

TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

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ALL Districts

The Texas Transportation Commission (commission) finds it necessary to propose new Chapter 10, Ethical Conduct by Entities Doing Business with the Department, New Subchapter A, General Provisions, §§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, §§10.101 - 10.102; New Subchapter D, Score Reduction for Ethical Violations by Architectural, Engineering, and Surveying Service Providers, §§10.151 - 10.160; New Subchapter E, Removal of Certification of Architectural, Engineering, and Surveying Service Providers for Ethical Violations, §§10.201 - 10.206; and New Subchapter F, Sanctions for Ethical Violations by Other Entities, §§10.251 - 10.257, all to be codified under Title 43, Texas Administrative Code, Part 1.

The preamble and the proposed new sections, attached to this minute order as Exhibits A - G, 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*.

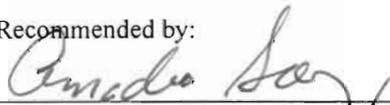
IT IS THEREFORE ORDERED by the commission that new §§10.1 - 10.7, §10.51, §§10.101 - 10.102, §§10.151 - 10.160, §§10.201 - 10.206, and §§10.251 - 10.257 are proposed for adoption and are authorized for publication in the *Texas Register* for the purpose of receiving public comments.

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:


Deputy Executive Director

Recommended by:


Executive Director

112385 AUG 26/10

Minute
Number

Date
Passed

1 Proposed Preamble

2 The Texas Department of Transportation (department) proposes new
3 Chapter 10, Ethical Conduct by Entities Doing Business with the
4 Department, new Subchapter A, General Provisions, new
5 §§10.1 - 10.7, New Subchapter B, Other Entities' Internal Ethics
6 and Compliance Procedures, §10.51, new Subchapter C, Required
7 Conduct by Entities Doing Business with the Department, new
8 §10.101 and §10.102, new Subchapter D, Score Reduction for
9 Ethical Violations by Architectural, Engineering, and Surveying
10 Service Providers, new §§10.151 - 10.160, new Subchapter E,
11 Removal of Precertification of Architectural, Engineering, and
12 Surveying Service Providers for Ethical Violations, new
13 §§10.201 - 10.206, new Subchapter F, Sanctions for Ethical
14 Violations by Other Entities, new §§10.251 - 10.257. These new
15 sections are proposed in association with new 43 TAC
16 §§9.101 - 9.115.

17

18 EXPLANATION OF PROPOSED NEW SUBCHAPTER

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

24

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

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

5
6 The proposed sections will only apply to agreements signed or
7 extended on or after the effective date of the rules.

8
9 New §10.1, Purpose, sets forth the purpose of the subchapter,
10 which is to prescribe the ethical conduct required of entities
11 that do business with the department and to describe how
12 violations will be enforced. Enforcement provisions for ethical
13 violations by a contractor who is subject to 43 TAC Chapter 9,
14 Subchapter G, Highway Improvement Contract Sanctions are
15 provided under that chapter rather than under new Chapter 10.
16 Chapter 10 does not apply to the federal government. The
17 requirements and enforcement measures of the chapter supplement
18 other applicable provisions. The latter provision gives notice
19 that the department may use all remedies legally available to
20 it.

21
22 New §10.2, Definitions, provides definitions for terms
23 associated with conduct requirements and enforcement provisions.
24 The definition of debarment is among those provided in the
25 section, and states that debarment is disqualification of an
26 entity from bidding on or entering into a contract with the

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

7

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

13

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

23

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

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

6
7 New §10.6, Conflict of Interest, describes a conflict of
8 interest as a circumstance arising out of an entity's existing
9 or past activities, business interests, contractual
10 relationships, or organizational structure, or a familial or
11 domestic living relationship between a department employee and
12 an employee of the entity, that affects or may affect the
13 entity's objectivity in performing the scope of work sought by
14 the department, or that provides or may reasonably appear to
15 provide an unfair competitive advantage to an entity or a third
16 party in the entity's performance of services for the department
17 or participation in an agreement with the department. As
18 stewards of public resources, the department has a vested
19 interest in ensuring that both impropriety and the perception of
20 impropriety are avoided.

21
22 New 10.7, Delegation of Authority, describes how and to whom the
23 executive director and assistant executive director may delegate
24 the authority given to them under this chapter. The executive
25 director may delegate to AN assistant executive director any
26 authority provided to the executive director under this chapter,

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

6
7 New §10.51, Internal Ethics and Compliance Program, is proposed
8 without change from existing §1.8, Internal Ethics and
9 Compliance Program. In the interest of organization, the
10 section has been removed from 43 TAC Chapter 1, Subchapter C,
11 Other Entities' Internal Ethics and Compliance Procedures, and
12 inserted into new Chapter 10. This allows for easy subject
13 matter reference and location of the rules.

14
15 New §10.101, Required Conduct, lists requirements to which
16 entities must adhere. Entities must disclose conflicts of
17 interest, refrain from offering benefits to department employees
18 or commissioners, and obey all applicable laws. An entity must
19 also maintain good standing with the state's comptroller of
20 public accounts, notify the department of a business-related
21 conviction or judgment against the entity, debarment for a
22 reason related to business integrity, or a violation of the law,
23 department rules, or the entity's internal compliance program if
24 that violation seriously and directly affects the entity's
25 responsibility to the department. This section provides notice
26 as to exactly what ethical standards of conduct the department

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

4

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

11

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

15

16 New §10.152, Score Reduction for Ethical Violations, states that
17 if a service provider violates the conduct requirements, the
18 executive director may reduce the provider's points total under
19 43 TAC Chapter 9, Subchapter C, Contracting for Architectural,
20 Engineering, and Surveying Services. This section states the
21 manner in which enforcement action will be taken against service
22 providers. The section also states that this action is in
23 addition to other actions available to the department. The
24 latter provision gives notice that the department is not
25 forfeiting any options legally available.

26

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

9
10 New §10.154, Factors Considered in Imposing Score Reduction,
11 describes the factors that the executive director will consider
12 in imposing a score reduction. Factors to be considered include
13 the seriousness and willfulness of the act or omission, whether
14 and when the provider has committed similar acts or omissions,
15 whether the department has been fully compensated for any
16 damages, and mitigating factors including the provider's
17 adoption and enforcement of an internal ethics and compliance
18 program, the provider's cooperation with the department in the
19 investigation of ethical violations, and the provider's
20 disassociation from individuals and firms that have been
21 involved in the ethical violation. Allowing the department to
22 consider a range of factors ensures that all aspects of a
23 particular situation can be assessed in imposing a score
24 reduction in response to a violation.

