

Standard Utility Agreement Submittal Guidance

Utility Portfolio Section, Right of Way Division
September 24, 2024

Contents

- 1. Purpose..... 2**
- 2. General Conditions..... 2**
- 3. Roles and Responsibilities..... 2**
- 4. Laws, Rules, or Regulations 2**
 - 4.1 Code of Federal Regulations (CFR) 2
 - 4.2 Texas Constitution and Statute: Transportation Code..... 3
 - 4.3 Texas Administrative Code (TAC) 4
 - 4.4 Texas Legislature 5
- 5. Common Standard Utility Agreement Requirements 5**
 - 5.1 Attachment A – Plans / Cost Estimate..... 5
 - 5.2 Attachment B – Utility's Accounting Method..... 7
 - 5.3 Attachment C – Utility's Schedule of Work and Estimated Date of Completion..... 8
 - 5.4 Attachment D – Statement Covering Contract Work 9
 - 5.5 Attachment E – Utility Joint Use Agreements and/or Utility Installation Request.....10
 - 5.6 Attachment F – Eligibility Ratio11
 - 5.7 Attachment G – Betterment Calculation and Estimates11
 - 5.8 Attachment H – Proof of Property Interest.....13
- 6. Utility Adjustments Performed as a Joint Bid 13**

1. Purpose

This document will aid the District Utility Coordinator or Utility Company in developing a Standard Utility Agreement and identifying the appropriate documentation required for the submittal. The information provided is based on general situations. Questions not covered in this guidance document should be forwarded to the Right of Way Division, Utility Portfolio Section.

2. General Conditions

The following conditions may be cause for a Standard Utility Agreement:

- Relocation of the utility meets the condition of Texas Transportation Code 203.092, requiring an improvement of:
 - A highway in this state established by appropriate authority as part of the National System of Interstate and Defense Highways, and the relocation is eligible for federal participation.
 - Any segment of the state highway system and the Utility has a compensable property interest in the land occupied by the facility to be relocated, or
 - A segment of the state highway system that the commission designated as a turnpike project or toll project before September 1, 2005.
- The Utility has an executed Master Utility Agreement.
 - A change to the TxDOT schematics or plans included in the NORA that requires the Utility to undertake subsequent utility accommodation activities qualifies.
 - A cancellation of TxDOT plans to construct the project.

3. Roles and Responsibilities

Both the **Utility Company ("Utility")** and the **TxDOT District ("District")** have the responsibility to identify conflicts and collaborate in the development of the Standard Utility Agreement package. The district and the utility company should work together to develop the Standard Utility Agreement package.

The **ROW Utility Specialist** can provide guidance and may conduct a courtesy review to identify potential deficiencies.

The **ROW Program Office** guides the Utility Specialists and performs a Compliance Review.

4. Laws, Rules, or Regulations

4.1 Code of Federal Regulations (CFR)

- 23 CFR 645.113 Agreements and authorizations.

- 23 CFR 645.113 (b) When applicable, the written agreement shall specify the terms and amounts of any contribution or repayments made or to be made by the Utility to the TD in connection with payments by the TD to the Utility under the provisions of §645.107 of this regulation.
- 23 CFR 635.410 – Buy America
- 23 CFR 645.113 – The Utility must furnish a schedule for accomplishing the work
- 23 CFR 635.121 – Contract Time and Time Extensions
 - Project staff should determine the controlling operations and assess the proposed work's potential impact.
- 23 CFR 645.115 Construction

(a) When the Utility is not adequately staffed and equipped to perform such work with its own forces and equipment at a time convenient to and in coordination with the associated highway construction, such work may be done by:

 - (1) A contract awarded by the TD or Utility to the lowest qualified bidder based on appropriate (Minimum 3 bidders) solicitation,
 - (2) Inclusion as part of the TD's highway construction contract let by the TD as agreed to by the Utility,
 - (3) An existing continuing contract, provided the costs are reasonable, or
 - (4) A contract for low-cost incidental work, such as tree trimming and the like, awarded by the TD or Utility without competitive bidding, provided the costs are reasonable.
- 23 CFR 645.117
 - Elected Betterments
 - (1) 23 CFR 645.117 (h) (1) Credit to the highway project will be required for the cost of any betterments to the facility being replaced or adjusted, and for the salvage value of the materials removed
 - Forced Betterments
 - (1) 23 CFR 645.117 (h) (3) No betterment credit is required for additions or improvements which are: (i) Required by the highway project, (engineering determination) (ii) Replacement devices or materials that are of equivalent standards although not identical, (iii) Replacement of devices or materials no longer regularly manufactured with next highest grade or size, (iv) Required by law under governmental and appropriate regulatory commission code, or (v) Required by current design practices regularly followed by the company in its own work, and there is a direct benefit to the highway project. Supporting documentation is required.

