Proposed Preamble

The Texas Department of Transportation (department) proposes new Chapter 10, Ethical Conduct by Entities Doing Business with the Department, new Subchapter A, General Provisions, new §§10.1 - 10.7, New Subchapter B, Other Entities' Internal Ethics and Compliance Procedures, §10.51, new Subchapter C, Required Conduct by Entities Doing Business with the Department, new §10.101 and §10.102, new Subchapter D, Score Reduction for Ethical Violations by Architectural, Engineering, and Surveying Service Providers, new §§10.151 - 10.160, new Subchapter E, Removal of Precertification of Architectural, Engineering, and Surveying Service Providers for Ethical Violations, new §§10.201 - 10.206, new Subchapter F, Sanctions for Ethical Violations by Other Entities, new §§10.251 - 10.257. These new sections are proposed in association with new 43 TAC §§9.101 - 9.115.

EXPLANATION OF PROPOSED NEW SUBCHAPTER

In its effort to emphasize transparency, accountability, and ethical standards, the department proposes new rules to establish conduct requirements for entities that do business with the department and to describe what measures may be taken in response to violations.

The new rules set forth ethical and other requirements that, if violated, may lead to disciplinary actions and sanctions. They

create enforcement provisions that correspond with different types of violations to provide clear notice of what an action's consequences will be and also describe how to appeal the enforcement action.

The proposed sections will only apply to agreements signed or extended on or after the effective date of the rules.

New §10.1, Purpose, sets forth the purpose of the subchapter, which is to prescribe the ethical conduct required of entities that do business with the department and to describe how violations will be enforced. Enforcement provisions for ethical violations by a contractor who is subject to 43 TAC Chapter 9, Subchapter G, Highway Improvement Contract Sanctions are provided under that chapter rather than under new Chapter 10. Chapter 10 does not apply to the federal government. The requirements and enforcement measures of the chapter supplement other applicable provisions. The latter provision gives notice that the department may use all remedies legally available to it.

New §10.2, Definitions, provides definitions for terms associated with conduct requirements and enforcement provisions. The definition of debarment is among those provided in the section, and states that debarment is disqualification of an entity from bidding on or entering into a contract with the

department, from participating as a subcontractor under a contract with the department, and from participating as a supplier of materials or equipment to be used under a contract with the department, so that debarment applies to an entity no matter what function the entity is attempting to undertake in an agreement with the department.

New §10.3, Delivery of Written Notice, Disclosures, or Requests to the Department, clarifies the proper methods of delivery of written notices, disclosures, and requests to the department, which are by mail and hand delivery. This ensures timely receipt of written communications to the department.

New §10.4, Act of Individual Imputed to Entity, limits when acts of those acting on behalf of an entity may be imputed to the entity. Only conduct of an individual acting on behalf of an entity that seriously and directly affects the entity's responsibility to the department may be imputed to the entity. The purpose of this section is to give notice that an entity may be sanctioned for acts of those acting on behalf of the entity, but only in situations where those acts seriously and directly affect the entity's responsibility to the department.

New §10.5, Benefit, defines a benefit as anything that is reasonably regarded as financial gain or advantage, including something given to another person in whose welfare the

beneficiary has a direct interest. It also describes what items are not considered benefits for purposes of the chapter. In order to protect the integrity of department agreements, it is the department's intent that its employees not be influenced by being offered things described as a benefit under this section.

New §10.6, Conflict of Interest, describes a conflict of interest as a circumstance arising out of an entity's existing or past activities, business interests, contractual relationships, or organizational structure, or a familial or domestic living relationship between a department employee and an employee of the entity, that affects or may affect the entity's objectivity in performing the scope of work sought by the department, or that provides or may reasonably appear to provide an unfair competitive advantage to an entity or a third party in the entity's performance of services for the department or participation in an agreement with the department. As stewards of public resources, the department has a vested interest in ensuring that both impropriety and the perception of impropriety are avoided.