25
26 New §10.155, Account and Period of Score Reduction, sets forth

1 guidelines for application of a score reduction by recommending,
2 for specific violations, the percentage and period of a score
3 reduction available to the executive director, taking into
4 consideration the mitigating factors described in §10.154(b).
5 The guidelines are set forth in a chart format that ties
6 recommended score reduction percentages and lengths of time to
7 specific violations based on varying factors. The chart is
8 designed to show the most severe score reduction allowable for a
9 specific violation. The executive director may assign a lesser
10 score reduction than recommended for a specific violation, but
11 may not assign a more severe score reduction than recommended.
12 The process provides notice as to a provider's recommended
13 reduction while also granting limited discretion to the
14 department.

15
16 New §10.156, Notice of Score Reduction, describes the contents
17 of the notice that will be sent to a service provider receiving
18 a score reduction. In order to ensure timely notification, the
19 department will notify the provider by certified mail within
20 five working days after the date of the assistant executive
21 director's decision to issue a sanction. The notice will state
22 the percentage of score reduction and the period during which it
23 will be imposed, summarize the facts and circumstances
24 underlying the reduction, explain how the percentage of score
25 reduction and time period of the reduction were determined using
26 Figure 43 TAC §10.155(b), inform the provider of the imposition

1 of a suspension if applicable, and state that the provider may
2 appeal the score reduction. In the interest of transparency, it
3 is the department's intent for a sanctioned service provider to
4 have full knowledge of the basis of the score reduction and how
5 the score reduction and period of imposition were decided.

6
7 Section 10.156 also states that the executive director,
8 concurrent with the delivery of the notice of a score reduction,
9 may suspend a service provider. Suspension protects department
10 resources from being irresponsibly allocated before a score
11 reduction is finally imposed. In order to ensure that a
12 suspension is not unnecessarily imposed, the executive director
13 will consider all relevant circumstances before imposing a
14 suspension, including the severity and willfulness of the
15 conduct, the likelihood of immediate harm to the public, and
16 whether there has been a pattern of inappropriate conduct. The
17 suspension terminates when a final order imposing the score
18 reduction is entered.

19
20 Finally, §10.156 specifies that the imposition of a score
21 reduction on a service provider does not affect the provider's
22 obligations under an agreement with the department or limit the
23 department's remedies under the agreement. This provision
24 preserves the integrity of contractual agreements with the
25 department.

26

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

14

15 New §10.158, Appeal of Score Reduction, describes the procedure
16 for appeal of a score reduction. A score reduction may be
17 appealed to the executive director for an informal hearing.
18 This option allows the provider the opportunity to appeal a
19 score reduction in an informal setting that requires minimal
20 time and resource investment. If the provider is unsatisfied
21 with the decision of the executive director, the provider may
22 pursue a contested case hearing in the State Office of
23 Administrative Hearings (SOAH). This option offers the provider
24 a judicial proceeding through which it may present evidence and
25 offer testimony in support of its appeal. Following the
26 contested case hearing, the administrative law judge's proposal

1 for decision is presented to the commission at a regularly
2 scheduled open meeting for a determination based on the proposal
3 for decision. The commission may consider oral presentations.
4 The commission's determination on the proposal for decision will
5 be adopted by minute order. The executive director will issue a
6 final order on the score reduction based on the commission's
7 determination, or if an appeal to SOAH is not requested, the
8 determination of the informal hearing. This multi-step process
9 for appeal ensures due process in the application of a score
10 reduction and allows a provider the opportunity to appeal a
11 sanction.

12

13 Finally, §10.158 states that a score reduction is automatically
14 stayed from the date that the department receives the notice of
15 appeal until a final order is entered by the executive director.
16 On entry of a final order by the executive director imposing the
17 score reduction, the full term of the score reduction will be
18 imposed on the date of the final order unless the executive
19 director expressly orders that a lesser score reduction be
20 imposed. Staying a score reduction during the pendency of an
21 appeal makes certain that a score reduction is not unjustly
22 imposed in a situation in which an appeal results in a reversal
23 of a score reduction. An order of the executive director under
24 §10.158 is not subject to judicial review unless otherwise
25 provided by law.

26

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

13
14 New §10.160, Publication of Names of Providers Receiving Score
15 Reductions, provides that the department will publish a list on
16 its website of the names of providers who are subject to score
17 reductions. The names will be added when the reduction becomes
18 effective and will be removed as soon as practicable after the
19 date on which the score reduction imposition ends. This
20 provision allows the public to know which service providers have
21 been found to have engaged in unethical conduct and illustrates
22 the department's commitment to holding its providers accountable
23 to a high standard of conduct.

24
25 New §10.201, Purpose, sets forth the purpose of Subchapter E,
26 Removal of Precertification of Architectural, Engineering, and

1 Surveying Service Providers for Ethical Violations, which is to
2 provide a procedure by which an architectural, engineering, or
3 surveying service provider's precertification can be removed by
4 the assistant executive director if a ground for removal under
5 §10.101 exists. This procedure ensures that only responsible
6 persons are precertified to enter into certain contracts with
7 the department.

8

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

23

24 New §10.203, Time Period of Prohibition from Reapplying for
25 Precertification, sets forth guidelines for application of a
26 certain period during which a person is prohibited from

1 reapplying for precertification. The guidelines are set forth
2 in a chart format that ties specific periods of prohibition to
3 specific violations based on varying factors. The chart is
4 designed to show the most severe period of prohibition from
5 reapplying for precertification that is allowable for a specific
6 violation. The assistant executive director may prohibit a
7 person from reapplying for precertification for a lesser period
8 than recommended for a specific violation, but may not prohibit
9 reapplication for a longer period than recommended. The process
10 provides notice as to a provider's recommended period of
11 prohibition while also granting limited discretion to the
12 department.

13
14 New §10.204, Notice of Removal of Precertification, describes
15 the contents of the notice that will be sent to a person whose
16 precertification is removed. In order to ensure timely
17 notification, the department will notify the person by certified
18 mail within five working days after the date of the assistant
19 executive director's decision to remove precertification. The
20 notice will state the period during which the person is
21 prohibited for applying for precertification, summarize the
22 facts and circumstances underlying the removal of
23 precertification, explain how the period of prohibition was
24 determined using Figure 43 TAC §10.203, and state that the
25 person may appeal the removal of precertification. It is the
26 department's intent to promote transparency by ensuring that a

1 person has full knowledge of the basis of a precertification
2 removal and how the period of prohibition was decided.

3

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

17

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

1 agreements with the department, but if the person does
2 participate in an agreement with the department, it must be in a
3 capacity that does not require precertification.

