement period for proposed pass-through payments be  
2 provided. Amendments to paragraph (11) clarify that project  
3 funding sources and amounts are required for each project cost  
4 category.

5  
6 New §5.53(a)(12) requires the proposal to list the financial  
7 assistance requested from the department in addition to funding  
8 under the pass-through agreement. Existing paragraphs (12)-(14)  
9 are renumbered as paragraphs (13) - (15) without change, and new  
10 paragraphs (16) and (17) are added. New §5.53(a)(16) requires a  
11 statement of whether the project is intended to be a part of a  
12 hurricane evacuation route. New §5.53(a)(17) requires a  
13 statement indicating whether the project has application to  
14 military base realignment or closure.

15  
16 Each of the revised or new information requirements is added to  
17 §5.53(a) to provide the information necessary for the Texas  
18 Transportation Commission (commission) to adequately evaluate  
19 the proposals under the new criteria established in new §5.55.

20  
21 New §5.54, Participation in the Program, is added to allow the  
22 commission the option of limiting the period of time during  
23 which submission of proposals will be received and limiting the  
24 total costs of all projects that will be reimbursed during a  
25 specific period, based on the commission's determination of the

1 availability of program funds. The commission may also impose  
2 conditions that limit participation to either public or private  
3 entities, limit eligible projects to either highway or railway  
4 projects, or limit the type of project costs that will be  
5 reimbursed. To impose such limitations, the department must  
6 publish a notice describing the deadline for submitting  
7 proposals, the estimated total amount of funds available for the  
8 period described in the notice, and any limitations on public or  
9 private participation, eligibility of highway or railway  
10 projects, or on the type of project costs that will be  
11 reimbursed. After the deadline expires, the department will  
12 evaluate all of the proposals and present an analysis of each to  
13 the commission. The limitation option is being used to give all  
14 interested entities an equal opportunity to participate in the  
15 program and take advantage of the limited program funds.

16

17 Current §5.54, Commission Approval to Negotiate, is repealed and  
18 added as new §5.55 with the changes described by this paragraph  
19 to expand the considerations that the department will use in  
20 reviewing proposals. New §5.55(1) requires the consideration of  
21 the proposer's proposed financial contribution and its  
22 relationship to total project costs, and deletes the criterion  
23 dealing with the general financial benefits to the state. The  
24 proposing entities are encouraged to contribute significant  
25 amounts of their own resources to the project. A higher

1 contribution demonstrates the importance of the project to the  
2 region and maximizes the use and leveraging of state funds. The  
3 deleted general financial benefits to the state concept is being  
4 replaced with other specific criteria in this section that  
5 better illustrate the benefits to the state. New paragraph (2)  
6 requires the consideration of the geographic area affected by  
7 the project. The proposing entities are encouraged to select  
8 potential projects that affect broad geographic areas. Projects  
9 that contribute to the statewide transportation system would be  
10 considered more beneficial than regional projects which, in  
11 turn, would be considered more beneficial than projects serving  
12 only a local geographic area. New §5.55(6) requires the  
13 consideration of the potential safety benefit that may be  
14 derived from the project. The proposing entity is encouraged to  
15 consider specific projects which have the greatest potential to  
16 enhance the safety of the transportation system as evidenced by  
17 the crash rate of the existing transportation segment under  
18 consideration compared to statewide averages for similar  
19 transportation segments. New §5.55(9) requires the  
20 consideration of the extent to which the project will close gaps  
21 in the state transportation system. New §5.55(11) adds  
22 consideration of the entity's proposed period for department  
23 reimbursement. The proposing entities should consider the  
24 longest reimbursement period feasible to maximize the use and  
25 leveraging of state funds. New §5.55(12) adds consideration of

1 the economic development potential in the area. The proposing  
2 entities should consider the effect of the proposed project on  
3 economic development and explain the relationship of the project  
4 to that specific commission goal. New §5.55(13) adds  
5 consideration of the financial strength of the proposing entity  
6 and replaces paragraph (10) of the current section. The  
7 proposing entities should provide sufficient information to give  
8 an indication of their financial ability to bring the project to  
9 a timely completion date. New §5.55(14) adds consideration of  
10 whether the project is part of a hurricane evacuation route.  
11 The proposing entities are encouraged to give any explanation of  
12 the relationship of the project, if applicable, to any hurricane  
13 evacuation route that would assist in facilitating traffic  
14 movement in the event of these weather related events. New  
15 §5.55(15) adds consideration of whether the project has  
16 application to a military base realignment or closure. The  
17 proposing entities are encouraged to give an explanation of the  
18 relationship of the project, if applicable, to any military base  
19 realignment or closure with respect to the contribution that the  
20 project will make, in the case of realignment, to national  
21 defense and base transportation efficiency or, in the case of  
22 closure, to future economic development in the area of the base  
23 closure. New §5.55(16) adds consideration of the experience of  
24 the entity in developing similar transportation projects and  
25 replaces paragraphs (7) and (8) of the current section. The

1 proposing entities should describe or list their experience with  
2 similar transportation projects with respect to timely project  
3 completion in the context of federal and state laws and  
4 regulations. New §5.55(17) adds consideration of the  
5 relationship of the project to stated commission goals. The  
6 proposing entities should describe the relationship of the  
7 project to the commission goals of reducing congestion,  
8 improving safety, enhancing and expanding economic opportunity,  
9 improving air quality, and increasing the value of  
10 transportation assets. Current §5.54(2) - (6) is reenacted as  
11 new §5.55(3) - (5), (7), and (8) without change.

12  
13 Current §5.55, Proposals from Private Entities, is repealed and  
14 added as new §5.56 with the changes to adjust the cross  
15 references within the section to conform to the renumbering of  
16 the sections. Also, the reference in current §5.55(c) to the  
17 relative weight given to criteria in the department's evaluation  
18 of private entities' proposals is removed to provide the  
19 department with greater flexibility in considering criteria  
20 under changing cash flow scenarios and to be consistent with the  
21 approach adopted for evaluation of all proposals under new  
22 §5.54(d).

23  
24 Current §5.56, Final Approval, is repealed and added as new  
25 §5.57. New §5.57(b)(2) adds a requirement that a pass-through

1 agreement must include identification of the one or more  
2 categories of project costs paid by the proposer for which the  
3 department will make a reimbursement under the program. This  
4 requirement makes the agreement correspond to any limitations  
5 imposed on department reimbursement as set out in the particular  
6 notice described in new §5.54. All other provisions of repealed  
7 §5.56 are reenacted as new §5.57.

8  
9 Current §5.57, Calculation of Pass-Through Fares and Tolls, is  
10 repealed and added as new §5.58 with no additional changes.

11  
12 Current §5.58, Project Development by Public or Private Entity,  
13 is repealed and added as new §5.59 with minor cross referencing  
14 changes in new §5.59(c)(7) and (9) to conform to the renumbering  
15 of the sections. New §5.59(f) adds a requirement that a public  
16 or private entity that intends to sell bonds and use pass-  
17 through tolls or fares as evidence of financial capability to  
18 repay the bonds, must provide the department with an opportunity  
19 to review and comment on the bond offering documents prior to  
20 sale of the bonds. The department would have a minimum of five  
21 business days to review and have the right to approve provisions  
22 in the offering documents that describe the pass-through  
23 agreement, the department's obligations under agreement, the  
24 interrelationship of the department, commission, and state  
25 highway fund, and the department's obligation to provide updated

1 information on the state highway fund. This requirement is  
2 necessary to give the department an opportunity prior to sale of  
3 the bonds to correct any mistakes in the offering documents that  
4 relate to the pass-through toll agreement and the department's  
5 obligations and to make sure that the department can comply with  
6 the future disclosure requirements. Otherwise, no additional  
7 changes are made from current §5.58 to new §5.59.

8  
9 Current §5.59, Operation, is reenacted in its entirety as new  
10 §5.60.

11  
12 COMMENTS

13 Comments on the proposed repeals, amendments, and new sections  
14 were received from one private entity, HDR Engineering, Inc.  
15 (HDR); one public entity, Montgomery County; and one former  
16 county official, Jim Powers. Each commenter's concerns and the  
17 department's responses are grouped by commenter.

18  
19 Comment: HDR suggests replacing the terms "pass-through fares"  
20 and "pass-through tolls" with the term "pass-through financing."  
21 The commenter notes that the use of the word "toll" has created  
22 artificially inflated resistance to the pass-through finance  
23 program by many elected officials and members of the public. It  
24 is believed that new terminology that better reflects the  
25 actuality of the program will alleviate much of this conflict.

1 The differences between highway and rail projects can be  
2 incorporated into more concise language rather than repeating  
3 much of the language as is currently the case.

4

5 Response: The terms "pass-through fares" and "pass-through  
6 tolls" are statutory language and therefore not subject to  
7 change by rule. Should the statute be changed in the future,  
8 the rules could be revised to reflect that revised statutory  
9 language and also consolidate the highway and rail project  
10 language. No additional action affecting the substance of these  
11 rules as proposed is made as a result of these comments.

12

13 Comment: HDR notes that the rule revision would allow the  
14 commission to restrict the types of project costs that will be  
15 reimbursed. The commenter suggests that the types of costs that  
16 will be reimbursed be established and not subject to change with  
17 each project call. Because of the competitive nature of the  
18 project calls, many entities will be developing their  
19 applications well in advance of the commission issuing a call  
20 for projects. An established list of items that will be  
21 reimbursed under the pass-through program will allow a level  
22 playing field for those entities that proceed at-risk in  
23 developing applications. The ability of the project to satisfy  
24 the program guidelines, the regional significance of the  
25 project, and local equity contribution should be the

1 differentiating factors where funding limitations exist for the  
2 commission in a given call for projects. This proposed change  
3 will allow applicants to proceed with financial plans with  
4 greater certainty of the criteria and focus more of their  
5 energies on anticipated participation.

6  
7 Response: The proposed rule revision in §5.54 allows the  
8 commission some flexibility to continue the program under  
9 limited funding conditions. The level of funding available will  
10 influence the categories of project costs that will be  
11 considered for reimbursement. It also allows the opportunity  
12 for more entities to participate in the program under these  
13 limiting conditions. No additional action affecting the  
14 substance of these rules as proposed is made as a result of  
15 these comments.

16  
17 Comment: Montgomery County makes a general observation that the  
18 proposed amendments reflect a more bureaucratic and less  
19 predictable approach to the administration of the pass-through  
20 program. The amendments propose to add additional criteria to  
21 the evaluation and processing of pass-through applications, yet  
22 in many cases those criteria are highly subjective in nature.  
23 The consequence would be to vest more control in the department  
24 staff and less control over the program by local entities who  
25 are the intended beneficiaries of the program. Shifting control

1 away from local entities and undermining the predictability of  
2 the process will discourage continued participation in the  
3 program by local entities. As is evidenced by Montgomery  
4 County's experience, and that of other local governments who  
5 have used pass-through financing to accelerate the delivery of  
6 important transportation projects through local control, the  
7 program has been very successful in its present form.  
8 Montgomery County submits that it would be a mistake to adopt  
9 the sweeping changes reflected in the proposed amendments, and  
10 that a better approach would be to make minor changes with the  
11 benefit of input from local entities.

12

13 Response: The proposed rule revisions do not take away any  
14 local control of project submission or, once the project is  
15 selected, project implementation by the entity. The proposed  
16 revisions allow the department and the commission to make more  
17 informed decisions with respect to project selection and with  
18 respect to the ultimate successful conclusion of the project.  
19 The revisions allow both the proposing entity and the department  
20 to examine the project from several perspectives to properly  
21 evaluate the need for the project and the resources needed to  
22 bring the project to an expeditious conclusion. No additional  
23 action affecting the substance of these rules as proposed is  
24 made as a result of these comments.