4.2 Texas Constitution and Statute: Transportation Code

- Texas Transportation Code, Section 203.092: REIMBURSEMENT FOR RELOCATION OF UTILITY FACILITIES.

(a) A utility shall make a relocation of a utility facility at the expense of this state if relocation of the utility facility is required by improvement of:

- (1) A highway in this state established by the appropriate authority as part of the National System of Interstate and Defense Highways and the relocation is eligible for federal participation.
- (2) Any segment of the state highway system and the Utility has a compensable property interest in the land occupied by the facility to be relocated; or
- (3) a segment of the state highway system that was designated by the commission as a turnpike project or toll project before September 1, 2005.

- Texas Transportation Code, Section 203.0935: Timely Agreement

If the department and the affected Utility enter into an agreement after negotiations under Subsection (a), the terms and conditions of the agreement shall govern the relocation of the Utility's facility covered by the agreement.

- Texas Transportation Code, Section 203.094: Timely Relocations
- Texas Transportation Code, Section. 223.045 – Steel and Iron Provision

4.3 Texas Administrative Code (TAC)

- Title 43, Part 1, Chapter 21, Subchapter B, Rule 21.22: Agreements

43 TAC Section 21.22 (b) The Utility shall negotiate with the department in good faith to reach an agreement on the terms of the relocation.

- Title 43, Part 1, Chapter 21, Subchapter C, Rule 21.53 Joint Use Agreement Forms

(a) Joint use agreement forms are to be used when a utility has a prior property interest which is being retained within the highway right of way, and:

- (1) when in connection with active highway projects, an adjusted or relocated utility facility occupies that part of the highway right of way; or
- (2) when a utility facility is retained within that part of the highway right of way without adjustment unless the Utility has a previously approved department joint use agreement covering the right of way limits and which includes provisions for control of access when applicable.

- Title 43, Part 1, Chapter 21, Subchapter C, Rule 21.37 – Design

- Title 43, Part 1, Chapter 21, Subchapter C, Rule 21.38 Construction, Maintenance, and Inspection

43 TAC 21.38 (e) (1) If a state highway improvement project requires the adjustment or relocation of a utility facility, the Utility, by agreement with the department, may authorize the department to include the adjustment or relocation of the utility facility in the highway construction contract. The department may enter into an agreement under this Subsection only if the district engineer determines that:

- (A) including the adjustment or relocation of the utility facility in the construction contract is necessary to meet the construction sequencing of the state highway improvement project or will expedite the Project;

- (B) the adjustment or relocation of the utility facility by the department's contractor can be accomplished in conformity with all applicable local, state, and federal regulations for the installation of the utility facility; and
- (C) the adjustment or relocation of the utility facility by the department's contractor will not involve an unreasonably high risk of:
 - (i) danger to the traveling public, highway, or construction workers due to the presence of hazardous materials, high pressure pipelines, or other potentially dangerous utility products; or
 - (ii) prolonged interruption of delivering a utility product essential to public health and safety.

4.4 Texas Legislature

- Senate Bill 1289

5. Common Standard Utility Agreement Requirements

5.1 Attachment A – Plans / Cost Estimate

Cost Estimate

- The estimate should contain the complete narrative of the work to be performed and should be matched to the Scope of Work on Form ROW-U-35 and the Plans under Attachment "A."
- Within the cost estimate, the line items should be broken down by unit and price. Line items such as mobilization and SWPPP can be entered into the cost estimate as a lump sum.
- Identify the materials subject to Buy America compliance with an (*)
 - The District shall verify the materials before installation.
- If there is overhead in the cost estimate, show how it is established and applied.
 - Note: Overhead can only be charged to a line item once.
- ROW Project Delivery should verify the Easement replacement and/or valuations.
- Actual Cost Estimates
 - Quantities are broken down by categories and unit costs.
 - It must be defined, reasonable, and justified.
 - Supporting documentation should be in the same format as the cost estimate at billing.
- Lump Sum Cost Estimate
 - Quantities are broken down by categories and unit costs.
 - It must be factual, justified, and accurate.
 - Required at execution of SUA.