4

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

21

22 New §10.206, Eligibility to Reapply for Precertification, allows
23 a person to request that the assistant executive director reduce
24 or remove a period of prohibition for precertification by
25 demonstrating changes in the circumstances that were described
26 in the notice of score reduction. The assistant executive

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

8

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

20

21 New §10.252, Procedure, details the method by which sanctions
22 will be imposed. The executive director may impose a sanction
23 on an entity if a ground for a sanction exists. If the
24 executive director decides to impose a sanction, it will be
25 imposed in accordance with Figure 43 TAC §10.255(c). These
26 provisions limit the executive director's discretion on when and

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

19
20 New §10.253, Notice of Sanction, describes the contents of the
21 notice that will be sent to an entity receiving a sanction. In
22 order to ensure timely notification, the department will notify
23 the entity by certified mail within five working days after the
24 date of the executive director's decision to issue a sanction.
25 The notice will state the sanction and the period of the
26 sanction, summarize the facts and circumstances underlying the

1 sanction, explain how the sanction was selected, inform the
2 entity of the imposition of a suspension if applicable, and
3 state that the entity may appeal the sanction. To encourage
4 transparency, it is the department's intent for a sanctioned
5 entity to have full knowledge of the basis of the sanction and
6 how the sanction was decided.

7
8 New §10.254, Available Sanctions, describes the sanctions
9 available to the department and also identifies factors that
10 will be considered in imposing the sanction. Available
11 sanctions, in order of increasing severity, are a reprimand,
12 prohibition from participating in a specified agreement, a limit
13 on the contract amount or amount of funds that may be awarded or
14 paid to the entity, or debarment of the entity for a period of
15 not more than 60 months. The range of sanctions available
16 allows the department to appropriately address various levels of
17 violations. Factors that will be considered in imposing the
18 sanction include the seriousness and willfulness of the act or
19 omission, whether and when the entity has committed similar acts
20 or omissions, whether the department has been fully compensated
21 for any damages, and mitigating factors, including the entity's
22 adoption and enforcement of an internal ethics and compliance
23 program, the entity's cooperation with the department in the
24 investigation of ethical violations, and the entity's
25 disassociation from individuals and firms that have been
26 involved in the ethical violation. The department's

1 consideration of a range of factors guarantees that all aspects
2 of a particular situation can be evaluated in assigning a
3 sanction to a violation.

4

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

20

21 New §10.256, Appeal of Sanction, describes the procedure for
22 appeal of a sanction other than a reprimand. A sanction may be
23 appealed to the executive director for an informal hearing.
24 This option allows the entity the opportunity to appeal a
25 sanction in an informal setting that requires minimal time and
26 resource investment. If the entity is unsatisfied with the

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

17

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

25

26 Section 10.256(f) states that a sanction is automatically stayed

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

13
14 New §10.257, Lessening or Removal of Sanction, provides that an
15 entity may request that the executive director reduce or remove
16 a sanction once in a 12-month period. This provision ensures
17 that the executive director will have the ability to lessen or
18 remove a sanction if the circumstances underlying the sanction
19 change and is intended to motivate entities to improve the
20 issues that originally led to the sanction in the effort to have
21 the sanction reduced or removed.

22

23 FISCAL NOTE

24 James Bass, Chief Financial Officer, has determined that for
25 each of the first five years the new chapter as proposed is in
26 effect, there will be no fiscal implications for state or local

1 governments as a result of enforcing or administering the new
2 chapter.

3

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

8

9 PUBLIC BENEFIT AND COST

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

18

19 PUBLIC HEARING

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

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

1 can be provided.

2

3 SUBMITTAL OF COMMENTS

4 Written comments on the proposed new Chapter 10 may be submitted

5 to Bob Jackson, General Counsel, Texas Department of

6 Transportation, 125 East 11th Street, Austin, Texas 78701-2483.

7 The deadline for receipt of comments is 5:00 p.m. October 12,

8 2010.

9

10 STATUTORY AUTHORITY

11 The new sections are proposed under Transportation Code,

12 §201.101, which provides the Texas Transportation Commission

13 with the authority to establish rules for the conduct of the

14 work of the department.

15

16 CROSS REFERENCE TO STATUTE

17 None.

1 SUBCHAPTER A. GENERAL PROVISIONS

2 §10.1. Purpose.

3 (a) As a steward of public resources, the department must
4 ensure the protection of public funds and maintain a high level
5 of transparency and accountability. Therefore, the department
6 expects entities doing business with the department to adhere to
7 ethical standards of conduct. This chapter prescribes required
8 ethical standards for entities doing business with the
9 department, and most enforcement provisions applicable for
10 violations of the ethical standards.

11 (b) The ethical requirements and enforcement provisions
12 provided under this chapter do not apply to the federal
13 government or an agency of the federal government.

14 (c) Enforcement provisions for ethical violations by a
15 contractor who is subject to Chapter 9, Subchapter G of this
16 title (relating to Highway Improvement Contract Sanctions) are
17 provided under that chapter rather than under this chapter.

18 (d) The requirements and enforcement provisions provided
19 under this chapter are in addition to any other contract, rule,
20 or legal requirement or enforcement provision.

21

22 §10.2. Definitions. The following words and terms, when used
23 in this chapter, have the following meanings, unless the context

1 clearly indicates otherwise.

2 (1) Assistant executive director--An assistant executive
3 director of the Texas Department of Transportation.

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

5 (3) Debarment--Disqualification of an entity from bidding
6 on or entering into a contract with the department, from
7 participating as a subcontractor under a contract with the
8 department, and from participating as a supplier of materials or
9 equipment to be used under a contract with the department.

10 (4) Department--The Texas Department of Transportation.

11 (5) Entity--A contractor, subcontractor, supplier,
12 grantee, subgrantee, provider, subprovider, governmental agency,
13 local government, or other business or governmental organization
14 with which the department does business. The term does not
15 include the federal government or an agency of the federal
16 government.

17 (6) Executive director--The executive director of the
18 Texas Department of Transportation.

19 (7) Reprimand--A written warning issued by the department
20 that documents an act or omission committed by an entity.

21 (8) Sanction--A consequence imposed on an entity for
22 failure to comply with this chapter including suspension,
23 reprimand, prohibition against participation in a specified

1 agreement, or debarment.

2 (9) Suspension--Immediate, temporary disqualification of
3 an entity or individual from entering into or attempting to
4 enter into an agreement with the department.

