

TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

Page 1 of 1

ALL Districts

The Texas Transportation Commission (commission) finds it necessary to repeal existing 43 TAC Chapter 9, Subchapter G, §§9.100 - 9.117, Highway Improvement Contract Sanctions, and simultaneously replace the repealed subchapter with new Subchapter G, §§9.101-9.115, Highway Improvement Contract Sanctions, to be codified under Title 43, Texas Administrative Code, Part 1.

The preamble and the repeals and new sections, attached to this minute order as Exhibits A - C, 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 repeal of §§9.100 - 9.117 and new §§9.101-9.115 are adopted and are authorized for filing with the Office of the Secretary of State.

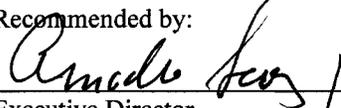
The executive director is directed to take the necessary steps to implement the actions as ordered in this minute order, pursuant to the requirements of the Administrative Procedure Act, Government Code, Chapter 2001.

Submitted and reviewed by:



Deputy Executive Director

Recommended by:



Executive Director

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Minute Number Date Passed

Adoption Preamble

1
2 The Texas Department of Transportation (department) adopts the
3 repeal of §§9.100 - 9.117 and simultaneous new §§9.101 - 9.115,
4 Subchapter G, Highway Improvement Contract Sanctions. These
5 repeals and new sections are adopted in association with new 43
6 TAC Chapter 10, Ethical Conduct by Entities Doing Business with
7 the Department. The repeal of §§9.100 - 9.117 and simultaneous
8 new §§9.101 - 9.107, §9.109, §9.111, §9.113 and §9.114 are
9 adopted without changes to the proposed text as published in the
10 September 10, 2010 issue of the *Texas Register* (35 TexReg 8303)
11 and will not be republished. New §9.108, §9.110, §9.112, and
12 §9.115 are adopted with changes to the proposed text as
13 published in the September 10, 2010 issue of the *Texas Register*
14 (35 TexReg 8303).

15

16 EXPLANATION OF ADOPTED REPEALS AND NEW SECTIONS

17 In its effort to emphasize transparency, accountability, and
18 high ethical standards, the department is restructuring its
19 sanction process for violations by highway improvement
20 contractors. This action is taken in conjunction with the
21 proposal of new 43 TAC Chapter 10. To streamline this process
22 the department is repealing the rules relating to the existing
23 sanction process and simultaneously proposing new sections.

24

25 The new rules set forth ethical and other requirements that, if

1 violated, may lead to sanctions. The sanction process is
2 changed to be consistent with other department sanctioning
3 processes. Additionally, the new rules create a fair process
4 with more notice of what is considered a violation that could
5 lead to sanction and more opportunity for appeal of a sanction
6 than is provided under the current process.

7

8 New §9.101, Purpose and Application of Subchapter, sets forth
9 the purpose of the subchapter, which is to ensure that only
10 responsible contractors are eligible to bid on, enter, and
11 subcontract under highway improvement contracts and that those
12 contracts are fully performed in an efficient and timely manner.
13 The language of existing §9.100 is maintained, as the underlying
14 purpose of protecting the health, welfare, and safety of the
15 traveling public and the state's substantial investment in its
16 system of state highways is unchanged. The new rules further
17 this purpose by improving the sanction process to allow for more
18 notice and opportunity for appeal. Added language stating that
19 the sanctions provided by this subchapter are in addition to
20 other actions and remedies available to the department gives
21 notice that the department is not forfeiting any options legally
22 available.

23

24 New §9.102, Definitions, maintains some definitions, alters some
25 definitions, removes some definitions, and adds other

1 definitions to those in current §9.101 in order to correlate
2 with the revised sanction process. The definitions of
3 "commission" and "highway improvement contract" are incorporated
4 without change from existing §9.101. The definitions of
5 "affiliated entity," "assistant executive director,"
6 "department," and "reprimand" are added. The definition of
7 "bidding capacity" in current §9.101 is removed because it is no
8 longer relevant to the revised sanction process. The
9 definitions of "contractor," "debarment," "executive director,"
10 "sanction," and "suspension" are revised from current §9.101.
11 The definition of "internal compliance process" in current
12 §9.101 is removed from the definitions section, revised, and
13 added to new §9.106, Compliance Program, to give emphasis to its
14 substantive requirements.

