

TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

Page 1 of 1

ALL Districts

The Texas Transportation Commission (commission) finds it necessary to propose amendments to §9.10, §9.11, and §9.17, relating to highway improvement contracts, to be codified under Title 43, Texas Administrative Code, Part 1.

The preamble and the proposed amendments, attached to this minute order as Exhibits A and B, 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 §9.10, §9.11, and §9.17 are proposed for adoption and are authorized for publication in the *Texas Register* for the purpose of receiving public comments.

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:

Recommended by:

Director, Maintenance Division

Executive Director

Minute Number Date Passed

1 Proposed Preamble

2 The Texas Department of Transportation (department) proposes
3 amendments to §9.10, §9.11, and §9.17, concerning highway
4 improvement contracts.

5

6 EXPLANATION OF PROPOSED AMENDMENTS

7 Transportation Code, §361.231 provided for the award of turnpike
8 improvement contracts. The section was repealed by H.B. 2702,
9 79th Legislature, Regular Session, 2005. Transportation Code,
10 Chapter 223, which is currently cited in the rules, now provides
11 for the award of highway improvement contracts for tolled state
12 highways. References to Transportation Code, §361.231 are
13 removed from §9.10, Purpose, and from the definitions of
14 "Building contract," "Construction contract," and "Maintenance
15 contract" in §9.11.

16

17 To improve clarity, minor changes to rule section citations have
18 been made in §9.11(23) and §9.11(34).

19

20 Transportation Code, §223.0041, authorizes the department to
21 award a maintenance contract for less than \$300,000 to the
22 second lowest bidder if the lowest bidder withdraws its bid
23 after bid opening. This statute further directs the department
24 to adopt rules governing the conditions under which the
25 withdrawal of the bid of the lowest bidder and consideration of

1 contract award to the second lowest bidder will be allowed.
2 Section 9.17 is being amended to include building maintenance
3 contracts. This will allow the department to avoid the
4 detrimental effects of delaying needed building maintenance.

5

6 FISCAL NOTE

7 James Bass, Chief Financial Officer, has determined that for
8 each of the first five years the amendments as proposed are in
9 effect, there will be no fiscal implications for local
10 governments and minimal fiscal implications for the state as a
11 result of enforcing or administering the amendments. The cost
12 savings of approximately \$75,000 is due to the fact that the
13 department will no longer incur advertising, printing, or
14 administrative costs associated with the re-bidding process.
15 There are no anticipated economic costs for persons required to
16 comply with the sections as proposed.

17

18 Zane Webb, Director, Maintenance Division has certified that
19 there will be no significant impact on local economies or
20 overall employment as a result of enforcing or administering the
21 amendments.

22

23 PUBLIC BENEFIT

24 Mr. Webb has also determined that for each year of the first
25 five years the sections are in effect, the public benefit

1 anticipated as a result of enforcing or administering the
2 amendments will be the expedited maintenance of department
3 buildings. There will be no adverse economic effect on small
4 businesses.

5

6 SUBMITTAL OF COMMENTS

7 Written comments on the proposed amendments to §9.10, §9.11, and
8 §9.17 may be submitted to Zane Webb, Director, Maintenance
9 Division, Texas Department of Transportation, 125 East 11th
10 Street, Austin, Texas 78701-2483. The deadline for receipt of
11 comments is 5:00 p.m. on September 11, 2006.

12

13 STATUTORY AUTHORITY

14 The amendments are proposed under Transportation Code, §201.101,
15 which provides the Texas Transportation Commission with the
16 authority to establish rules for the conduct of the work of the
17 department, and more specifically, Transportation Code,
18 §223.0041, which authorizes the department to adopt rules
19 regarding the award of certain maintenance contracts to the
20 second lowest bidder.

21

22 CROSS REFERENCE TO STATUTE

23 Transportation Code, §201.101 and §223.0041.

1 SUBCHAPTER B. HIGHWAY IMPROVEMENT CONTRACTS

2 §9.10. Purpose. The sections under this subchapter prescribe
3 the policies and procedures governing bidder qualification,
4 bidding, award, and execution of a contract entered under
5 Transportation Code, Chapter 223, Subchapters A-C [~~or~~
6 ~~Transportation Code, §361.231~~].