New 10.7, Delegation of Authority, describes how and to whom the executive director and assistant executive director may delegate the authority given to them under this chapter. The executive director may delegate to AN assistant executive director any authority provided to the executive director under this chapter,

unless otherwise provided. The assistant executive director may delegate to an employee of the department who is not below the level of district engineer, division director, or office director any authority provided to the assistant executive director under this chapter, unless otherwise provided.

New §10.51, Internal Ethics and Compliance Program, is proposed without change from existing §1.8, Internal Ethics and Compliance Program. In the interest of organization, the section has been removed from 43 TAC Chapter 1, Subchapter C, Other Entities' Internal Ethics and Compliance Procedures, and inserted into new Chapter 10. This allows for easy subject matter reference and location of the rules.

New §10.101, Required Conduct, lists requirements to which entities must adhere. Entities must disclose conflicts of interest, refrain from offering benefits to department employees or commissioners, and obey all applicable laws. An entity must also maintain good standing with the state's comptroller of public accounts, and must notify the department of, as well as adequately address, a business-related conviction or judgment against the entity, debarment for a reason related to business integrity, or a violation of the law, department rules, or the entity's internal compliance program if that violation seriously and directly affects the entity's responsibility to the department. This section provides notice as to exactly what

ethical standards of conduct the department requires entities follow. High ethical standards are essential in promoting transparency, accountability, and responsible use of department resources.

New §10.102, Grounds for Sanctions, provides that an entity's violation of the conduct requirements is a ground for an enforcement action. Allowing the department to impose an enforcement action on an entity ensures that the required conduct will be adhered to by entities doing business with the department.

New §10.151, Definitions, provides definitions for Subchapter D, Score Reduction for Ethical Violations by Architectural, Engineering, and Surveying Service Providers.

New §10.152, Score Reduction for Ethical Violations, states that if a service provider violates the conduct requirements, the executive director may reduce the provider's points total under 43 TAC Chapter 9, Subchapter C, Contracting for Architectural, Engineering, and Surveying Services. This section states the manner in which enforcement action will be taken against service providers. The section also states that this action is in addition to other actions available to the department. The latter provision gives notice that the department is not forfeiting any options legally available.

New §10.153, Member Score Reduction Applied to Team, provides that if any member of a team has the member's score reduced under this subchapter, then the score reduction applies to all submissions made by the team under 43 TAC Chapter 9, Subchapter C, Contracting for Architectural, Engineering, and Surveying Services. Holding a team accountable for the actions of its team members provides an additional level of protection of the department's interest in doing business with ethical providers.

New §10.154, Factors Considered in Imposing Score Reduction, describes the factors that the executive director will consider in imposing a score reduction. Factors to be considered include the seriousness and willfulness of the act or omission, whether and when the provider has committed similar acts or omissions, whether the department has been fully compensated for any damages, and mitigating factors including the provider's adoption and enforcement of an internal ethics and compliance program, the provider's cooperation with the department in the investigation of ethical violations, and the provider's disassociation from individuals and firms that have been involved in the ethical violation. Allowing the department to consider a range of factors ensures that all aspects of a particular situation can be assessed in imposing a score reduction in response to a violation.

New §10.155, Account and Period of Score Reduction, sets forth guidelines for application of a score reduction by recommending, for specific violations, the percentage and period of a score reduction available to the executive director, taking into consideration the mitigating factors described in §10.154(b). The guidelines are set forth in a chart format that ties recommended score reduction percentages and lengths of time to specific violations based on varying factors. The chart is designed to show the most severe score reduction allowable for a specific violation. The executive director may assign a lesser score reduction than recommended for a specific violation, but may not assign a more severe score reduction than recommended. The process provides notice as to a provider's recommended reduction while also granting limited discretion to the department.

New §10.156, Notice of Score Reduction, describes the contents of the notice that will be sent to a service provider receiving a score reduction. In order to ensure timely notification, the department will notify the provider by certified mail within five working days after the date of the assistant executive director's decision to issue a sanction. The notice will state the percentage of score reduction and the period during which it will be imposed, summarize the facts and circumstances underlying the reduction, explain how the percentage of score reduction and time period of the reduction were determined using

Figure 43 TAC §10.155(b), inform the provider of the imposition of a suspension if applicable, and state that the provider may appeal the score reduction. In the interest of transparency, it is the department's intent for a sanctioned service provider to have full knowledge of the basis of the score reduction and how the score reduction and period of imposition were decided.