15
16 New §9.103, Notification of Rules, is incorporated without
17 change from current §9.103.

18
19 New §9.104, Delivery of Written Notice or Requests to the
20 Department, clarifies proper methods of delivery of written
21 notices, disclosures, or requests to the department, which are
22 by mail and hand delivery. This ensures timely receipt of
23 written communications to the department.

24
25 New §9.105, Act of Individual or Entity Imputed to Contractor,

1 incorporates language from existing §9.106, Responsibility for
2 Acts of Others, but limits when the acts of those acting on
3 behalf of a contractor may be imputed to the contractor. Only
4 conduct of an individual or entity acting on behalf of a
5 contractor that seriously and directly affects the contractor's
6 responsibility to the department may be imputed to the
7 contractor. The purpose of this section is to give notice that
8 a contractor may be sanctioned for acts of those acting on
9 behalf of the contractor, but only in situations where those
10 acts seriously and directly affect the contractor's
11 responsibility to the department.

12

13 New §9.106, Compliance Program, incorporates, with changes, the
14 requirements of existing Subchapter G. In the interest of
15 consistency of what is considered an acceptable compliance
16 program to the department, the language of new 43 TAC §10.51,
17 Internal Ethics and Compliance Program, is incorporated into new
18 §9.106.

19

20 New §9.107, Grounds for Sanction, provides the grounds for which
21 sanctions may be imposed under the subchapter. New §9.107(1),
22 relating to failure to execute a highway improvement contract
23 after a bid is awarded, and new §9.107(2), relating to rejection
24 by the Texas Transportation Commission (commission) of two or
25 more bids due to bidder error, incorporate the language from

1 existing §9.102(4) and (5), respectively, without change. New
2 §9.107(3) is based on existing §9.102(7) but clarifies that a
3 sanction may be based on the department's declaring a contractor
4 in default on a highway improvement contract, rather than on the
5 contractor's declaration of default.

6
7 New §9.107(4) states that sanctions may be imposed for violation
8 of new 43 TAC §10.101, relating to required conduct by entities
9 doing business with the department. New §10.101, concurrently
10 adopted with these rules, sets forth ethical requirements that
11 apply to all entities doing business with the department. The
12 inclusion of violation of this ground for sanction is in line
13 with the department's emphasis on ethical behavior and
14 responsible business conduct.

15
16 New §9.108, Procedure, details the method by which sanctions
17 will be imposed. The executive director may impose a sanction
18 on a contractor if a ground for a sanction exists and will
19 impose sanctions in accordance with §9.111(c). Section 9.108(a)
20 and (b) limit the executive director's discretion on when and
21 how to impose a sanction and give notice to contractors of the
22 same. The citation to §9.112(g) is changed from the proposed
23 version of the rule to correctly reference subsection §9.112(f).
24 Section 9.108(c) incorporates the substantive content of
25 existing §9.111, Contractual Obligations Unaffected, and

1 specifies that the imposition of a sanction on a contractor does
2 not affect the contractor's obligations under an agreement with
3 the department or limit the department's remedies under the
4 agreement. This preserves the integrity of contractual
5 agreements with the department. Finally, §9.108(d) states that
6 the executive director, concurrent with the delivery of the
7 notice of a sanction other than a reprimand, may suspend a
8 contractor without a prior hearing. This incorporates the
9 substantive content of existing §9.110, Suspension. Suspension
10 may be used to protect department resources from being
11 irresponsibly allocated before a sanction is finally imposed.
12 In order to ensure that a suspension is not unnecessarily
13 imposed, the executive director will consider all relevant
14 circumstances before imposing a suspension, including the
15 severity and willfulness of the conduct, the likelihood of
16 immediate harm to the public, and whether there has been a
17 pattern of inappropriate conduct.

