

TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

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ALL Districts

The Texas Transportation Commission (commission) finds it necessary to adopt amendments to §9.20, relating to partial payments, to be codified under Title 43, Texas Administrative Code, Part 1.

The preamble and the adopted 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 §9.20 are adopted and 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:

Recommended by:

Director, Construction Division

Executive Director

Minute Number Date Passed

1 Adoption Preamble

2 The Texas Department of Transportation (department) adopts
3 amendments to §9.20, concerning partial payments. The
4 amendments to §9.20 are adopted without changes to the proposed
5 text as published in the September 7, 2007 issue of the *Texas*
6 *Register* (32 TexReg 6104) and will not be republished.

7

8 EXPLANATION OF ADOPTED AMENDMENTS

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

16

17 To comply with new federal regulations prohibiting retainage on
18 federal-aid highway improvement contracts as well as statutory
19 amendments as specified in House Bill 2075, 80th Legislature,
20 Regular Session, 2007, paragraph (1) of §9.20, Partial payments,
21 is amended to remove the requirement that construction contracts
22 and preventative maintenance contracts provide for partial
23 payments. Partial payments may, however, apply to these
24 contracts at the department's discretion. For contracts in
25 existence prior to the adoption of this amendment, the

1 department will consider issuing change orders to release some
2 or all of the retainage that has already been withheld.

3

4 Paragraphs (2), (3), and (5) of §9.20 are removed in their
5 entirety as they apply to required partial payments and are no
6 longer needed. Existing paragraph (4) of §9.20 is renumbered to
7 paragraph (2) as a result of these deletions and amended to
8 conform to the changes made to paragraph (1) of that section.

9

10 COMMENTS

11 No comments on the proposed amendments were received.

12

13 STATUTORY AUTHORITY

14 The amendments are adopted under Transportation Code, §201.101,
15 which provides the commission with the authority to establish
16 rules for the conduct of the work of the department, and more
17 specifically, Transportation Code, §§223.001-223.016, which
18 requires the department to competitively bid highway improvement
19 contracts.

20

21 CROSS REFERENCE TO STATUTE

22 Transportation Code, §§223.009-223.010.

1 SUBCHAPTER B. HIGHWAY IMPROVEMENT CONTRACTS

2 §9.20. Partial Payments. Highway improvement contracts may
3 provide for partial payments.

4 (1) Construction and preventive maintenance contracts.
5 Construction contracts and preventive maintenance contracts may
6 [will] provide for partial payments [~~of an amount not exceeding~~
7 ~~95% of the value of the work done, except as provided in~~
8 ~~paragraph (2) of this section. The department will retain 5.0%~~
9 ~~of the contract price until the entire work has been completed~~
10 ~~and accepted, except as provided in paragraphs (2) and (3) of~~
11 ~~this section].~~

12 (2) [~~Construction and preventive maintenance contracts~~
13 ~~involving the use of nonhazardous recycled materials.~~
14 ~~Construction contracts and preventive maintenance contracts~~
15 ~~involving the use of nonhazardous recycled materials approved by~~
16 ~~the department will provide for partial payments of an amount~~
17 ~~not exceeding 96% of the value of the work done. Prior to~~
18 ~~beginning of work, the contractor must identify the quantities~~
19 ~~of nonhazardous recycled materials to be used in the contracted~~
20 ~~work. Once the contractor's commitment to utilize nonhazardous~~
21 ~~recycled materials has been established, the department will~~
22 ~~retain 4.0% of the contract price until the entire work has been~~
23 ~~completed and accepted, except as provided in paragraph (3) of~~

1 ~~this section.]~~

2 ~~[(3) Construction and preventive maintenance contracts~~
3 ~~involving separate vegetative establishment, maintenance, or~~
4 ~~performance periods. The department may release a portion of~~
5 ~~the amount retained under paragraph (1) or (2) of this section~~
6 ~~when the work is completed, provided a sufficient amount of the~~
7 ~~contract price is retained to ensure satisfactory completion of~~
8 ~~the separate vegetative establishment, maintenance, or~~
9 ~~performance period.]~~

10 ~~[(4)]~~ At the request of a contractor and with the approval
11 of the department and the comptroller of public accounts, any
12 amount retained ~~[the retained amount]~~ may be deposited under the
13 terms of a trust agreement with a state or national bank that
14 has its main office or a branch office in Texas as selected by
15 the contractor, provided that the contract price exceeds
16 \$300,000. The trust agreement shall provide that:

17 (A) interest earned on deposited funds will be paid to
18 the contractor unless otherwise specified under the terms of the
19 agreement;

20 (B) all expenses incident to the deposit and all charges
21 made by the escrow agent for custody of the securities and
22 forwarding of interest shall be paid solely by the contractor;

23 (C) the department may, at any time and with or without

1 reason, demand in writing that the bank return or repay, within
2 30 days of the demand, the retainage or any investments in which
3 it is invested; and

4 (D) any other terms and conditions prescribed by the
5 department and the comptroller of public accounts as necessary
6 to protect the interests of the state.

7 [~~(5) Routine maintenance and professional services~~
8 ~~contracts. The department will not retain funds for routine~~
9 ~~maintenance contracts or contracts for the making of all~~
10 ~~necessary plans and surveys preliminary to construction,~~
11 ~~reconstruction, or maintenance.]~~