

Texas Administrative Code

<u>TITLE 43</u>	TRANSPORTATION
<u>PART 1</u>	TEXAS DEPARTMENT OF TRANSPORTATION
<u>CHAPTER 27</u>	TOLL PROJECTS
<u>SUBCHAPTER H</u>	DETERMINATION OF TERMS FOR CERTAIN TOLL PROJECTS
RULE §27.90	Purpose

Transportation Code, §228.013 requires, for certain department toll projects in which a private entity has a financial interest in the project's performance, that the distribution of the project's financial risk, the method of financing for the project, and the tolling structure and methodology be determined by a committee comprised of representatives from the department, any local toll project entity for the area in which the project is located, the applicable metropolitan planning organization, and each municipality or county that provides revenue or right of way for the project. This subchapter prescribes the process for a committee's issuance of its determination.

Source Note: The provisions of this §27.90 adopted to be effective September 15, 2011, 36 TexReg 5951

RULE §27.91 Definitions

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

- (1) Availability payment contract--A comprehensive development agreement under which payments are made to a private entity from project and other revenue to compensate the private entity for capital, operating, and financial costs, which may be based on the private entity's performance under the agreement.
- (2) Commission--The Texas Transportation Commission.
- (3) Committee--A committee established under this subchapter.
- (4) Comprehensive development agreement--An agreement with a private entity authorized under Transportation Code, Chapter 223, Subchapter E that, at a minimum, provides for the design and construction, reconstruction, extension, expansion, or improvement of a toll project and may also provide for the financing, acquisition, maintenance, or operation of a toll project.
- (5) Concession agreement--A comprehensive development agreement under which a private entity agrees to develop, finance, and construct a toll project, and to assume operation or maintenance responsibilities for a toll project, in exchange for rights to revenue of the project.
- (6) Department--The Texas Department of Transportation.
- (7) Executive director--The executive director of the department or the executive director's designee.
- (8) Local funds--Funds of a city or county, any other funds paid by a city or county to meet local participation requirements, and money deposited in a subaccount created under Transportation Code, §228.012.

(9) Local toll project entity--Has the meaning assigned by Transportation Code, §373.001.

(10) Metropolitan planning organization--The organization or policy board of an organization created and designated under 23 U.S.C. §134 and 49 U.S.C. §5303, as amended, to make transportation planning decisions for a metropolitan planning area in which a toll project is located and to carry out the metropolitan transportation planning process.

(11) Toll project--Has the meaning assigned by Transportation Code, §201.001.

Source Note: The provisions of this §27.91 adopted to be effective September 15, 2011, 36 TexReg 5951

RULE §27.92 Financial Terms

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

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

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

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

(b) Formation and membership of committee. For a project subject to Transportation Code, Chapter 373, Subchapter B, the committee shall be formed after the department exercises its option under that subchapter to develop, finance, construct, and operate the project. The membership of a committee shall be determined after the commission authorizes the department to initiate a procurement for a toll project that provides for the potential delivery of the project through a concession agreement or an availability payment contract. To be eligible to serve as a committee member, a person must be an elected official or a full-time employee of the represented entity. A committee consists of the following members:

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

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

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

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

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

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

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

(d) Duties. A committee established under this subchapter shall submit a report to the executive director before the date the department issues a request for qualifications for the toll project, except for a project for which the department and a local toll project entity have agreed on the terms and conditions for the project under Transportation Code, §228.0111, or for which a local toll project entity has waived its option to develop, construct, and operate the project, in which

case the report shall be submitted before the date the department issues a request for proposals for the project. If the project is subject to a market valuation agreement, market valuation waiver agreement, or similar agreement entered into under Transportation Code, §228.0111, or a toll project agreement entered into under Transportation Code, §373.006, the report may not include determinations that are inconsistent with the provisions of the agreement that relate to the determinations to be included in the report. A report shall contain the following determinations:

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

(2) the method of financing for the project, which is a determination of whether the project should be funded with private or public funding or a combination of private and public funding; and

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

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

(f) Meetings.

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

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

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

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

(5) Public information. All minutes, transcripts, and other records of the committees are records of the department and as such, are subject to disclosure under the provisions of Government Code, Chapter 552.

(g) Administrative support. For each committee, the executive director will designate an office or division of the department that will be responsible for providing any necessary administrative support essential to the functions of the committee. The department will provide project

information and other information to the committee to assist the committee in carrying out its duties, including the project procurement schedule.

