

# Texas Administrative Code

TITLE 43

TRANSPORTATION

PART 1

TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 15

FINANCING AND CONSTRUCTION OF TRANSPORTATION  
PROJECTS

SUBCHAPTER E

FEDERAL, STATE, AND LOCAL PARTICIPATION

RULE §15.52

**Agreements**

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This section describes the contents of the department's joint participation agreement with a local government for a highway improvement project and the responsibilities of the parties to such an agreement.

(1) Right of entry. If the local government is the owner of the project site, it shall permit the department or its authorized representative to occupy the site to perform all activities required to execute the work.

(2) **Right of way and utility relocations and adjustments.** The local government will provide all necessary right of way and utility relocations and adjustments, whether publicly or privately owned, in accordance with §15.55 of this subchapter (relating to Construction Cost Participation). Existing utilities will be relocated and adjusted by the local government with respect to location and type of installation in accordance with the requirements of the department under §21.21 of this title (relating to State Participation in Relocation, Adjustment, and/or Removal) and Chapter 21, Subchapter C of this title (relating to Utility Accommodation).

(3) Funding arrangement. **The agreement will specify the funding arrangement agreed upon by the department and the local government.** The funding arrangement shall include any adjustments required by §15.55 of this subchapter. The funding arrangement agreed upon by the department and the local government for drainage construction costs will be as specified under §15.54(e) of this subchapter (relating to Construction).

(A) **Standard (fixed price).** The fixed price amount will be based on the estimated cost of the work to be performed by the department on a project for which state or federal funds are received.

(i) A local government is responsible for the fixed price amount, which is not subject to adjustment unless:

(I) differing site conditions are encountered;

(II) work requested by the local government is ineligible for federal participation; or

(III) the adjustment is mutually agreed on by the department and the local government.

(ii) In determining the fixed price amount, the department will consider:

(I) requests by the local government to include work that is ineligible for federal or state participation;

(II) the need for accelerated project delivery;

(III) the type of work proposed and the ability to accurately estimate its cost; and

(IV) any other considerations relating to the benefit of the state, the traveling public, and the operations of the department.

(iii) The department may refuse to enter into an agreement with a local government that has not previously complied with the financial obligations under an agreement entered into under this subchapter.

(B) Specified percentage. If approved by the executive director, the local government is responsible for all, or a specified percentage, as shown in Figure: 43 TAC §15.55(c) of this subchapter, of the direct costs incurred by the department for preliminary engineering, construction engineering, construction, and right of way, as well as the direct cost for any work included in the project which is ineligible for federal or state participation. For federally funded non-construction programs, the local government is responsible for any required match and for any work included that is ineligible for federal or state participation. The department will accept in-kind contributions for matching funds or other funds only under agreements that do not include highway construction.

(C) Periodic.

(i) The executive director may approve a local government to make periodic payments of its funding share only if:

(I) the periodic payments sought are based on the estimated cost for the work for which the funds are received and the local government proposes a schedule to repay the entire amount; and

(II) the local government does not have a delinquent obligation to the department, as defined in §5.10 of this title (relating to Collection of Debts).

(ii) In approving a request for periodic payments, the executive director will consider:

(I) inability of the local government to pay its total funding share prior to the department's scheduled date for contract letting, based upon population level, bonded indebtedness, tax base, and tax rate;

(II) past payment performance;

(III) need for accelerated project delivery;

(IV) whether the project is located in a local government that consists of all or a portion of an economically disadvantaged county; and

(V) any other considerations relating to the benefit of the state, the public, and the operations of the department.

(D) Off-State Highway System Bridge Program. For projects funded in the Off-State Highway System Bridge Program, the local government is responsible for a fixed amount that is based on the specified percentage, as shown in Figure: 43 TAC §15.55(c) of this subchapter, of the estimated direct costs for preliminary engineering, construction engineering, and construction, and for the actual direct costs for right of way and eligible utilities. The estimated direct costs that will be used to establish the fixed amount under this subparagraph, are based on the department's estimate of the eligible work at the time the agreement is executed. The local government is responsible for the estimated direct cost of any project cost item or portion of a cost item that is not eligible for federal participation under the Highway Bridge Program, 23 U.S.C. §144 and Highway Bridge Replacement and Rehabilitation Program, 23 C.F.R. §650 Subpart D. The fixed amount under this subparagraph will be adjusted through the execution of an amendment to reflect additional costs resulting from changes made at the request of the local government, either during preliminary engineering or construction.

(4) Interest. The department will not pay interest on funds provided by the local government. Funds provided by the local government will be deposited into, and retained in, the state treasury.

(5) Amendments. In the case of significantly differing site conditions or other mutually agreed upon changes in the scope of work authorized in the agreement, the department, and the local government will amend the funding agreement, setting forth the reason for the change and establishing the revised participation to be provided by the local government.