18
19 New §9.109, Notice of Sanction, describes the contents of the
20 notice that will be sent to a contractor receiving a sanction.
21 New §9.109 incorporates, with changes, language from existing
22 §9.109. To ensure timely notification, the department will
23 notify the contractor by certified mail within five working days
24 after the date of the executive director's decision to issue a
25 sanction. The notice will state the sanction and the period of

1 the sanction, summarize the facts and circumstances underlying
2 the sanction, explain how the sanction was selected, inform the
3 contractor of the imposition of a suspension if applicable, and
4 finally state that the contractor may appeal the sanction. In
5 the interest of transparency, it is the department's intent for
6 a sanctioned contractor to have full knowledge of the basis of
7 the sanction and how the sanction was decided.

8

9 New §9.110, Available Sanctions, describes the sanctions
10 available to the department and also identifies factors that
11 will be considered in imposing the sanction. Available
12 sanctions, in order of increasing severity, are a reprimand,
13 prohibition from participating in a specified agreement, a limit
14 on the contract amount or amount of funds that may be awarded or
15 paid to the contractor, or debarment of the contractor for a
16 period of not more than 36 months. The range of sanctions
17 available allows the department to appropriately address various
18 levels of violations. New §9.110, incorporates, with changes,
19 language from existing §9.104, Referral to Executive Director,
20 and from existing §9.105, Determinations Related to Sanctions,
21 which both discuss factors that will be considered in issuing
22 the sanction. New §9.110 states that factors that will be
23 considered include the seriousness and willfulness of the act or
24 omission, whether and when the contractor has committed similar
25 acts or omissions, whether the department has been fully

1 compensated for any damages, and mitigating factors including
2 the contractor's adoption and enforcement of an internal ethics
3 and compliance program, the contractor's cooperation with the
4 department in the investigation of ethical violations, and the
5 contractor's disassociation from individuals and firms that have
6 been involved in the ethical violation. Allowing the department
7 to consider a range of factors ensures that all aspects of a
8 particular situation can be assessed in assigning a sanction to
9 a violation.

10

11 New §9.111, Application of Sanction, sets forth guidelines for
12 application of a sanction by assigning, for specific violations,
13 the sanctions available to the executive director and taking
14 into consideration the factors described in §9.110(b). New
15 §9.111 replaces existing §9.107, Sanction Levels, and §9.108,
16 Application of Sanctions, in describing how the executive
17 director will select and apply a sanction. The guidelines are
18 set forth in a chart format that ties specific sanctions to
19 specific violations based on varying factors. The chart is
20 designed to show the most severe sanction allowable for a
21 specific violation. The executive director may assign a lesser
22 sanction than recommended for a specific violation, but may not
23 assign a more severe sanction than recommended.

24

25 New §9.112, Appeal of Sanction, describes the procedure for

1 appeal of a sanction other than a reprimand. A sanction may be
2 appealed to the executive director for an informal hearing.
3 This provision incorporates the informal hearing described in
4 existing §9.112, Opportunity for Informal Hearing. The informal
5 hearing option allows the contractor the opportunity to appeal a
6 sanction in an informal setting that requires minimal time and
7 resource investment. If the contractor is unsatisfied with the
8 decision of the executive director, the contractor may pursue a
9 contested case hearing in the State Office of Administrative
10 Hearings (SOAH). This provision incorporates the formal hearing
11 described in existing §9.114, Opportunity for Formal Hearing.
12 The contested case hearing option offers the contractor a
13 judicial proceeding through which it may present evidence and
14 offer testimony in support of its appeal. Following the
15 contested case hearing, the administrative law judge's proposal
16 for decision is presented to the commission at a regularly
17 scheduled open meeting for a determination based on the proposal
18 for decision. The commission may consider oral presentations.
19 The commission's determination on the proposal for decision will
20 be adopted by minute order. The executive director will issue a
21 final order on the sanction based on the commission's
22 determination, or if an appeal to SOAH is not requested, the
23 determination of the informal hearing. This multi-step process
24 for appeal ensures due process in the application of a sanction
25 and allows a contractor the opportunity to appeal a sanction to

1 a party not involved in the decision to sanction.

2

3 Section 9.112(e) also specifies that a reprimand may be appealed
4 by delivering to the executive director a written notice of
5 appeal and written documentation disputing the reprimand. The
6 executive director will make the determination on an appeal and
7 issue a final order. Because a letter of reprimand is the least
8 severe sanction and has minimal implications for a contractor, a
9 more limited opportunity to appeal is appropriate.