- Bid Tabulations
- Fee schedules
- Quotes

Plans

- Plans need to be legible.
- Note: Before executing the agreement, review the plans to ensure that the plans are legible.
- Facilities that will remain in place, removed, and/or abandoned should be labeled accurately and appropriately.
- Contains the following.
 - Clearly show the existing and proposed TxDOT ROW – to verify Eligibility Ratio Calculation.
 - Existing and proposed Utility facilities – including size and material; to verify betterment calculation.
 - Existing and proposed Utility easements, if applicable
 - Show the conflict between the Utility's facility and the proposed highway construction.

Resources

Plans

- ROW Utility Manual, Chapter 6, Section 2

Cost Estimate

- ROW Utility Manual, Chapter 7
- CFR 645.113 (c) – Itemized Cost Estimate
- Buy America
 - 23 USC 313
 - 23 CFR 635.410
 - Transportation Code 223.045
 - Senate Bill 1289

Recommended

- Create the cost estimate in the same format that the invoice package will look.
- For lump sum items, summarize how the cost was developed. The Utility is the author, but the District may assist where needed.
- If the Utility does not possess a sufficient cost estimate format, they could use the Standard Estimate Tool.

5.2 Attachment B – Utility's Accounting Method

- Actual Cost Method of Accounting
 - The Cost Estimate from Attachment "A" should allow for comparison to the actual cost of the accommodation.
 - Final billing requires a comparison of the estimated cost to the actual cost.
 - Items identified as Buy America materials will need to be verified before installation.
 - Cost estimates must have quantities broken down by categories and unit costs.
 - Cost Estimate must be defined, reasonable, and justified.
 - Supporting documentation is required at billing.
 - Supplemental Agreements are needed when:
 - Scope change or Addressing deficiencies
 - costs of the adjustment is +/- 25% or \$100,000.
- Lump Sum Method of Accounting
 - Used for projects with "small" Total Cost Estimates and are not complex.
 - Bid Tabs, fee schedules, and quotes are required before the execution of the agreement.
 - Items identified as Buy America materials will need to be verified before installation.
 - Cost estimates must have quantities broken down by categories and unit costs.
 - The Costs must be factual, justified, and accurate.
 - Supplemental Agreements are needed when:
 - The scope of the relocation changed.

Resources

- ROW Utility Manual, Chapter 7, Section 2
- CFR 645.113

Recommended

- If the agreement is the actual cost, be sure the lump sum amount is "N/A" on the second page of the Standard Utility Agreement Form ROW-U-35.

5.3 Attachment C – Utility's Schedule of Work and Estimated Date of Completion

- The schedule of work on the agreement should be verified before execution of the agreement.
- The schedule should be compared with the construction schedule. Get with the District Construction office to verify that the utility adjustments do not impact the Project's critical path.
- The schedule of work should not reflect the dates before the execution of the agreement.
- Provide a summary describing why the change is necessary.

Resources

- CFR – 645.113 and 635.121
- TAC – 21.22
- TAC – 21.37

Recommended

- Ensure that the schedule is updated before the execution of the agreement.

5.4 Attachment D – Statement Covering Contract Work

- The Utility should determine which workforce method will conduct the engineering and construction.
 - Attachment D and Form ROW-U-48, Statement Covering Utility Construction Contract Work, answers the questions of who will be performing the construction of the physical relocation of the facility and how they were procured.
 - Attachment D also covers the Contracted Engineering through selection on the cover page.
- ROW-U-48
 - Selection A: is a request for bids through open advertising.
 - The bid is awarded to the lowest qualified bidder.
 - Selection B: selections of bidders are based on "pre-qualified contractors of known qualified contractors."
 - A bid is awarded to the lowest qualified bidder.
 - Minimum of three bidders will be required
 - Selection C: work will be performed under an existing continuing contract.
 - Fee Schedule is required for comparison to the cost estimate.
 - Selection D: Special cases. When there is a rare situation where the Utility cannot follow any of the selections above. TxDOT approval is required.
 - Selection E: is used when a utility is a joint bid with a TxDOT roadway construction contractor to perform the accommodation.
 - In addition, Form ROW-U-48-1, which is derived from the Voluntary Utility Relocation Contributions on State Highway Improvement Projects (AFA), outlines the responsibilities of TxDOT and the Utility for the adjustment and is required as part of the agreement when executed and submitted to ROW Division.

Resources

- CFR – 645.115
- TAC 21.38 (e)

Recommended

- District and Utility should be in communication early in the coordination to determine how the bid tabulations or fee schedule rates will be verified.