5

6 §10.3. Delivery of Written Notice, Disclosures, or Requests to
7 the Department. For the purposes of this chapter, written
8 notice, disclosures, or requests may be delivered to the
9 department by:

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

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

17

18 §10.4. Act of Individual Imputed to Entity. For the purposes
19 of this chapter, an act of or omission by a person on behalf of
20 an entity that seriously and directly affects the entity's
21 responsibility to the department is considered to be an act or
22 omission of the entity.

23

1 §10.5. Benefit.

2 (a) Except as provided by subsection (b) of this section, a
3 benefit, for the purposes of this chapter, is anything that is
4 reasonably regarded as financial gain or financial advantage,
5 including a benefit to another person in whose welfare the
6 beneficiary has a direct and substantial interest, regardless of
7 whether the donor is reimbursed. Examples are cash, loans,
8 meals other than ordinary working meals, lodging, services,
9 tickets, door prizes, free entry to entertainment or sporting
10 events, transportation, hunting or fishing trips, or discounts
11 on goods or services.

12 (b) The following are not benefits for the purposes of this
13 chapter:

14 (1) an ordinary working meal;

15 (2) a token item, other than cash, a check, stock, bond,
16 or similar item, that is distributed generally as a normal means
17 of advertising and that does not exceed an estimated value of
18 \$25;

19 (3) an honorarium in the form of a meal served at an
20 official, department-related event such as a conference,
21 workshop, seminar, or symposium; or

22 (4) reimbursement for food, travel, or lodging to an
23 event described by paragraph (3) of this subsection in an amount

1 allowable under department policy if the recipient were to seek
2 reimbursement from the department, or a greater amount if
3 preapproved by the assistant executive director.

4

5 §10.6. Conflict of Interest. For the purposes of this chapter,
6 a conflict of interest is a circumstance arising out of existing
7 or past activities, business interests, contractual
8 relationships, or organizational structure of an entity, or a
9 familial or domestic living relationship between a department
10 employee and an employee of the entity, and because of which:

11 (1) the entity's objectivity in performing the scope of
12 work sought by the department is or might be affected; or

13 (2) the entity's performance of services on behalf of the
14 department or participation in an agreement with the department
15 provides or may reasonably appear to provide an unfair
16 competitive advantage to the entity or to a third party.

17

18 §10.7. Delegation of Authority.

19 (a) The executive director may delegate to the assistant
20 executive director any authority provided to the executive
21 director under this chapter, unless otherwise provided.

22 (b) The assistant executive director may delegate to an
23 employee of the department who is not below the level of

1 district engineer, division director, or office director any
2 authority provided to the assistant executive director under
3 this chapter, including authority delegated under subsection (a)
4 of this section, unless otherwise provided.

1 SUBCHAPTER B. OTHER ENTITIES' INTERNAL ETHICS
2 AND COMPLIANCE PROCEDURES

3 §10.51. Internal Ethics and Compliance Program.

4 (a) Various sections of this title require an entity to
5 adopt and enforce an internal ethics and compliance program. To
6 comply with that requirement, the entity must certify to the
7 department that the entity:

8 (1) has adopted an internal ethics and compliance program
9 that:

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

13 (B) satisfies all requirements of this section; and

14 (2) enforces compliance with its internal ethics and
15 compliance program.

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

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

22 (2) appropriate care is being taken to avoid the
23 delegation of substantial discretionary authority to individuals

1 whom the organization knows, or should know, have a propensity
2 to engage in illegal activities;

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

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

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

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

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

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

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

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

1 offenses; and

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

3 conduct that, at a minimum, addresses:

4 (A) record retention;

5 (B) fraud;

6 (C) equal opportunity employment;

7 (D) sexual harassment and sexual misconduct;

8 (E) conflicts of interest;

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

10 (G) gifts and honoraria.

11 (c) The department may, at its discretion, request that the

12 entity provide the department with written evidence of the

13 entity's internal ethics and compliance program.

1 SUBCHAPTER C. REQUIRED CONDUCT BY ENTITIES DOING
2 BUSINESS WITH THE DEPARTMENT

3 §10.101. Required Conduct. An entity that does business with
4 the department is required to:

5 (1) disclose to the department in writing the existence
6 of a conflict of interest involving an agreement between the
7 entity and the department and adequately remedy the conflict:

8 (A) before the effective date of the agreement; or

9 (B) if the conflict of interest arises after the
10 effective date of the agreement, within five working days after
11 the date that the entity knows or should have known of the
12 conflict;

13 (2) refrain from offering, giving, or agreeing to give a
14 benefit to a member of the commission or to a department
15 employee;

16 (3) adhere to all civil and criminal laws related to
17 business;

18 (4) maintain good standing with the comptroller, other
19 state agencies, states, and agencies of the federal government
20 with which the entity has had a business relationship;

21 (5) notify the department in writing within five working
22 days after the date that the entity knows or should have known
23 of the existence of:

1 (A) a conviction of, a plea of guilty or nolo
2 contendere to, a civil judgment for or a public admission to a
3 crime or offense related to business by the entity;

4 (B) debarment of the entity by the comptroller, another
5 state agency, another state, or an agency of the federal
6 government for a ground related to business integrity; or

7 (C) any behavior of the entity that seriously and
8 directly affects the entity's responsibility to the department
9 and that is also a violation of:

10 (i) the law;

11 (ii) the department's rules that relate to the
12 entity's dealing with the department; or

13 (iii) the entity's internal ethics and compliance
14 procedures.

15

16 §10.102. Grounds for Sanctions. An entity's violation of
17 §10.101 of this subchapter (relating to Required Conduct) is a
18 ground for the imposition of sanctions, score reduction, or
19 removal from precertification status under this chapter.

1 SUBCHAPTER D. SCORE REDUCTION FOR ETHICAL VIOLATIONS BY
2 ARCHITECTURAL, ENGINEERING, AND SURVEYING SERVICE PROVIDERS
3 §10.151. Definitions. The following words, when used in this
4 subchapter, have the following meanings, unless the context
5 clearly indicates otherwise.

6 (1) Provider--An individual or entity that provides
7 engineering, architectural, or surveying services.

8 (2) Team--The provider and all proposed subproviders who
9 will be working on a particular contract.

10

11 §10.152. Score Reduction for Ethical Violations.

12 (a) If a provider violates §10.101 of this chapter
13 (relating to Required Conduct), the executive director may
14 reduce the provider's points total under 43 TAC Chapter 9,
15 Subchapter C, Contracting for Architectural, Engineering, and
16 Surveying Services, in accordance with this subchapter.

17 (b) An action taken under this subchapter is in addition to
18 other actions and remedies available to the department.