25

1 Comment: Montgomery County states that other proposed  
2 amendments are either unnecessary or overly burdensome to local  
3 entities. One proposed amendment would add a provision to  
4 §5.53(a)(4) requiring documentation evidencing local public  
5 support for the pass-through project and any local public  
6 opposition. Such a requirement would place a significant  
7 additional burden on local entities. Projects are already  
8 required to be in metropolitan approved plans and are most often  
9 presented by governmental sponsors. It is unlikely they would  
10 bring projects forward that do not have local support or for  
11 which there is not a perceived need. The department does not  
12 need to second-guess local decisions to bring projects forward  
13 by requiring further documentary proof. Moreover, the nature of  
14 the required documentation is vague and unclear, leaving local  
15 entities without adequate direction as to how to comply with the  
16 requirement. Montgomery County therefore recommends eliminating  
17 this proposed requirement or limiting its application to  
18 projects presented by private entity applicants.

19  
20 Response: The commission has continually expressed a desire for  
21 evidence of local project support. There could be cases where  
22 some local governmental entities do not have full knowledge or  
23 are not in complete agreement with a proposed project. The  
24 commission wants all input to be considered before going forward  
25 with project development. In the past, simple letters or

1 resolutions have been adequate documentation of local support.  
2 No additional action affecting the substance of these rules as  
3 proposed is made as a result of these comments.

4

5 Comment: Montgomery County states that the proposed amendment  
6 to §5.53(a)(9) would require "financial information sufficient  
7 to show the financial strength and capability of the proposer to  
8 develop and complete the project." It is important that the  
9 pass-through rules continue to take into account the unique  
10 characteristics of the communities and project served by the  
11 program. Additionally, proposed §5.55(13) would require the  
12 commission to consider the financial strength of the proposer  
13 prior to authorizing the executive director to negotiate the  
14 financial terms of a pass-through agreement. Montgomery County  
15 believes that the intent of the pass-through program would be  
16 better served by looking at project-specific funding rather than  
17 the financial strength of the proposer. Many counties and other  
18 local entities (particularly rural cities and counties where an  
19 entity's tax base may be modest) are unable to demonstrate  
20 significant financial strength on paper, yet nevertheless have  
21 projects backed by strong project-specific financing.  
22 Montgomery County therefore recommends modifying rules  
23 §5.53(a)(9) and §5.55(13) to consider the financial strength of  
24 the project (and proposed project financing) rather than the  
25 financial strength of the proposer itself.

1

2 Response: The rules as proposed do not make any requirement of  
3 a specific level of financial strength that must be shown. In  
4 fact, §5.53(a)(9) refers the financial strength component  
5 specifically toward the capability to develop and complete the  
6 project. An entity's proposed project, showing sufficient  
7 financial strength through strong project-specific financing,  
8 would not be unacceptable absent any other financial information  
9 to the contrary. However, that is why overall strength of the  
10 entity must be a consideration. No additional action affecting  
11 the substance of these rules as proposed is made as a result of  
12 these comments.

13

14 Comment: Montgomery County notes that several of the proposed  
15 amendments place substantial discretion in the hands of the  
16 department creating too much subjectivity and, therefore,  
17 potentially discouraging participation. For example, proposed  
18 §5.54(a) would grant the department the discretion to  
19 periodically limit the periods of time during which they will  
20 accept proposals based on "circumstances that may impair the  
21 ability of entities to equally participate in the program." No  
22 further guidance is offered. The subjectivity inherent in  
23 allowing the department to periodically determine whether "equal  
24 participation" (a vague and undefined phrase in itself) is  
25 possible would undermine local initiative and give the

1 department too much discretion. Local transportation needs do  
2 not fall neatly into program cycles. Montgomery County  
3 recommends focusing on adequate funding for the program and  
4 leaving the application process open, rather than allowing it to  
5 be periodically closed at the discretion of the department for  
6 subjectively determined reasons.

7

8 Response: The revised rule allows the commission the  
9 flexibility to accept pass-through proposals individually as  
10 received or by providing for a program call for a specified  
11 period of time during which proposals will be accepted. Some  
12 entities have expressed concern about: the time and cost spent  
13 in submitting proposals individually when funds are not  
14 available; having their proposal equally considered with other  
15 proposed projects as opposed to simply which entity is the first  
16 to submit a proposal; and knowing which costs would be eligible  
17 for reimbursement under a pass-through agreement prior to  
18 spending resources to develop a project proposal. This revision  
19 allows the commission to consider those concerns under various  
20 proposal submission and funding scenarios. No additional action  
21 affecting the substance of these rules as proposed is made as a  
22 result of these comments.

23

24 Comment: Montgomery County states that proposed §5.54(b)(5)  
25 would require the notice regarding availability of pass-through

1 financing to specify the categories of project costs that will  
2 be considered eligible for reimbursement. This, too, should be  
3 a project-specific determination, as the cost categories needed  
4 will vary based on the unique characteristics of the project.  
5 It should not be up to the department to prescribe this in a  
6 "one size fits all" approach. Montgomery County recommends  
7 removing proposed §5.54(b)(5) or modifying it to reflect a  
8 project-specific approach.

9

10 Response: One of the purposes of the new section is to provide  
11 some level of program continuation even in periods of very  
12 limited cash flow. Another purpose is to extend the opportunity  
13 for participation to as many entities as possible. By limiting  
14 the financing to specific areas of participation, the limited  
15 funds can be extended to more entities and projects,  
16 acknowledging that the level of participation on the part of the  
17 proposer will increase if specific project cost categories are  
18 excluded from reimbursement. No additional action affecting the  
19 substance of these rules as proposed is made as a result of  
20 these comments.

21

22 Comment: Montgomery County notes that proposed §5.55(1) would  
23 require the commission to consider the proposer's proposed  
24 financial contribution to the project from sources other than  
25 the department prior to authorizing negotiation of a pass-

1 through agreement. Montgomery County recommends modifying this  
2 rule as well to clarify that financing costs that local entities  
3 will bear are included in the calculation.

4

5 Response: The commission has consistently indicated that  
6 financing costs will not be considered as part of the  
7 negotiation of the reimbursement amount. The inclusion of these  
8 costs would negate much of the benefit of the pass-through  
9 program approach from a state level perspective. No additional  
10 action affecting the substance of these rules as proposed is  
11 made as a result of these comments.

12

13 Comment: Montgomery County states that proposed §5.55(7) would  
14 require the commission to consider the potential benefits to  
15 regional air quality that may be derived from a project.  
16 Montgomery County recommends specifically limiting that  
17 requirement to non-attainment or near non-attainment areas, as  
18 the benefit of air quality is otherwise irrelevant.

19

20 Response: Other than re-numbering, there has been no revision  
21 to the current rule language. It continues in its original  
22 form. The commission has indicated that one of their goals is  
23 improving air quality throughout the State of Texas. The  
24 commission has not indicated that this goal is limited to non-  
25 attainment or near non-attainment areas. Therefore, this

1 paragraph allows for the entity to make a statement about any  
2 potential benefits to regional air quality that may be derived  
3 from the project. No additional action affecting the substance  
4 of these rules as proposed is made as a result of these  
5 comments.

6  
7 Comment: Montgomery County notes that proposed §5.55 lists  
8 several criteria that the commission must consider prior to  
9 authorizing the executive director to negotiate the terms of a  
10 pass-through agreement. Some of the criteria are far too  
11 subjective, including "the extent to which the project would  
12 close gaps in the state transportation system" (§5.55(9)) and  
13 "the relationship of the proposed project to stated commission  
14 goals" (§5.55(17)). There is tremendous subjectivity involved in  
15 determining whether or to what extent a project would close gaps  
16 in the state transportation system. The relationship of a  
17 project to commission goals is equally subjective, as there are  
18 not identified goals or criteria against which to measure the  
19 project. Again, as noted at the outset, subjectivity in the  
20 process reduces its predictability and will discourage local  
21 participation, which is not in the best interest of the  
22 department or the state. Montgomery County recommends removing  
23 these two items from the list of criteria to be considered by  
24 the commission or, in the alternative, outlining specific goals  
25 or parameters for measuring these criteria to reduce their

1 subjectivity.

2

3 Response: The commission and department staff need the ability  
4 to consider a project from several perspectives. A project's  
5 effect on closing gaps in the system may be statewide, regional,  
6 or local in nature. The commission's stated goals of reducing  
7 congestion, enhancing safety, expanding economic opportunity,  
8 improving air quality, and preserving the value of  
9 transportation assets are another set of issues with which  
10 projects may be considered. A project proposal should have the  
11 flexibility to address these issues from an equally varied set  
12 of perspectives and explain the individual project's impact on  
13 these issues without restriction. No additional action  
14 affecting the substance of these rules as proposed is made as a  
15 result of these comments.

16

17 Comment: Montgomery County recommends clarifying the time frame  
18 for the pass-through agreement discussed in proposed §5.57(b)  
19 and changing the reference to the "project development  
20 agreement" in the proposed §5.59(c)(4) to "pass-through  
21 agreement" and cross-referencing §5.57(b).

22

23 Response: The comment is not clear with respect to the time  
24 frame discussed in §5.57(b). The agreement will begin upon  
25 execution by both parties and terminate upon completion of the

1 reimbursement payments. If the comment references the deadlines  
2 for key stages of project development, those deadlines will be  
3 negotiated by both parties as part of the agreement and will  
4 vary for each individual project. With respect to naming the  
5 referenced agreement, the agreement once executed has to do with  
6 the development of the project and the reimbursement schedule.  
7 While the suggested reference could be used, the agreement  
8 reference to project development seems more definitive at the  
9 point of agreement execution. No additional action affecting  
10 the substance of these rules as proposed is made as a result of  
11 these comments.

12

13 Comment: Montgomery County recommends that proposed §5.57(b)(4)  
14 be deleted. Pass-through financing was established as a means  
15 for local communities to accelerate the development of needed  
16 transportation projects by allowing local entities to seek  
17 reimbursement from the department for upfront costs of  
18 constructing or expanding a state highway project. As a result,  
19 local control, and more specifically the delegation of control  
20 over key project development responsibilities to local entities,  
21 is a critical component of the pass-through program. Yet, as  
22 noted previously, many of the proposed changes have the  
23 potential to erode local control. For example, proposed  
24 §5.57(b) sets forth various requirements for the contents of a  
25 pass-through agreement, including "allocation of responsibility

1 for all significant work to be performed, including  
2 environmental documentation, right of way acquisition, utility  
3 adjustments, engineering, construction, and maintenance"  
4 (§5.57(b)(4)). Montgomery County submits that there should be  
5 no "allocation" of responsibility for the referenced activities  
6 - those responsibilities should, as they do now, remain under  
7 control of the local government sponsor. Making these  
8 negotiated items in a pass-through agreement means that the  
9 department may try to assume responsibility for some or all of  
10 the activities. That, in turn, divests the local entity of  
11 control over important project development functions and  
12 introduces uncertainty into the project development process -  
13 uncertainty which is untenable if a local entity is financing a  
14 project from third party sources. In other words, the  
15 delegation of responsibility for key functions like  
16 environmental reviews and right-of-way acquisition to a local  
17 project sponsor allows them to retain control over timing and  
18 performance - important controls they would lose if the  
19 department insists on performing these functions in the  
20 negotiation of a pass-through agreement.

21  
22 Response: Other than re-numbering, there has been no revision  
23 of the language contained in proposed paragraph (4) (see current  
24 §5.56(b)(3)). Section 5.57(b)(4) assigns responsibility to the  
25 parties in the agreement. It prevents work from having to be

1 repeated by both parties and ensures that significant work is  
2 not overlooked. For example, if the department has already  
3 completed a portion of the environmental documentation, the  
4 agreement will provide for the department to turn that  
5 documentation over to the entity and let the environmental  
6 process progress forward from that point. This paragraph will  
7 not take project control from the local entity once the project  
8 development agreement is executed. No additional action  
9 affecting the substance of these rules as proposed is made as a  
10 result of these comments.

