

TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

Page 1 of 1

ALL Districts

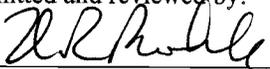
The Texas Transportation Commission (commission) finds it necessary to propose amendments to §9.20, relating to partial payments, to be codified under Title 43, Texas Administrative Code, Part 1.

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 §9.20 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:



Director, Construction Division

Recommended by:



Executive Director

111035 AUG 23 07

Minute
Number

Date
Passed

1 Proposed Preamble

2 The Texas Department of Transportation (department) proposes
3 amendments to §9.20, concerning partial payments.

4

5 EXPLANATION OF PROPOSED AMENDMENTS

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

13

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

25

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

6

7 FISCAL NOTE

8 James Bass, Chief Financial Officer, has determined that for
9 each of the first five years the amendments as proposed are in
10 effect, there will be fiscal implications for state or local
11 governments as a result of enforcing or administering the
12 amendments. Although the majority of retainage is held in local
13 banks, retainage for smaller contracts is held in the State
14 Highway Fund, with the department earning interest on the
15 amounts derived to be constitutionally dedicated. Interest on
16 funds held back due to retainage is approximately \$2 million
17 annually, which the department may lose as revenue each year if
18 retainage is no longer held. There are no anticipated economic
19 costs for persons required to comply with the section as
20 proposed.

21

22 Thomas Bohuslav, Director, Construction Division, has certified
23 that there will be no significant impact on local economies or
24 overall employment as a result of enforcing or administering the
25 amendments.

1

2 PUBLIC BENEFIT

3 Mr. Bohuslav has also determined that for each year of the first
4 five years the section is in effect, the public benefit
5 anticipated as a result of enforcing or administering the
6 amendments will be to further the department's mission to
7 provide an efficient and fair process of administering payment
8 for the department's highway improvement contracts in compliance
9 with statutory amendments to Transportation Code, Chapter 223 by
10 House Bill 2075, 80th Legislature, Regular Session, 2007. There
11 will be no adverse economic effect on small businesses.

12

13 SUBMITTAL OF COMMENTS

14 Written comments on the proposed amendments to §9.20, may be
15 submitted to Thomas Bohuslav, Director, Construction Division,
16 Texas Department of Transportation, 125 East 11th Street,
17 Austin, Texas 78701-2483. The deadline for receipt of comments
18 is 5:00 p.m. on October 8, 2007.

19

20 STATUTORY AUTHORITY

21 The amendments are proposed under Transportation Code, §201.101,
22 which provides the commission with the authority to establish
23 rules for the conduct of the work of the department, and more
24 specifically, Transportation Code, §§223.001-223.016, which
25 requires the department to competitively bid highway improvement

- 1 contracts.
- 2
- 3 CROSS REFERENCE TO STATUTE
- 4 Transportation Code, §§223.009-223.010.

SUBCHAPTER B. HIGHWAY IMPROVEMENT CONTRACTS

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

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

(2) [~~Construction and preventive maintenance contracts involving the use of nonhazardous recycled materials. Construction contracts and preventive maintenance contracts involving the use of nonhazardous recycled materials approved by the department will provide for partial payments of an amount not exceeding 96% of the value of the work done. Prior to beginning of work, the contractor must identify the quantities of nonhazardous recycled materials to be used in the contracted work. Once the contractor's commitment to utilize nonhazardous recycled materials has been established, the department will retain 4.0% of the contract price until the entire work has been 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.]~~