10

11 Finally, §9.112 states that a sanction is automatically stayed
12 from the date that the department receives the notice of appeal
13 until a final order is entered by the executive director. This
14 provision incorporates the substantive content of existing
15 §9.115, Stay of Sanctions. On entry of a final order by the
16 executive director imposing the sanction, the full term of the
17 sanction will be imposed on the date of the final order unless
18 the executive director expressly orders that a lesser sanction
19 be imposed. Staying a sanction during the pendency of an appeal
20 makes certain that a sanction is not unjustly imposed in a
21 situation in which an appeal results in a reversal of a
22 sanction. The automatic stay provided in §9.112(f) does not
23 apply to a suspension or a reprimand.

24

25 An order of the executive director under §9.112 is final and not

1 subject to judicial review, unless otherwise provided by law.
2
3 New §9.113, Indirect Sanction on an Affiliated Entity,
4 incorporates, with changes, language from existing §9.113,
5 Informal Hearing on Indirect Sanction. The section states that
6 a sanction imposed on a contractor under this subchapter will
7 also be imposed as an indirect sanction on an affiliated entity
8 of the contractor. The affiliated entity will receive notice
9 that states the sanction, summarizes the underlying facts and
10 circumstances, explains how the sanction was selected, informs
11 the affiliated entity of the imposition of a suspension if
12 applicable, and states that the entity may appeal the indirect
13 sanction. The process for an informal hearing before the
14 executive director is incorporated without substantive change
15 from existing §9.113. However, new §9.113 adds the opportunity
16 for an entity to request a hearing before the commission at a
17 regularly scheduled open meeting. The commission may consider
18 oral presentations and written documents presented by the
19 department and interested parties. The chair will set the
20 hearing and the amount of time allowed for presentation. The
21 commission's determination of the appeal will be adopted by
22 minute order, and the executive director will issue a final
23 order on the indirect sanction based on the commission's
24 determination. The opportunity for an appeal to the commission
25 increases due process in the application of a sanction to an

1 affiliated entity, and ensures that the entity is given adequate
2 recourse to refute its status as an affiliated entity.

3

4 New §9.114, Lessening or Removal of Sanction, incorporates, with
5 changes, language from existing §9.117. The new section allows
6 a contractor or affiliated entity to request that the executive
7 director reduce or remove a sanction once in a 12-month period.
8 This provision ensures that the executive director will have the
9 ability to lessen or remove a sanction if the circumstances
10 underlying the sanction change and promotes a continuing effort
11 by a sanctioned contractor to address the issues that led to the
12 sanction in the effort to have the sanction lessened or removed.

13

14 New §9.115, List of Debarred or Suspended Contractors,
15 incorporates, with changes, language from existing §9.116. New
16 §9.115 states that the department will provide on its website a
17 list of the names of the contractors and their known affiliates
18 and principals who are subject to a sanction other than a
19 reprimand. The name of a contractor and its known affiliates
20 and principals will be added to the list when a final order is
21 issued and will be removed from the list as soon as practicable
22 after the date on which the application of the sanction ends or
23 is removed. The purpose of this section is to inform non-
24 sanctioned contractors and local governments of the contractors
25 that have been sanctioned.

1

2 COMMENTS

3 Comments were received from the Associated General Contractors
4 of Texas (AGC).

5

6 Comment: The commenter suggested that suspensions should not be
7 imposed without a prior hearing and opportunity to respond. A
8 show cause notice should be used before issuance of a
9 suspension, with at least 45 days built in for an informal
10 hearing. A contractor facing a suspension should be allowed to
11 review and copy all evidence relied upon in imposing the
12 proposed suspension, and suspensions should be limited to
13 certain enumerated offenses.

14

15 Response: The department agrees that suspensions should not be
16 imposed except when immediate action is required to protect the
17 public interest, and §9.108(d) has been changed to add that
18 requirement. The department disagrees with the remainder of the
19 comment because a prior hearing is not feasible for suspensions.
20 The purpose of suspension is to avoid immediate harm to the
21 public interest that may result from continuing to do business
22 with a company that has demonstrated that it is not responsible.
23 Furthermore, the circumstances under which a contractor would be
24 suspended are such that it is virtually impossible for a
25 potential suspension to come as a surprise to a contractor. A

1 contractor finding itself in a position to be suspended is free
2 at any time to submit information for the department's
3 consideration. The department will continue to provide copies
4 of evidence relied upon in imposing proposed suspensions on
5 request as allowed by law.