11  
12 Comment: Montgomery County recommends that §5.57(b)(10) be  
13 deleted. The reference is to an agreement including "deadlines  
14 for key stages of project development." Even with the current  
15 delegation of key functions to local sponsors there are too many  
16 unknowns to commit to project deadlines within the body of a  
17 pass-through agreement. Those deadlines can be subject to a  
18 number of influences, not the least of which is the department  
19 and the time it takes to review various submittals and  
20 information as part of its oversight function. Current practice  
21 is to incorporate milestone dates in project development  
22 schedules, which are primarily determined between the local  
23 sponsor and its project developer. Doing so allows the local  
24 entity to retain control over the schedule and, if desired,  
25 transfer risk and responsibility to its project developer.

1 Therefore, those deadlines do not belong in a pass-through  
2 agreement with the department, and requiring otherwise will  
3 further divest local entities of control over their project.

4  
5 Response: Other than re-numbering, there has been no revision  
6 of the language contained in proposed paragraph (10) (see  
7 current §5.56(b)(9)). The pass-through toll program has  
8 experienced delays in some projects moving forward after  
9 execution of the project development agreement. This has  
10 contributed to funds for the program being in limbo with respect  
11 to how much and when the department may have to start  
12 reimbursement payments. Internal auditors have cited these  
13 project delays as contributing to the inefficiency of the  
14 program. The purpose of this paragraph is not to take over the  
15 project schedule, but to encourage the upfront development of a  
16 realistic project schedule that allows completion of the project  
17 and reimbursement to the entity to progress in a timely and  
18 efficient manner. No additional action affecting the substance  
19 of these rules as proposed is made as a result of these  
20 comments.

21  
22 Comment: Montgomery County states proposed §5.58(a)(1)(A)(i)  
23 requires the commission to consider, in determining the level of  
24 pass-through fares, whether "the project's estimated benefits to  
25 mobility warrant a pass-through fare at a level that is more or

1 less than the department's estimate of project costs." This  
2 gives undue weight to the department's cost estimates, which  
3 could be incorrect. The proper measure should be estimates  
4 agreed to by the department and the project sponsor. Montgomery  
5 County also directed these same comments to §5.58(b)(1)(A)(i).

6  
7 Response: Other than re-numbering, there has been no revision  
8 of the language contained in proposed §5.58(a)(1)(A)(i) or  
9 (b)(1)(A)(i) (see current §5.57(a)(1)(A)(i) and (b)(1)(A)(i)).  
10 The department's estimate acts as a baseline to ensure that the  
11 department does not pay more for the project than the project  
12 would have cost the department if done internally. The proposer  
13 will also be able to submit their independent estimate as part  
14 of the project application. Past experience indicates that the  
15 parties discuss differences in their respective estimates.  
16 However, because of the long term commitment of state highway  
17 fund resources, the department will rely on its own independent  
18 project estimate. It is noted that differences in project cost  
19 between the two parties can still be a factor in the negotiation  
20 of the final project reimbursement amount. No additional action  
21 affecting the substance of these rules as proposed is made as a  
22 result of these comments.

23  
24 Comment: Montgomery County states that clarification is also  
25 needed regarding §5.58(a)(1)(B)(i), which provides that the

1 commission may approve payment of pass-through fares in excess  
2 of the department's current estimate "by the difference between  
3 the department's current estimate and the department's estimate  
4 for the time when the project would likely have been completed  
5 in the absence of a pass-through agreement." It is well known  
6 that the department faces serious funding challenges, and that  
7 the pass-through program was shut down (notwithstanding its  
8 popularity and success) because of funding constraints. It is  
9 unclear when, if ever, the department may have sufficient funds  
10 to complete projects brought forward under the pass-through  
11 program. Montgomery County recommends deleting this  
12 possibility, and limiting the payments to agreed upon cost  
13 estimates plus some stated adjustment for inflation. Montgomery  
14 County also directed these same comments to §5.58(b)(1)(B)(i).

15  
16 Response: Other than re-numbering, there has been no revision  
17 of the language contained in proposed §5.58(a)(1)(B)(i) or  
18 (b)(1)(B)(i) (see current §5.57(a)(1)(B)(i) or (b)(1)(B)(i)).  
19 It should be noted at the outset that the department will have  
20 funds available to honor all project reimbursements as reflected  
21 in executed project agreements. The difference between the  
22 department's current estimate and the department's estimate for  
23 the time when the project would likely have been completed would  
24 generally be an inflation factor. As stated in a previous  
25 response, the department's estimate acts as a baseline to ensure

1 that the department does not pay more for the project than the  
2 project would have cost the department if done internally. If a  
3 case of differences in applying the future inflation factor  
4 occurs, the reimbursement amount is still subject to negotiation  
5 between the two parties. No additional action affecting the  
6 substance of these rules as proposed is made as a result of  
7 these comments.

8

9 Comment: Montgomery County states that proposed  
10 §5.58(a)(1)(A)(iii) requires the commission to consider, in  
11 establishing the level of pass-through fares, whether "the  
12 public or private entity proposes to share in the cost of the  
13 project." Montgomery County recommends modifying this rule to  
14 clarify that financing costs that local entities will bear are  
15 included in that calculation. Financing costs can be a major  
16 component of the project development costs that local entities  
17 will bear, and there is no reason not to consider those as part  
18 of a local entity's cost sharing and financial contribution to a  
19 project. Montgomery County also directed these same comments to  
20 §5.58(b)(1)(A)(iii).

21

22 Response: Other than re-numbering, there has been no revision  
23 of the language contained in proposed §5.58(a)(1)(A)(iii) or  
24 (b)(1)(A)(iii) (see current §5.57(a)(1)(A)(iii) or  
25 (b)(1)(A)(iii)). The commission has consistently indicated that

1 financing costs will not be considered as part of the  
2 negotiation of the reimbursement amount. If the department had  
3 the resources to bear the financing costs of the state highway  
4 system project, then there is little benefit to using a pass-  
5 through agreement in terms of completing the project. Simply  
6 stated, the department could just complete the project now and  
7 finance the cost based on future revenues and incur the debt  
8 service internally. No additional action affecting the  
9 substance of these rules as proposed is made as a result of  
10 these comments.

11  
12 Comment: Montgomery County notes that proposed  
13 §5.58(a)(1)(B)(ii) states that the commission will not consider  
14 any financing costs incurred by the local entity in determining  
15 the level of pass-through fares. To do so ignores a significant  
16 component of project costs and potential cash flow requirements  
17 facing a local entity. Also, to do so seems inconsistent with  
18 the intent of Transportation Code, §91.075(b) which provides  
19 that pass-through fares may be reimbursement for the  
20 "acquisition, design, development, *financing*, construction,  
21 relocation, maintenance, or operation of a passenger rail  
22 facility or freight facility" (emphasis added). Montgomery  
23 County therefore recommends deleting §5.58(a)(1)(B)(ii).

24  
25 Response: The language contained in proposed §5.58(a)(1)(B)(ii)

1 is unchanged from current §5.57(a)(1)(B)(ii) language. The  
2 commission has consistently indicated that financing costs will  
3 not be considered as part of the negotiation of the  
4 reimbursement amount. The inclusion of these costs would negate  
5 much of the benefit of the pass-through program approach from a  
6 state level perspective. No additional action affecting the  
7 substance of these rules as proposed is made as a result of  
8 these comments.

9  
10 Comment: Montgomery County recommends deleting a portion of  
11 §5.58(a)(3)(A) and §5.58(b)(3)(A) (addressing pass-through fares  
12 and pass-through tolls, respectively,) which state that "Unless  
13 authorized by the commission and incorporated in a pass-through  
14 agreement by the department, the department's liability under a  
15 pass-through agreement shall be neither increased nor decreased  
16 by cost overruns and underruns." Montgomery County recommends  
17 deleting the first portion of that sentence (in each referenced  
18 section) to remove the commission's discretion to modify the  
19 department's liability by agreement. The rules should recognize  
20 that it is up to the local entity to deliver the project. The  
21 local entity is in a better position than the department to  
22 assume the risks and benefits associated with project delivery  
23 and to negotiate appropriate risk transfers with its developer.  
24 By assuming the risk, the local entity bears the responsibility  
25 for any cost overruns, but it is also appropriate that the

1 entity benefit from any cost underruns. They should not be  
2 penalized for delivering the project "under budget."

3

4 Response: Other than re-numbering, there has been no revision  
5 of the language contained in proposed §5.58(a)(3)(A) and  
6 §5.58(b)(3)(A) (see current §5.57(a)(3)(A) and §5.58(b)(3)(A)).  
7 The reimbursement amount to be paid to the entity by the  
8 department is fixed in the agreement. Project cost overruns or  
9 underruns are the responsibility of the entity and do not affect  
10 the amount of reimbursement as described in the executed  
11 agreement unless there was a mutually agreeable change in the  
12 scope of the project. Any amendments to the agreement would  
13 have to be agreed to and executed by both parties. Project cost  
14 underruns would not result in a penalty to the entity. No  
15 additional action affecting the substance of these rules as  
16 proposed is made as a result of these comments.

17

18 Comment: Montgomery County notes that in addition and similar to  
19 proposed §5.58(a)(1)(B)(ii), proposed §5.58(b)(1)(B)(ii) states  
20 that financing costs will not be considered in determining the  
21 level of pass-through tolls. Again, it is completely unfair to  
22 eliminate the substantial costs that local entities bear to  
23 accelerate a project from the calculus of the level of pass-  
24 through tolls. Those are real costs and are being paid during  
25 the same period that pass-through toll payments are being

1 received. There is no reason not to consider these costs, and  
2 to exclude them seems inconsistent with the intent of  
3 Transportation Code, §222.104(b) which provides that pass-  
4 through tolls may be reimbursement for the "design, development,  
5 *financing*, construction, maintenance, or operation of a toll or  
6 non-toll facility" (emphasis added).

7  
8 Response: The language contained in proposed  
9 §5.58((b)(1)(B)(ii) is unchanged from current  
10 §5.57(b)(1)(B)(ii). The commission has consistently indicated  
11 that financing costs will not be considered as part of the  
12 negotiation of the reimbursement amount. The inclusion of these  
13 costs would negate much of the benefit of the pass-through  
14 program approach from a state level perspective. No additional  
15 action affecting the substance of these rules as proposed is  
16 made as a result of these comments.

17  
18 Comment: Montgomery County states that proposed  
19 §5.58(b)(2)(B)(iii) and (iv) include among the potential bases  
20 for variation in pass-through tolls, the condition of the  
21 roadway and whether the highway is tolled. Neither of those  
22 factors should impact the pass-through toll amount. That amount  
23 should be influenced by project costs and traffic volumes, and  
24 Montgomery County therefore recommends deleting this section.

25

1 Response: Other than re-numbering, there has been no revision  
2 of the language contained in proposed §5.58(b)(2)(B)(iii) and  
3 (iv) (see current §5.57(b)(2)(B)(iii) and (iv)). The factors  
4 cited, such as the condition of the roadway and whether the  
5 highway is tolled, will have a direct impact on both the project  
6 costs and the projected traffic volumes. The ability to  
7 consider such project factors and their influence on traffic  
8 volume needs to be the basis for negotiation of the project  
9 development agreement and the associated reimbursement amount.  
10 No additional action affecting the substance of these rules as  
11 proposed is made as a result of these comments.

12

13 Comment: Montgomery County notes that §5.59(a)(1) provides that  
14 the department may choose to conduct the environmental review  
15 and public involvement for a project. Montgomery County  
16 believes that it is essential that environmental review and  
17 public involvement should be delegated to the local entity and  
18 should remain under local control. Montgomery County recommends  
19 deleting the last sentence of proposed §5.59(a) so that local  
20 entities can more predictably develop the project schedules  
21 referenced above (in connection with proposed §5.57(b)(10)).