19

20 §10.153. Member Score Reduction Applied to Team. If any member
21 of a team receives or has received a score reduction under this
22 subchapter, then the score reduction will be applied to all
23 submissions of the team under 43 TAC Chapter 9, Subchapter C,

1 relating to Contracting for Architectural, Engineering and
2 Surveying Services.

3

4 §10.154. Factors Considered in Imposing Score Reduction.

5 (a) Before imposing a score reduction, the executive
6 director will consider the following factors:

7 (1) the seriousness and willfulness of the act or
8 omission;

9 (2) whether the provider has committed similar acts or
10 omissions and, if so, when those acts or omissions were
11 committed;

12 (3) whether the provider, or a third party on behalf of
13 the provider, has fully compensated the department for any
14 damages suffered by the department as a result of the provider's
15 acts or omissions; and

16 (4) any mitigating factors.

17 (b) For the purposes of subsection (a)(4) of this section,
18 mitigating factors are:

19 (1) the provider's adoption and enforcement of an
20 internal ethics and compliance program that satisfies the
21 requirements of §10.51 of this chapter (relating to Internal
22 Ethics and Compliance Program);

23 (2) the provider's cooperation with the department in the

1 investigation of ethical violations, including the provision of
2 a full and complete account of the provider's involvement; and
3 (3) the provider's disassociation from individuals and
4 firms that have been involved in the ethical violation.

5

6 §10.155. Amount and Period of Score Reduction.

7 (a) The executive director, at the executive director's
8 sole discretion, may assign a score reduction that is less than,
9 but not greater than, the recommended score reduction under
10 subsection (b) of this section.

11 (b) Figure 43 TAC §10.155(b) sets forth guidelines for
12 application of a score reduction by assigning for the specific
13 violations of §10.101 of this chapter (relating to Required
14 Conduct), the percentage of score reduction available, and the
15 maximum period for which that percentage of score reduction may
16 be applied, taking into consideration the factors described in
17 §10.154 of this subchapter (relating to Factors Considered in
18 Imposing Score Reduction).

- 1 Figure 43 TAC §10.155(b)
- 2 Guidelines for Selection of Score Reduction based on Grounds and Factors
- 3

Ground for Score Reduction	Recommended Percentage and Period of Score Reduction/Factors for Imposition			
	no more than 10% reduction for a time period of no more than 12 months	no more than 20% reduction for a time period of no more than 36 months	no more than 50% reduction for a time period of no more than 48 months	no more than 75% reduction for a time period of no more than 60 months
§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"> • the provider meets all mitigating factors of §10.154(b) and • the provider has not committed similar acts or omissions and • the seriousness and willfulness of the act or omission is not severe, and • the provider, or 	recommended if: <ul style="list-style-type: none"> • the provider does not meet all mitigating factors of §10.154(b), or • the provider has committed similar acts or omissions, or • the seriousness and willfulness of the act or omission is severe, or • the department has not been

			a third party on behalf of the provider, has fully compensated the department for any damages suffered by the department as a result of the provider's acts or omissions	fully compensated for any damages suffered by the department as a result of the provider's acts or omissions
§10.101(1) relating to conflicts of interest; or §10.101(2) relating to offering, giving, or agreeing to give a benefit	allowable with written explanation of justification	recommended only if: <ul style="list-style-type: none"> • the provider meets all of the mitigating factors of §10.154(b), and • the provider has not committed similar acts or omissions, and • the seriousness and willfulness of the act or omission is not severe, and • the provider, or a third party on behalf of the provider, has fully 	recommended only if: <ul style="list-style-type: none"> • the provider meets some of the mitigating factors of §10.154(b), and • the provider has not committed similar acts or omissions, and • the seriousness and willfulness of the act or omission is not severe, and • the provider, or a third party on behalf of the 	recommended if: <ul style="list-style-type: none"> • the provider meets no mitigating factors of §10.154(b), or • the provider 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 compensated for any damages suffered by the

		compensated the department for any damages suffered by the department as a result of the provider's acts or omissions	provider, has fully compensated the department for any damages suffered by the department as a result of the provider's acts or omissions	department as a result of the provider's acts or omissions
§10.101(5) relating to notifying the department	recommended only if: <ul style="list-style-type: none"> the provider meets all mitigating factors of §10.154(b), and the provider has not committed similar acts or omissions, and the seriousness and willfulness of the act or omission is not severe, and the provider, or a third party on behalf of the provider, has fully 	recommended only if: <ul style="list-style-type: none"> the provider meets some of the mitigating factors of §10.154(b), and the provider has not committed similar acts or omissions, and the seriousness and willfulness of the act or omission is not severe, and the provider, or a third party on behalf of the provider, has fully compensated the department for 	recommended if: <ul style="list-style-type: none"> the provider 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 compensated for any damages suffered by the department as a result of the provider's 	recommended only if: <ul style="list-style-type: none"> the provider has committed similar acts or omissions, 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 provider's acts or omissions

	compensated the department for any damages suffered by the department as a result of the provider's acts or omissions	any damages suffered by the department as a result of the provider's acts or omissions	acts or omissions	
--	---	--	-------------------	--

1

1 §10.156. Notice of Score Reduction.

2 (a) If the executive director imposes a score reduction
3 under this section, the department will notify the provider by
4 certified mail within five working days after the date of the
5 executive director's decision. The notice will:

6 (1) state the percentage of score reduction and the
7 period during which the reduction will be imposed;

8 (2) summarize the facts and circumstances underlying the
9 reduction;

10 (3) explain how the percentage of score reduction and the
11 time period of the score reduction were determined using Figure
12 43 TAC §10.155(b) as a basis for explanation;

13 (4) if applicable, inform the provider of the imposition
14 of a suspension under subsection (b) of this section; and

15 (5) state that the provider may appeal the reduction in
16 accordance with §10.158 of this subchapter (relating to Appeal
17 of Score Reduction).

18 (b) The executive director, concurrent with the delivery of
19 the notice of a score reduction, may suspend a provider. Before
20 imposing a suspension, the executive director will consider all
21 relevant circumstances, including the severity and willfulness
22 of the conduct, the likelihood of immediate harm to the public,
23 and whether there has been a pattern of inappropriate conduct.

1 The suspension terminates when a final order is entered under
2 §10.158(d) of this subchapter.

3 (c) The imposition of a score reduction or a suspension on
4 a provider does not affect the provider's obligations under an
5 agreement with the department or limit the department's remedies
6 under the agreement.

7

8 §10.157. Application of Score Reduction.

9 (a) The score reduction will be applied to each letter of
10 interest submittal of the provider under 43 TAC Chapter 9,
11 Subchapter C, Contracting for Architectural, Engineering, and
12 Surveying Services.

