

1 SUBCHAPTER G. HIGHWAY IMPROVEMENT CONTRACT SANCTIONS

2 §9.101. Purpose and Application of Subchapter.

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

10 (b) The sanctions provided by this subchapter are in  
11 addition to other actions and remedies available to the  
12 department.

13  
14 §9.102. Definitions. The following words and terms, when used  
15 in this chapter, have the following meanings, unless the context  
16 clearly indicates otherwise.

17 (1) Affiliated entity--An entity, regardless of when  
18 formed, that has the same or similar management, ownership, or  
19 principal employees as the sanctioned or suspended contractor.

20 (2) Assistant executive director--An assistant executive  
21 director of the Texas Department of Transportation.

22 (3) Commission--The Texas Transportation Commission.

23 (4) Contractor--An entity that is eligible to bid on a

1 highway improvement contract or that functions or seeks to  
2 function as a subcontractor under a highway improvement contract  
3 or as a supplier of materials or equipment to be used in the  
4 construction or maintenance of a part of the state highway  
5 system.

6 (5) Debarment--Disqualification of a contractor from  
7 entering into an agreement with a state or federal agency.

8 (6) Department--The Texas Department of Transportation.

9 (7) Executive director--The executive director of the  
10 Texas Department of Transportation.

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

16 (9) Reprimand--A written warning issued by the department  
17 that documents an act or omission committed by a contractor.

18 (10) Sanction--A consequence imposed on a contractor for  
19 failure to comply with this subchapter including suspension,  
20 reprimand, prohibition against participation in a specified  
21 agreement, or debarment.

22 (11) Suspension--Immediate, temporary disqualification of  
23 a contractor from entering into or attempting to enter into an

1 agreement with the department.

2

3 §9.103. Notification of Rules. The department will send a copy  
4 of this subchapter to each prequalified contractor. The  
5 department's failure to comply with this section does not affect  
6 the applicability of this subchapter.

7

8 §9.104. Delivery of Written Notice or Requests to the  
9 Department. For the purposes of this chapter, written notice,  
10 disclosures, or requests may be delivered to the department by:

11 (1) sending the document by United States mail or by  
12 overnight delivery service to: Executive Director, Texas  
13 Department of Transportation, 125 East 11th Street, Austin,  
14 Texas 78701; or

15 (2) hand delivering the document to: Executive Director,  
16 Texas Department of Transportation, 125 East 11th Street,  
17 Austin, Texas.

18

19 §9.105. Act of Individual or Entity Imputed to Contractor. The  
20 conduct of an individual or entity acting on behalf of a  
21 contractor that seriously and directly affects the contractor's  
22 responsibility to the department may be imputed to the  
23 contractor.

1

2 §9.106. Compliance Program.

3 (a) To be considered as having a compliance program for  
4 purposes of this chapter, the contractor must certify to the  
5 department that the contractor:

6 (1) has adopted an internal ethics and compliance program  
7 that:

8 (A) is designed to detect and prevent violations of the  
9 law, including regulations, and ethical standards applicable to  
10 the entity or its officers or employees; and

11 (B) satisfies the requirements of this section; and

12 (2) enforces compliance with its internal ethics and  
13 compliance program.

14 (b) A contractor's internal ethics and compliance program  
15 must be in writing and must provide compliance standards and  
16 procedures that the entity's employees and agents are expected  
17 to follow. At a minimum, the program must provide that:

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

20 (2) appropriate care is being taken to avoid the  
21 delegation of substantial discretionary authority to individuals  
22 whom the organization knows, or should know, have a propensity  
23 to engage in illegal activities;

1           (3) compliance standards and procedures are effectively  
2 communicated to all of the organization's employees by requiring  
3 them to participate in training and disseminating to them  
4 information that explains, in understandable language, the  
5 requirements of the program;

6           (4) the governing body or individuals of the organization  
7 have periodic training in ethics and in the compliance program;

8           (5) compliance standards and procedures are effectively  
9 communicated to all of the organization's agents;

10           (6) reasonable steps are being taken to achieve  
11 compliance with the compliance standards and procedures by:

12           (A) using monitoring and auditing systems that are  
13 designed to reasonably detect noncompliance; and

14           (B) providing and publicizing a system for the  
15 organization's employees and agents to report suspected  
16 noncompliance without fear of retaliation;

17           (7) consistent enforcement of compliance standards and  
18 procedures is administered through appropriate disciplinary  
19 mechanisms;

20           (8) reasonable steps are being taken to respond  
21 appropriately to detected offenses and to prevent future similar  
22 offenses; and

23           (9) the organization has a written employee code of

1 conduct that, at a minimum, addresses:

2 (A) record retention;

3 (B) fraud;

4 (C) equal opportunity employment;

5 (D) sexual harassment and sexual misconduct;

6 (E) conflicts of interest;

7 (F) personal use of the organization's property; and

8 (G) gifts and honoraria.

