

TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

Page 1 of 1

ALL Districts

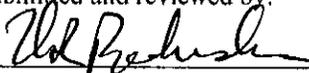
The Texas Transportation Commission (commission) finds it necessary to adopt amendments to §9.15, §9.17, §9.18 relating to highway improvement contracts, and §9.106 relating to contractor sanctions, to be codified under Title 43, Texas Administrative Code, Part 1.

The preambles and the adopted amendments, attached to this minute order as Exhibits A - D, are incorporated by reference as though set forth at length verbatim in this minute order.

IT IS THEREFORE ORDERED by the commission that the amendments to §9.15, §9.17, §9.18, and §9.106 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:



Director, Construction Division

Recommended by:



Executive Director

110311 NOV 17 05

Minute Number Date Passed

1 Adoption Preamble

2 The Texas Department of Transportation (department) adopts
3 amendments to §9.15, §9.17, and §9.18 concerning highway
4 improvement contracts. The amendments to §9.15, §9.17, and
5 §9.18 are adopted without changes to the proposed text as
6 published in the September 9, 2005 issue of the *Texas Register*
7 (30 TexReg 5756) and will not be republished.

8

9 EXPLANATION OF ADOPTED AMENDMENTS

10 Transportation Code, Chapter 223, Subchapter A, prescribes the
11 method by which the department receives competitive bids for the
12 improvement of highways that are a part of the state highway
13 system. Pursuant to this authority, the Texas Transportation
14 Commission (commission) has previously adopted §§9.10-9.21 to
15 specify the process by which the department will administer and
16 manage highway improvement contracts.

17

18 Section 9.15(b)(1)(H) is revised to state that a proposal will
19 not be accepted or read if, when required, the bid does not
20 include a fully completed historically underutilized business
21 subcontracting plan as prescribed by §9.54(c)(1) of this title
22 (relating to Historically Underutilized Business (HUB) Program).
23 This revision is necessary to provide clarity regarding specific
24 HUB plan requirements associated with bid acceptance or
25 rejection by the department.

1

2 Section 9.17(d) is revised to increase the maximum bid amount
3 from \$100,000 to \$300,000 for the possible award of a
4 maintenance contract to the second lowest bidder when the lowest
5 bidder withdraws their bid after bid opening. This revision is
6 necessary in order to implement statutory revisions to
7 Transportation Code, §223.0041, as contained in Senate Bill 573,
8 79th Legislature, Regular Session, 2005.

9

10 Section 9.18(c) is revised to allow for an alternative form of
11 performance and payment bond on maintenance contracts. This
12 revision is necessary in order to implement statutory revisions
13 to Transportation Code, §223.042, as contained in House Bill
14 2659, 79th Legislature, Regular Session, 2005.

15

16 Revisions to §9.15, §9.17 and §9.18 also include minor
17 formatting changes. To be consistent, references to "this
18 title" have been changed to "this chapter."

19

20 COMMENTS

21 No comments on the proposed amendments were received.

22

23 STATUTORY AUTHORITY

24 The amendments are adopted under Transportation Code, §201.101,
25 which provides the commission with the authority to establish

1 rules for the conduct of the work of the department, and more
2 specifically, Transportation Code, §§223.001-223.016, which
3 requires the department to competitively bid highway improvement
4 contracts.

5

6 CROSS REFERENCE TO STATUTE

7 Transportation Code, §§223.0041 and 223.042.

1 SUBCHAPTER B. HIGHWAY IMPROVEMENT CONTRACTS

2 §9.15. Acceptance, Rejection, and Reading of Proposals.

3 (a) Public reading. Bids will be opened and read in
4 accordance with Transportation Code, §223.004 and §223.005. Bids
5 for contracts with an engineer's estimate of less than \$300,000
6 may be filed with the district engineer at the headquarters for
7 the district, and opened and read at a public meeting conducted
8 by the district engineer, or his or her designee on behalf of
9 the commission.

10 (b) Proposals not read.