13 (b) The score reduction will be applied at the earliest of
14 the following steps in the selection process:

15 (1) on assignment of a relative importance factor (RIF)
16 at the long list evaluation (§9.34 of this title, relating to
17 Short List Determination);

18 (2) on assignment of an RIF at the short list proposal
19 evaluation (§9.35 of this title, relating to Short List Meeting,
20 Proposals, and Evaluation);

21 (3) on assignment of an RIF at the interview evaluation
22 (§9.36 of this title, relating to Short List Interviews and
23 Evaluation); or

1 (4) on preparation of a contract evaluation summary
2 (§9.37 of this title, relating to Selection).

3
4 §10.158. Appeal of Score Reduction.

5 (a) A provider may appeal a score reduction by delivering
6 to the executive director a written notice of appeal within 10
7 working days after the date that the department mails the notice
8 of the score reduction under §10.156 of this subchapter
9 (relating to Notice of Score Reduction).

10 (b) If the notice of appeal is timely delivered, the
11 provider will be given the opportunity for an informal hearing
12 before the executive director. The executive director will set
13 a time for the hearing at the executive director's earliest
14 convenience. The executive director will set the maximum time
15 allowed for oral presentations and the procedure for written
16 documents to be presented by the provider. The executive
17 director will notify the provider in writing within 5 working
18 days of the executive director's determination on the appeal.

19 (c) If the provider is dissatisfied with the determination
20 of the executive director, the provider may request an
21 administrative hearing under §1.21 et seq. of this title
22 (relating to Procedures in Contested Case). To be effective the
23 request must be received by the executive director within 10

1 working days after the date that the executive director mails
2 the notification of determination under subsection (b) of this
3 section.

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

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

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

20 (2) the commission's determination under subsection (d)
21 of this section.

22 (f) A score reduction is automatically stayed from the date
23 that the department receives the notice of appeal until a final

1 order is entered by the executive director. On entry of a final
2 order by the executive director imposing the score reduction,
3 the full term of the score reduction will be imposed on the date
4 of the final order unless the executive director expressly
5 orders that a lesser score reduction be imposed.

6 (h) The order of the executive director issued under
7 subsection (f) of this section is final and not subject to
8 judicial review, except as required by law.

9

10 §10.159. Lessening or Removal of Score Reduction.

11 (a) A provider may request the lessening or removal of an
12 imposed score reduction by delivering to the executive director
13 the request in writing and written documentation in support of
14 the request demonstrating changes in the circumstances that were
15 described in the notice of score reduction under §10.156 of this
16 subchapter (relating to Notice of Score Reduction).

17 (b) The executive director, at the executive director's
18 sole discretion, may decide to lessen or remove the imposed
19 score reduction. The executive director will send a written
20 notice of the decision to the provider.

21 (c) The executive director will consider not more than one
22 request for an entity under this section during any 12-month
23 period.

1

2 §10.160. Publication of Names of Providers Receiving Score

3 Reductions.

4 (a) The department will provide on its website a list of
5 the names of the providers who are subject to score reductions
6 under this subchapter.

7 (b) The name of a provider will be added to the list when
8 the score reduction becomes effective and will be removed from
9 the list as soon as practicable after the date on which the
10 application of the score reduction ends.

1 SUBCHAPTER E. REMOVAL OF PRECERTIFICATION OF ARCHITECTURAL,
2 ENGINEERING, AND SURVEYING SERVICE PROVIDERS
3 FOR ETHICAL VIOLATIONS

4 §10.201. Purpose. A person who is precertified under §9.43 of
5 this title (relating to Precertification Requirements) may have
6 the person's precertification removed by the assistant executive
7 director if a ground for removal of precertification under
8 §10.101 of this chapter (relating to Required Conduct) exists.

9
10 §10.202. Factors Considered in Removing Precertification.

11 (a) Before removing a person's precertification, the
12 assistant executive director will consider the following
13 factors:

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

16 (2) whether and when the person has committed similar
17 acts or omissions;

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

22 (4) any mitigating factors.

23 (b) For the purposes of subsection (a)(4) of this section,

1 the following are mitigating factors:

2 (1) the person's cooperation with the department in the
3 investigation of ethical violations, including the provision of
4 a full and complete account of the person's involvement; or

5 (2) the person's disassociation from individuals and
6 firms that have been involved in the ethical violation.

7

8 §10.203. Time Period of Prohibition from Reapplying for
9 Precertification.

10 (a) If a person's precertification is removed under this
11 subchapter, the period during which the person is prohibited
12 from reapplying for precertification is set by the assistant
13 executive director based on the guidelines in subsection (c) of
14 this section.

15 (b) The assistant executive director, at the assistant
16 executive director's sole discretion, may prohibit a person from
17 applying for precertification for less time than, but not more
18 time than, the recommended time period under subsection (c) of
19 this section.

20 (c) Figure 43 TAC §10.203(c) sets forth guidelines for
21 assigning the time period during which a person is prohibited
22 from reapplying for precertification based on specific
23 violations of §10.101 of this chapter (relating to Required

- 1 Conduct), taking into consideration the factors described in
- 2 §10.202 of this subchapter (relating to Factors Considered in
- 3 Removing Precertification).

1 Figure 43 TAC §10.203(c)

2 Guidelines for Selecting Period of Prohibition based on Grounds and Factors

Ground for Removal of Precertification	Period of Prohibition from Reapplying for Precertification			
	no more than 12 months	no more than 36 months	no more than 48 months	no more than 60 months
§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"> • the person meets all mitigating factors listed in §10.202(b) and • the person has not committed similar acts or omissions and • the seriousness and willfulness of the act or omission is not severe, and • the person , or a third party on behalf of the 	recommended if: <ul style="list-style-type: none"> • the person does not meet all mitigating factors listed in §10.202(b), or • the person 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

			person, has fully compensated the department for any damages suffered by the department as a result of the individual's acts or omissions	compensated for any damages suffered by the department as a result of the individual's acts or omissions
§10.101(2) relating to offering, giving, or agreeing to give a benefit; or §10.101(1) relating to conflicts of interest	allowable with written explanation of justification	recommended only if: <ul style="list-style-type: none"> • the person meets all of the mitigating factors of §10.202(b), and • the person has not committed similar acts or omissions, and • the seriousness and willfulness of the act or omission is not severe, and • the person, or a third party on behalf of the individual, has fully compensated the 	recommended only if: <ul style="list-style-type: none"> • the person meets some of the mitigating factors of §10.202(b), and • the person has not committed similar acts or omissions, and • the seriousness and willfulness of the act or omission is not severe, and • the person, or a third party on behalf of the person, has fully compensated the 	recommended if: <ul style="list-style-type: none"> • the person meets no mitigating factors listed in §10.202(b), or • the person 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 compensated for any damages suffered by the department as a