Section 10.156 also states that the executive director, concurrent with the delivery of the notice of a score reduction, may suspend a service provider. Suspension protects department resources from being irresponsibly allocated before a score reduction is finally imposed. In order to ensure that a suspension is not unnecessarily imposed, the executive director will consider all relevant circumstances before imposing a suspension, including the severity and willfulness of the conduct, the likelihood of immediate harm to the public, and whether there has been a pattern of inappropriate conduct. The suspension terminates when a final order imposing the score reduction is entered.

Finally, §10.156 specifies that the imposition of a score reduction on a service provider does not affect the provider's obligations under an agreement with the department or limit the department's remedies under the agreement. This provision preserves the integrity of contractual agreements with the department.

New §10.157, Application of Score Reduction, provides that the score reduction will be applied to each letter of interest submittal under 43 TAC Chapter 9, Subchapter C, Contracting for Architectural, Engineering, and Surveying Services. It states that the score reduction will be applied at the earliest of the following steps in the selection process: (1) on assignment of the score at the long list evaluation; (2) on assignment of the score at the short list proposal evaluation; (3) on assignment of the score at the interview evaluation; or (4) on preparation of a contract evaluation summary. This procedure allows the department to consider an ethical violation at the earliest possible step after which it is decided to impose a score reduction.

New §10.158, Appeal of Score Reduction, describes the procedure for appeal of a score reduction. A score reduction may be appealed to the executive director for an informal hearing. This option allows the provider the opportunity to appeal a score reduction in an informal setting that requires minimal time and resource investment. If the provider is unsatisfied with the decision of the executive director, the provider may pursue a contested case hearing in the State Office of Administrative Hearings (SOAH). This option offers the provider a judicial proceeding through which it may present evidence and offer testimony in support of its appeal. Following the

contested case hearing, the administrative law judge's proposal for decision is presented to the commission at a regularly scheduled open meeting for a determination based on the proposal for decision. The commission may consider oral presentations. The commission's determination on the proposal for decision will be adopted by minute order. The executive director will issue a final order on the score reduction based on the commission's determination, or if an appeal to SOAH is not requested, the determination of the informal hearing. This multi-step process for appeal ensures due process in the application of a score reduction and allows a provider the opportunity to appeal a sanction.

Finally, §10.158 states that a score reduction is automatically stayed from the date that the department receives the notice of appeal until a final order is entered by the executive director. On entry of a final order by the executive director imposing the score reduction, the full term of the score reduction will be imposed on the date of the final order unless the executive director expressly orders that a lesser score reduction be imposed. Staying a score reduction during the pendency of an appeal makes certain that a score reduction is not unjustly imposed in a situation in which an appeal results in a reversal of a score reduction. An order of the executive director under §10.158 is not subject to judicial review unless otherwise provided by law.

New §10.159, Lessening or Removal of Score Reduction, allows a provider to request that the executive director reduce or remove a score reduction by demonstrating changes in circumstances that were described in the notice of score reduction under §10.156. The executive director will consider a provider's request not more than once in a 12-month period. This provision ensures that the executive director will have the ability to lessen or remove a score reduction if the circumstances underlying the score reduction change and promotes a continuing effort by a sanctioned provider to address the issues that led to the score reduction in the effort to have the score reduction lessened or removed.

New §10.160, Publication of Names of Providers Receiving Score Reductions, provides that the department will publish a list on its website of the names of providers who are subject to score reductions. The names will be added when the reduction becomes effective and will be removed as soon as practicable after the date on which the score reduction imposition ends. This provision allows the public to know which service providers have been found to have engaged in unethical conduct and illustrates the department's commitment to holding its providers accountable to a high standard of conduct.