5.5 Attachment E – Utility Joint Use Agreements and/or Utility Installation Request

- Use of the correct forms
 - Utility Joint Use Agreements
 - The Utility's facilities remain in place or inside their existing easement.
 - They are adjusting the Utility's facility within their existing easement.
 - To address the property interest left behind after the Utility moved out of their easement.
 - Utility Permit – via UIR or RULIS
 - When the Utility installs or adjusts its facility within the Existing and Proposed ROW. The agreement can have either:
 - The permit number(s).
 - The approved permit
 - Or the Notice of Proposed Installation (NOPI)
 - The TxDOT District ensures the Utility has an approved permit before breaking ground.
 - Quitclaim
 - When a replacement easement is involved, TxDOT reimburses the Utility for the proposed easement. Before TxDOT can reimburse for the replacement easement, the Utility must quitclaim the existing easement. Typically, the quitclaim comes after the execution of the Standard Utility Agreement.

Resources

- TAC 21.53

Recommended

- Include the information of segment(s) that is joint use, permitted, or quitclaim in the plans on Attachment "A."
- If utilizing the Utility Joint Use Agreement or Quitclaim, highlight the joint or quitclaimed area on the plans.
- The Utility Permit does not have to be executed when the SUA is executed, but the Utility should provide the permit number.

5.6 Attachment F – Eligibility Ratio

- A calculation is required if the adjustment is on a Non-Interstate Highway.
 - Property interest documentation is required (Attachment H).
 - Calculate the Eligibility Ratio based on the existing Utility Facilities located within the existing and proposed ROW.
 - In developing the ratio, line length or number of poles is restricted to facilities located within the existing and proposed highway right of way.
 - Facilities outside the existing and proposed right-of-way limits will not be used to develop the ratio.
 - The percentage established from the ratio will be applied to all applicable costs necessary for the adjustment.

Resources

- ROW Utility Manual Chapter 8, Section 2
- Transportation Code 203.092

Recommended

- Eligibility Ratio (ER) should be calculated in a format that the compliance reviewer can duplicate.
- Providing notes on how the ER is calculated to assist the reviewer in understanding the calculation.
- Adding a table with the facilities in the ROW and an Easement amount on each plan sheet supports the ER calculation.

5.7 Attachment G – Betterment Calculation and Estimates

TxDOT cost participation is based on the cost of providing the most economical replacement facility or restoring functionally equivalent service to the replaced facility. The costs of elective betterment items are ineligible for TxDOT and Federal participation. Such elective betterments should be depicted on the plan as part of the work proposed (See Utility Manual, Chapter 7, Section 2).

- Elective Betterment – The Utility elects to upgrade or improve the existing facility.
 - Two complete cost estimates are required.
 - Estimate showing the improved facility to be constructed.
 - Estimate with the Replacement In-Kind
 - In some cases, the In-Kind would be with new material.

- Example: If the existing facility is a six-inch concrete pipe. The Utility wants to use a twelve-inch HDPE pipe. The In-Kind would be the cost of relocating the facility with a six-inch HDPE pipe. The reason is that the availability or use of a six-inch concrete pipe is not as commonly available.
 - Calculate the betterment ratio as follows:
 - Determine the existing facility's type, size, length, and capacity.
 - Determine the proposed facility's type, size, length, and capacity.
 - Identify upgrades or improvements to the existing facility.
 - Calculate the betterment ratio, if any.
 - All costs associated with the betterment portion should be considered in the calculation of the betterment ratio.
- Forced Betterment – The Utility must upgrade or improve the existing facility caused by non-elective means.
 - Justification is required and placed in this Attachment.
 - In Attachment A, Cost Estimate, the calculation for Forced Betterment is to include the cost of the Betterment as eligible costs. No calculations are required.
- Items that do not count as Betterment.
 - It is changing the route of the facility if additional length is required to restore the facility to complete working order.
 - "Negative Betterment" is not possible, as any reduction in relocation cost is considered minimalization (Refer back to Avoid, Minimize, Accommodate). The most economical adjustment is not Betterment.

Resources	Recommended
CFR 645.117	<ul style="list-style-type: none"> • Document what the elective Betterment is. Describe what is being upgraded or improved, including size, length, and capacity. • Betterment Ratio is applied to all costs of the relocation. • Get approval of Forced Betterment from the ROW Division before executing the Standard Utility Agreement. For forced betterments, provide. <ul style="list-style-type: none"> ○ Justification, and ○ Supporting documentation (Engineering determination). • In Attachment "A," plans must illustrate where the Elective and Forced Betterment are located. • Provide supporting documentation. <ul style="list-style-type: none"> ○ For example, the existing facility summary sheet.

