TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

ALL Districts

The Texas Transportation Commission (commission) finds it necessary to propose amendments to §9.102, §9.107, §9.111, §9.113, and §9.114, relating to Highway Improvement Contract Sanctions, 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 verbatim in this minute order, except that they are subject to technical corrections and revisions, approved by the general counsel, necessary for compliance with state or federal law or for acceptance by the Secretary of State for filing and publication in the *Texas Register*.

IT IS THEREFORE ORDERED by the commission that the amendments to §9.102, §9.107, §9.111, §9.113, and §9.114 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

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Minute Number | Date Passed

Proposed Preamble

The Texas Department of Transportation (department) proposes amendments to §9.102, §9.107, §9.111, §9.113, and §9.114, concerning Highway Improvement Contract Sanctions.

EXPLANATION OF PROPOSED AMENDMENTS

The legislature and department policy have declared that it is the department's duty to: (1) promote the health, safety, welfare, convenience, and enjoyment of the traveling public; and (2) protect the public investment in the interstate and primary systems.

By statute, the department awards highway improvement contracts to the lowest qualified bidder (Transportation Code, Section 223.0041). Contractors that acquire work and then do not advance the work in a timely manner negatively impact the traveling public and business along the construction corridor. There are many reasons that contribute to contractors' schedules not being met; some of these reasons are outside of the contractor's control. The amendments provided under these rules allow the department to take action against a contractor whose schedules are not being met due to factors that are under its control. This rule is not applicable to projects awarded prior to its effective date.

Amendments to §9.102, Definitions, delete the definition of "affiliated entity" because the definition has proven too vague to be helpful in imposing sanctions on affiliates. The amendments re-designate the paragraphs of this section accordingly. A new substantive provision for determining affiliated entities for the purposes of Chapter 9, Subchapter G, is added in §9.113.

Amendments to §9.107, Grounds for Sanctions, adds a new ground for which sanctions may be imposed. Under the new provision, a sanction may be imposed if the department determines, using the criteria specified in the provision, that a contractor fails to timely complete a project.

Amendments to §9.111, Application of Sanction, add to the chart in Figure 43 TAC §9.111(c) the descriptions of various sanctions that may be imposed by the executive director for a contractor's failure to timely complete projects under contract, as determined under §9.107(b).

Amendments to §9.113, Indirect Sanction on an Affiliated Entity, add a new provision to be used to determine if entities are affiliated for the purposes of Chapter 9, Subchapter G. To ensure conformity between Subchapters B and G of Chapter 9, the new provision refers to the criteria provided under 43 TAC

§9.12(d) for determining the affiliation of two or entities. The provision is added at the beginning of the section, as new subsection (a); the existing subsections are re-designated accordingly, with an amendment to a cross reference to reflect the re-designation of existing subsection (c).

Amendments to §9.114, Lessening or Removal of Sanction, change a reference to a subsection in §9.113 from §9.113(b) to §9.113(c) to reflect the re-designation of subsections within that section, as described above.

FISCAL NOTE

Benjamin H. Asher, Interim Chief Financial Officer, has determined that for each of the first five years in which the amendments as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments.

Tracy D. Cain, P.E., Director, Construction Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

PUBLIC BENEFIT AND COST

Mr. Cain has also determined that for each year of the first

five years in which the sections are in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be a lessened administrative overhead and improved enforcement efforts by the department, making enforcement of sanctions more transparent to the public and predictable to sign owners. 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.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §9.102, §9.107, §9.111, §9.113, and §9.114 may be submitted to Rule Comments, Office of General Counsel, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483 or to RuleComments@txdot.gov with the subject line “Sanction Rules.” The deadline for receipt of comments is 5:00 p.m. on March 14, 2016. In accordance with Transportation Code, §201.811(a)(5), a person who submits comments must disclose, in writing with the comments, whether the person does business with the department, may benefit monetarily from the proposed amendments, or is an employee of the department.

STATUTORY AUTHORITY

The amendments 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.

SUBCHAPTER G. HIGHWAY IMPROVEMENT CONTRACT SANCTIONS

§9.102. Definitions. The following words and terms, when used in this subchapter [~~chapter~~], have the following meanings, unless the context clearly indicates otherwise.

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

[~~(2)~~] Assistant executive director--An assistant executive director of the Texas Department of Transportation.

(2) [~~(3)~~] Commission--The Texas Transportation Commission.

(3) [~~(4)~~] Contractor--An entity that is eligible to bid on a highway improvement contract or that functions or seeks to function as a subcontractor under a highway improvement contract or as a supplier of materials or equipment to be used in the construction or maintenance of a part of the state highway system.

(4) [~~(5)~~] Debarment--Disqualification of a contractor from entering into an agreement with a state or federal agency.

(5) [~~(6)~~] Department--The Texas Department of Transportation.

(6) [~~(7)~~] Executive director--The executive director of the Texas Department of Transportation.

(7) [~~(8)~~] Highway improvement contract--A contract entered under Transportation Code, Chapter 223, Subchapter A for the construction, reconstruction, or maintenance of a segment of the state highway system, or for the construction or maintenance of a building or other facility appurtenant to a building.

(8) [~~(9)~~] Reprimand--A written warning issued by the department that documents an act or omission committed by a contractor.

