

1 SUBCHAPTER G. HIGHWAY IMPROVEMENT CONTRACT SANCTIONS

2 §9.100. Purpose. It is the policy of the Texas Transportation
3 Commission to protect the health, welfare, and safety of the
4 traveling public and the state's substantial investment in its
5 system of state highways. This policy requires procedures to
6 ensure that only responsible contractors are eligible to bid on,
7 enter, and subcontract under highway improvement contracts and
8 that those contracts are fully performed in an efficient and
9 timely manner.

10

11 §9.101. Definitions. The following words and terms, when used
12 in this subchapter, shall have the following meanings, unless
13 the context clearly indicates otherwise.

14 (1) Bidding capacity--An amount calculated in accordance
15 with §9.12 of this chapter (relating to Qualification of
16 Bidders).

17 (2) Commission--The Texas Transportation Commission.

18 (3) Compliance Program--A written internal compliance and
19 ethics program applicable to the contractor's organization. The
20 program must be recognized as a qualifying compliance program by
21 the department. At a minimum the program must provide
22 compliance standards and procedures that employees and agents
23 are expected to follow and must provide that:

1 (A) high-level personnel are responsible for oversight
2 of compliance with the standards and procedures;

3 (B) appropriate care is being taken to avoid the
4 delegation of substantial discretionary authority to individuals
5 whom the organization knows, or should know, have a propensity
6 to engage in illegal activities;

7 (C) compliance standards and procedures are effectively
8 communicated to all of the organization's employees by requiring
9 them to participate in training and disseminating to them
10 information that explains, in understandable language, the
11 requirements of the program;

12 (D) the governing body or individuals of the
13 organization have periodic training in ethics and in the
14 compliance program;

15 (E) compliance standards and procedures are
16 effectively communicated to all of the organization's agents;

17 (F) reasonable steps are being taken to achieve
18 compliance with the compliance standards and procedures by:

19 (i) using monitoring and auditing systems that are
20 designed to reasonably detect noncompliance; and

21 (ii) providing and publicizing a system for the
22 organization's employees and agents to report suspected
23 noncompliance without fear of retaliation;

1 (G) consistent enforcement of compliance standards and
2 procedures is administered through appropriate disciplinary
3 mechanisms;

4 (H) reasonable steps are being taken to respond
5 appropriately to detected offenses and to prevent future similar
6 offenses; and

7 (I) the organization has a written employee code of
8 conduct that, at a minimum, addresses:

- 9 (i) record retention;
10 (ii) fraud;
11 (iii) equal opportunity employment;
12 (iv) sexual harassment and sexual misconduct;
13 (v) conflicts of interest;
14 (vi) personal use of the organization's property; and
15 (vii) gifts and honoraria.

16 (4) Contractor--An entity that is eligible to bid on a
17 highway improvement contract or that functions or seeks to
18 function as a subcontractor under a highway improvement contract
19 or as a supplier of materials or equipment to be used in the
20 construction or maintenance of a part of the state highway
21 system. The term includes an affiliated entity of a contractor,
22 as described by §9.12(d) of this chapter (relating to Affiliated
23 entities).

1 (5) Debarment--Disqualification of a contractor from
2 bidding on or entering into a highway improvement contract, from
3 participating as a subcontractor under a highway improvement
4 contract, and from participating as a supplier of materials or
5 equipment to be used in the construction or maintenance of a
6 part of the state highway system.

7 (6) Executive director--The executive director of the
8 Texas Department of Transportation or the director's designee
9 not below the level of division director.

10 (7) Highway improvement contract--A contract entered
11 under Transportation Code, Chapter 223, Subchapter A for the
12 construction, reconstruction, or maintenance of a segment of the
13 state highway system, or for the construction or maintenance of
14 a building or other facility appurtenant to a building.

15 (8) Sanction--Debarment or reduction in bidding capacity.

16 (9) Suspension--Immediate, temporary disqualification of
17 a contractor from bidding on or entering into a highway
18 improvement contract, from participating as a subcontractor
19 under a highway improvement contract, and from participating as
20 a supplier of materials or equipment to be used in the
21 construction or maintenance of a part of the state highway
22 system. Suspension differs from a sanction involving debarment
23 as it may take effect prior to and during a hearing.