New §10.201, Purpose, sets forth the purpose of Subchapter E,

Removal of Precertification of Architectural, Engineering, and Surveying Service Providers for Ethical Violations, which is to provide a procedure by which an architectural, engineering, or surveying service provider's precertification can be removed by the assistant executive director if a ground for removal under §10.101 exists. This procedure ensures that only responsible persons are precertified to enter into certain contracts with the department.

New §10.202, Factors Considered in Removing Precertification, describes the factors that the assistant executive director will consider before removing a person's precertification. Factors that will be considered include the seriousness and willfulness of the act or omission, whether and when the person has committed similar acts or omissions, whether the department has been fully compensated for any damages, and mitigating factors including the person's cooperation with the department in the investigation of ethical violations, and the person's disassociation from individuals and firms that have been involved in the ethical violation. The department's consideration of multiple factors means that all aspects of a particular situation can be assessed before a person's precertification is removed.

New §10.203, Time Period of Prohibition from Reapplying for Precertification, sets forth guidelines for application of a

certain period during which a person is prohibited from reapplying for precertification. The guidelines are set forth in a chart format that ties specific periods of prohibition to specific violations based on varying factors. The chart is designed to show the most severe period of prohibition from reapplying for precertification that is allowable for a specific violation. The assistant executive director may prohibit a person from reapplying for precertification for a lesser period than recommended for a specific violation, but may not prohibit reapplication for a longer period than recommended. The process provides notice as to a provider's recommended period of prohibition while also granting limited discretion to the department.

New §10.204, Notice of Removal of Precertification, describes the contents of the notice that will be sent to a person whose precertification is removed. In order to ensure timely notification, the department will notify the person by certified mail within five working days after the date of the assistant executive director's decision to remove precertification. The notice will state the period during which the person is prohibited for applying for precertification, summarize the facts and circumstances underlying the removal of precertification, explain how the period of prohibition was determined using Figure 43 TAC §10.203, and state that the person may appeal the removal of precertification. It is the

department's intent to promote transparency by ensuring that a person has full knowledge of the basis of a precertification removal and how the period of prohibition was decided.

Section 10.204 also states that the executive director, concurrent with the delivery of the notice of a precertification removal, may suspend a person from participating in agreements with the department. Suspension protects department resources from being irresponsibly allocated before precertification is finally removed. In order to ensure that a suspension is not unnecessarily imposed, the assistant executive director will consider all relevant circumstances before imposing a suspension, including the severity and willfulness of the conduct, the likelihood of immediate harm to the public, and whether there has been a pattern of inappropriate conduct. The suspension terminates when a final order removing the precertification is entered.

Finally, §10.204 specifies that removal of precertification does not affect the provider's obligations under an agreement with the department or limit the department's remedies under the agreement. This preserves the integrity of contractual agreements with the department. Additionally, unless the person is suspended, precertification removal does not prevent the person from participating in agreements with the department in a capacity that does not require precertification status. This

clarifies that a person is not prohibited from participating in agreements with the department, but if the person does participate in an agreement with the department, it must be in a capacity that does not require precertification.

New §10.205, Appeal of Removal of Precertification, describes the procedure for appeal of precertification removal. Removal may be appealed to the executive director by submitting documentation with the notice for appeal or by requesting an in-person meeting with the executive director. At the meeting, the person may present written documentation and oral testimony, and may answer questions from the executive director. The executive director will issue a final order after considering all documentation and testimony. The final order is not subject to judicial review, except as required by law. Additionally, the executive director may not delegate authority under this section. Providing for appeal to the executive director ensures that a person has the ability to contest the removal of precertification if the person so desires, and that the executive director may change the removal of precertification if the situation so dictates.

New §10.206, Eligibility to Reapply for Precertification, allows a person to request that the assistant executive director reduce or remove a period of prohibition for precertification by demonstrating changes in the circumstances that were described

in the notice of score reduction The assistant executive director will consider a provider's request not more than once in a 12-month period. This provision ensures that the assistant executive director will have the ability to lessen or remove a period of prohibition if there is a change in the circumstances that led to precertification removal and encourages persons to remedy the problems that led to precertification removal in the effort to have a period of prohibition lessened or removed.