7
8 §9.11. Definitions. The following words and terms, when used
9 in this subchapter, shall have the following meanings, unless
10 the context clearly indicates otherwise.

11 (1) Advertisement--The public announcement required by
12 law inviting bids for work to be performed or materials to be
13 furnished.

14 (2) Alternate bid item--A bid item identified by the
15 department as an acceptable substitute for a regular bid item.

16 (3) Apparent low bidder--The bidder determined to have
17 the numerically lowest total bid as a result of the tabulation
18 of bids by the department.

19 (4) Available bidding capacity--The contractor's approved
20 bidding capacity less uncompleted work on department contracts.

21 (5) Award--The commission's acceptance of a contractor's
22 bid for a proposed contract that authorizes the department to
23 enter into a contract.

1 (6) Bidder--An individual, partnership, limited liability
2 company, corporation, or joint venture submitting a bid for a
3 proposed contract.

4 (7) Bid bond--The security executed by the contractor and
5 the surety furnished to the department to guarantee payment of
6 liquidated damages if the contractor fails to enter into an
7 awarded contract.

8 (8) Bid error--A mathematical mistake by the prime
9 contractor in the unit bid price entered in the proposal.

10 (9) Bidding capacity--The maximum dollar value a
11 contractor may have under contract with the department at any
12 given time.

13 (10) Building contract--A contract entered under
14 Transportation Code, Chapter 223, Subchapter A, [~~ex~~
15 ~~Transportation Code, §361.231,~~] for the construction or
16 maintenance of a department building or appurtenant facilities.
17 Building contracts are considered to be highway improvement
18 contracts.

19 (11) Certificate of insurance--A form approved by the
20 department covering insurance requirements stated in the
21 contract.

22 (12) Certification of Eligibility Status form--A
23 notarized form describing any suspension, voluntary exclusion,

1 ineligibility determination actions by an agency of the federal
2 government, indictment, conviction, or civil judgment involving
3 fraud, official misconduct, each with respect to the bidder or
4 any person associated with the bidder in the capacity of owner,
5 partner, director, officer, principal investor, project
6 director/supervisor, manager, auditor, or a position involving
7 the administration of federal funds, covering the three-year
8 period immediately preceding the date of the qualification
9 statement.

10 (13) Commission--The Texas Transportation Commission or
11 authorized representative.

12 (14) Confidential Questionnaire--A prequalification form
13 reflecting detailed financial and experience data.

14 (15) Construction contract--A contract entered under
15 Transportation Code, Chapter 223, Subchapter A, [~~or~~
16 ~~Transportation Code, §361.231,~~] for the construction or
17 reconstruction of a segment of the state highway system.

18 (16) Department--The Texas Department of Transportation.

19 (17) Deputy executive director--Any second tier manager
20 appointed by the executive director.

21 (18) Disadvantaged business enterprise (DBE)--Has the
22 meaning assigned by §9.51(10) of this chapter (relating to
23 Definitions).

1 (19) District engineer--The chief executive officer in
2 each of the designated district offices of the department.

3 (20) Emergency--Any situation or condition of a
4 designated state highway, resulting from a natural or man-made
5 cause, that poses an imminent threat to life or property of the
6 traveling public or which substantially disrupts or may disrupt
7 the orderly flow of traffic and commerce.

8 (21) Executive director--The executive director of the
9 Texas Department of Transportation.

10 (22) Highway improvement contract--A construction,
11 maintenance, or building contract.

12 (23) Historically underutilized business (HUB)--Has the
13 meaning assigned by §9.51(16) [~~§9.51(17)~~] of this chapter.

14 (24) Joint venture--Any combination of individuals,
15 partnerships, limited liability companies, or corporations
16 submitting a single bid proposal.

17 (25) Letting official--The executive director or any
18 department employee empowered by the executive director to
19 officially receive bids and close the receipt of bids at a
20 letting.

21 (26) Maintenance contract--A contract entered under
22 Transportation Code, Chapter 223, Subchapter A, [~~ex~~
23 ~~Transportation Code, §361.231,~~] for the maintenance of a segment

1 of the state highway system.