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§9.102. Grounds for Sanctions. The executive director may sanction a contractor for:

(1) a conviction of, a plea of guilty or nolo contendere to a charge of, or a civil judgment or a public admission by the contractor or an individual or entity that acted on behalf of the contractor related to:

(A) fraud or other criminal offense in connection with obtaining, attempting to obtain, or performing a public agreement or transaction;

(B) the violation of a federal or state antitrust statute, including a statute that proscribes price fixing between competitors, allocation of customers between competitors, or bid rigging; or

(C) embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, receiving stolen property, making false claims, or obstruction of justice;

(2) any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the contractor's responsibility, if the executive director has probable cause to believe that the offense has been committed;

1 (3) the contractor's disqualification by the comptroller,
2 another state, or an agency of the federal government for any of
3 the reasons listed in this section;

4 (4) failure to execute a highway improvement contract
5 after a bid is awarded, unless the contractor honors a bid
6 guaranty submitted under §9.14(d) of this chapter (relating to
7 Bid guaranty);

8 (5) the rejection by the commission of two or more bids
9 by the contractor during the 36-month period preceding the month
10 in which the determination is being made because of contractor
11 error;

12 (6) failure of the contractor to notify the department
13 promptly of a conviction of a crime related to bidding or
14 debarment for any reason by the comptroller, another state, or
15 an agency of the federal government; or

16 (7) the contractor's declaration of default on a highway
17 improvement contract.

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19 §9.103. Notification of Rules. The department will send a copy
20 of this subchapter to each prequalified contractor. The
21 department's failure to comply with this section does not affect
22 the applicability of this subchapter.

23

1 §9.104. Referral to Executive Director.

2 (a) Considerations for referral. In determining whether to
3 refer a contractor to the executive director for possible
4 sanctions for the contractor's actions, the department may
5 consider:

6 (1) the contractor's involvement in planning, initiating,
7 or carrying out the actions or involvement in the failure to
8 act;

9 (2) whether, in light of all facts and circumstances, a
10 lengthy debarment is necessary to protect the interest of the
11 state;

12 (3) restitution paid by the contractor or a third party
13 for damages suffered by a governmental entity as a result of the
14 contractor's actions or failure to act;

15 (4) cooperation by the contractor with a governmental
16 entity in the investigation of the contractor's actions or
17 failure to act, including the provision of a full and complete
18 account of the contractor's involvement;

19 (5) the contractor's dissociation from individuals and
20 firms that have been involved with the actions or failure to
21 act;

22 (6) the actual or potential harm or impact resulting from
23 the contractor's actions or failure to act;

1 (7) the frequency or duration of the incidents related to
2 the actions;

3 (8) any history or pattern of related offenses by the
4 contractor;

5 (9) the contractor's exclusion or disqualification by the
6 federal government or another state;

7 (10) whether the contractor recognizes the seriousness of
8 its actions and has accepted responsibility for the actions;

9 (11) whether the actions were pervasive within the
10 contractor's organization;

11 (12) the positions held by the persons involved in the
12 actions;

13 (13) whether the contractor's organization took
14 appropriate corrective action or remedial actions to prevent
15 recurrence;

16 (14) whether the principals of the organization tolerated
17 the actions;

18 (15) whether the contractor brought the actions to the
19 attention of the appropriate government agency in a timely
20 manner;

21 (16) whether effective standards of conduct and internal
22 controls were in place at the time the act occurred;

23 (17) any appropriate disciplinary actions taken against

1 those individuals responsible for the actions; and

2 (18) any other factors appropriate to the circumstances
3 of a particular case.

4 (b) Failure to act. For purposes of this section, "action"
5 includes the failure to act if action is required.

6

7 §9.105. Determinations Related to Sanction.

8 (a) Determination of existence of grounds. If the
9 contractor's actions are referred to the executive director, the
10 executive director will determine whether a ground for
11 sanctioning the contractor listed by §9.102 of this subchapter
12 (relating to Grounds for Sanctions) exists.

13 (b) Determination to sanction. If the executive director
14 determines that one or more grounds for sanctioning the
15 contractor exist, the executive director will determine whether
16 or not to impose sanctions against the contractor. In making
17 that determination, the executive director will consider:

18 (1) the seriousness of a contractor's actions or failure
19 to act and the circumstances giving rise to those actions or
20 failures;

21 (2) the existence of, and adherence to, a compliance
22 program, and whether the program compliance officer has the
23 authority to implement the program effectively; and

1 (3) any other mitigating circumstances.

2 (c) Agreed modification of procedure. The procedure for
3 considering a sanction may be modified by an agreement between
4 the executive director and the contractor.

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6 §9.106. Responsibility for Acts of Others. The conduct of an
7 individual or entity acting on behalf of a contractor may be
8 imputed to the contractor.

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10 §9.107. Sanction Levels.

11 (a) If the executive director determines to impose a
12 sanction on a contractor under §9.105 of this subchapter
13 (relating to Determinations Related to Sanction), the executive
14 director will determine which of the following sanction levels
15 is to be applied:

16
17 (1) Level 1--A 50% reduction in bidding capacity for no
18 more than 12 months.