22

23 Response: Other than re-numbering, there has been no revision  
24 of the language contained in proposed §5.59(a) (see current  
25 §5.58(a)). Subsection (a) does not restrict an entity from

1 having local control of the environmental review or public  
2 involvement process that is assigned as part of the agreement.  
3 However, the department may already have started environmental  
4 review and/or public involvement prior to a project being  
5 selected as a pass-through candidate. It may simply be more  
6 efficient for the department to complete some or all of the  
7 processes in order to keep the project on schedule to  
8 construction. No additional action affecting the substance of  
9 these rules as proposed is made as a result of these comments.

10

11 Comment: Montgomery County states that §5.59(f) would require  
12 public or private entities intending to sell bonds and use pass-  
13 through tolls or fares as evidence of financial capability to  
14 repay the bonds, to provide the department with an opportunity  
15 to review and comment on the bond offering documents prior to  
16 the sale of the bonds. While using debt to finance projects is  
17 relatively new to the department, public and private entities  
18 have issued bonds to finance projects for decades. The market  
19 requires a legal opinion to accompany any bond offering,  
20 including one from the Attorney General, which is ample  
21 safeguard to potential purchasers. No benefit is achieved by  
22 inserting the department in the process, and in fact this  
23 provision could add significant delay to a timely issuance -  
24 critical to a local entity. This provision also raises concern  
25 of whether the department is attempting to "approve" the

1 issuance of debt, a role that is not appropriate for the agency.  
2 Montgomery County therefore recommends eliminating this proposed  
3 requirement.

4  
5 Response: The intention of §5.59(f) is not for the department  
6 to approve the issuance of debt by another entity. The  
7 department wants an opportunity to review the bond offering  
8 documents to understand any obligations or interrelationships  
9 between the offering and the department, commission, or state  
10 highway fund, and any department obligation to provide bond  
11 investors with updated information on the status of the state  
12 highway fund. No additional action affecting the substance of  
13 these rules as proposed is made as a result of these comments.

14  
15 Comment: Former county official Mr. Jim Powers notes that the  
16 majority of the proposed amendments to §5.53 are standard  
17 proposal requirements and should be readily available to  
18 proposers.

19  
20 Response: The comment is noted and no additional action  
21 affecting the substance of these rules as proposed is made as a  
22 result of this comment.

23  
24 Comment: Mr. Powers notes that the proposed §5.54 is intended  
25 to provide transparency in terms of notifying the public of

1 available funding for program periods and to provide planning  
2 capability to the department in determining program periods.

3

4 Response: The comment is noted and no additional action  
5 affecting the substance of these rules as proposed is made as a  
6 result of this comment.

7

8 Comment: Mr. Powers notes that, along with the proposed  
9 programmatic changes in administering the program, the  
10 additions to the proposed §5.55 are the substantive changes  
11 proposed for the pass-through program. Requiring proposers to  
12 enumerate specific benefits should give the department's  
13 evaluation efforts more transparency and put proposers on "equal  
14 footing" with regard to project selection.

15

16 Response: The comment is noted and no additional action  
17 affecting the substance of these rules as proposed is made as a  
18 result of this comment.

19

20 Comment: Mr. Powers notes that proposed §5.56 and §5.57 provide  
21 consistency with proposed proposal requirements and criteria.

22

23 Response: The comments are noted and no additional action  
24 affecting the substance of these rules as proposed is made as a  
25 result of these comments.

1

2 STATUTORY AUTHORITY

3 The amendments are adopted under Transportation Code, §201.101,  
4 which provides the commission with the authority to establish  
5 rules for the conduct of the work of the department, and more  
6 specifically, Transportation Code, §91.075(d), which provides  
7 the commission with the authority to adopt rules for a pass-  
8 through fare program and Transportation Code, §222.104(g), which  
9 provides the commission with the authority to adopt rules for a  
10 pass-through toll program.

11

12 CROSS REFERENCE TO STATUTE

13 Transportation Code, §91.075 and §222.104.

1 SUBCHAPTER E. PASS-THROUGH FARES AND TOLLS

2 §5.53. Proposal.

3 (a) Proposal requirements. A public or private entity may  
4 submit in writing to the department a proposal for a project or  
5 a series of projects to be developed under a pass-through  
6 agreement. The proposal must include:

7 (1) a description of the project, including the project  
8 limits, connections with other transportation facilities, [~~and~~]  
9 any services to be provided, and the geographic area affected;

10 (2) an application, on a form provided by the department,  
11 that includes all scope and estimate documentation forms and  
12 related attachments and any other materials and information  
13 required by the application;

14 (3) a statement of the benefits anticipated to result  
15 from completion of the project, including the economic  
16 development potential in the area, reduced congestion on the  
17 state highway system, enhanced safety, and improved air quality  
18 in the region;

19 (4) a description of and documentation evidencing the  
20 local public support for the project and any local public  
21 opposition;

22 (5) a proposed project development and implementation  
23 schedule, including an estimated date when the project will be

1 open to traffic;

2 (6) a description of the entity's experience in  
3 developing highway projects, if the proposer is a public entity  
4 and if the proposal is for the development of a highway project  
5 by that entity;

6 (7) a description of the entity's experience in  
7 developing railway projects, if the proposer is a public entity  
8 and if the proposal is for the development of a railway project  
9 by that entity;

10 (8) complete information concerning the experience,  
11 expertise, technical competence, and qualifications of the  
12 proposer and of each member of the proposer's management team  
13 and of other key employees or consultants, including the name,  
14 address, and professional designation of each member of the  
15 proposer's management team and of other key employees or  
16 consultants, and the capability of the proposer to develop the  
17 proposed projects, if the proposer is a private entity and if  
18 the proposal is for the development of a project by that entity;

19 (9) financial [~~complete~~] information sufficient to show  
20 the financial strength and capability of the proposer to develop  
21 and complete the project, or to make all projected future  
22 payments[7] if the proposal is for the development of a project  
23 by the department;

1           (10) the total amount and period of reimbursement  
2 requested and proposed pass-through payment schedule;

3           (11) the project funding sources and amounts proposed for  
4 each of the project cost categories including design,  
5 development, financing, construction, maintenance, and operation  
6 [by fiscal year];

7           (12) the type of funding and other kinds of department  
8 contributions and participation requested for the project, other  
9 than reimbursement from the pass-through toll program;

10          (13) [~~+12~~] for a highway project, a statement indicating  
11 whether the proposer intends for the project to be tolled and,  
12 if the proposer intends for a tolled project to be first opened  
13 to traffic as a non-tolled highway, the approximate date on  
14 which the highway will begin to be tolled;

15          (14) [~~+13~~] a statement indicating whether the proposer  
16 intends to enter into a comprehensive development agreement, if  
17 the proposer is a private entity and if the proposal is for the  
18 development of a project by that entity; [~~and~~]

19          (15) [~~+14~~] a statement indicating whether the entity has  
20 or intends to designate a contiguous geographic area in the  
21 jurisdiction of the entity as a transportation reinvestment zone  
22 under Transportation Code, Chapter 222, Subchapter E, if the  
23 proposer is a public entity;[~~-~~]

1           (16) a statement indicating whether the project is  
2 intended to function as part of a hurricane evacuation route;  
3 and

4           (17) a statement indicating whether the project has  
5 application to a military base realignment or closure.

6           (b) Public release of proposal. If requested, and unless  
7 prohibited by law, the department will release to the public a  
8 proposal submitted under this section.

9           (c) Certain contracting requirements. The private entity  
10 and the department may agree to develop a project under a  
11 comprehensive development agreement if authorized by other law.  
12 For a highway project that is developed by the proposer,  
13 notwithstanding any other provision of this subchapter, Chapter  
14 27, Subchapter A, of this title (relating to Comprehensive  
15 Development Agreements), applies to the solicitation,  
16 advertisement, negotiation, and execution of a comprehensive  
17 development agreement. For a railway project that is developed  
18 by the proposer, notwithstanding any other provision of this  
19 subchapter, Chapter 7, Subchapter B, of this title (relating to  
20 Contracts) applies to the solicitation, advertisement  
21 negotiation, and execution of a comprehensive development  
22 agreement.

23

1 §5.54. Participation in the Program.

2 (a) If the commission determines that funds available for  
3 use in the pass-through toll program are limited, or other  
4 circumstances exist that may impair the ability of entities to  
5 equally participate in the program, the commission may  
6 periodically limit the periods of time during which the  
7 department will accept proposals for projects to be developed  
8 and, for each specific period, prescribe conditions for  
9 submission and the costs that may be reimbursed under a pass-  
10 through agreement.

11 (b) Upon the commission's designation of a specific period  
12 for acceptance of proposals and determination of the applicable  
13 conditions, the department will publish a notice in the Texas  
14 Register soliciting proposals for projects to be developed under  
15 a pass-through agreement under this subchapter. The notice will  
16 specify:

17 (1) the deadline for submitting proposals under the  
18 notice;

19 (2) the estimated amount of funds available in the pass-  
20 through toll program that can be allocated to proposals  
21 submitted under the notice;

22 (3) whether submissions will be accepted from only public  
23 entities or from both public and private entities;

1           (4) whether submissions will be accepted for only highway  
2 projects, only railway projects, or for both highway and railway  
3 projects;

4           (5) the categories of project costs, as described by  
5 §5.53(a)(11) of this subchapter, that will be considered as  
6 eligible for reimbursement; and

7           (6) any other condition deemed appropriate by the  
8 commission.

9           (c) A proposal submitted in response to a notice must  
10 contain the information required by §5.53 of this subchapter.

11           (d) The department will evaluate the submitted proposals  
12 using the items of consideration set forth in §5.55 of this  
13 subchapter and present its analyses to the commission.

14  
15 §5.55. Commission Approval to Negotiate. The commission may  
16 authorize the executive director to negotiate the financial  
17 terms of a potential pass-through agreement under this  
18 subchapter or, if the proposer is a private entity, authorize  
19 the department to solicit competitive proposals under §5.56 of  
20 this subchapter, after considering:

21           (1) the proposer's proposed financial contribution to the  
22 project from sources other than the department, in relation to  
23 total project cost;

- 1           (2) the geographic area affected;  
2           (3) local public support for the project;  
3           (4) for a highway project, whether the project is  
4 included in the department's Unified Transportation Program;  
5           (5) the extent to which the project will relieve  
6 congestion on the state highway system;  
7           (6) the potential safety benefit that may be derived from  
8 the project;  
9           (7) potential benefits to regional air quality that may  
10 be derived from the project;  
11           (8) the compatibility of the proposed project with  
12 existing and planned transportation facilities;  
13           (9) the extent to which the project will close gaps in  
14 the state transportation system;  
15           (10) whether the entity has or intends to designate a  
16 contiguous geographic area in the jurisdiction of the entity as  
17 a transportation reinvestment zone under Transportation Code,  
18 Chapter 222, Subchapter E, if the proposer is a public entity;  
19           (11) the proposer's proposed amount and period for  
20 department reimbursement and proposed pass-through payment  
21 schedule;  
22           (12) the economic development potential in the area;  
23           (13) the financial strength of the proposer;

1           (14) whether the project is part of a hurricane  
2 evacuation route;

3           (15) whether the project has application to a military  
4 base realignment or closure;

5           (16) the experience of the proposer in developing similar  
6 transportation projects; and

7           (17) the relationship of the proposed project to stated  
8 commission goals.

9

10 §5.56. Proposals from Private Entities.

11           (a) If the commission approves the further evaluation of a  
12 proposal of a private entity under §5.55 of this subchapter, the  
13 department will publish notice of that decision and provide an  
14 opportunity for the submission of competing proposals.