11 (1) The department will not accept and will not read a
12 proposal if:

13 (A) the proposal is submitted by an unqualified bidder;

14 (B) the proposal is in a form other than the official
15 proposal form issued to the bidder;

16 (C) the certification and affirmation are not signed;

17 (D) the proposal was not in the hands of the letting
18 official at the time and location specified in the
19 advertisement;

20 (E) the bidder modifies the proposal in a manner that
21 alters the conditions or requirements for work as stated in the
22 proposal;

23 (F) the proposal guaranty, when required, does not

1 comply with §9.14(d) of this chapter [~~title~~] (relating to
2 Submittal of Proposal);

3 (G) the bidder did not attend a specified mandatory
4 pre-bid conference;

5 (H) the bid does not include a fully completed
6 historically underutilized business subcontracting plan in
7 accordance with §9.54(c)(1) of this chapter (relating to
8 Historically Underutilized Business (HUB) Program) when
9 required;

10 (I) a computer printout proposal, when used, does not
11 have the unit bid prices entered in designated spaces, is not
12 signed in the name of the firm or firms to whom the proposal was
13 issued, or omits required bid items or includes items not shown
14 in the proposal;

15 (J) the bidder was not authorized to be issued a
16 proposal under §9.13(e) of this chapter [~~title~~] (relating to
17 Notice of Letting and Issuance of Proposals);

18 (K) the proposal did not otherwise conform with the
19 requirements of §9.14 of this chapter [~~title~~];

20 (L) the bidder fails to properly acknowledge receipt of
21 all addenda;

22 (M) the proposal submitted has the incorrect number of
23 bid items; or

1 (N) the bidder bids more than the maximum or less than
2 the minimum number of allowable working days shown on the plans
3 when working days is a bid item.

4 (2) If more than one proposal involving a bidder under
5 the same or different names is submitted on the same project,
6 the department will not accept and will not read any of the
7 proposals submitted by that bidder for that project.

8 (c) Revision bid by bidder.

9 (1) A bidder may change a bid price before it is
10 submitted to the department by changing the price and initialing
11 the revision in ink.

12 (2) A bidder may change a bid price after it is submitted
13 to the department by requesting return of the bid in writing
14 prior to the expiration of the time for receipt of bids, as
15 stated in the advertisement. The request must be made by a
16 person authorized to bind the bidder. The department will not
17 accept a request by telephone or telegraph, but will accept a
18 properly signed telefacsimile request. The revised bid must be
19 resubmitted prior to the time specified for the close of the
20 receipt of bids.

21 (d) Withdrawal of bid. A bidder may withdraw a bid by
22 submitting a request in writing before the time and date of the
23 bid opening. The request must be made by a person authorized to

1 bind the bidder. The department will not accept telephone or
2 telegraph requests, but will accept a properly signed
3 telefacsimile request. Except as provided in §9.16(c) of this
4 chapter (relating to Tabulation of Bids) and §9.17(d) of this
5 chapter (relating to Award of Contract), a bidder may not
6 withdraw a bid subsequent to the time for the receipt of bids.

7 (e) Unbalanced bids. The department will examine the unit
8 bid prices of the apparent low bid for reasonable conformance
9 with the department's estimated prices. The department will
10 evaluate a bid with extreme variations from the department's
11 estimate, or where obvious unbalancing of unit prices has
12 occurred. For the purposes of the evaluation, the department
13 will presume the same retainage percentage for all bidders. In
14 the event that the evaluation of the unit bid prices reveals
15 that the apparent low bid is mathematically and materially
16 unbalanced, the bidder will not be considered in future bids for
17 the same project.

18

19 §9.17. Award of Contract.

20 (a) The commission may reject any and all bids opened,
21 read, and tabulated under §9.15 and §9.16 of this chapter
22 [~~title~~] (relating to Acceptance, Rejection, and Reading of
23 Proposals, and Tabulation of Bids). It will reject all bids if:

NOTE: Additions underlined
Deletions in []
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Exhibit B

1 (1) there is reason to believe collusion may have existed
2 among the bidders;

3 (2) the lowest bid is determined to be both
4 mathematically and materially unbalanced;

5 (3) the lowest bid is higher than the department's
6 estimate and the commission determines that re-advertising the
7 project for bids may result in a significantly lower low bid;

8 (4) the lowest bid is higher than the department's
9 estimate and the commission determines that the work should be
10 done by department forces; or

11 (5) the lowest bid is determined to contain a bid error
12 that meets the notification requirements contained in
13 §9.16(e)(1) of this subchapter and satisfies the criteria
14 contained in §9.16(e)(2).

15 (b) Except as provided in subsection (c), (d), or (e) of
16 this section, if the commission does not reject all bids, it
17 will award the contract to the lowest bidder.

18 (c) In accordance with the Government Code, Chapter 2252,
19 Subchapter A, the commission will not award a contract to a
20 nonresident bidder unless the nonresident underbids the lowest
21 bid submitted by a responsible resident bidder by an amount that
22 is not less than the amount by which a resident bidder would be
23 required to underbid the nonresident bidder to obtain a

1 comparable contract in the state in which the nonresident's
2 principal place of business is located.