9 (c) The department may, at its discretion, request that the  
10 contractor provide the department with written evidence of the  
11 contractor's internal ethics and compliance program.

12

13 §9.107. Grounds for Sanction. Sanctions may be imposed under  
14 this section for:

15 (1) failure to execute a highway improvement contract  
16 after a bid is awarded, unless the contractor honors a bid  
17 guaranty submitted under §9.14(d) of this chapter (relating to  
18 Submittal of Bid);

19 (2) the rejection by the commission of two or more bids  
20 by the contractor during the 36-month period preceding the month  
21 in which the determination is being made because of contractor  
22 error;

23 (3) the department's declaration of a contractor in

1 default on a highway improvement contract; or

2 (4) violation of §10.101 of this title (relating to  
3 Required Conduct).

4

5 §9.108. Procedure.

6 (a) The executive director may impose a sanction on a  
7 contractor if a ground for a sanction under §9.107 of this  
8 subchapter (relating to Grounds for Sanction) exists. The  
9 executive director will impose sanctions under this subchapter  
10 in accordance with §9.111(c) of this subchapter (relating to  
11 Application of Sanction).

12 (b) Except as provided in §9.112(g) of this subchapter, a  
13 sanction is effective on the date specified in the notice of  
14 sanction under §9.109 (relating to Notice of Sanction).

15 (c) The imposition of a sanction on a contractor does not  
16 affect the contractor's obligations under an agreement with the  
17 department or limit the department's remedies under the  
18 agreement.

19 (d) The executive director, concurrent with the delivery of  
20 the notice of a sanction other than a reprimand, may suspend a  
21 contractor without a prior hearing. Before imposing a  
22 suspension, the executive director will consider all relevant  
23 circumstances, including the severity and willfulness of the

1 conduct, the likelihood of immediate harm to the public, and  
2 whether there has been a pattern of inappropriate conduct. The  
3 suspension terminates when a final order is entered under  
4 §9.112(e).

5  
6 §9.109. Notice of Sanction. If the executive director imposes  
7 a sanction under this subchapter, the department will notify the  
8 contractor by certified mail within five working days after the  
9 date of the executive director's decision. The notice will:

10 (1) state the sanction and the period of the sanction, if  
11 applicable;

12 (2) summarize the facts and circumstances underlying the  
13 sanction;

14 (3) explain how the sanction was selected, using  
15 §9.111(c) of this subchapter (relating to Application of  
16 Sanction) as a basis for explanation;

17 (4) if applicable, inform the contractor of the  
18 imposition of a suspension under §9.108(d) of this subchapter  
19 (relating to Procedure); and

20 (5) state that the contractor may appeal the sanction in  
21 accordance with §9.112 (relating to Appeal of Sanction).

22

23 §9.110. Available Sanctions.

1           (a) The available sanctions, in order of increasing  
2 severity, are:

3           (1) a reprimand;

4           (2) prohibition from participating in a specified  
5 agreement, whether the agreement was previously awarded or to be  
6 awarded or whether funds under the agreement have been paid or  
7 are to be paid;

8           (3) a limit on the contract amount or amount of funds  
9 that may be awarded or paid to the contractor for a period of  
10 not more than 60 months; or

11           (4) debarment of the contractor for a period of not more  
12 than 60 months.

13           (b) Before imposing a sanction, the executive director will  
14 consider:

15           (1) the seriousness and willfulness of the act or  
16 omission;

17           (2) whether the contractor has committed similar acts or  
18 omissions and if so, when those acts or omissions were  
19 committed;

20           (3) whether the contractor, or a third party on behalf of  
21 the contractor, has fully compensated the department for any  
22 damages suffered by the department as a result of the  
23 contractor's acts or omissions; and

1 (4) any mitigating factors.