6

7 Comment: The maximum term of a debarment should be three years
8 rather than five.

9

10 Response: The department agrees with this comment, and §9.110
11 has been changed to establish a 36-month limit on both bid
12 capacity reductions and debarments.

13

14 Comment: Only the actions of an entity owner and its officers
15 should be imputed to the contractor. The actions of employees
16 and subcontractors should not be imputed to the contractor
17 unless management has knowledge of the act.

18

19 Response: The department disagrees with this comment because an
20 employee acting within the scope of his or her employment acts
21 as the agent of the employer. The department will, of course,
22 consider this type of evidence in deciding whether to take
23 action against a firm.

24

25 Comment: The time limit for notice of appeal should be at least

1 20 days, to allow for investigation of facts by the contractor.

2

3 Response: The department agrees with this comment, and
4 §9.112(a) and (e) have been changed to reflect 15 working days
5 rather than 10 working days.

6

7 Comment: The rules should prohibit TxDOT personnel from
8 threatening sanctions in a dispute over performance or in a
9 claim asserted by a contractor.

10

11 Response: The department disagrees with this suggestion. This
12 issue can be handled as a management issue within the department
13 and need not be the subject of rulemaking.

14

15 Comment: The commenter stated that requiring an audit of a
16 contractor's internal compliance program (ICP) is overly
17 burdensome for smaller contractors. Annual review of the
18 program should suffice. Further, making a violation of a
19 contractor's ICP a separate ground for sanction will deter
20 contractors from adopting ICP's.

21

22 Response: The department disagrees with this comment. The
23 rules do not require the audit of an entity's ICP, they require
24 that an ICP include a system, such as auditing, to detect
25 noncompliance. Violation of a contractor's own ICP is only a

1 violation if it seriously and directly affects the entity's
2 responsibility to the department.

3

4 In addition, a change is made in §9.115(b) to reflect correction
5 of a typographic error in the citation to §9.112.

6

7 STATUTORY AUTHORITY

8 The repeals and new sections are adopted under Transportation
9 Code, §201.101, which provides the commission with the authority
10 to establish rules for the conduct of the work of the
11 department.

12

13 CROSS REFERENCE TO STATUTE

14 None.

1 SUBCHAPTER G. HIGHWAY IMPROVEMENT CONTRACT SANCTIONS

2 §9.101. Purpose and Application of Subchapter.

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

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

13

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

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

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

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

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

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

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

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

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

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

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

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

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

1 agreement with the department.

2

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

7

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

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

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

18

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

1

2 §9.106. Compliance Program.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 conduct that, at a minimum, addresses:

2 (A) record retention;

3 (B) fraud;

4 (C) equal opportunity employment;

5 (D) sexual harassment and sexual misconduct;

6 (E) conflicts of interest;

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

8 (G) gifts and honoraria.

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

12

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

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

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

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

1 default on a highway improvement contract; or

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

4

5 §9.108. Procedure.

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

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

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

20 (d) The executive director, concurrent with the delivery of
21 the notice of a sanction other than a reprimand, may suspend a
22 contractor without a prior hearing when immediate action is
23 necessary to protect the public interest. Before imposing a

1 suspension, the executive director will consider all relevant
2 circumstances, including the severity and willfulness of the
3 conduct, the likelihood of immediate harm to the public, and
4 whether there has been a pattern of inappropriate conduct. The
5 suspension terminates when a final order is entered under
6 §9.112(d) or (e) of this subchapter.

7

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

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

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

16 (3) explain how the sanction was selected, using
17 §9.111(c) of this subchapter (relating to Application of
18 Sanction) as a basis for explanation;

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

22 (5) state that the contractor may appeal the sanction in
23 accordance with §9.112 of this subchapter (relating to Appeal of

1 Sanction).

2

3 §9.110. Available Sanctions.