15           (b) The department will publish a notice in the *Texas*  
16 *Register* and in one or more newspapers of general circulation.  
17 The notice will state that the department has received a  
18 proposal under this subchapter, that it intends to evaluate the  
19 proposal, that it may negotiate a pass-through agreement with  
20 the proposer based on the proposal, and that it will accept for  
21 simultaneous consideration any competing proposals that the  
22 department receives in accordance with this subchapter within 45  
23 days of the initial publication of the notice in the *Texas*

1 Register, or such additional time as authorized by the  
2 commission. In determining whether to authorize additional time  
3 for submission of competing proposals, the commission will  
4 consider the complexity of the proposal.

5 (c) The notice will summarize the proposed project and  
6 identify its proposed location. The notice will also specify  
7 the general criteria that will be used to evaluate all  
8 proposals. Specific evaluation criteria will be set forth in  
9 the request for proposals. The criteria will include:

10 (1) the factors listed in §5.55 of this subchapter, to  
11 the extent applicable;

12 (2) the proposer's qualifications, technical competence,  
13 and financial capability;

14 (3) an analysis of the proposer's project implementation  
15 schedule; and

16 (4) any other factor deemed appropriate by the  
17 department.

18 (d) A proposal submitted in response to a notice must  
19 contain the information required by §5.53 of this subchapter.

20 (e) The original proposer may submit a revised proposal in  
21 response to a notice.

22 (f) Upon expiration of the 45-day period, or such  
23 additional time as authorized by the commission, the department

1 will evaluate the proposal of the original proposer and any  
2 properly submitted competing proposals, utilizing the evaluation  
3 criteria set forth in the request for proposals.

4 (g) The department will rank all proposals after the  
5 evaluation described in subsection (f) of this section, and may  
6 select the private entity whose proposal provides the best value  
7 to the department. The executive director will direct the  
8 department's attempt to negotiate a pass-through agreement with  
9 that proposer.

10 (h) If an agreement satisfactory to the executive director  
11 cannot be negotiated with the proposer, the department will  
12 formally end negotiations with that proposer. The department  
13 may reject all proposals or proceed to the next most highly  
14 ranked proposal and attempt to negotiate an agreement with that  
15 party.

16

17 §5.57. Final Approval.

18 (a) Authorization to negotiate final agreement. The  
19 executive director will submit to the commission a summary of  
20 the final financial terms of a proposed pass-through agreement.  
21 The final financial terms may consist of specific payment terms  
22 and schedules or may consist of a range of acceptable  
23 parameters. The commission may authorize the executive director

1 to negotiate and execute a final agreement only if it finds  
2 that:

3 (1) the project serves the public interest and not merely  
4 a private interest;

5 (2) the proposed pass-through agreement is in the best  
6 interest of the state;

7 (3) the project is compatible with existing and planned  
8 transportation facilities; and

9 (4) the project furthers state, regional, and local  
10 transportation plans, programs, policies, and goals.

11 (b) Contents of pass-through agreement. Before any work is  
12 done for which reimbursement will be requested through a pass-  
13 through toll or fare, the department and the public or private  
14 entity shall execute a pass-through agreement containing, at a  
15 minimum, the following:

16 (1) identification of the scope and nature of the work to  
17 be performed;

18 (2) identification of the one or more categories of  
19 project costs, as described by §5.53(a)(11) of this subchapter,  
20 that the department will reimburse;

21 (3) all financial terms, as applicable, including the  
22 levels of pass-through tolls or fares, maximum and minimum  
23 periodic payments, and maximum and minimum total payments;

1           (4) allocation of responsibility for all significant work  
2 to be performed, including environmental documentation, right of  
3 way acquisition, utility adjustments, engineering, construction,  
4 and maintenance;

5           (5) provision for the collection and use of toll or other  
6 revenues, if applicable;

7           (6) all provisions required by state or federal law;

8           (7) a map showing the location of the project;

9           (8) a proposed project schedule;

10          (9) an estimated budget;

11          (10) deadlines for key stages of project development;

12          (11) procedures and timelines for the submission of  
13 materials and for approvals;

14          (12) for a local government, a copy of the resolution or  
15 ordinance authorizing execution of the agreement;

16          (13) provisions for termination of the agreement; and

17          (14) if applicable, a copy of the order, resolution, or

18 ordinance designating a contiguous geographic area in the  
19 jurisdiction of a public entity as a transportation reinvestment  
20 zone under Transportation Code, Chapter 222, Subchapter E.

21

22 §5.58. Calculation of Pass-Through Fares and Tolls.

23          (a) Pass-through fares.

1           (1) Amount to be reimbursed.

2           (A) General. The commission shall establish the level  
3 of pass-through fares or shall establish parameters within which  
4 the department may negotiate the level of pass-through fares.  
5 In establishing the level of pass-through fares or parameters  
6 within which the department may negotiate the level of pass-  
7 through fares, the commission shall consider whether:

8           (i) the project's estimated benefits to mobility  
9 warrant a pass-through fare at a level that is more or less than  
10 the department's estimate of project costs;

11           (ii) the project will result in a significant  
12 economic gain or loss to the entity responsible for its  
13 development;

14           (iii) the public or private entity proposes to share  
15 in the cost of the project; and

16           (iv) the state or the public or private entity will  
17 benefit, and to what extent, if the project is built sooner than  
18 would be the case in the absence of a pass-through agreement.

19           (B) Limits on pass-through fare levels.

20           (i) The commission will not approve payment by the  
21 department of a level of pass-through fares that exceeds the  
22 department's estimate, except as permitted by this subparagraph.  
23 The commission may approve the department's payment of a level

1 of pass-through fares that exceeds the department's current  
2 estimate, but only by the difference between the department's  
3 current estimate and the department's estimate for the time when  
4 the project would likely have been completed in the absence of a  
5 pass-through agreement.

6 (ii) In determining the level of pass-through fares,  
7 the commission will not consider any financing cost incurred by  
8 the public or private entity.

9 (2) Payment schedule and method.

10 (A) Payment schedule. The schedule of pass-through  
11 fare payments will be calculated based on the department's  
12 traffic projections for the railway and a number and frequency  
13 of payments to be negotiated between the department and the  
14 public or private entity. The payment schedule may include a  
15 maximum and a minimum periodic amount to be paid annually or in  
16 total.

17 (B) Variable payments. The pass-through fare may vary  
18 on any basis that reasonably reflects the value of improvements,  
19 the nature of the railway traffic, or benefits to the highway  
20 system, including:

21 (i) number, type, and class of passengers;

22 (ii) type of freight;

23 (iii) tonnage of freight;

1           (iv) number or type of cars;

2           (v) mileage traveled; or

3           (vi) characteristics of track.

4           (3) Allocation of risk.

5           (A) Cost overruns and underruns. Unless otherwise  
6 authorized by the commission and incorporated in a pass-through  
7 agreement by the department, the department's liability under a  
8 pass-through agreement shall be neither increased nor decreased  
9 by cost overruns or underruns. Pass-through fare payments by  
10 the department shall not be increased if there is a cost overrun  
11 or decreased if there is a cost underrun unless an adjustment is  
12 specifically authorized by the commission and incorporated in a  
13 pass-through agreement by the department.

14           (B) Traffic volume. If traffic volume exceeds or falls  
15 below expectations, the pass-through fare will not be adjusted.  
16 Payments shall not exceed the maximum annual amount specified in  
17 the pass-through agreement and shall not be below the minimum  
18 annual amount specified in the pass-through agreement. The  
19 pass-through agreement shall provide that if required, payments  
20 shall continue until the total of all payments equals the total  
21 pass-through fare amount specified by the commission in  
22 approving the pass-through fare.

23           (b) Pass-through tolls.

1           (1) Level of pass-through tolls.

2           (A) General. The commission shall establish the level  
3 of pass-through tolls or shall establish parameters within which  
4 the department may negotiate the level of pass-through tolls.  
5 In establishing the level of pass-through tolls or parameters  
6 within which the department may negotiate the level of pass-  
7 through tolls, the commission shall consider whether:

8           (i) the project's estimated benefits to mobility  
9 warrant a pass-through toll at a level that is more or less than  
10 the department's estimate of project costs;

11           (ii) the project will result in a significant  
12 economic gain or loss to the entity responsible for its  
13 development;

14           (iii) the public or private entity proposes to share  
15 in the cost of the project; and

16           (iv) the state or the public or private entity will  
17 benefit, and to what extent, if the project is built sooner than  
18 would be the case in the absence of a pass-through agreement.

19           (B) Limits on pass-through toll levels.

20           (i) The commission will not approve payment by the  
21 department of a level of pass-through tolls that exceeds the  
22 department's estimate, except as permitted by this subparagraph.  
23 The commission may approve the department's payment of a level

1 of pass-through tolls that exceeds the department's current  
2 estimate, but only by the difference between the department's  
3 current estimate and the department's estimate for the time when  
4 the project would likely have been completed in the absence of a  
5 pass-through agreement.

6 (ii) In determining the level of pass-through tolls,  
7 the commission will not consider any financing cost incurred by  
8 the public or private entity.

9 (2) Payment schedule and method.

10 (A) Payment schedule. The schedule of pass-through  
11 toll payments will be calculated based on the department's  
12 traffic projections for the highway and a number and frequency  
13 of payments to be negotiated between the department and the  
14 public or private entity. The payment schedule may include a  
15 maximum and a minimum annual amount to be paid periodically or  
16 in total.

17 (B) Variable payments. The pass-through toll may vary  
18 on any basis that reasonably reflects the value of improvements,  
19 the nature of the highway, or benefits to other aspects of the  
20 highway system, including:

21 (i) the number of vehicles using the highway;

22 (ii) the number of vehicle-miles traveled on the  
23 highway;

1           (iii) the condition of the highway; and

2           (iv) whether the highway is tolled.

3           (3) Allocation of risk.

4           (A) Cost overruns and underruns. Unless otherwise  
5 authorized by the commission and incorporated in a pass-through  
6 agreement by the department, the department's liability under a  
7 pass-through agreement shall be neither increased nor decreased  
8 by cost overruns or underruns.

9           (i) Projects developed by the public or private  
10 entity. If the project is being developed by the public or  
11 private entity, the pass-through toll payments by the department  
12 shall not be increased if there is a cost overrun or decreased  
13 if there is a cost underrun unless an adjustment is specifically  
14 authorized by the commission and incorporated in a pass-through  
15 agreement by the department.

16           (ii) Projects developed by the department. If the  
17 project is being developed by the department, the pass-through  
18 agreement shall provide that the pass-through toll or the  
19 maximum amount payable, or both, shall be adjusted to reflect  
20 the department's actual costs unless the commission specifically  
21 directs that the department shall bear the risk of cost overruns  
22 or underruns.

23           (B) Traffic volume. If traffic volume exceeds or falls

1 below expectations, the pass-through toll will not be adjusted.  
2 Payments shall not exceed the maximum annual amount specified in  
3 the pass-through agreement and shall not be below the minimum  
4 annual amount specified in the pass-through agreement. The  
5 pass-through agreement shall provide that if required, payments  
6 shall continue until the total of all payments equals the total  
7 pass-through toll amount specified by the commission in  
8 approving the pass-through toll.

9  
10 §5.59. Project Development by Public or Private Entity.

11 (a) Social and environmental impact.

12 (1) General. A public or private entity that is  
13 responsible for the construction of a project shall conduct the  
14 environmental review and public involvement for the project in  
15 the manner prescribed by Chapter 2, Subchapter A of this title  
16 (relating to Environmental Review and Public Involvement for  
17 Transportation Projects). The department may choose to conduct  
18 the environmental review and public involvement.

19 (2) Department approval. The department must approve  
20 each environmental review under this section before construction  
21 of the project begins.

22 (b) Right of way and utilities.

23 (1) Responsibility. This subsection applies when the

1 public or private entity is responsible for the acquisition of  
2 right of way or the adjustment of utilities.

3 (2) Right of way procedures.

4 (A) Manual requirements. The acquisition of right of  
5 way performed by or on behalf of the public or private entity  
6 shall comply with the latest version of each of the department's  
7 manuals.