19 (2) Level 2--Debarment of the contractor for no more than
20 12 months.

21 (3) Level 3--Debarment of the contractor for no more than
22 36 months.

23 (4) Level 4--Debarment of the contractor for no more than

1 60 months.

2 (b) In determining the appropriate sanction level, the
3 executive director will consider the existence of, and the
4 contractor's adherence to, a compliance program, and whether the
5 contractor's program compliance officer has the authority to
6 effectively implement the program.

7 (c) If a contractor is debarred on the ground provided by
8 §9.102(3) of this subchapter (relating to Grounds for
9 Sanctions), the period of the debarment may not exceed the
10 period of disqualification established by the state or federal
11 agency on which the debarment is based.

12
13 §9.108. Application of Sanctions.

14 (a) Consecutive sanctions. In the case of multiple actions
15 or failures by a contractor arising out of separate occurrences,
16 the executive director may impose multiple sanctions
17 consecutively and in any order.

18 (b) Imposition of lesser sanctions. When applying a level
19 of sanctions provided by §9.107 of this subchapter (relating to
20 Sanction Levels), the executive director may impose a sanction
21 that is less than the maximum sanction for that level. For
22 example, the bidding capacity may be reduced by a lesser
23 percentage than the percentage provided for Level 1, or a

1 reduction in bidding capacity of any amount may be ordered for
2 any length of time for Level 2, 3, or 4.

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4 §9.109. Notice of Sanctions.

5 (a) Notification. The department will notify a contractor
6 of a sanction by certified mail within five calendar days after
7 the executive director's decision to impose the sanction.

8 (b) Contents. The notice will give the general reasons for
9 the sanction, summarize the facts and circumstances underlying
10 the sanction, identify the effective date and period of the
11 sanction, and, if applicable, state that the contractor may
12 request a hearing within 10 days after the date of receiving the
13 notice of the sanction.

14 (c) Effective date. Except as provided in §9.115 of this
15 subchapter (relating to Stay of Sanctions), a sanction is
16 effective on the date specified in the notice.

17

18 §9.110. Suspension.

19 (a) The executive director may immediately suspend a
20 contractor under this section if the executive director
21 determines that grounds for a sanction exist under §9.102 of
22 this subchapter (relating to Grounds for Sanctions).

23 (b) Notice of suspension. The department will notify a

1 contractor of a suspension by certified mail within five
2 calendar days after the executive director's decision to suspend
3 the contractor. The notice will:

4 (1) give the general reasons for the suspension;

5 (2) summarize the facts and circumstances underlying the
6 suspension;

7 (3) identify the effective date of the suspension; and

8 (4) state that the contractor may petition in writing for
9 an informal hearing within 10 days after the date of receiving
10 the notice of the suspension.

11 (c) Inclusion in sanction notice. The notice of suspension
12 may be included in a sanction notice under §9.109 of this
13 subchapter (relating to Notice of Sanctions).

14 (d) Duration. A suspension will terminate when a final
15 order is entered after a hearing or when ordered by the
16 executive director.

17
18 §9.111. Contractual Obligations Unaffected. The imposition of
19 a sanction or suspension does not affect a contractor's
20 contractual obligations or limit the commission's contractual
21 remedies.

22
23 §9.112. Opportunity for Informal Hearing.

1 (a) A contractor that is sanctioned at a Level 2 or
2 greater, or suspended, may request an informal hearing on the
3 sanction or suspension. The request must be in writing and
4 received by the department within 10 days after the date the
5 contractor receives notice of the sanction or suspension. For
6 the purpose of requesting a hearing, a notice of sanction or
7 suspension is presumed to be received by the contractor on the
8 third business day after the date on which it is mailed by the
9 department.

10 (b) Not later than the 30th day after the date of receipt
11 of the written request, the executive director will hold an
12 informal hearing with the contractor to discuss the sanction or
13 suspension.

14 (c) The contractor will be given the opportunity to present
15 evidence at the hearing to demonstrate that not imposing the
16 sanction or suspension is in the best interest of the state.

17 (d) The executive director will consider the evidence
18 presented and inform the contractor in writing within 30 days of
19 the informal hearing of the final determination to continue,
20 modify, or end the sanction or suspension.

21 (e) If the executive director determines to continue a
22 sanction, the contractor may request a formal hearing under
23 §9.114 of this subchapter (relating to Opportunity for Formal

1 Hearing).

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3 §9.113. Informal Hearing on Indirect Sanction.

4 (a) An entity may petition the executive director for an
5 informal hearing on the imposition of a sanction or suspension
6 that is indirectly imposed on the entity solely because of a
7 family relationship with another entity on which the sanction or
8 suspension was directly imposed.