4 (a) The available sanctions, in order of increasing
5 severity, are:

6 (1) a reprimand;

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

11 (3) a limit on the contract amount or amount of funds
12 that may be awarded or paid to the contractor for a period of
13 not more than 36 months; or

14 (4) debarment of the contractor for a period of not more
15 than 36 months.

16 (b) Before imposing a sanction, the executive director will
17 consider:

18 (1) the seriousness and willfulness of the act or
19 omission;

20 (2) whether the contractor has committed similar acts or
21 omissions and if so, when those acts or omissions were
22 committed;

23 (3) whether the contractor, or a third party on behalf of

1 the contractor, has fully compensated the department for any
2 damages suffered by the department as a result of the
3 contractor's acts or omissions; and

4 (4) any mitigating factors.

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

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

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

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

17

18 §9.111. Application of Sanction.

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

23 (b) If a contractor commits multiple violations arising out

1 of separate occurrences, the executive director may impose
2 multiple sanctions in accordance with subsection (c) of this
3 section.

4 (c) Figure 43 TAC §9.111(c) sets forth guidelines for
5 application of a sanction by assigning, for specific violations
6 of §9.107 of this subchapter (relating to Grounds for Sanction),
7 the sanctions available to the executive director as described
8 in §9.110(a) of this subchapter (relating to Available
9 Sanctions), taking into consideration the factors described in
10 §9.110(b) of this subchapter.

1 Figure 43 TAC §9.111(c)

2 Guidelines for Application of Sanctions based on Grounds and Factors

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

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

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

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

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

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

1 subsection (a) of this section.

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

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

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

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

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

1 executive director a written notice of appeal and written
2 documentation disputing the reprimand within 15 working days
3 after the effective date of the sanction as specified in the
4 notice of sanction. The executive director will make the
5 determination on an appeal and issue a final order under this
6 subsection.

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

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

18

19 §9.113. Indirect Sanction on an Affiliated Entity.

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

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

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

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

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

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

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

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

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

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

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

7 (A) intercompany transactions;

8 (B) equipment;

9 (C) personnel;

10 (D) office space;

11 (E) finances; and

12 (F) other affiliation criteria.

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

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

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

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

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

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

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

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

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

21

22 §9.114. Lessening or Removal of Sanction.

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

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

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

15

16 §9.115. List of Debarred or Suspended Contractors.

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

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

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

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

1 SUBCHAPTER G. HIGHWAY IMPROVEMENT CONTRACT SANCTIONS

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

10
11 §9.101. Definitions. The following words and terms, when used
12 in this subchapter, shall have the following meanings, unless
13 the context clearly indicates otherwise.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18
19 §9.103. Notification of Rules. The department will send a copy
20 of this subchapter to each prequalified contractor. The
21 department's failure to comply with this section does not affect
22 the applicability of this subchapter.

23

1 §9.104. Referral to Executive Director.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

23 (17) any appropriate disciplinary actions taken against

1 those individuals responsible for the actions; and

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

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

6

7 §9.105. Determinations Related to Sanction.

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

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

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

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

1 (3) any other mitigating circumstances.

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

5
6 §9.106. Responsibility for Acts of Others. The conduct of an
7 individual or entity acting on behalf of a contractor may be
8 imputed to the contractor.

9
10 §9.107. Sanction Levels.

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

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

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

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

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

1 60 months.

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

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

12
13 §9.108. Application of Sanctions.

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

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

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

3

4 §9.109. Notice of Sanctions.

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

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

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

17

18 §9.110. Suspension.

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

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

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

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

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

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

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

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

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

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

22
23 §9.112. Opportunity for Informal Hearing.

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

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

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

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

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

1 Hearing).

2

3 §9.113. Informal Hearing on Indirect Sanction.

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

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

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

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

18 (A) intercompany transactions;

19 (B) equipment;

20 (C) personnel;

21 (D) office space;

22 (E) finances; and

23 (F) other affiliation criteria.

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

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

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

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

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

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

1

2 §9.114. Opportunity for Formal Hearing.

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

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

16

17 §9.115. Stay of Sanctions.

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

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

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

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

10

11 §9.116. List of Debarred or Suspended Contractors.

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

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

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

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

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

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

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

8

9 §9.117. Request for Review.

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

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

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

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