8 (B) Alternative procedures. A public or private entity  
9 may request written approval to use a different accepted  
10 procedure for a particular item or phase of work. The use of an  
11 alternative procedure is subject to the approval of the Federal  
12 Highway Administration. The executive director may approve the  
13 use of an alternative procedure if the alternative procedure is  
14 determined to be sufficient to discharge the department's state  
15 and federal responsibilities in acquiring real property.

16 (3) Utility adjustments. The adjustment, removal, or  
17 relocation of utility facilities performed by or on behalf of  
18 the public or private entity shall comply with applicable  
19 federal and state laws and regulations.

20 (c) Design and construction.

21 (1) Responsibility. This subsection applies when the  
22 public or private entity is responsible for the design,  
23 construction, and, operation, as applicable, of each project it

1 undertakes. This responsibility includes ensuring that all EPIC  
2 are addressed in project design and carried out during project  
3 construction and operation.

4 (2) Design criteria.

5 (A) State criteria. All designs developed by or on  
6 behalf of the public or private entity shall comply with the  
7 latest version of the department's manuals.

8 (i) Highway projects. Each highway project shall, at  
9 a minimum, comply with the:

10 (I) Roadway Design Manual;

11 (II) Pavement Design Manual;

12 (III) Hydraulic Design Manual;

13 (IV) Texas Manual on Uniform Traffic Control

14 Devices;

15 (V) Bridge Design Manual;

16 (VI) Texas Accessibility Standards;

17 (VII) 16 TAC Chapter 68 relating to Elimination of

18 Architectural Barriers; and

19 (VIII) Americans with Disabilities Act

20 Accessibility Guidelines.

21 (ii) Railway projects. Each railway project shall

22 comply, at a minimum, with the current version of the American

23 Railway Engineering and Maintenance of Right of Way Association

1 standards.

2 (B) Alternative criteria. A public or private entity  
3 may request approval to use different accepted criteria for a  
4 particular item of work. Alternative criteria may include the  
5 latest version of the AASHTO Policy on Geometric Design of  
6 Highways and Streets, the AASHTO Pavement Design Guide, and the  
7 AASHTO Bridge Design Specifications. The use of alternative  
8 criteria is subject to the approval of the Federal Highway  
9 Administration or the Federal Railroad Administration for those  
10 projects involving federal funds. The executive director may  
11 approve the use of alternative criteria if the alternative  
12 criteria are determined to be sufficient to protect the safety  
13 of the traveling public and protect the integrity of the  
14 transportation system.

15 (C) Exceptions to design criteria. A public or private  
16 entity may request approval to deviate from the state or  
17 alternative criteria for a particular design element on a case-  
18 by-case basis. The request for approval shall state the  
19 criteria for which an exception is being requested and must  
20 include a comprehensive description of the circumstances and  
21 engineering analysis supporting the request. The executive  
22 director may approve an exception after determining that the  
23 particular criteria could not reasonably be met due to physical,

1 environmental, or other relevant factors and that the proposed  
2 design is a prudent engineering solution.

3 (3) Access to a highway project.

4 (A) Access management. Access to a highway shall be in  
5 compliance with the department's access management policy.

6 (B) Interstate access. For proposed highway projects  
7 that will change the access control line to an interstate  
8 highway, the public or private entity shall submit to the  
9 department all data necessary for the department to request  
10 Federal Highway Administration approval.

11 (4) Preliminary design submission and approval. When  
12 design is approximately 30% complete or as otherwise provided in  
13 a pass-through agreement, the public or private entity shall  
14 send the following preliminary design information to the  
15 department for review and approval in accordance with the  
16 procedures and timeline established in the project development  
17 agreement described in subsection (d) of this section:

18 (A) for a highway project, a completed Design Summary  
19 Report form as contained in the department's Project Development  
20 Process Manual;

21 (B) a design schematic depicting plan, profile, and  
22 superelevation information for each roadway or a design  
23 schematic depicting plan, profile, and superelevation based on

1 top of railway for each railway line;

2 (C) typical sections showing existing and proposed  
3 horizontal dimensions, cross slopes, location of profile grade  
4 line, pavement layer thickness and composition, earthen slopes,  
5 and right of way lines for each roadway or subballast and  
6 ballast layer thickness and composition for each railway line;

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

8 (E) hydraulic studies and drainage area maps showing  
9 the drainage of waterways entering the project and local project  
10 drainage;

11 (F) an explanation of the anticipated handling of  
12 existing traffic during construction;

13 (G) when structures meeting the definition of a bridge  
14 as defined by the National Bridge Inspection Standards are  
15 proposed, an indication of structural capacity in terms of  
16 design loading;

17 (H) an explanation of how the U.S. Army Corps of  
18 Engineers permit requirements, including associated  
19 certification requirements of the Texas Commission on  
20 Environmental Quality, will be satisfied if the project involves  
21 discharges into waters of the United States; and

22 (I) for a highway project, the location and text of  
23 proposed mainlane guide signs shown on a schematic that includes

1 lane lines or arrows indicating the number of lanes.

2 (5) Highway construction specifications.

3 (A) All plans, specifications, and estimates developed  
4 by or on behalf of the public or private entity for a highway  
5 project shall conform to the latest version of the department's  
6 Standard Specifications for Construction and Maintenance of  
7 Highways, Streets, and Bridges, and shall conform to department-  
8 required special specifications and special provisions.

9 (B) The executive director may approve the use of an  
10 alternative specification if the proposed alternative  
11 specification is determined to be sufficient to ensure the  
12 quality and durability of the finished product for the intended  
13 use and the safety of the traveling public.

14 (6) Railway construction specifications.

15 (A) All plans, specifications, and estimates developed  
16 by or for the public or private entity for a railway project  
17 shall conform to all construction and material specifications  
18 established in the American Railway Engineering and Maintenance  
19 of Right of Way Association standards.

20 (B) The executive director may approve the use of an  
21 alternative specification if the proposed alternative  
22 specification is determined to be sufficient to ensure the  
23 quality and durability of the finished product for the intended

1 use and the safety of the public and the railway system.

2 (7) Submission and approval of final design plans and  
3 contract administration procedures. When final plans are  
4 complete, the public or private entity shall send the following  
5 information to the department for review and approval in  
6 accordance with the procedures and timelines established in the  
7 contract described in §5.57(b) of this subchapter:

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

11 (B) revisions to the preliminary design submission  
12 previously approved by the department in a format that is  
13 summarized or highlighted for the department;

14 (C) a proposal for awarding the construction contract  
15 in compliance with applicable state and federal requirements;

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

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

22 (8) Construction inspection and oversight.

23 (A) Unless the department agrees in writing to assume

1 responsibility for some or all of the following items, the  
2 public or private entity is responsible for:

3 (i) overseeing all construction operations, including  
4 the oversight and follow through with all EPIC;

5 (ii) assessing contract revisions for potential  
6 environmental impacts; and

7 (iii) obtaining any necessary EPIC required for  
8 contract revisions.

9 (B) The department may inspect the construction of the  
10 project at times and in a manner it deems necessary to ensure  
11 compliance with this section.

12 (9) Contract revisions. All revisions to any  
13 construction contract entered into under a pass-through  
14 agreement under this subchapter shall comply with the latest  
15 version of the applicable national or state administration  
16 criteria and manuals, and must be submitted to the department  
17 for its records. Any revision that affects prior environmental  
18 approvals or significantly revises project scope or the  
19 geometric design must be submitted to the department for  
20 approval prior to beginning the revised construction work.  
21 Procedures governing the department's approval, including time  
22 limits for department review, shall be included in the agreement  
23 described in §5.57(b) of this subchapter.

1           (10) As-built plans. Within six months after final  
2 completion of the construction project, the public or private  
3 entity shall file with the department a set of the as-built  
4 plans incorporating any contract revisions. These plans shall  
5 be signed, sealed, and dated by a professional engineer licensed  
6 in Texas certifying that the project was constructed in  
7 accordance with the plans and specifications.

8           (11) Document and information exchange. The public or  
9 private entity agrees to deliver to the department all materials  
10 used in the development of the project including aerial  
11 photography, computer files, surveying information, engineering  
12 reports, environmental documentation, general notes,  
13 specifications, contract provision requirements, and all  
14 information necessary for the department to update legacy data  
15 systems.

16           (12) State and federal law. The public or private entity  
17 shall comply with all federal and state laws and regulations  
18 applicable to the project and the state highway system, and  
19 shall provide or obtain all applicable permits, plans, and other  
20 documentation required by a federal or state entity.

21           (d) Contracts. All contracts for the development,  
22 construction, or operation of a project shall be awarded in  
23 compliance with applicable law.

1       (e) Federal law. If any federal funds are used in the  
2 development or construction of a project under this subchapter,  
3 or if the department intends to fund pass-through toll payments  
4 with federal funds, the development and construction of the  
5 project shall be accomplished in compliance with all applicable  
6 federal requirements.

7       (f) Bond financing.

8       (1) Department review. If any public or private entity  
9 responsible for financing a portion of a project to be developed  
10 under a pass-through agreement intends to sell bonds and use  
11 pass-through toll or fare payments from the department as  
12 evidence of financial capability to repay the bonds, the entity  
13 shall provide the department an opportunity to review and  
14 comment on bond offering documents prior to sale of the bonds.

15       (2) Pass-through agreement. The pass-through agreement  
16 must provide that:

17       (A) the department will have at least five business  
18 days after the date on which it receives all of the bond  
19 offering documents to review those documents; and

20       (B) the public or private entity must obtain department  
21 pre-approval of any provision in the bond offering documents  
22 that describes the pass-through agreement, the department's  
23 obligations under the agreement, the interrelationship of the

1 department, commission, and state highway fund, and the  
2 department's obligation to provide bond investors with updated  
3 information on the status of the state highway fund.

4 (3) Business day. For purposes of this subsection,  
5 "business day" excludes Saturday, Sunday, a federal holiday, the  
6 Friday after Thanksgiving, and December 24 and 26.

7  
8 §5.60. Operation.

9 (a) Agreement. A pass-through agreement may provide for a  
10 public or private entity to operate a highway or a railway.

11 (b) Responsibility. To the extent provided in the  
12 agreement, a public or private entity shall perform or cause to  
13 be performed all work required to operate the highway or  
14 railway. This work includes all maintenance and repair required  
15 to ensure that the highway or railway functions as intended and  
16 meets the performance standards established for maintenance  
17 under subsection (c) of this section.

18 (c) Maintenance of highways. In performing work under this  
19 section on a highway, the public or private entity shall meet or  
20 exceed the most current "Texas Maintenance Assessment Program"  
21 minimum rating requirements for non-interstate state highways as  
22 established by the commission in its implementation of  
23 Government Accounting Standards Board Statement No. 34. If the

1 highway will be tolled, the public or private entity shall meet  
2 or exceed the minimum rating requirements for interstate  
3 highways.

4 (d) Maintenance of railways. In performing work under this  
5 section on a railway, the public or private entity shall meet  
6 all standards for safety and maintenance established by the  
7 Federal Railroad Administration and the National Transportation  
8 Safety Board, including all standards published in 49 CFR  
9 Subtitle B, Chapters II and VIII.

10 (e) Alternative standards. A public or private entity may  
11 request approval to use alternative maintenance standards. The  
12 executive director may approve the use of alternative  
13 maintenance standards if the director determines that the  
14 alternative standards are sufficient to protect the safety of  
15 the public and to protect the integrity of the transportation  
16 system.