2 (c) For the purposes of subsection (b)(4) of this section,  
3 the following are mitigating factors:

4 (1) the contractor's adoption and enforcement of an  
5 internal ethics and compliance program that satisfies the  
6 requirements of §9.106 of this subchapter (relating to  
7 Compliance Program);

8 (2) the contractor's cooperation with the department in  
9 the investigation of ethical violations, including the provision  
10 of a full and complete account of the contractor's involvement;  
11 or

12 (3) the contractor's disassociation from individuals and  
13 firms that have been involved in the ethical violation.

14

15 §9.111. Application of Sanction.

16 (a) The executive director, at the executive director's  
17 sole discretion, may impose a sanction that is less severe, but  
18 not more severe, than the sanction recommended under subsection  
19 (c) of this section.

20 (b) If a contractor commits multiple violations arising out  
21 of separate occurrences, the executive director may impose  
22 multiple sanctions in accordance with subsection (c) of this  
23 section.

1           (c) Figure 43 TAC §9.111(c) sets forth guidelines for  
2 application of a sanction by assigning, for specific violations  
3 of §9.107 of this subchapter (relating to Grounds for Sanction),  
4 the sanctions available to the executive director as described  
5 in §9.110(a) of this subchapter (relating to Available  
6 Sanctions), taking into consideration the factors described in  
7 §9.110(b) of this subchapter.

- 1 Figure 43 TAC §9.111(c)
- 2 Guidelines for Application of Sanctions based on Grounds and Factors

Ground for Sanction	Sanction			
	Reprimand	Prohibition from entering into a specified agreement	Limit on contract amount	Debarment
§10.101(4) relating to maintaining good standing	allowable with written explanation of justification	allowable with written explanation of justification	allowable with written explanation of justification	recommended
§10.101(3) relating to adherence to civil and criminal laws	allowable with written explanation of justification	allowable with written explanation of justification	recommended only if: <ul style="list-style-type: none"> <li>• the contractor meets all mitigating factors listed in §9.110(c), and</li> <li>• the contractor has not committed similar acts or omissions and</li> <li>• the seriousness and willfulness of the act or omission is not severe, and</li> <li>• the contractor, or a third party</li> </ul>	recommended if: <ul style="list-style-type: none"> <li>• the contractor does not meet all mitigating factors listed in §9.110(c), or</li> <li>• the contractor has committed similar acts or omissions, or</li> <li>• the seriousness and willfulness of the act or omission is severe, or</li> <li>• the department has not been fully compensated for any damages</li> </ul>

			on behalf of the contractor, has fully compensated the department for any damages suffered by the department as a result of the contractor's acts or omissions	suffered by the department as a result of the contractor's acts or omissions
<p>§10.101(2) relating to offering, giving, or agreeing to give a benefit;                  §10.101(1) relating to conflicts of interest;                  §9.107(a)(1) relating to failure to execute a contract; or                  §9.107(a)(3) relating to contractor's declaration of default</p>	allowable with written explanation of justification	<p>recommended only if:</p> <ul style="list-style-type: none"> <li>• the contractor meets all of the mitigating factors of §9.110(c), and</li> <li>• the contractor has not committed similar acts or omissions, and</li> <li>• the seriousness and willfulness of the act or omission is not severe, and</li> <li>• the contractor, or a third party on behalf of the contractor, has</li> </ul>	<p>recommended only if:</p> <ul style="list-style-type: none"> <li>• the contractor meets some of the mitigating factors of §9.110(c), and</li> <li>• the contractor has not committed similar acts or omissions, and</li> <li>• the seriousness and willfulness of the act or omission is not severe, and</li> <li>• the contractor, or a third party on behalf of the</li> </ul>	<p>recommended if:</p> <ul style="list-style-type: none"> <li>• the contractor meets no mitigating factors listed in §9.110(c), or</li> <li>• the contractor has committed similar acts or omissions, or</li> <li>• the seriousness and willfulness of the act or omission is not severe, or</li> <li>• the department has not been fully compensated for any damages</li> </ul>