		department for any damages suffered by the department as a result of the individual's acts or omissions	department for any damages suffered by the department as a result of the individual's acts or omissions	result of the individual's acts or omissions
§10.101(5) relating to notifying the department	recommended only if: <ul style="list-style-type: none"> • the person meets all mitigating factors listed in §10.202(b), and • the person has not committed similar acts or omissions, and • the seriousness and willfulness of the act or omission is not severe, and • the person, or a third party on behalf of the person, has fully compensated the department for any damages 	recommended only if: <ul style="list-style-type: none"> • the person meets some of the mitigating factors of §10.202(b), and • the person has not committed similar acts or omissions, and • the seriousness and willfulness of the act or omission is not severe, and • the person, or a third party on behalf of the person, has fully compensated the department for any damages suffered by the 	recommended if: <ul style="list-style-type: none"> • the person 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 compensated for any damages suffered by the department as a result of the person's acts or omissions 	recommended only if: <ul style="list-style-type: none"> • the person has committed similar acts or omissions, 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 person's acts or omissions

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	suffered by the department as a result of the individual's acts or omissions	department as a result of the individual's acts or omissions		
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1

2

1 §10.204. Notice of Removal of Precertification.

2 (a) If the assistant executive director removes a person's
3 precertification, the department will notify the person by
4 certified mail within five working days after the date of the
5 assistant executive director's decision. The notice will:

6 (1) state the period for which precertification is
7 prohibited;

8 (2) summarize the facts and circumstances underlying the
9 removal of precertification;

10 (3) explain how the period of the prohibition was
11 selected, using §10.203 of this subchapter (relating to Time
12 Period of Prohibition from Reapplying for Precertification) as a
13 basis for explanation; and

14 (4) state that the person may appeal the removal of
15 precertification under §10.205 of this subchapter (relating to
16 Appeal of Removal of Precertification).

17 (b) The assistant executive director, concurrent with the
18 delivery of the notice of removal from precertification status,
19 may suspend a person from participating in agreements with the
20 department. Before imposing a suspension, the assistant
21 executive director will consider all relevant circumstances,
22 including the severity and willfulness of the conduct, the
23 likelihood of immediate harm to the public, and whether there

1 has been a pattern of inappropriate conduct. The suspension
2 terminates when the deadline for appeal under §10.205(a) of this
3 subchapter has passed and the provider has not appealed the
4 removal from precertification status, or if the provider has
5 appealed, when a final order is entered under §10.205(c) of this
6 subchapter.

7 (c) The removal of a person's precertification or a
8 suspension of a person does not affect the person's obligations
9 under an agreement with the department or limit the department's
10 remedies under the agreement.

11 (d) Unless the assistant executive director imposes a
12 suspension under subsection (b) of this section, the removal of
13 a person's precertification status does not prevent that person
14 from participating in agreements with the department in a
15 capacity that does not require precertification status.

16

17 §10.205. Appeal of Removal of Precertification.

18 (a) A person may appeal the removal of precertification by
19 delivering to the executive director a written notice of appeal
20 within 10 working days after the date that the department mails
21 the notice of removal of precertification under §10.204 of this
22 subchapter (relating to Notice of Removal of Precertification).

23 (b) The person may submit with the notice of appeal written

1 documentation in support of the appeal. The person may
2 alternatively request an in-person meeting with the executive
3 director for the purpose of presenting written documentation and
4 oral presentation in support of the appeal and answering
5 questions posed by the executive director. The meeting will be
6 scheduled at the executive director's earliest convenience.

7 (c) The executive director will consider any written
8 documentation submitted by a person and any oral presentation
9 made in support of an appeal. The executive director will make
10 a decision on the person's appeal and issue a final order. The
11 decision of the executive director is final and not subject to
12 judicial review, except as required by law.

13 (d) The executive director may not delegate authority under
14 this section.

15

16 §10.206. Eligibility to Reapply for Precertification.

17 (a) A person whose precertification has been removed under
18 this subchapter may not reapply for precertification until after
19 the period of prohibition for precertification ends.

20 (b) A person may request the reduction or removal of a
21 period of prohibition for precertification by delivering to the
22 assistant executive director the request in writing and written
23 documentation in support of the request demonstrating changes in

1 the circumstances that were described in the notice of score
2 reduction under §10.204 of this subchapter (relating to Notice
3 of Removal of Precertification).

4 (c) The assistant executive director, at the assistant
5 executive director's sole discretion, may decide to reduce or
6 remove the period of prohibition for precertification. The
7 assistant executive director will send a written notice of the
8 decision to the provider.

9 (d) The assistant executive director will consider not more
10 than one request for an entity under this section during any 12-
11 month period.

1 SUBCHAPTER F. SANCTIONS FOR ETHICAL VIOLATIONS BY OTHER ENTITIES

2 §10.251. Application of Subchapter.

3 (a) This subchapter applies only to an individual or entity
4 doing business with the department that is subject to this
5 chapter but not subject to Subchapter D, Score Reduction for
6 Ethical Violations by Architectural, Engineering, and Surveying
7 Service Providers, of this chapter.

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

11

12 §10.252. Procedure.

13 (a) The executive director may impose a sanction on an
14 entity if a ground for a sanction under §10.101 of this chapter
15 (relating to Required Conduct) exists. The executive director
16 will impose sanctions under this subchapter in accordance with
17 §10.255(c) of this subchapter (relating to Application of
18 Sanction).

19 (b) Except as provided in §10.256(g) of this subchapter
20 (relating to Appeal of Sanction), a sanction is effective on the
21 date specified in the notice of sanction under §10.253 of this
22 subchapter (relating to Notice of Sanction).

1 (c) The imposition of a sanction on an entity does not
2 affect the entity's obligations under an agreement with the
3 department or limit the department's remedies under the
4 agreement.

5 (d) The executive director, concurrent with the delivery of
6 the notice of a sanction other than a reprimand, may suspend an
7 entity without a prior hearing. Before imposing a suspension,
8 the executive director will consider all relevant circumstances,
9 including the severity and willfulness of the conduct, the
10 likelihood of immediate harm to the public, and whether there
11 has been a pattern of inappropriate conduct. The suspension
12 terminates when a final order is entered under §10.256(e) of
13 this subchapter.