(6) Payment provision. The agreement will establish the conditions for payment by the local government, including, but not limited to, the method of payment and the time of payment.

(A) Standard (fixed price). If a fixed price funding arrangement is used, the fixed price amount is not subject to adjustment, except as provided for in paragraph (3)(A)(i) of this section.

(B) Specified percentage.

(i) Upon execution of the agreement or at a later date, unless periodic payments have been requested by the local government and approved by the executive director, the local government will pay, as a minimum, its funding share for the estimated cost for any right of way and preliminary engineering for the project. Unless periodic payments have been requested by the local government and approved by the executive director, the local government, before the department's scheduled date for contract letting, will remit to the department an amount equal to the remainder of the local government's funding share for the project.

(ii) After the project is completed the final cost will be determined by the department, based on its standard accounting procedures. If it is found that the amount received is insufficient to pay the local government's funding share, then the department will notify the local government of the amount of the difference and the local government shall promptly transmit that amount to the department. If it is found that the amount received is in excess of the local government's funding share, the excess funds paid by the local government shall be returned.

(C) Periodic. After a periodically paid project is completed, the final cost will be determined by the department based on its standard accounting procedures. If it is found that the amount received is insufficient to pay the local government's funding share, then the department will notify the local government of the amount of the difference and the local government shall promptly transmit that

amount to the department. If it is found that the amount received is in excess of the local government's funding share, the excess funds paid by the local government shall be returned.

(D) Off-State Highway System Bridge Program. For projects funded in the Off-State Highway System Bridge Program, the department will determine the final cost after the project is completed, based on its standard accounting procedures. The department will notify the local government of any amount due for payment of costs related to changes made at the request of the local government. The local government shall promptly transmit the required amount to the department.

(E) Valuation of in-kind contributions. Before the department may enter an agreement under which goods, services, or real estate are accepted rather than financial consideration, the department will document a value for the in-kind contributions consistent with 49 C.F.R. §18.24.

(7) Termination. If the local government withdraws from the project after the agreement is executed, it shall be responsible for all direct and indirect project costs incurred by the department for the items of work in which the local government is participating.

(8) Responsibilities of the parties. The local government and the department shall identify in the agreement which party will prepare or provide construction plans, perform construction, advertise for bids, award a construction contract, and perform construction supervision. Activities assigned to the local government must comply with subparagraph (A) of this paragraph and have the approvals required by subparagraph (B) of this paragraph.

(A) Local government performance and management of projects. For state highway improvement projects and other projects using state or federal funds, the agreement between the department and a local government may provide for the local government to:

(i) perform, using employees under the direct control of the local government, a highway improvement project on the state highway system;

(ii) outsource preliminary project engineering and design, bid opening, award of construction to a contractor, and construction management by the local government or a consultant hired by the local government of an improvement project for which reimbursement is requested;

(iii) contract for highway construction; or

(iv) perform other projects as authorized by law.

(B) Approval authority. Before a local government may perform an act described in subparagraph (A) of this paragraph, the executive director must authorize the local government to perform that act. The executive director may also approve the performance by employees of the local government of projects or activities appurtenant to a state highway, including drainage facilities, surveying, traffic counts, driveway construction, landscaping, guardrails, and other items incidental to the roadway itself, such as signing, pavement markings, signals, illumination, and traffic management systems.

(C) Conditions. A local government may perform an act described in subparagraph (A) of this paragraph only if:

(i) the local government commits in the agreement to comply with all federal, state, and department requirements, standards, and specifications, and agrees to forfeit any claim to federal and state reimbursement if they fail to comply;

(ii) the project is authorized by the commission in the current Unified Transportation Program or by a specific minute order;

(iii) a project on the state highway system performed or managed by a local government is operationally beneficial to the state;

(iv) a roadway construction project requested by the local government that is to be on the state highway system, for which local management is proposed, is funded with at least 50 percent of the funds coming from a non-federal and non-state source, unless a lesser percentage is approved by the executive director;

(v) the local government agrees to pay any cost overruns in addition to its local participation on an off-state highway system bridge program project for which local management is proposed; and

(vi) the department reviews and approves all plans, contract awards, and change orders.

(D) Approval. The department will not approve any project that includes the local government improving freeway mainlanes on the state highway system, without express written approval of the executive director. In determining its approval or disapproval of local government's request to manage one or more elements of performance and management of a project, the department will evaluate the following criteria:

(i) previous experience of the local government in performing the type of work proposed;

(ii) the capability of the local government to perform the type of work proposed or to award and manage a contract for that work in a timely manner, consistent with federal, state, and department regulations, standards, and specifications;

(iii) the need for accelerated project delivery;

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