

TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

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ALL Districts

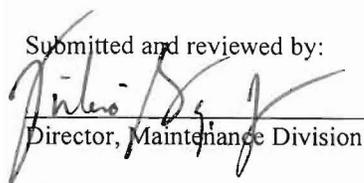
The Texas Transportation Commission (commission) finds it necessary to adopt amendments to §9.51, Definitions, and §9.54, Historically Underutilized Business (HUB) Program, relating to business opportunity programs to be codified under Title 43, Texas Administrative Code, Part 1.

The preamble and the adopted 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 §9.51 and §9.54 are adopted and are authorized for filing with the Office of the Secretary of State.

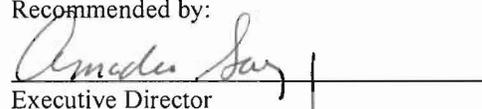
The executive director is directed to take the necessary steps to implement the actions as ordered in this minute order, pursuant to the requirements of the Administrative Procedure Act, Government Code, Chapter 2001.

Submitted and reviewed by:



Director, Maintenance Division

Recommended by:



Executive Director

112068 DEC 17 09

Minute
Number

Date
Passed

Adoption Preamble

The Texas Department of Transportation (department) adopts amendments to §9.51, Definitions, and §9.54, Historically Underutilized Business (HUB) Program, concerning business opportunity programs. The amendments to §9.51 and §9.54 are adopted without changes to the proposed text as published in the October 10, 2009 issue of the *Texas Register* (34 TexReg 7059) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

House Bill 2702, 79th Legislature, Regular Session, 2005 amended Government Code, §2166.302 to exempt the department's building contracts from the requirement that all state building contracts incorporate the Comptroller of Public Accounts' (CPA) Uniform General Conditions, which require compliance with CPA's HUB rules. These rule amendments will enable bidders on building construction contracts to use the department's newly implemented electronic bidding system, which will improve the continuity and efficiency of the letting process without reducing contracting opportunities for participants in the HUB and SBE programs. The amendments will also allow building construction contracts to use the same contract provisions as construction contracts, which will improve contract management.

Amendments to §9.51 add a definition for CPA, which stands for

1 Comptroller of Public Accounts. This definition is added due to
2 the statutory change in responsibility from the Texas Building
3 and Procurement Commission, later renamed to the Texas
4 Facilities Commission, to the Comptroller of Public Accounts.
5 Subsequent definitions are renumbered for clarity. Renumbered
6 definition (17) corrects a reference to the Texas Building and
7 Procurement Commission, changing the reference to the
8 Comptroller of Public Accounts instead. Former definition (24),
9 which refers to the Texas Building and Procurement Commission,
10 is deleted as it is no longer necessary.

11
12 Amendments to §9.54 remove aviation contracts from the
13 department's HUB program. The reference to aviation contracts
14 is deleted as superfluous because, while the department
15 administers aviation grants, it does not enter into aviation
16 contracts. The amendments also correct the references to the
17 CPA and the CPA's rules related to the HUB program.

18
19 Amendments to §9.54 also exempt building contracts from the
20 requirement that each bidder submit a HUB plan prior to contract
21 award. The amended rule will instead require only the low
22 bidder to submit a HUB plan. Requirements for the form of the
23 plan and submittal deadlines will be included in the contract or
24 proposal for each project.

25

1 COMMENTS

2 No comments on the proposed amendments were received.

3

4 STATUTORY AUTHORITY

5 The amendments are adopted under Transportation Code, §201.101,
6 which provides the Texas Transportation Commission with the
7 authority to establish rules for the conduct of the work of the
8 department, and more specifically, Transportation Code,
9 §201.702, which establishes the department's disadvantaged
10 business program.

11

12 CROSS REFERENCE TO STATUTE

13 Government Code, §2161.004 and §2166.302.

1 SUBCHAPTER D. BUSINESS OPPORTUNITY PROGRAMS

2 §9.51. Definitions. The following words and terms, when used
3 in this subchapter, shall have the following meanings, unless
4 the context clearly indicates otherwise.

5 (1) Building contract--A contract entered under
6 Transportation Code, Chapter 223, Subchapter A, for the
7 construction or maintenance of a department building or
8 appurtenant facilities.

9 (2) Business opportunity programs section (CSTB) of the
10 Construction Division--The department office that certifies DBEs
11 and SBEs and administers the DBE, HUB, and SBE programs.

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

13 (4) Construction contract--A contract entered under
14 Transportation Code, Chapter 223, Subchapter A, for the
15 construction or reconstruction of a segment of the state highway
16 system.

17 (5) CPA--Comptroller of Public Accounts.

18 (6) [~~+5~~] DBE certification--The process governed by 49
19 CFR Part 26 which verifies an applicant's eligibility to be a
20 DBE.