5.8 Attachment H – Proof of Property Interest

- Discovery of existing property interest
 - Provide supporting documentation.
 - Two Affidavits are needed.
 - By the Utility Owner
 - By the Landowner or Disinterested Party
 - Easement documentation
 - To determine if the Utility has property interest, conduct a title search of the deed records at the county clerk's office or from the title commitments issued for new highway right-of-way parcels. The Utility may claim a compensable interest within the existing highway right of way by property rights that predate the existing highway right of way. To substantiate the Utility's claim, they must provide documentation of owning the prior right. In some cases, a ROW attorney validation is required.

Resources

- Transportation Code – 203.092

Recommended

- Affidavit – Form ROW-U-Affidavit needs to be filled out if there is a change in ownership.
- Chain of ownership can also help with the verification of ownership of the facility.

6. Utility Adjustments Performed as a Joint Bid

By mutual consent of TxDOT and the Utility Owner, utility adjustments may be included in the highway contract.

- (a) The Utility Owner is responsible for the utility adjustment design information, itemized estimate, special provisions, and specifications for constructing the utility adjustments will be included in the TxDOT contract documents.
- (b) TxDOT will be responsible for preparing, letting, awarding, and administering the contract.
- (c) Specific duties, responsibilities, and authorities concerning the inspection and acceptance of the work must be clearly defined by TxDOT in cooperation with the utility in advance of the contract letting date.

- (d) The TxDOT Project Construction Engineer, in coordination with the Utility Construction Representative, will promptly address change orders or disputes that arise and affect the utility adjustment. The intent is to resolve the construction issues or disputes at the earliest possible time to avoid escalation of costs and delay to the work completion.
- (e) When reimbursable utility work is included in the TxDOT contract, it must be authorized by the preparation and approval of a Utility Agreement Assembly. The appropriate parties will prepare this assembly.
- (f) When wholly or partially ineligible utility work is included in the TxDOT contract, an AFA as part of the Utility Agreement will be required. Ineligible work would include non-reimbursable betterments, utility adjustments without compensable interests, or utility adjustments with partial compensable interests. Requests for AFAs should be initiated by the TxDOT Project Design Engineer and the TxDOT Utility Coordinator and included in the PS&E submission. The AFAs will then be processed in the Contract Services Divisions.
 - (i) Utilities may be eligible for State cost participation on their facility adjustments. The "eligibility ratio" is the relationship between real property interest held within the proposed highway right of way and the total highway right of way occupied by the utility facility. The TxDOT Utility Coordinator will make the determination of this eligibility ratio and will be subject to approval by the ROW Program Office. An exception to this determination of eligibility exists for the Interstate Highway System, on which utility adjustments are normally 100% reimbursable, or Toll Projects.
- (g) Information in Agreement Assembly
 - (i) Memo from District to Division
 - (A) TxDOT Contractor will conduct the document portion or whole accommodation.
 - (ii) Attachment A
 - (A) Include and identify estimated costs of the TxDOT Contractor.
 - (1) Include material and labor.
 - (B) Include any procurement requirements (Special Specifications) that the TxDOT Contractor must comply with procuring the materials.
 - (C) If the Utility is to procure part or whole materials, indicate the item the utility will procure the items.
 - (D) If engineering is a Joint Bid, provide the estimate from the PEPS contract.

- (E) Buy America-compliant materials must be identified. The TxDOT Contractor and Construction Division is responsible for obtaining and maintaining Buy America-compliant documentation.
- (iii) Attachment B: The accounting method must be Actual Cost.
- (iv) Attachment C: Schedule can be estimated dates the contractor will start the accommodation.
- (v) Attachment D
 - (A) ROW-U-48 – Check box “E” is to be selected.
 - (B) ROW-U-48-1 – to be included.
- (vi) Attachment E: Standard documentation
- (vii) Attachment F: Standard documentation
- (viii) Attachment G: Standard documentation
- (ix) Attachment H: Standard documentation
- (x) Advance Funding Agreement For Voluntary Utility Relocation Contributions On State Highway Improvement Projects (Utility AFA)
 - (A) The Utility and TxDOT should start working on the Utility AFA as soon as the Utility indicates that they want to include the accommodation in the highway contract.
 - (B) Note: for municipalities and other entities that would need to present the Utility AFA to a board or council for execution, planning and keeping to a schedule is important. Often, the document must get on the agenda; therefore, the document must be completed in a timely manner. This timeline should also include when the Utility would be able to obtain funding to TxDOT. Funding must be provided 45 days before Letting.

Resources

- CFR 645.109
- CFR 645.115

Recommended

- Early communication is important.
- Establish deadlines. If the Utility is not meeting the deadlines, the District must communicate the critical deadlines to the Utility. If the Utility is not meeting the deadline then the utility will have to relocate the facility themselves or procure a contractor.