1 SUBCHAPTER E. PASS-THROUGH FARES AND TOLLS

2 §5.54. Commission Approval to Negotiate. The commission may  
3 authorize the executive director to negotiate the financial  
4 terms of a potential pass-through agreement under this  
5 subchapter or, if the proposer is a private entity, authorize  
6 the department to solicit competitive proposals under §5.55 of  
7 this subchapter, after considering:

8 (1) financial benefits to the state;

9 (2) local public support for the project;

10 (3) for a highway project, whether the project is in the  
11 department's Unified Transportation Program;

12 (4) the extent to which the project will relieve  
13 congestion on the state highway system;

14 (5) potential benefits to regional air quality that may  
15 be derived from the project;

16 (6) the compatibility of the proposed project with  
17 existing and planned transportation facilities;

18 (7) the entity's experience in developing highway  
19 projects, if the proposer is a public entity and if the proposal  
20 is for the development of a highway project by that entity;

21 (8) the entity's experience in developing railway  
22 projects, if the proposer is a public entity and if the proposal  
23 is for the development of a railway project by that entity;

1           (9) the qualifications of the proposer to accomplish the  
2 proposed work, if the proposer is a private entity and if the  
3 proposal is for the development of a project by that entity;

4           (10) the financial capability of the proposer to make all  
5 projected pass-through payments, if the proposal is for the  
6 development of a project by the department; and

7           (11) whether the entity has or intends to designate a  
8 contiguous geographic area in the jurisdiction of the entity as  
9 a transportation reinvestment zone under Transportation Code,  
10 Chapter 222, Subchapter E, if the proposer is a public entity.

11

12 §5.55. Proposals from Private Entities.

13           (a) If the commission approves the further evaluation of a  
14 proposal of a private entity under §5.54 of this subchapter, the  
15 department will publish notice of that decision and provide an  
16 opportunity for the submission of competing proposals.

17           (b) The department will publish a notice in the Texas  
18 Register and in one or more newspapers of general circulation.  
19 The notice will state that the department has received a  
20 proposal under this subchapter, that it intends to evaluate the  
21 proposal, that it may negotiate a pass-through agreement with  
22 the proposer based on the proposal, and that it will accept for  
23 simultaneous consideration any competing proposals that the

1 department receives in accordance with this subchapter within 45  
2 days of the initial publication of the notice in the Texas  
3 Register, or such additional time as authorized by the  
4 commission. In determining whether to authorize additional time  
5 for submission of competing proposals, the commission will  
6 consider the complexity of the proposal.

7 (c) The notice will summarize the proposed project and  
8 identify its proposed location. The notice will also specify  
9 the general criteria that will be used to evaluate all proposals  
10 and the relative weight given to the criteria. Specific  
11 evaluation criteria will be set forth in the request for  
12 proposals. The criteria will include:

13 (1) the factors listed in §5.54 of this subchapter, to  
14 the extent applicable;

15 (2) the proposer's qualifications, technical competence,  
16 and financial capability;

17 (3) an analysis of the proposer's project implementation  
18 schedule; and

19 (4) any other factor deemed appropriate by the  
20 department.

21 (d) A proposal submitted in response to a notice must  
22 contain the information required by §5.53 of this subchapter.

23 (e) The original proposer may submit a revised proposal in

1 response to a notice.

2 (f) Upon expiration of the 45-day period, or such  
3 additional time as authorized by the commission, the department  
4 will evaluate the proposal of the original proposer and any  
5 properly submitted competing proposals, utilizing the evaluation  
6 criteria set forth in the request for proposals.

7 (g) The department will rank all proposals after the  
8 evaluation described in subsection (f) of this section, and may  
9 select the private entity whose proposal provides the best value  
10 to the department. The executive director will direct the  
11 department's attempt to negotiate a pass-through agreement with  
12 that proposer.

13 (h) If an agreement satisfactory to the executive director  
14 cannot be negotiated with the proposer, the department will  
15 formally end negotiations with that proposer. The department  
16 may reject all proposals or proceed to the next most highly  
17 ranked proposal and attempt to negotiate an agreement with that  
18 party.

19  
20 §5.56. Final Approval.

21 (a) Authorization to negotiate final agreement. The  
22 executive director will submit to the commission a summary of  
23 the final financial terms of a proposed pass-through agreement.

1 The final financial terms may consist of specific payment terms  
2 and schedules or may consist of a range of acceptable  
3 parameters. The commission may authorize the executive director  
4 to negotiate and execute a final agreement only if it finds  
5 that:

6 (1) the project serves the public interest and not merely  
7 a private interest;

8 (2) the proposed pass-through agreement is in the best  
9 interest of the state;

10 (3) the project is compatible with existing and planned  
11 transportation facilities; and

12 (4) the project furthers state, regional, and local  
13 transportation plans, programs, policies, and goals.

14 (b) Contents of pass-through agreement. Before any work is  
15 done for which reimbursement will be requested through a pass-  
16 through toll or fare, the department and the public or private  
17 entity shall execute a pass-through agreement containing, at a  
18 minimum, the following:

19 (1) identification of the scope and nature of the work to  
20 be performed;

21 (2) all financial terms, as applicable, including the  
22 levels of pass-through tolls or fares, maximum and minimum  
23 periodic payments, and maximum and minimum total payments;

1           (3) allocation of responsibility for all significant work  
2 to be performed, including environmental documentation, right of  
3 way acquisition, utility adjustments, engineering, construction,  
4 and maintenance;

5           (4) provision for the collection and use of toll or other  
6 revenues, if applicable;

7           (5) all provisions required by state or federal law;

8           (6) a map showing the location of the project;

9           (7) a proposed project schedule;

10          (8) an estimated budget;

11          (9) deadlines for key stages of project development;

12          (10) procedures and timelines for the submission of  
13 materials and for approvals;

14          (11) for a local government, a copy of the resolution or  
15 ordinance authorizing execution of the agreement;

16          (12) provisions for termination of the agreement; and

17          (13) if applicable, a copy of the order, resolution, or  
18 ordinance designating a contiguous geographic area in the  
19 jurisdiction of a public entity as a transportation reinvestment  
20 zone under Transportation Code, Chapter 222, Subchapter E.

21

22 §5.57. Calculation of Pass-Through Fares and Tolls.

23          (a) Pass-through fares.

1 (1) Amount to be reimbursed.

2 (A) General. The commission shall establish the level  
3 of pass-through fares or shall establish parameters within which  
4 the department may negotiate the level of pass-through fares.  
5 In establishing the level of pass-through fares or parameters  
6 within which the department may negotiate the level of pass-  
7 through fares, the commission shall consider whether:

8 (i) the project's estimated benefits to mobility  
9 warrant a pass-through fare at a level that is more or less than  
10 the department's estimate of project costs;

11 (ii) the project will result in a significant  
12 economic gain or loss to the entity responsible for its  
13 development;

14 (iii) the public or private entity proposes to share  
15 in the cost of the project; and

16 (iv) the state or the public or private entity will  
17 benefit, and to what extent, if the project is built sooner than  
18 would be the case in the absence of a pass-through agreement.

19 (B) Limits on pass-through fare levels.

20 (i) The commission will not approve payment by the  
21 department of a level of pass-through fares that exceeds the  
22 department's estimate, except as permitted by this subparagraph.  
23 The commission may approve the department's payment of a level

1 of pass-through fares that exceeds the department's current  
2 estimate, but only by the difference between the department's  
3 current estimate and the department's estimate for the time when  
4 the project would likely have been completed in the absence of a  
5 pass-through agreement.

6 (ii) In determining the level of pass-through fares,  
7 the commission will not consider any financing cost incurred by  
8 the public or private entity.

9 (2) Payment schedule and method.

10 (A) Payment schedule. The schedule of pass-through  
11 fare payments will be calculated based on the department's  
12 traffic projections for the railway and a number and frequency  
13 of payments to be negotiated between the department and the  
14 public or private entity. The payment schedule may include a  
15 maximum and a minimum periodic amount to be paid annually or in  
16 total.

17 (B) Variable payments. The pass-through fare may vary  
18 on any basis that reasonably reflects the value of improvements,  
19 the nature of the railway traffic, or benefits to the highway  
20 system, including:

21 (i) number, type, and class of passengers;

22 (ii) type of freight;

23 (iii) tonnage of freight;

- 1 (iv) number or type of cars;
- 2 (v) mileage traveled; or
- 3 (vi) characteristics of track.

4 (3) Allocation of risk.

5 (A) Cost overruns and underruns. Unless otherwise  
6 authorized by the commission and incorporated in a pass-through  
7 agreement by the department, the department's liability under a  
8 pass-through agreement shall be neither increased nor decreased  
9 by cost overruns or underruns. Pass-through fare payments by  
10 the department shall not be increased if there is a cost overrun  
11 or decreased if there is a cost underrun unless an adjustment is  
12 specifically authorized by the commission and incorporated in a  
13 pass-through agreement by the department.

14 (B) Traffic volume. If traffic volume exceeds or falls  
15 below expectations, the pass-through fare will not be adjusted.  
16 Payments shall not exceed the maximum annual amount specified in  
17 the pass-through agreement and shall not be below the minimum  
18 annual amount specified in the pass-through agreement. The  
19 pass-through agreement shall provide that if required, payments  
20 shall continue until the total of all payments equals the total  
21 pass-through fare amount specified by the commission in  
22 approving the pass-through fare.

23 (b) Pass-through tolls.

1 (1) Level of pass-through tolls.

2 (A) General. The commission shall establish the level  
3 of pass-through tolls or shall establish parameters within which  
4 the department may negotiate the level of pass-through tolls.  
5 In establishing the level of pass-through tolls or parameters  
6 within which the department may negotiate the level of pass-  
7 through tolls, the commission shall consider whether:

8 (i) the project's estimated benefits to mobility  
9 warrant a pass-through toll at a level that is more or less than  
10 the department's estimate of project costs;

11 (ii) the project will result in a significant  
12 economic gain or loss to the entity responsible for its  
13 development;

14 (iii) the public or private entity proposes to share  
15 in the cost of the project; and

16 (iv) the state or the public or private entity will  
17 benefit, and to what extent, if the project is built sooner than  
18 would be the case in the absence of a pass-through agreement.

19 (B) Limits on pass-through toll levels.

20 (i) The commission will not approve payment by the  
21 department of a level of pass-through tolls that exceeds the  
22 department's estimate, except as permitted by this subparagraph.  
23 The commission may approve the department's payment of a level

1 of pass-through tolls that exceeds the department's current  
2 estimate, but only by the difference between the department's  
3 current estimate and the department's estimate for the time when  
4 the project would likely have been completed in the absence of a  
5 pass-through agreement.

6 (ii) In determining the level of pass-through tolls,  
7 the commission will not consider any financing cost incurred by  
8 the public or private entity.

9 (2) Payment schedule and method.

10 (A) Payment schedule. The schedule of pass-through  
11 toll payments will be calculated based on the department's  
12 traffic projections for the highway and a number and frequency  
13 of payments to be negotiated between the department and the  
14 public or private entity. The payment schedule may include a  
15 maximum and a minimum annual amount to be paid periodically or  
16 in total.

17 (B) Variable payments. The pass-through toll may vary  
18 on any basis that reasonably reflects the value of improvements,  
19 the nature of the highway, or benefits to other aspects of the  
20 highway system, including:

21 (i) the number of vehicles using the highway;

22 (ii) the number of vehicle-miles traveled on the  
23 highway;

1 (iii) the condition of the highway; and

2 (iv) whether the highway is tolled.

3 (3) Allocation of risk.

4 (A) Cost overruns and underruns. Unless otherwise  
5 authorized by the commission and incorporated in a pass-through  
6 agreement by the department, the department's liability under a  
7 pass-through agreement shall be neither increased nor decreased  
8 by cost overruns or underruns.

9 (i) Projects developed by the public or private  
10 entity. If the project is being developed by the public or  
11 private entity, the pass-through toll payments by the department  
12 shall not be increased if there is a cost overrun or decreased  
13 if there is a cost underrun unless an adjustment is specifically  
14 authorized by the commission and incorporated in a pass-through  
15 agreement by the department.

16 (ii) Projects developed by the department. If the  
17 project is being developed by the department, the pass-through  
18 agreement shall provide that the pass-through toll or the  
19 maximum amount payable, or both, shall be adjusted to reflect  
20 the department's actual costs unless the commission specifically  
21 directs that the department shall bear the risk of cost overruns  
22 or underruns.