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

Source Note: The provisions of this §27.92 adopted to be effective September 15, 2011, 36 TexReg 5951; amended to be effective July 19, 2012, 37 TexReg 5344

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sion) is the removal of all provisions in the department's rules relating to the Trans-Texas Corridor.

Amendments to §27.2 remove paragraph (15)(B) relating to a facility or a combination of facilities on the Trans-Texas Corridor being an eligible project for the purposes of 43 TAC Chapter 27, Subchapter A and redesignate the following subparagraphs accordingly.

FISCAL NOTE

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

Mark Tomlinson, Director, Texas Turnpike Authority Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

PUBLIC BENEFIT AND COST

Mr. Tomlinson has also determined that for each year of the first five years in which the section is in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be to have the rule accurately reflect the statutory law. There are no anticipated economic costs for persons required to comply with the section as proposed.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §27.2 may be submitted to Mark Tomlinson, Director, Texas Turnpike Authority Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on August 15, 2011.

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

None.

§27.2. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) - (14) (No change.)

(15) Eligible project--A project described in Transportation Code, §223.201, and including a:

(A) toll project;

~~{(B) facility or a combination of facilities on the Trans-Texas Corridor, as defined in §24.11 of this title (relating to Comprehensive Development Agreements);}~~

(B) ~~{(C)}~~ state highway improvement project that includes both tolled and nontolled lanes and that may include nontolled appurtenant facilities;

(C) ~~{(D)}~~ state highway improvement project in which the private entity has an interest in the project;

(D) ~~{(E)}~~ state highway improvement project financed wholly or partly with the proceeds of private activity bonds, as defined by Section 141(a), Internal Revenue Code of 1986; or

(E) ~~{(F)}~~ project that combines a toll project and a rail facility as defined in Transportation Code, §91.001.

(16) - (33) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 30, 2011.

TRD-201102490

Bob Jackson

General Counsel

Texas Department of Transportation

Earliest possible date of adoption: August 14, 2011

For further information, please call: (512) 463-8683



SUBCHAPTER H. DETERMINATION OF TERMS FOR CERTAIN TOLL PROJECTS

43 TAC §§27.90 - 27.92

The Texas Department of Transportation (department) proposes new §27.90, Purpose, §27.91, Definitions, and §27.92, Financial Terms, concerning Determination of Terms for Certain Toll Projects.

EXPLANATION OF PROPOSED NEW SECTIONS

Transportation Code, §228.013, added by Senate Bill 1420, 82nd Legislature, Regular Session, 2011, requires, for certain department toll projects in which a private entity has a financial interest in the project's performance, that the distribution of the project's financial risk, the method of financing for the project, and the tolling structure and methodology be determined by a committee comprised of representatives from the department, any local toll project entity for the area in which the project is located, the applicable metropolitan planning organization, and each municipality or county that provides revenue or right of way for the project. The proposed new sections prescribe the process for a committee's issuance of its determination.

The new sections define the circumstances in which a committee must be established and the process for the issuance of a report containing the committee's determination. The terms determined by a committee will affect the project procurement and the terms of the comprehensive development agreement for the toll project. Accordingly, a determination must be issued as soon as practical after a procurement has been authorized. The new sections only apply to projects developed under comprehensive development agreements. Based on the terms of agreements that have been used by the department for the development, construction, and operation of toll projects, a private entity will only have a financial interest in the performance of a project developed under a comprehensive development agreement.

New §27.90 describes the purpose of the new sections.

New §27.91 defines words and terms used in the new sections.

New §27.92 provides that the new sections only apply to a toll project that will be developed under a concession agreement or an availability payment contract. Of the comprehensive development agreements entered into or contemplated to be entered into by the department, only a concession agreement or an avail-

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ability payment contract provides a private entity with a financial interest in the project's performance.

New §27.92 limits the applicability of the new sections to a toll project for which funds allocated to a metropolitan planning organization or local funds are expected to be used to pay for project costs, property of a municipality or county is expected to be used as project right of way, or a municipality or county is expected to pay for the acquisition of right of way for the project. It is in the state's interest to have a determination issued as soon as possible. It may not be possible to know with certainty whether funds allocated to a metropolitan planning organization or city or county funds will be used to pay for project costs. Accordingly, new §27.92 provides that new Subchapter H of Chapter 27 applies if those funds are expected to be used to pay project costs.