2 (27) Materially unbalanced bid--A bid which generates a
3 reasonable doubt that award to the bidder submitting a
4 mathematically unbalanced bid will result in the lowest ultimate
5 cost to the state.

6 (28) Mathematically unbalanced bid--A bid containing lump
7 sum or unit bid items that do not reflect reasonable actual
8 costs plus a reasonable proportionate share of the bidder's
9 anticipated profit, overhead costs, and other indirect costs.

10 (29) Preventive maintenance contract--Contracts let
11 through the construction contracting procedure to preserve and
12 prevent further deterioration of the roadways and rights of way,
13 with all its components.

14 (30) Proposal--The offer of the bidder, made out on the
15 prescribed form, including addenda issued, giving bid prices for
16 performing the work described in the plans and specifications.

17 (31) Proposal guaranty--The security designated in the
18 proposal and furnished by the bidder as a guaranty that the
19 bidder will enter into a contract if awarded the work.

20 (32) Regular bid item--A bid item contained in a proposal
21 and not designated as an alternate bid item.

22 (33) Routine maintenance contract--Contracts let through
23 the routine maintenance contracting procedure to preserve and

1 repair roadways and rights of way, with all its components, to
2 its designed or accepted configuration.

3 (34) Small business enterprise (SBE)--Has the meaning
4 assigned by §9.51(22) [~~§9.51(23)~~] of this chapter.

5

6 §9.17. Award of Contract.

7 (a) The commission may reject any and all bids opened,
8 read, and tabulated under §9.15 and §9.16 of this chapter
9 (relating to Acceptance, Rejection, and Reading of Proposals,
10 and Tabulation of Bids). It will reject all bids if:

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

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

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

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

21 (5) the lowest bid is determined to contain a bid error
22 that meets the notification requirements contained in
23 §9.16(e)(1) of this subchapter and satisfies the criteria

1 contained in §9.16(e)(2).

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

5 (c) In accordance with the Government Code, Chapter 2252,
6 Subchapter A, the commission will not award a contract to a
7 nonresident bidder unless the nonresident underbids the lowest
8 bid submitted by a responsible resident bidder by an amount that
9 is not less than the amount by which a resident bidder would be
10 required to underbid the nonresident bidder to obtain a
11 comparable contract in the state in which the nonresident's
12 principal place of business is located.

13 (d) For a maintenance contract for a building or a segment
14 of the state highway system involving a bid amount of less than
15 \$300,000, if the lowest bidder withdraws its bid after bid
16 opening, the executive director may recommend to the commission
17 that the contract be awarded to the second lowest bidder.

18 (1) For purposes of this subsection, the term
19 "withdrawal" includes written withdrawal of a bid after bid
20 opening, failure to provide the required insurance or bonds, or
21 failure to execute the contract.

22 (2) The executive director may recommend award of the
23 contract to the second lowest bidder if he or she, in writing,

1 determines that the second lowest bidder is willing to perform
2 the work at the unit bid prices of the lowest bidder; and

3 (A) the unit bid prices of the lowest bidder are
4 reasonable, and delaying award of the contract may result in
5 significantly higher unit bid prices;

6 (B) there is a specific need to expedite completion of
7 the project to protect the health or safety of the traveling
8 public, or

9 (C) delaying award of the contract would jeopardize the
10 structural integrity of the highway system.

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

14 (4) If the commission awards a contract to the second
15 lowest bidder and the department successfully enters into a
16 contract with the second lowest bidder, the department will
17 return the lowest bidder's proposal guaranty upon execution of
18 that contract. The lowest bidder may be considered in default
19 and will be subject to debarment under §9.100, et seq. of this
20 chapter.

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

1 (f) Contracts with an engineer's estimate of less than
2 \$300,000 may be awarded or rejected by the executive director or
3 the director's designee under the same conditions and
4 limitations as provided in subsections (a)-(c) of this section.

5 (g) The commission may rescind the award of any contract
6 prior to contract execution upon a determination that it is in
7 the best interest of the state. In such an instance, the
8 proposal guaranty will be returned to the bidder. No
9 compensation will be paid to the bidder as a result of this
10 cancellation.

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