23 (B) Traffic volume. If traffic volume exceeds or falls

1 below expectations, the pass-through toll will not be adjusted.  
2 Payments shall not exceed the maximum annual amount specified in  
3 the pass-through agreement and shall not be below the minimum  
4 annual amount specified in the pass-through agreement. The  
5 pass-through agreement shall provide that if required, payments  
6 shall continue until the total of all payments equals the total  
7 pass-through toll amount specified by the commission in  
8 approving the pass-through toll.

9

10 §5.58. Project Development by Public or Private Entity.

11 (a) Social and environmental impact.

12 (1) General. A public or private entity that is  
13 responsible for the construction of a project shall conduct the  
14 environmental review and public involvement for the project in  
15 the manner prescribed by Chapter 2, Subchapter C of this title  
16 (relating to Environmental Review and Public Involvement for  
17 Transportation Projects). The department may choose to conduct  
18 the environmental review and public involvement.

19 (2) Department approval. The department must approve  
20 each environmental review under this section before construction  
21 of the project begins.

22 (b) Right of way and utilities.

23 (1) Responsibility. This subsection applies when the

1 public or private entity is responsible for the acquisition of  
2 right of way or the adjustment of utilities.

3 (2) Right of way procedures.

4 (A) Manual requirements. The acquisition of right of  
5 way performed by or on behalf of the public or private entity  
6 shall comply with the latest version of each of the department's  
7 manuals.

8 (B) Alternative procedures. A public or private entity  
9 may request written approval to use a different accepted  
10 procedure for a particular item or phase of work. The use of an  
11 alternative procedure is subject to the approval of the Federal  
12 Highway Administration. The executive director may approve the  
13 use of an alternative procedure if the alternative procedure is  
14 determined to be sufficient to discharge the department's state  
15 and federal responsibilities in acquiring real property.

16 (3) Utility adjustments. The adjustment, removal, or  
17 relocation of utility facilities performed by or on behalf of  
18 the public or private entity shall comply with applicable  
19 federal and state laws and regulations.

20 (c) Design and construction.

21 (1) Responsibility. This subsection applies when the  
22 public or private entity is responsible for the design,  
23 construction, and, operation, as applicable, of each project it

1 undertakes. This responsibility includes ensuring that all EPIC  
2 are addressed in project design and carried out during project  
3 construction and operation.

4 (2) Design criteria.

5 (A) State criteria. All designs developed by or on  
6 behalf of the public or private entity shall comply with the  
7 latest version of the department's manuals.

8 (i) Highway projects. Each highway project shall, at  
9 a minimum, comply with the:

10 (I) Roadway Design Manual;

11 (II) Pavement Design Manual;

12 (III) Hydraulic Design Manual;

13 (IV) Texas Manual on Uniform Traffic Control  
14 Devices;

15 (V) Bridge Design Manual;

16 (VI) Texas Accessibility Standards;

17 (VII) 16 TAC Chapter 68 relating to Elimination of  
18 Architectural Barriers; and

19 (VIII) Americans with Disabilities Act  
20 Accessibility Guidelines.

21 (ii) Railway projects. Each railway project shall  
22 comply, at a minimum, with the current version of the American  
23 Railway Engineering and Maintenance of Right of Way Association

1 standards.

2 (B) Alternative criteria. A public or private entity  
3 may request approval to use different accepted criteria for a  
4 particular item of work. Alternative criteria may include the  
5 latest version of the AASHTO Policy on Geometric Design of  
6 Highways and Streets, the AASHTO Pavement Design Guide, and the  
7 AASHTO Bridge Design Specifications. The use of alternative  
8 criteria is subject to the approval of the Federal Highway  
9 Administration or the Federal Railroad Administration for those  
10 projects involving federal funds. The executive director may  
11 approve the use of alternative criteria if the alternative  
12 criteria are determined to be sufficient to protect the safety  
13 of the traveling public and protect the integrity of the  
14 transportation system.

15 (C) Exceptions to design criteria. A public or private  
16 entity may request approval to deviate from the state or  
17 alternative criteria for a particular design element on a case-  
18 by-case basis. The request for approval shall state the  
19 criteria for which an exception is being requested and must  
20 include a comprehensive description of the circumstances and  
21 engineering analysis supporting the request. The executive  
22 director may approve an exception after determining that the  
23 particular criteria could not reasonably be met due to physical,

1 environmental, or other relevant factors and that the proposed  
2 design is a prudent engineering solution.

3 (3) Access to a highway project.

4 (A) Access management. Access to a highway shall be in  
5 compliance with the department's access management policy.

6 (B) Interstate access. For proposed highway projects  
7 that will change the access control line to an interstate  
8 highway, the public or private entity shall submit to the  
9 department all data necessary for the department to request  
10 Federal Highway Administration approval.

11 (4) Preliminary design submission and approval. When  
12 design is approximately 30% complete or as otherwise provided in  
13 a pass-through agreement, the public or private entity shall  
14 send the following preliminary design information to the  
15 department for review and approval in accordance with the  
16 procedures and timeline established in the project development  
17 agreement described in subsection (d) of this section:

18 (A) for a highway project, a completed Design Summary  
19 Report form as contained in the department's Project Development  
20 Process Manual;

21 (B) a design schematic depicting plan, profile, and  
22 superelevation information for each roadway or a design  
23 schematic depicting plan, profile, and superelevation based on

1 top of railway for each railway line;

2 (C) typical sections showing existing and proposed  
3 horizontal dimensions, cross slopes, location of profile grade  
4 line, pavement layer thickness and composition, earthen slopes,  
5 and right of way lines for each roadway or subballast and  
6 ballast layer thickness and composition for each railway line;

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

8 (E) hydraulic studies and drainage area maps showing  
9 the drainage of waterways entering the project and local project  
10 drainage;

11 (F) an explanation of the anticipated handling of  
12 existing traffic during construction;

13 (G) when structures meeting the definition of a bridge  
14 as defined by the National Bridge Inspection Standards are  
15 proposed, an indication of structural capacity in terms of  
16 design loading;

17 (H) an explanation of how the U.S. Army Corps of  
18 Engineers permit requirements, including associated  
19 certification requirements of the Texas Commission on  
20 Environmental Quality, will be satisfied if the project involves  
21 discharges into waters of the United States; and

22 (I) for a highway project, the location and text of  
23 proposed mainlane guide signs shown on a schematic that includes

1 lane lines or arrows indicating the number of lanes.

2 (5) Highway construction specifications.

3 (A) All plans, specifications, and estimates developed  
4 by or on behalf of the public or private entity for a highway  
5 project shall conform to the latest version of the department's  
6 Standard Specifications for Construction and Maintenance of  
7 Highways, Streets, and Bridges, and shall conform to department-  
8 required special specifications and special provisions.

9 (B) The executive director may approve the use of an  
10 alternative specification if the proposed alternative  
11 specification is determined to be sufficient to ensure the  
12 quality and durability of the finished product for the intended  
13 use and the safety of the traveling public.

14 (6) Railway construction specifications.

15 (A) All plans, specifications, and estimates developed  
16 by or for the public or private entity for a railway project  
17 shall conform to all construction and material specifications  
18 established in the American Railway Engineering and Maintenance  
19 of Right of Way Association standards.

20 (B) The executive director may approve the use of an  
21 alternative specification if the proposed alternative  
22 specification is determined to be sufficient to ensure the  
23 quality and durability of the finished product for the intended

1 use and the safety of the public and the railway system.

2 (7) Submission and approval of final design plans and  
3 contract administration procedures. When final plans are  
4 complete, the public or private entity shall send the following  
5 information to the department for review and approval in  
6 accordance with the procedures and timelines established in the  
7 contract described in §5.56(b) of this subchapter:

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

11 (B) revisions to the preliminary design submission  
12 previously approved by the department in a format that is  
13 summarized or highlighted for the department;

14 (C) a proposal for awarding the construction contract  
15 in compliance with applicable state and federal requirements;

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

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

22 (8) Construction inspection and oversight.

23 (A) Unless the department agrees in writing to assume

1 responsibility for some or all of the following items, the  
2 public or private entity is responsible for:

3 (i) overseeing all construction operations, including  
4 the oversight and follow through with all EPIC;

5 (ii) assessing contract revisions for potential  
6 environmental impacts; and

7 (iii) obtaining any necessary EPIC required for  
8 contract revisions.

9 (B) The department may inspect the construction of the  
10 project at times and in a manner it deems necessary to ensure  
11 compliance with this section.

12 (9) Contract revisions. All revisions to any  
13 construction contract entered into under a pass-through  
14 agreement under this subchapter shall comply with the latest  
15 version of the applicable national or state administration  
16 criteria and manuals, and must be submitted to the department  
17 for its records. Any revision that affects prior environmental  
18 approvals or significantly revises project scope or the  
19 geometric design must be submitted to the department for  
20 approval prior to beginning the revised construction work.  
21 Procedures governing the department's approval, including time  
22 limits for department review, shall be included in the agreement  
23 described in §5.56(b) of this subchapter.

1           (10) As-built plans. Within six months after final  
2 completion of the construction project, the public or private  
3 entity shall file with the department a set of the as-built  
4 plans incorporating any contract revisions. These plans shall  
5 be signed, sealed, and dated by a professional engineer licensed  
6 in Texas certifying that the project was constructed in  
7 accordance with the plans and specifications.

8           (11) Document and information exchange. The public or  
9 private entity agrees to deliver to the department all materials  
10 used in the development of the project including aerial  
11 photography, computer files, surveying information, engineering  
12 reports, environmental documentation, general notes,  
13 specifications, contract provision requirements, and all  
14 information necessary for the department to update legacy data  
15 systems.

16           (12) State and federal law. The public or private entity  
17 shall comply with all federal and state laws and regulations  
18 applicable to the project and the state highway system, and  
19 shall provide or obtain all applicable permits, plans, and other  
20 documentation required by a federal or state entity.

21           (d) Contracts. All contracts for the development,  
22 construction, or operation of a project shall be awarded in  
23 compliance with applicable law.

1 (e) Federal law. If any federal funds are used in the  
2 development or construction of a project under this subchapter,  
3 or if the department intends to fund pass-through toll payments  
4 with federal funds, the development and construction of the  
5 project shall be accomplished in compliance with all applicable  
6 federal requirements.

7

8 §5.59. Operation.

9 (a) Agreement. A pass-through agreement may provide for a  
10 public or private entity to operate a highway or a railway.

11 (b) Responsibility. To the extent provided in the  
12 agreement, a public or private entity shall perform or cause to  
13 be performed all work required to operate the highway or  
14 railway. This work includes all maintenance and repair required  
15 to ensure that the highway or railway functions as intended and  
16 meets the performance standards established for maintenance  
17 under subsection (c) of this section.

18 (c) Maintenance of highways. In performing work under this  
19 section on a highway, the public or private entity shall meet or  
20 exceed the most current "Texas Maintenance Assessment Program"  
21 minimum rating requirements for non-interstate state highways as  
22 established by the commission in its implementation of  
23 Government Accounting Standards Board Statement No. 34. If the

1 highway will be tolled, the public or private entity shall meet  
2 or exceed the minimum rating requirements for interstate  
3 highways.

4 (d) Maintenance of railways. In performing work under this  
5 section on a railway, the public or private entity shall meet  
6 all standards for safety and maintenance established by the  
7 Federal Railroad Administration and the National Transportation  
8 Safety Board, including all standards published in 49 CFR  
9 Subtitle B, Chapters II and VIII.

10 (e) Alternative standards. A public or private entity may  
11 request approval to use alternative maintenance standards. The  
12 executive director may approve the use of alternative  
13 maintenance standards if the director determines that the  
14 alternative standards are sufficient to protect the safety of  
15 the public and to protect the integrity of the transportation  
16 system.