(9) [~~(10)~~] Sanction--A consequence imposed on a contractor for failure to comply with this subchapter including suspension, reprimand, prohibition against participation in a specified agreement, or debarment.

(10) [~~(11)~~] Suspension--Immediate, temporary disqualification of a contractor from entering into or attempting to enter into an agreement with the department.

§9.107. Grounds for Sanction.

(a) Sanctions may be imposed under this section for:

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

(2) the rejection by the commission of two or more

bids by the contractor during the 36-month period preceding the month in which the determination is being made because of contractor error;

(3) the department's declaration of a contractor in default on a highway improvement contract; [~~or~~]

(4) violation of §10.101 of this title (relating to Required Conduct);or

(5) failure to timely complete projects under contract.

(b) For purposes of subsection (a)(5) of this section, a contractor fails to timely complete a project if the district engineer of the district in which the project is located determines that:

(1) the contractor:

(A) has not completed the project within the time allowed under the contract, as adjusted by all applicable change orders; or

(B) has used more than 80 percent of the time allocated for the project, as adjusted by all applicable change orders, and the percent of allocated time used divided by the percent of the contract completed, both as adjusted by all applicable change orders, is greater than 1.2; and

(2) the contractor is more than 10 percent behind on

all of its other contracted department projects, as adjusted by all applicable change orders.

§9.111. Application of Sanction.

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

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

(c) Figure 43 TAC §9.111(c) sets forth guidelines for application of a sanction by assigning, for specific violations of §9.107 of this subchapter (relating to Grounds for Sanction), the sanctions available to the executive director as described in §9.110(a) of this subchapter (relating to Available Sanctions), taking into consideration the factors described in §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: • the contractor meets all mitigating factors listed in §9.110(c), and • the contractor has not committed similar acts or omissions and • the seriousness and willfulness of the act or omission is not severe, and • the contractor,	recommended if: • the contractor does not meet all mitigating factors listed in §9.110(c), or • the contractor has committed similar acts or omissions, or • the seriousness and willfulness of the act or omission is severe, or • the department has not been fully

			or a third party 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	compensated for any damages suffered by the department as a result of the contractor's acts or omissions
§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	allowable with written explanation of justification	recommended only if: • the contractor meets all of the mitigating factors of §9.110(c), and • the contractor has not committed similar acts or omissions, and • the seriousness and willfulness of the act or omission is	recommended only if: • the contractor meets some of the mitigating factors of §9.110(c), and • the contractor has not committed similar acts or omissions, and • the seriousness and willfulness of the act or omission is	recommended if: • the contractor meets no mitigating factors listed in §9.110(c), or • the contractor has committed similar acts or omissions, or • the seriousness and willfulness of the act or omission is not severe, or • the department has not been fully

		not severe, and • the contractor, or a third party 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	not severe, and • the contractor, or a third party 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	compensated for any damages 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: • the contractor meets all mitigating factors listed in §9.110(c), and • the contractor has not committed similar acts or omissions, and	recommended only if: • the contractor meets some of the mitigating factors of §9.110(c), and • the contractor has not committed similar acts or omissions, and	recommended if: • the contractor has committed similar acts or omissions, or • the seriousness and willfulness of the act or omission is	recommended only if: • the contractor has committed similar acts or omissions, and • the seriousness and willfulness of the act or

	• the seriousness and willfulness of the act or omission is not severe, and • the contractor, or a third party 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	• the seriousness and willfulness of the act or omission is not severe, and • the contractor, or a third party 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	severe, or • the department has not been fully compensated for any damages suffered by the department as a result of the contractor's acts or omissions	omission is severe, and • the department has not been fully compensated for any damages suffered by the department as a result of the contractor's acts or omissions
§9.107(a)(5) relating to a contractor not being responsive in the timely completion of projects under	allowable with written explanation of justification	allowable with written explanation of justification	recommended	recommended only if: • the contractor has committed similar acts or omissions,

contract				and • the seriousness and willfulness of the act or omission is severe, and • the department has not been fully compensated for any damages suffered by the department as a result of the contractor's acts or omissions

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§9.113. Indirect Sanction on an Affiliated Entity.

(a) For the purposes of this subchapter, an entity is an affiliated entity of a contractor if the entity and contractor satisfy any of the affiliation criteria provided under §9.12(d)(1) of this chapter. In addition to those affiliation criteria, the department, in making a determination of affiliation, may consider:

(1) the frequency of transactions between the entities; and

(2) the extent to which the entities share equipment, personnel, office space, and finances.

(b) [~~a~~] A sanction imposed on a contractor under this subchapter will also be imposed as an indirect sanction on an affiliated entity of the contractor.

(c) [~~(b)~~] The affiliated entity will receive notice of the indirect sanction that will:

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

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

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

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

(5) state that the affiliated entity may appeal the indirect sanction in accordance with subsection (d) [~~(c)~~] of this section.

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

(1) Not later than the 30th day after the date of receipt of the written request, the executive director will hold an informal hearing with the affiliated entity to discuss the relationship associated with the affiliation.

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

(A) intercompany transactions;

(B) equipment;

(C) personnel;

(D) office space;

(E) finances; and

(F) other affiliation criteria.

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

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

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

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

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

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

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

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

§9.114. Lessening or Removal of Sanction.

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

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

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