		fully compensated the department for any damages suffered by the department as a result of the contractor's acts or omissions	contractor, has fully compensated the department for any damages suffered by the department as a result of the contractor's acts or omissions	suffered by the department as a result of the contractor's acts or omissions
§10.101(5) relating to notifying the department; or §9.107(a)(2) relating to rejection of two or more bids	recommended only if: <ul style="list-style-type: none"> <li>the contractor meets all mitigating factors listed in §9.110(c), and</li> <li>the contractor has not committed similar acts or omissions, and</li> <li>the seriousness and willfulness of the act or omission is not severe, and</li> <li>the contractor, or a third party on behalf of the</li> </ul>	recommended only if: <ul style="list-style-type: none"> <li>the contractor meets some of the mitigating factors of §9.110(c), and</li> <li>the contractor has not committed similar acts or omissions, and</li> <li>the seriousness and willfulness of the act or omission is not severe, and</li> <li>the contractor, or a third party on behalf of the contractor, has fully</li> </ul>	recommended if: <ul style="list-style-type: none"> <li>the contractor has committed similar acts or omissions, or</li> <li>the seriousness and willfulness of the act or omission is severe, or</li> <li>the department has not been fully compensated for any damages suffered by the department as a result of</li> </ul>	recommended only if: <ul style="list-style-type: none"> <li>the contractor has committed similar acts or omissions, and</li> <li>the seriousness and willfulness of the act or omission is severe, and</li> <li>the department has not been fully compensated for any damages suffered by the department as a result of the contractor's acts or omissions</li> </ul>

	contractor, has fully compensated the department for any damages suffered by the department as a result of the contractor's acts or omissions	compensated the department for any damages suffered by the department as a result of the contractor's acts or omissions	the contractor's acts or omissions	
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1 §9.112. Appeal of Sanction.

2 (a) A sanction, other than a reprimand, and unless ordered  
3 or directed by the federal government, may be appealed to the  
4 executive director by delivering to the executive director a  
5 written notice of appeal within 10 working days after the  
6 effective date of the sanction as specified in the notice of  
7 sanction. If the notice of appeal is timely delivered, the  
8 contractor will be given the opportunity for an informal hearing  
9 before the executive director. The executive director will set  
10 a time for the hearing at the executive director's earliest  
11 convenience. The executive director will set time allowed for  
12 oral presentations and written documents presented by the  
13 contractor. The executive director will notify the contractor  
14 in writing within 5 working days of the executive director's  
15 determination on the appeal.

16 (b) If the contractor is dissatisfied with the  
17 determination of the executive director, the contractor may  
18 request an administrative hearing under §1.21 et seq. of this  
19 title (relating to Procedures in Contested Case). To be  
20 effective the request must be received by the executive director  
21 within 10 working days after the date that the executive  
22 director mails the notification of determination under

1 subsection (a) of this section.

2 (c) The administrative law judge's proposal for decision  
3 resulting from the administrative hearing will be presented to  
4 the commission at a regularly scheduled open meeting. The  
5 commission may consider oral presentations. The commission will  
6 make a determination based on the proposal for decision. The  
7 commission's determination on the proposal for decision will be  
8 adopted by minute order and reflected in the minutes of the  
9 meeting.

10 (d) If an appeal to the executive director or by an  
11 administrative hearing, as appropriate, is not timely requested  
12 under this section, the executive director will issue a final  
13 order imposing the sanction when the deadline for requesting an  
14 appeal has passed. If an appeal is timely requested, the  
15 executive director will issue a final order based on one of the  
16 following:

17 (1) the executive director's determination under  
18 subsection (a) of this section; or

19 (2) the commission's determination under subsection (c)  
20 of this section.

21 (e) If the only sanction being imposed is a reprimand, the  
22 contractor may appeal the reprimand by delivering to the

1 executive director a written notice of appeal and written  
2 documentation disputing the reprimand within 10 working days  
3 after the effective date of the sanction as specified in the  
4 notice of sanction. The executive director will make the  
5 determination on an appeal and issue a final order under this  
6 subsection.

7 (f) A sanction, other than a suspension or a reprimand, is  
8 automatically stayed from the date that the department receives  
9 the notice of appeal until a final order is entered by the  
10 executive director. On entry of a final order by the executive  
11 director imposing the sanction, the full term of the sanction  
12 will be imposed on the date of the final order unless the  
13 executive director expressly orders that a lesser sanction be  
14 imposed.

15 (g) The order of the executive director issued under  
16 subsection (e) of this section is final and not subject to  
17 judicial review, except as required by law.

18

19 §9.113. Indirect Sanction on an Affiliated Entity.