3 (d) For a maintenance contract involving a bid amount of
4 less than \$300,000 [~~\$100,000~~], if the lowest bidder withdraws
5 its bid after bid opening, the executive director may recommend
6 to the commission that the contract be awarded to the second
7 lowest bidder.

8 (1) For purposes of this subsection, the term
9 "withdrawal" includes written withdrawal of a bid after bid
10 opening, failure to provide the required insurance or bonds, or
11 failure to execute the contract.

12 (2) The executive director may recommend award of the
13 contract to the second lowest bidder if he or she, in writing,
14 determines that the second lowest bidder is willing to perform
15 the work at the unit bid prices of the lowest bidder; and

16 (A) the unit bid prices of the lowest bidder are
17 reasonable, and delaying award of the contract may result in
18 significantly higher unit bid prices;

19 (B) there is a specific need to expedite completion of
20 the project to protect the health or safety of the traveling
21 public, or

22 (C) delaying award of the contract would jeopardize the
23 structural integrity of the highway system.

1 (3) The commission may accept the withdrawal of the
2 lowest bid after bid opening if it concurs with the executive
3 director's determinations.

4 (4) If the commission awards a contract to the second
5 lowest bidder and the department successfully enters into a
6 contract with the second lowest bidder, the department will
7 return the lowest bidder's proposal guaranty upon execution of
8 that contract. The lowest bidder may be considered in default
9 and will be subject to debarment under §9.100, et seq. of this
10 chapter.

11 (e) When additional information is required to make a final
12 decision, the commission may defer the award or rejection of the
13 contract until the next regularly scheduled commission meeting.

14 (f) Contracts with an engineer's estimate of less than
15 \$300,000 may be awarded or rejected by the executive director or
16 the director's designee under the same conditions and
17 limitations as provided in subsections (a)-(c) of this section.

18 (g) The commission may rescind the award of any contract
19 prior to contract execution upon a determination that it is in
20 the best interest of the state. In such an instance, the
21 proposal guaranty will be returned to the bidder. No
22 compensation will be paid to the bidder as a result of this
23 cancellation.

1

2 §9.18. After Contract Award.

3 (a) Contract execution.

4 (1) Except as provided in paragraphs (2) and (3) of this
5 subsection, within 15 days after written notification of award
6 of a contract, the successful bidder must execute and furnish to
7 the department the contract with:

8 (A) a performance bond and a payment bond, if required
9 and as required by the Government Code, Chapter 2253, with
10 powers of attorneys attached, each in the full amount of the
11 contract price except as provided by subsection (c) of this
12 section, executed by a surety company or surety companies
13 authorized to execute surety bonds under and in accordance with
14 state law (Department interpretations made in accordance with
15 §9.16(b)(2) of this chapter (relating to Tabulation of Bids)
16 will be used to determine the contract amount for providing a
17 performance bond and payment bond, if required, and as required
18 by the Government Code, Chapter 2253.);

19 (B) a certificate of insurance showing coverages in
20 accordance with contract requirements;

21 (C) when required, written evidence of current good
22 standing from the Comptroller of Public Accounts; and

23 (D) a list of all quoting subcontractors and suppliers.

1 (2) A successful bidder on a routine maintenance contract
2 will be required to provide the certificate of insurance prior
3 to the date the contractor begins work as specified in the
4 department's order to begin work.

5 (3) Within the time specified in the contract, the
6 successful bidder on a construction contract containing a DBE or
7 SBE goal, who is not a DBE or SBE, must submit all the
8 information required by the department in accordance with
9 §9.53(e) of this chapter [~~title~~] (relating to Disadvantaged
10 Business Enterprise (DBE) Program) and §9.55(c) of this chapter
11 [~~title~~] (relating to Small Business Enterprise (SBE) Program).
12 The successful bidder must comply with paragraph (1) of this
13 subsection within 15 days after written notification of
14 acceptance by the department of the successful bidder's
15 documentation to achieve the DBE or SBE goal.

16 (b) Proposal guaranty. The department will retain the
17 proposal guaranty of the successful bidder until after the
18 contract has been executed and bonded. If the successful bidder
19 does not comply with subsection (a) of this section, the
20 proposal guaranty will become the property of the state, not as
21 a penalty but as liquidated damages; provided, however, the
22 department may, based on documentation submitted by the
23 contractor, grant a 15-day extension to comply with the

1 requirements under subsection (a)(3) of this section. A bidder
2 who forfeits a proposal guaranty will not be considered in
3 future proposals for the same work unless there has been a
4 substantial change in the design of the project subsequent to
5 the forfeiture of the proposal guaranty.