21 (7) [~~+6~~] DBE joint venture--An association of a DBE firm
22 and one or more other firms to carry out a single business
23 enterprise for profit for which purpose they combine their

1 property, capital, efforts, skills, and knowledge, and in which
2 the DBE is responsible for a distinct, clearly defined portion
3 of the work of the contract and whose share in the capital
4 contribution, control, management, risks, and profits of the
5 joint venture are commensurate with its ownership interest.

6 (8) [~~(7)~~] DBE, HUB, or SBE participation goal--A number
7 representing participation in contracts and purchasing by a DBE,
8 HUB, or SBE firm determined by a percentage of the total cost of
9 the contract or purchase.

10 (9) [~~(8)~~] Department--The Texas Department of
11 Transportation.

12 (10) [~~(9)~~] Director--The Director of the Construction
13 Division of the department.

14 (11) [~~(10)~~] Disadvantaged Business Enterprise (DBE)--As
15 defined in 49 CFR §26.5, a for profit small business concern
16 which is at least 51% owned by one or more socially and
17 economically disadvantaged individuals, or in the case of a
18 publicly owned business, at least 51% of the stock of which is
19 owned by one or more socially and economically disadvantaged
20 individuals, and whose management and daily business operations
21 are controlled by one or more of the socially and economically
22 disadvantaged individuals who own it.

23 (12) [~~(11)~~] District engineer--The chief administrative

1 officer in charge of a district of the department.

2 (13) [~~(12)~~] Division--An organizational unit in the
3 department's Austin headquarters.

4 (14) [~~(13)~~] Executive director--The executive director of
5 the department or designee not below the level of assistant
6 executive director.

7 (15) [~~(14)~~] Federal-aid contract--A contract between the
8 department and a contractor that is paid for in whole or in part
9 with United States Department of Transportation or other federal
10 financial assistance.

11 (16) [~~(15)~~] Good faith efforts--Efforts to achieve a DBE,
12 HUB, or SBE goal that, by their scope, intensity, and
13 appropriateness to the objectives, can reasonably be expected to
14 fulfill the program requirements, even if they are not fully
15 successful.

16 (17) [~~(16)~~] Historically Underutilized Business (HUB)--
17 Any business so certified by the Comptroller of Public Accounts
18 [~~Texas Building and Procurement Commission~~].

19 (18) [~~(17)~~] Liquidated damages--An amount contractually
20 stipulated as a reasonable estimation of actual damages to be
21 recovered by the department if the other party breaches the
22 terms of the contract.

23 (19) [~~(18)~~] Maintenance contract--A contract entered

1 under Transportation Code, Chapter 223, Subchapter A, for the
2 maintenance of a segment of the state highway system.

3 (20) [~~19~~] Operating administration--The Federal Highway
4 Administration (FHWA), Federal Aviation Administration (FAA), or
5 Federal Transit Administration (FTA).

6 (21) [~~20~~] Packager--A person or firm engaged in the
7 commercial packing of materials or supplies produced by others.

8 (22) [~~21~~] Race-neutral DBE or HUB participation--Any
9 participation by a DBE or HUB through customary competitive
10 procurement procedures.

11 (23) [~~22~~] Small Business Enterprise (SBE)--A firm
12 (including its affiliates) whose annual gross receipts do not
13 exceed the U.S. Small Business Administration's size standards
14 for four consecutive years. The U.S. Small Business
15 Administration's size standards are categorized by four-digit
16 Standard Industrial Classification (SIC) codes as stated in 13
17 CFR §121.201. A firm must meet the size standard for the SIC
18 code designated by the principal business of the firm. The
19 department considers those firms that meet these size standards
20 to be disadvantaged.

21 (24) [~~23~~] Socially and economically disadvantaged
22 individuals--As defined in 49 CFR §26.5, individuals who are
23 United States citizens or lawfully admitted permanent residents

1 and who the department finds to be socially and economically
2 disadvantaged on a case-by-case basis or who are members of the
3 following groups which are rebuttably presumed to be socially
4 and economically disadvantaged:

5 (A) Black Americans which includes persons having
6 origins in any of the Black racial groups of Africa;

7 (B) Hispanic Americans which includes persons of
8 Mexican, Puerto Rican, Cuban, Dominican, Central or South
9 American, or other Spanish or Portuguese culture or origin,
10 regardless of race;

11 (C) Native Americans which includes persons who are
12 American Indian, Eskimo, Aleut, or native Hawaiian;

13 (D) Asian-Pacific Americans which includes persons
14 whose origins are from Japan, China, Taiwan, Korea, Burma
15 (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand,
16 Malaysia, Indonesia, Philippines, Brunei, Samoa, Guam, the
17 Commonwealth of the Northern Marianas or the United States Trust
18 Territories of the Pacific Islands (Republic of Palau), Macao,
19 Fiji, Tonga, Kiribati, Juvalu, Nauru, Federated States of
20 Micronesia, or Hong Kong;

21 (E) Subcontinent Asian-Americans which includes persons
22 whose origins are from India, Pakistan, Bangladesh, Bhutan, the
23 Maldives Islands, Nepal, or Sri Lanka; or

1 (F) women.