9 (b) Not later than the 30th day after the date of receipt
10 of the written request, the executive director will hold an
11 informal hearing with the entity to discuss the family
12 relationship associated with the affiliation.

13 (c) Within 15 days after the date the informal hearing is
14 held, the department will conduct a review to determine the
15 affiliation of the entities.

16 (1) The review will include, but is not limited to,
17 consideration of the entities':

18 (A) intercompany transactions;

19 (B) equipment;

20 (C) personnel;

21 (D) office space;

22 (E) finances; and

23 (F) other affiliation criteria.

1 (2) For purposes of this section, two entities are
2 affiliated if one of the entities was formed after the sanction
3 or suspension of the other entity and has the same or similar
4 management, ownership, or principal employees as the sanctioned
5 or suspended entity.

6 (d) The executive director will consider the evidence
7 presented and inform the entity in writing within 30 days of the
8 informal hearing of the final determination to continue or lift
9 the indirect sanction or suspension.

10 (e) The executive director may grant an exception to the
11 indirect sanction only if the department finds that the
12 operations and control of an entity affected by an indirect
13 sanction are independent from the directly sanctioned entity.

14 (f) The granting of a sanction or suspension exception does
15 not remove the affiliation classification between the affected
16 business entities.

17 (g) The department may conduct follow-up reviews and revoke
18 the exception if the department determines that the affiliated
19 entities are no longer independent.

20 (h) If the executive director does not grant an exception
21 and determines to continue an indirect sanction or suspension,
22 the entity may request a formal hearing under §9.114 of this
23 subchapter (relating to Opportunity for Formal Hearing).

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2 §9.114. Opportunity for Formal Hearing.

3 (a) A contractor that is sanctioned at a Level 1, or that
4 is dissatisfied with the decision following an informal hearing
5 under §9.112 of this subchapter (relating to Opportunity for
6 Informal Hearing) or §9.113 of this subchapter (relating to
7 Informal Hearing on Indirect Sanction), may request an
8 administrative hearing under §1.21 et seq. of this title
9 (relating to Procedures in Contested Cases).

10 (b) The request must be received by the executive director
11 within 10 days after the date that the contractor receives
12 notice of the Level 1 sanction under §9.109 of this subchapter
13 (relating to Notice of Sanctions), or notice of the
14 determination under §9.112(d) of this subchapter or §9.113(d) of
15 this subchapter.

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17 §9.115. Stay of Sanctions.

18 (a) A sanction is automatically stayed from the date a
19 petition for an informal hearing is received until the date the
20 decision is made following the informal hearing, or from the
21 date a request for a formal hearing is received until the date a
22 final order is entered by the commission.

23 (b) If a formal hearing is not requested following an

1 informal hearing, the full term of the sanction will be
2 reinstated on the date of the entry of a decision to continue
3 the sanction as if the sanction were first imposed on that date.

4 (c) If a formal hearing is requested, the full term of the
5 sanction will be reinstated on the date of the entry of a final
6 decision imposing the sanction or the date the hearing request
7 is dismissed as if the sanction were first imposed on that date
8 unless the commission specifically orders that a lesser sanction
9 be imposed.

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11 §9.116. List of Debarred or Suspended Contractors.

12 (a) To inform non-sanctioned contractors and local
13 governments of the contractors that are ineligible to
14 participate in department contracts, the department will post on
15 the department's Internet site a list of names of the
16 contractors and their known affiliates and principals on which a
17 Level 2, Level 3, or Level 4 sanction has been imposed.

18 (b) The department will update the posting after the later
19 of the time of:

20 (1) the determination under §9.105 of this subchapter
21 (relating to Determinations Related to Sanction);

22 (2) the determination under §9.112 of this subchapter
23 (relating to Opportunity for Informal Hearing) or §9.113 of this

1 subchapter (relating to Informal Hearing on Indirect Sanction)
2 if an informal hearing is timely requested; or

3 (3) the commission's final order if a formal hearing is
4 timely requested.

5 (c) The department will update the posting immediately
6 after the executive director suspends a contractor under §9.110
7 of this subchapter (relating to Suspension).

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9 §9.117. Request for Review.

10 (a) A sanctioned contractor may send a written request to
11 the executive director to review an imposed sanction for
12 modification. The request must provide new evidence supporting
13 the request for review.

14 (b) The executive director will not consider more than one
15 request under this section relating to a sanction during any 12-
16 month period.

17 (c) The executive director will review the evidence
18 provided in the contractor's written review request and inform
19 the contractor in writing of the final determination on the
20 modification of the sanction.

21 (d) If the executive director determines that modification
22 of the sanction is in the public interest, the executive
23 director may reduce or eliminate the imposed sanction.