20 (a) A sanction imposed on a contractor under this  
21 subchapter will also be imposed as an indirect sanction on an  
22 affiliated entity of the contractor.

1 (b) The affiliated entity will receive notice of the  
2 indirect sanction that will:

3 (1) state the sanction and the period of the sanction, if  
4 applicable;

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

7 (3) explain how the sanction was selected, using  
8 §9.111(c) of this subchapter (relating to Application of  
9 Sanction) as a basis for explanation;

10 (4) if applicable, inform the affiliated entity of the  
11 imposition of a suspension under §9.108(d) of this subchapter  
12 (relating to Procedure); and

13 (5) state that the affiliated entity may appeal the  
14 indirect sanction in accordance with subsection (c) of this  
15 section.

16 (c) An affiliated entity, in accordance with this  
17 subsection, may petition the executive director for an informal  
18 hearing on the imposition of an indirect sanction or suspension  
19 that is imposed on the affiliated entity solely because of its  
20 status as an affiliated entity.

21 (1) Not later than the 30th day after the date of receipt  
22 of the written request, the executive director will hold an

1 informal hearing with the affiliated entity to discuss the  
2 relationship associated with the affiliation.

3 (2) Within 15 days after the date the informal hearing is  
4 held, the department will conduct a review to determine the  
5 affiliation of the entities. The review will include, but is  
6 not limited to, consideration of the entities':

7 (A) intercompany transactions;

8 (B) equipment;

9 (C) personnel;

10 (D) office space;

11 (E) finances; and

12 (F) other affiliation criteria.

13 (3) The executive director will consider the evidence  
14 presented and inform the affiliated entity in writing within 30  
15 days of the informal hearing of the final determination to  
16 continue or lift the indirect sanction or suspension.

17 (4) The executive director may grant an exception to the  
18 indirect sanction only if the department finds that the  
19 operations and control of an affiliated entity affected by an  
20 indirect sanction are independent from the directly sanctioned  
21 entity.

22 (5) The granting of a sanction or suspension exception

1 does not remove the affiliation classification between the  
2 affected business entities.

3 (6) The department may conduct follow-up reviews and may  
4 recommend that the executive director revoke the exception if  
5 the department determines that the affiliated entities are no  
6 longer independent.

7 (d) If the executive director does not grant or revoke an  
8 exception and determines to continue an indirect sanction or  
9 suspension, the affiliated entity may request the opportunity  
10 for a hearing before the commission at a regularly scheduled  
11 open meeting.

12 (1) The commission may consider oral presentations and  
13 written documents presented by the department and interested  
14 parties. The chair will set the hearing and the amount of time  
15 allowed for presentation.

16 (2) The commission's determination of the appeal will be  
17 adopted by minute order and reflected in the minutes of the  
18 meeting.

19 (3) The executive director will issue a final order on  
20 the indirect sanction based on the commission's determination.

21

22 §9.114. Lessening or Removal of Sanction.

1           (a) A contractor or affiliated entity may request the  
2 reduction or removal of a sanction imposed under this subchapter  
3 by delivering to the executive director the request in writing  
4 and written documentation in support of the request  
5 demonstrating changes in the circumstances that were described  
6 in the notice of sanction under §9.109 or §9.113(b) of this  
7 subchapter (relating to Notice of Sanction and Indirect Sanction  
8 on an Affiliated Entity, respectively).

9           (b) The executive director, at the executive director's  
10 sole discretion, may decide to reduce or remove the sanction.  
11 The executive director will send a written notice of the  
12 decision to the contractor or affiliated entity.

13           (c) The executive director will consider not more than one  
14 request under this section during any 12-month period.

15

16 §9.115. List of Debarred or Suspended Contractors.

17           (a) The department will provide on its website a list of  
18 the names of the contractors and their known affiliates and  
19 principals who are subject to a sanction other than a reprimand  
20 under this subchapter.

21           (b) The name of a contractor and its known affiliates and  
22 principals will be added to the list when a final order is

1 issued under §9.112(e) of this subchapter (relating to Appeal of  
2 Sanction) and will be removed from the list as soon as  
3 practicable after the date on which the application of the  
4 sanction ends or is removed.

5 (c) The name of a contractor and its known affiliates and  
6 principals will be added to the list immediately after the  
7 executive director suspends a contractor under §9.108(d) of this  
8 subchapter (relating to Procedure).