2 [~~(24) TBPC The Texas Building and Procurement~~
3 ~~Commission.~~]

4

5 §9.54. Historically Underutilized Business (HUB) Program.

6 (a) Applicability. The HUB program is applicable to
7 contracts relating to buildings, professional services,
8 [~~aviation~~], public transportation, private consultant services,
9 and purchases funded entirely with state and local funds.

10 (b) HUB goals. The commission will establish overall
11 annual HUB participation goals. Individual contract goals will
12 be assigned as necessary to achieve the overall goal.

13 (1) Annual goals. The commission will establish annual
14 agency HUB participation goals making use of disparity studies,
15 including the disparity study described in Government Code,
16 §2161.002(c) or its replacement, as well as other relevant
17 information. The department will make a good faith effort to
18 meet or exceed this annual goal.

19 (2) Contract goals. Individual contracts are assigned
20 HUB goals based on the availability of qualified HUBs, work site
21 location, dollar value of the contract, and type of work items
22 specified in the contract. The department will assign
23 individual contract goals for HUB participation to cumulatively

1 meet the annual HUB goals that are not being met through race-
2 neutral means.

3 (c) Contractor obligation. Department contracts, as listed
4 in subsection (a) of this section, that are funded entirely with
5 state and local funds will include a contract provision
6 addressing HUB requirements. A contract estimated to involve
7 more than \$100,000.00, with available subcontracting
8 opportunities, will include provisions requiring a HUB
9 subcontracting plan.

10 (1) HUB plan. For contracts other than building
11 contracts, the [The] HUB plan will be submitted at the same time
12 as the response (bid, proposal, offer, or other applicable
13 expression of interest). Responses that do not include a
14 completed HUB plan shall be rejected due to material failure to
15 comply with advertised specifications. For building contracts,
16 the HUB plan will be submitted after conditional contract award
17 as specified in the contract or proposal. A respondent must
18 state whether it is a certified HUB. The department will
19 approve any changes to the HUB plan and determine whether any
20 additional opportunities exist for HUBs and will require
21 submission of a revised HUB plan for additional opportunities if
22 the original scope of work is expanded through a change order or
23 contract amendment. The department will monitor the plan on a

1 monthly basis to determine compliance with the plan. The
2 contractor will be given an opportunity to explain why failure
3 to fulfill the plan should not be attributed to a lack of good
4 faith. If the determination is made that the HUB plan was not
5 implemented in good faith, the department may report to the CPA
6 [~~TBPE~~] in the manner described by Title 34, Chapter 20,
7 Subchapter B (relating to Historically Underutilized Business
8 Program) [~~Title 1, Chapter 113, Subchapter F~~] and may revoke the
9 contract for breach of contract and make a claim against the
10 contractor. The HUB plan will include the following
11 information.

12 (A) The names and vendor numbers of the HUBs that will
13 be used during the course of the contract.

14 (B) The approximate dollar value expected to be paid to
15 each HUB and expected percentage of the work the HUB will
16 perform.

17 (C) When a contractor is unable to obtain HUB
18 participation, a description of the actions taken in an attempt
19 to solicit HUB participation. The department will consider
20 these actions in determining a respondent's good faith effort.
21 These actions may include, but are not limited to:

22 (i) advertising in general circulation and trade
23 association media concerning subcontracting opportunities;

1 (ii) contacting three or more qualified HUBs and
2 allowing no less than five working days from receipt of notice
3 for HUBs to participate effectively, unless circumstances
4 require a different time period, as determined by the
5 department, and documented in the contractor's files;

6 (iii) dividing the contract work into reasonable
7 portions in accordance with standard industry practices;

8 (iv) providing qualified HUBs with adequate
9 information about bonding, insurance, plans, specifications,
10 scope of work, and the requirements of the contract;

11 (v) contacting, for HUB referrals, available small
12 business community organizations, contractor groups, local,
13 state, and federal business assistance offices, and other
14 organizations that provide support services to HUBs;

15 (vi) negotiating in good faith with qualified HUBs,
16 not rejecting qualified HUBs who were also the best value
17 responsive bidder;

18 (vii) participating in a Mentor Protégé Program under
19 Government Code, §2161.065, and the submission of a protégé in
20 the HUB plan; and

21 (viii) providing written justification of the
22 selection process if no HUB subcontractors are selected.

23 (2) No assigned goal. A contract estimated to involve

1 more than \$100,000 with available subcontracting opportunities,
2 but without an assigned goal, will include provisions requiring
3 a HUB participation plan as a condition of contract award.