14
15 §10.253. Notice of Sanction. If the executive director imposes
16 a sanction under this subchapter, the department will notify the
17 entity by certified mail within five working days after the date
18 of the executive director's decision. The notice will:

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

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

1 (3) explain how the sanction was selected, using
2 §10.255(c) of this subchapter (relating to Application of
3 Sanction) as a basis for explanation;

4 (4) if applicable, inform the entity of the imposition of
5 a suspension under §10.252(d) of this subchapter (relating to
6 Procedure); and

7 (5) state that the provider may appeal the reduction in
8 accordance with §10.256 of this subchapter (relating to Appeal
9 of Sanction).

10

11 §10.254. Available Sanctions.

12 (a) The available sanctions, in order of increasing
13 severity, are:

14 (1) a reprimand;

15 (2) prohibition from participating in a specified
16 agreement, whether the agreement was previously awarded or to be
17 awarded or whether funds under the agreement have been paid or
18 are to be paid;

19 (3) a limit on the contract amount or amount of funds
20 that may be awarded or paid to the entity for a period of not
21 more than 60 months; or

22 (4) debarment of the entity for a period of not more than

1 60 months.

2 (b) Before imposing a sanction, the executive director will
3 consider the following factors:

4 (1) the seriousness and willfulness of the act or
5 omission;

6 (2) whether the entity has committed similar acts or
7 omissions and if so, when those acts or omissions were
8 committed;

9 (3) whether the entity, or a third party on behalf of the
10 entity, has fully compensated the department for any damages
11 suffered by the department as a result of the entity's acts or
12 omissions; and

13 (4) any mitigating factors.

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

16 (1) the entity's adoption and enforcement of an internal
17 ethics and compliance program that satisfies the requirements of
18 §10.51 of this chapter (relating to Internal Ethics and
19 Compliance Program);

20 (2) the entity's cooperation with the department in the
21 investigation of ethical violations, including the provision of
22 a full and complete account of the entity's involvement; or

1 (3) the entity's disassociation from individuals and
2 firms that have been involved in the ethical violation.

3
4 §10.255. Application of Sanction.

5 (a) The executive director, at the executive director's
6 sole discretion, may impose a sanction that is less severe, but
7 not more severe, than the sanction recommended under §10.254(c)
8 of this subchapter (relating to Available Sanctions).

9 (b) If an entity commits multiple violations arising out of
10 separate occurrences, the executive director may impose multiple
11 sanctions in accordance with subsection (c) of this section.

12 (c) Figure 43 TAC §10.255(c) sets forth guidelines for
13 application of a sanction by assigning for specific violations
14 of §10.101 of this chapter (relating to Required Conduct), the
15 sanctions available to the executive director as described in
16 §10.254(a) of this subchapter, taking into consideration the
17 factors described in subsection §10.254(b) of this subchapter.

- 1 Figure 43 TAC §10.255(c)
- 2 Guidelines for Application of Sanction 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"> • the entity meets all mitigating factors listed in §10.254(c), and • the entity has not committed similar acts or omissions and • the seriousness and willfulness of the act or omission is not severe, and • the entity, or a third party on 	recommended if: <ul style="list-style-type: none"> • the entity does not meet all mitigating factors listed in §10.254(c), or • the entity has committed similar acts or omissions, or • the seriousness and willfulness of the act or omission is severe, or • the department has not been

			<p>behalf of the entity, has fully compensated the department for any damages suffered by the department as a result of the entity's acts or omissions</p>	<p>fully compensated for any damages suffered by the department as a result of the entity's acts or omissions</p>
<p>§10.101(2) relating to offering, giving, or agreeing to give a benefit; or §10.101(1) relating to conflicts of interest</p>	<p>allowable with written explanation of justification</p>	<p>recommended only if:</p> <ul style="list-style-type: none"> • the entity meets all of the mitigating factors of §10.254(c), and • the entity has not committed similar acts or omissions, and • the seriousness and willfulness of the act or omission is not severe, and • the entity, or a third party on behalf of the entity, has 	<p>recommended only if:</p> <ul style="list-style-type: none"> • the entity meets some of the mitigating factors of §10.254(c), and • the entity has not committed similar acts or omissions, and • the seriousness and willfulness of the act or omission is not severe, and • the entity, or a third party on behalf of the entity, has 	<p>recommended if:</p> <ul style="list-style-type: none"> • the entity meets no mitigating factors listed in §10.254(c), or • the entity 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 compensated for any damages

		fully compensated the department for any damages suffered by the department as a result of the entity's acts or omissions	fully compensated the department for any damages suffered by the department as a result of the entity's acts or omissions	suffered by the department as a result of the entity's acts or omissions
§10.101(5) relating to notifying the department	recommended only if: <ul style="list-style-type: none"> the entity meets all mitigating factors listed in §10.254(c), and the entity has not committed similar acts or omissions, and the seriousness and willfulness of the act or omission is not severe, and the entity, or a third party on behalf of the entity, has fully 	recommended only if: <ul style="list-style-type: none"> the entity meets some of the mitigating factors of §10.254(c), and the entity has not committed similar acts or omissions, and the seriousness and willfulness of the act or omission is not severe, and the entity, or a third party on behalf of the entity, has fully compensated the 	recommended if: <ul style="list-style-type: none"> the entity 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 compensated for any damages suffered by the department as a result of 	recommended only if: <ul style="list-style-type: none"> the entity has committed similar acts or omissions, 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 entity's acts or omissions

	compensated the department for any damages suffered by the department as a result of the entity's acts or omissions	department for any damages suffered by the department as a result of the entity's acts or omissions	the entity's acts or omissions	
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1

1 §10.256. 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 entity 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 the maximum
12 allowed for oral presentations and the procedure for written
13 documents to be presented by the entity. The executive director
14 will notify the entity in writing within 5 working days of the
15 executive director's determination on the appeal.

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

1 section.

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

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

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

18 (2) the commission's determination under subsection (c).

19 (e) If the only sanction being imposed is a reprimand, the
20 entity may appeal the reprimand by delivering to the executive
21 director a written notice of appeal and written documentation
22 disputing the reprimand within 10 working days after the

1 effective date of the sanction as specified in the notice of
2 sanction. The executive director will make the determination on
3 an appeal and issue a final order under this subsection.

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

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

15

16 §10.257. Lessening or Removal of Sanction.

17 (a) An entity may request the reduction or removal of a
18 sanction imposed under this subchapter by delivering to the
19 executive director the request in writing and written
20 documentation in support of the request demonstrating changes in
21 the circumstances that were described in the notice of score
22 reduction under §10.253 of this subchapter.

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

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