New §10.251, Application of Subchapter, provides that Subchapter F, Sanctions for Ethical Violations by Other Entities, only applies to entities or individuals doing business with the department that are subject to Chapter 10 but are not subject to Subchapter E of Chapter 10, relating to Score Reduction for Ethical Violations by Architectural, Engineering, and Surveying Service Providers. Additionally, the section states that sanctions provided by this subchapter are in addition to other actions and remedies available to the department. The latter provision gives notice that the department is not forfeiting any options legally available to it.

New §10.252, Procedure, details the method by which sanctions will be imposed. The executive director may impose a sanction on an entity if a ground for a sanction exists. If the executive director decides to impose a sanction, it will be imposed in accordance with Figure 43 TAC §10.255(c). These

provisions limit the executive director's discretion on when and how to impose a sanction and give notice to entities of these limits. The section also states that a sanction is effective on the date specified in the notice, unless it is stayed pending an appeal. The section specifies that the imposition of a sanction on an entity does not affect the entity's obligations under an agreement with the department or limit the department's remedies under the agreement. This provision preserves the integrity of contractual agreements with the department. Finally, this section states that the executive director, concurrent with the delivery of the notice of a sanction other than a reprimand, may suspend an entity without a prior hearing. This protects department resources from being irresponsibly allocated before a sanction is finally imposed. In order to ensure that a suspension is not unnecessarily imposed, the executive director will consider all relevant circumstances before imposing a suspension, including the severity and willfulness of the conduct, the likelihood of immediate harm to the public, and whether there has been a pattern of inappropriate conduct.

New §10.253, Notice of Sanction, describes the contents of the notice that will be sent to an entity receiving a sanction. In order to ensure timely notification, the department will notify the entity by certified mail within five working days after the date of the executive director's decision to issue a sanction. The notice will state the sanction and the period of the

sanction, summarize the facts and circumstances underlying the sanction, explain how the sanction was selected, inform the entity of the imposition of a suspension if applicable, and state that the entity may appeal the sanction. To encourage transparency, it is the department's intent for a sanctioned entity to have full knowledge of the basis of the sanction and how the sanction was decided.

New §10.254, Available Sanctions, describes the sanctions available to the department and also identifies factors that will be considered in imposing the sanction. Available sanctions, in order of increasing severity, are a reprimand, prohibition from participating in a specified agreement, a limit on the contract amount or amount of funds that may be awarded or paid to the entity, or debarment of the entity for a period of not more than 60 months. The range of sanctions available allows the department to appropriately address various levels of violations. Factors that will be considered in imposing the sanction include the seriousness and willfulness of the act or omission, whether and when the entity has committed similar acts or omissions, whether the department has been fully compensated for any damages, and mitigating factors, including the entity's adoption and enforcement of an internal ethics and compliance program, the entity's cooperation with the department in the investigation of ethical violations, and the entity's disassociation from individuals and firms that have been

involved in the ethical violation. The department's consideration of a range of factors guarantees that all aspects of a particular situation can be evaluated in assigning a sanction to a violation.

New §10.255, Application of Sanction, sets forth guidelines for application of a sanction by assigning, for specific violations, the sanctions available to the executive director and taking into consideration the factors described in §10.254(b). The guidelines are set forth in a chart format that ties specific sanctions to specific violations based on varying factors. The chart is designed to show the most severe sanction allowable for a specific violation. The executive director may assign a lesser sanction than recommended for a specific violation, but may not assign a more severe sanction than recommended. Additionally, if an entity commits multiple violations arising out of separate occurrences, the executive director may impose multiple sanctions. The process provides notice as to an entity's recommended sanction while also granting limited discretion to the department.