4 (3) Assigned goal. A contract with an assigned goal will
5 include provisions that will require the contractor to satisfy
6 the following stipulations as a condition of contract award.

7 (A) Commitments. Within the time specified in the
8 contract or proposal, the contractor must furnish a commitment
9 agreement for each certified HUB that will be used to meet the
10 contract goal. The commitment agreement must include:

11 (i) the items of work to be performed;

12 (ii) the quantities of work or material;

13 (iii) the unit measure, unit price, and total cost
14 for each item;

15 (iv) the total amount of the HUB commitment;

16 (v) the original signatures of the contractor and the
17 proposed HUB; and

18 (vi) if the commitment involves a HUB material
19 supplier, an explanation of the function to be performed and a
20 description of any arrangements, including joint check
21 agreements, made with other material suppliers, manufacturers,
22 distributors, hauling firms, or freight companies.

23 (B) Good faith effort. If the contractor is unable to

1 meet the goal, the contractor must document the good faith
2 efforts taken to obtain HUB participation in accordance with
3 applicable contract provisions. The department will consider as
4 good faith efforts all documented explanations that are
5 submitted and that describe a contractor's failure to meet a
6 goal, including actions described under paragraph (1)(C) of this
7 subsection for contracts without an assigned goal.

8 (4) Reporting.

9 (A) The contractor must submit periodic reports at
10 intervals specified in the contract using a report form
11 acceptable to the department that includes, but is not limited
12 to, identification of the HUB by name and vendor number. The
13 report must indicate the actual amount paid to each HUB. The
14 report must be submitted even if no payments were made during
15 the period being reported. When required by the department, the
16 contractor must attach proof of payment including, but not
17 limited to, copies of canceled checks.

18 (B) The contractor must submit a final report in
19 accordance with the contract, using a form acceptable to the
20 department which shows the total paid to each HUB.

21 (5) Credit for expenditures. A contractor will receive
22 credit for all payments actually made to a HUB for work
23 performed and costs incurred in accordance with the contract,

1 including all subcontracted work.

2 (6) Subcontracting.

3 (A) A HUB contractor or subcontractor may not
4 subcontract more than 75% of a contract. The HUB shall perform
5 not less than 25% of the value of the contract work with:

6 (i) assistance of employees employed and paid
7 directly by the HUB;

8 (ii) employees leased from a licensed employee
9 leasing company; and

10 (iii) equipment owned or rented directly by the HUB.

11 (B) A contractor may not furnish work crews to a HUB
12 subcontractor.

13 (C) A HUB may lease equipment consistent with standard
14 industry practice. A HUB may lease equipment from the prime
15 contractor if a rental agreement, separate from the subcontract
16 specifying the terms of the lease arrangement, is approved by
17 the department prior to the HUB starting the work.

18 (i) If the equipment is of a specialized nature, the
19 lease may include the operator. If the practice is generally
20 acceptable within the industry, the operator may remain on the
21 lessor's payroll. The operation of the equipment shall be
22 subject to the full control of the HUB, for a short term, and
23 involve a specialized piece of heavy equipment readily available

1 at the job site.

2 (ii) For equipment that is not specialized, the HUB
3 shall provide the operator and be responsible for all payroll
4 and labor compliance requirements.

5 (d) HUB certification.

6 (1) The department and CPA [TBPC] operate under a
7 memorandum of agreement that allows CPA [TBPC] to recognize the
8 department's certified DBE firms as HUB firms. The CPA [TBPC]
9 certifies businesses as HUBs using procedures set forth at Title
10 34, Texas Administrative Code, §20.17 (relating to Certification
11 Process) [~~Title 1, Texas Administrative Code, §§111.11 et seq.~~].

12 A business denied HUB certification through CPA's [TBPC's]
13 certification process may appeal the CPA [TBPC] determination in
14 accordance with procedures set forth at Title 34 , Texas
15 Administrative Code, §20.18 (relating to Protests) [~~Title 1,~~
16 ~~Texas Administrative Code, §111.14 (relating to Protests)~~]. A
17 business denied DBE/HUB certification through the department's
18 certification process may seek review of the denial as described
19 in §9.53(d)(8) and (10) of this subchapter (relating to
20 Disadvantaged Business Enterprise (DBE) Program).

21 (2) The department will submit information regarding DBEs
22 who qualify as HUBs to CPA [TBPC] for certification.

23 (3) A challenge regarding a firm's eligibility as a HUB

1 and based on the department's certification process must be
2 submitted to the department for resolution. A HUB firm whose
3 certification is based on the department's DBE certification
4 will lose both certifications if found to be ineligible as a
5 DBE.

6 (4) CPA [~~TBPC~~] maintains a directory of certified HUBs.