Transportation Code, §228.013 does not define what funds are dedicated to or controlled by a region, municipality, or county. The only funds a regional body has responsibility for allocating to department toll projects are the funds the Texas Transportation Commission (commission) allocates to metropolitan planning organizations. Funds of a city or county that are granted to the municipality or county by the department and not used to meet local participation requirements would not be dedicated to or controlled by the municipality or county. This construction of the statute is consistent with the department's understanding that the purpose of the statute is to provide local and regional stakeholders with a say in project terms that affect the risk of loss of local and regional funds committed to a project.

New §27.92 provides that the membership of a committee will be determined after the commission authorizes the department to initiate a procurement for a toll project subject to the new sections. New §27.92 also provides that a committee shall submit a report to the department's executive director prior to the date the department issues a request for qualifications for a toll project, except for a project for which the department and a local toll project entity have agreed on the terms and conditions for the project under Transportation Code, §228.0111, or for which a local toll project entity has waived its option to develop, construct, and operate the project. For those projects, many of the terms to be considered by a committee have already been settled. The report for those projects must be submitted prior to the date the department issues a request for proposals for the project. The terms determined by a committee will affect the project procurement, the delivery method used, and the terms of the comprehensive development agreement for the toll project. Accordingly, a determination must be issued as soon as practical after a procurement has been authorized. Delay in issuing a request for qualifications or request for proposals and entering into an agreement for the delivery of a toll project will result in additional costs and increased congestion because of the delay in completing those needed projects.

In order to have a determination issued as soon as possible, the membership of a committee would be determined before it is clear whether a particular entity is required to be represented. New §27.92 provides that a committee will be comprised of one member appointed by each metropolitan planning organization and local toll project entity within whose boundaries all or part of the proposed project may be located, and one member appointed by each city and county with which the department intends to enter into an agreement under which the city or county will provide local funds to pay for right-of-way acquisition or other project costs or to acquire right of way for the project, or will provide property of the city or county for use as project right of way.

New §27.92 provides that a report issued by a committee will contain a determination concerning the distribution of project financial risk, which is defined as the allocation of revenue risk for a toll project between the department and the private entity with which the department enters into an agreement for the project. New §27.92 also provides that a report issued by a committee will contain a determination concerning the method of financing for the project, which is defined as a determination of whether the project should be funded with private or public funding or a combination of private and public funding. Transportation Code, §228.013 does not define those provisions. The definitions in the new sections are consistent with the department's understanding that the purpose of the statute is to provide local and regional stakeholders with a say in project terms that affect the risk of loss of local and regional funds committed to a project.

New §27.92 provides that a report issued by a committee will also contain a determination concerning the project's tolling structure and methodology, unless the project is subject to a regional tolling policy or the terms and conditions of a market valuation agreement or market valuation waiver agreement. Regional tolling policies have been adopted by certain metropolitan planning organizations that include, among other things, policies on toll rates and toll rate escalation. The membership of a metropolitan planning organization's policy board generally will include the municipalities, counties, and local toll project entities that would be part of a committee established under Transportation Code, §228.013. Similarly, a market valuation agreement or market valuation waiver agreement will include agreed terms and conditions for the development, construction, and operation of a toll project that include toll rates and toll rate escalation.

New §27.92 provides that if a committee does not submit a report by the date the department is scheduled to issue a request for qualifications or request for proposals, as applicable, for a project, the department will use any business terms applicable to the project that have been adopted by the metropolitan planning organization and that relate to the determinations to be included in the report. As discussed above, the membership of a metropolitan planning organization's policy board generally will include the entities that would be part of a committee.

New §27.92 includes provisions relating to committee meetings and administrative support of a committee that are intended to ensure the efficient operation of the committee, including having a division or office of the department schedule meetings for the committee and having the committee chair and the department finalize meeting agendas. Notices of meetings must comply with the requirements of the Open Meetings Act. The department shall provide information to the committee, including the project procurement schedule, necessary for a committee to issue a report in a timely manner.

New §27.92 defines a quorum of a committee as one half of the number of members appointed to the committee, and provides that a committee may act only by majority vote of the members present at the meeting and voting. These provisions will ensure that a committee is able to carry out its functions in a timely manner.

New §27.92 provides that a committee will cease to exist after submitting its report, but that the department may reconvene a committee if changed circumstances may result in a change in the committee's determinations.

FISCAL NOTE