6 (c) Performance or payment bonds [~~bond~~]. For [~~routine~~]
7 maintenance contracts [~~in which the contractor assumes~~
8 ~~responsibility for maintaining a portion of a highway facility~~
9 ~~for a set period of time,~~] the department may require that a
10 performance or payment bond:

11 (1) be in an amount equal to the greatest annual amount
12 to be paid under the contract and remain in effect for one year
13 from the date work is resumed after any default by the
14 contractor; or

15 (2) be in an amount equal to the amount to be paid the
16 contractor during the term of the bond and be for a term of two
17 years, renewable annually in two-year increments.

1 Adoption Preamble

2 The Texas Department of Transportation (department) adopts
3 amendments to §9.106 concerning contractor sanctions. The
4 amendments to §9.106 are adopted without changes to the proposed
5 text as published in the September 9, 2005 issue of the *Texas*
6 *Register* (30 TexReg 5757) and will not be republished.

7

8 EXPLANATION OF ADOPTED AMENDMENTS

9 The Texas Department of Transportation's contractor sanction
10 rules set forth the circumstances under which contractors may be
11 sanctioned and the procedures that must be followed. The Texas
12 Transportation Commission (commission) has previously adopted
13 §§9.100-9.106 to specify the process by which the department
14 will administer and manage highway improvement contracts.

15

16 Section 9.106(a)(5) and (a)(6) are combined to provide that
17 sanctions may be imposed if a contractor fails to execute a
18 highway improvement contract after a bid is awarded and fails to
19 honor a bid guaranty submitted under §9.14(d) of this chapter
20 (relating to Submittal of Proposal). A contractor will no
21 longer be sanctioned for failure to execute a contract if the
22 bid guaranty is honored, because collection of the bid guaranty
23 is sufficient. This revision is necessary to protect the
24 integrity of the department's competitive bidding process and
25 clarify the specific instances when sanctions would apply in the

1 event an awarded highway improvement is not executed.

2

3 COMMENTS

4 No comments on the proposed amendments were received.

5

6 STATUTORY AUTHORITY

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

10

11 CROSS REFERENCE TO STATUTE

12 None.

1 SUBCHAPTER G. CONTRACTOR SANCTIONS

2 §9.106. Sanctions.

3 (a) Grounds. The executive director may sanction a
4 contractor for the following reasons:

5 (1) conviction of a bidding crime, a plea of guilty or
6 nolo contendere to a charge of a bidding crime, or a public
7 admission to a bidding crime, whether made by the contractor or
8 by an individual or entity that acted on behalf of the
9 contractor;

10 (2) conviction of the contractor for an offense
11 indicating a lack of moral or ethical integrity, such as bribery
12 or payment of kickbacks or secret rebates to agents of a
13 governmental entity, if the offense reflects on the business
14 practices of the contractor;

15 (3) commission of acts indicating a lack of moral or
16 ethical integrity and reflecting on the business practices of
17 the contractor, if the executive director has probable cause to
18 believe that the acts have been committed;

19 (4) disqualification of the contractor by a state or by
20 an agency of the federal government for any of the reasons
21 listed in this section;

22 (5) the contractor fails to execute a highway improvement
23 contract after a bid is awarded [†]

1 ~~(6)~~ unless the contractor honors ~~[fails to honor]~~ a bid
2 guaranty submitted under §9.14(d) of this chapter (relating to
3 Submittal of Proposal);

4 (6) ~~(7)~~ rejection of a bid by the commission because of
5 contractor error twice in a three year period;

6 (7) ~~(8)~~ failure of the contractor to notify the
7 department promptly of a conviction of a bidding crime or
8 debarment for any reason by a state or by an agency of the
9 federal government; or

10 (8) ~~(9)~~ the contractor is declared in default on a
11 highway improvement contract.

12 (b) Sanction levels.

13 (1) Level 1. A 50% reduction in bidding capacity for no
14 more than 12 months.

15 (2) Level 2. Debarment of the contractor for no more
16 than 12 months.

17 (3) Level 3. Debarment of the contractor for no more
18 than 36 months.

19 (4) Level 4. Permanent debarment of the contractor.

20 (c) Exception. Debarment under subsection (a)(4) of this
21 section may not be for more than the period of debarment
22 established by the state or federal agency on whose actions the
23 debarment is based.