New §10.256, Appeal of Sanction, describes the procedure for appeal of a sanction other than a reprimand. A sanction may be appealed to the executive director for an informal hearing. This option allows the entity the opportunity to appeal a sanction in an informal setting that requires minimal time and

resource investment. If the entity is unsatisfied with the decision of the executive director, the entity may pursue a contested case hearing in the State Office of Administrative Hearings (SOAH). This option offers the entity a judicial proceeding through which it may present evidence and offer testimony in support of its appeal. Following the contested case hearing, the administrative law judge's proposal for decision is presented to the commission at a regularly scheduled open meeting for a determination based on the proposal for decision. The commission may consider oral presentations. The commission's determination on the proposal for decision will be adopted by minute order. The executive director will issue a final order on the sanction based on the commission's determination, or if an appeal to SOAH is not requested, the determination of the informal hearing. This multi-step process for appeal ensures due process in the application of a sanction and allows an entity the opportunity to appeal a sanction.

Section 10.256(e) specifies that a reprimand may be appealed by delivering to the executive director a written notice of appeal and written documentation disputing the reprimand. The executive director will make the determination on an appeal and issue a final order. Because a reprimand is the least severe sanction and has minimal implications on an entity, a more limited opportunity to appeal is appropriate.

Section 10.256(f) states that a sanction is automatically stayed from the date that the department receives the notice of appeal until a final order is entered by the executive director. On entry of a final order by the executive director imposing the sanction, the full term of the sanction will be imposed on the date of the final order unless the executive director expressly orders that a lesser sanction be imposed. Staying a sanction during the pendency of an appeal makes certain that a sanction is not unjustly imposed in a situation in which an appeal results in a reversal of a sanction. The automatic stay provided by subsection (f) does not apply to a suspension or a reprimand. An order of the executive director under §10.256 is not subject to judicial review unless otherwise provided by law.

New §10.257, Lessening or Removal of Sanction, provides that an entity may request that the executive director reduce or remove a sanction once in a 12-month period. This provision ensures that the executive director will have the ability to lessen or remove a sanction if the circumstances underlying the sanction change and is intended to motivate entities to improve the issues that originally led to the sanction in the effort to have the sanction reduced or removed.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the new chapter as proposed is in

effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the new chapter.

Steve Simmons, Deputy Executive Director, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the new chapter.

PUBLIC BENEFIT AND COST

Mr. Simmons has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the new chapter will be to increase the integrity of department agreements by ensuring contractors adhere to ethical standards of conduct. There are no anticipated economic costs for persons required to comply with the sections as proposed. There will be no adverse economic effect on small businesses.

PUBLIC HEARING

Pursuant to the Administrative Procedure Act, Government Code, Chapter 2001, the Texas Department of Transportation will conduct a public hearing to receive comments concerning the proposed rules. The public hearing will be held at 9:00 a.m. on September 22, 2010, in the Ric Williamson Hearing Room, First Floor, Dewitt C. Greer State Highway Building, 125 East 11th

Street, Austin, Texas and will be conducted in accordance with the procedures specified in 43 TAC §1.5. Those desiring to make comments or presentations may register starting at 8:30 a.m. Any interested persons may appear and offer comments, either orally or in writing; however, questioning of those making presentations will be reserved exclusively to the presiding officer as may be necessary to ensure a complete record. While any person with pertinent comments will be granted an opportunity to present them during the course of the hearing, the presiding officer reserves the right to restrict testimony in terms of time and repetitive content. Organizations, associations, or groups are encouraged to present their commonly held views and identical or similar comments through a representative member when possible. Comments on the proposed text should include appropriate citations to sections, subsections, paragraphs, etc. for proper reference. Any suggestions or requests for alternative language or other revisions to the proposed text should be submitted in written form. Presentations must remain pertinent to the issues being discussed. A person may not assign a portion of his or her time to another speaker. Persons with disabilities who plan to attend this meeting and who may need auxiliary aids or services such as interpreters for persons who are deaf or hearing impaired, readers, large print or Braille, are requested to contact Government and Public Affairs Division, 125 East 11th Street, Austin, Texas 78701-2483, (512) 305-9137 at least two

working days prior to the hearing so that appropriate services can be provided.

SUBMITTAL OF COMMENTS

Written comments on the proposed new Chapter 10 may be submitted to Bob Jackson, General Counsel, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. October 12, 2010.

STATUTORY AUTHORITY

The new sections are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

None.