

TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

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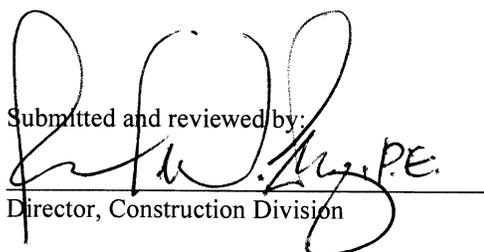
ALL Districts

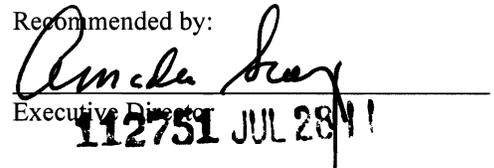
The Texas Transportation Commission (commission) finds it necessary to propose amendments to §9.13 relating to Notice of Letting and Issuance of Bid Forms to be codified under Title 43, Texas Administrative Code, Part 1.

The preamble and the proposed amendments, attached to this minute order as Exhibits A and B, are incorporated by reference as though set forth verbatim in this minute order, except that they are subject to technical corrections and revisions, approved by the General Counsel, necessary for compliance with state or federal law or for acceptance by the Secretary of State for filing and publication in the *Texas Register*.

IT IS THEREFORE ORDERED by the commission that the amendments to §9.13 are proposed for adoption and are authorized for publication in the *Texas Register* for the purpose of receiving public comments.

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

Submitted and reviewed by:

Director, Construction Division

Recommended by:

Executive Director
112751 JUL 28 11

Minute Number Date Passed

1 Proposed Preamble

2 The Texas Department of Transportation (department) proposes
3 amendments to §9.13, concerning Notice of Letting and Issuance
4 of Bids Forms.

5

6 EXPLANATION OF PROPOSED AMENDMENTS

7 Senate Bill 1420, relating to the continuation and functions of
8 the department, enacted by the 82nd Legislature, Regular
9 Session, 2011, re-titled and amended Transportation Code,
10 §223.002, Notice by Publication. The amendments to the section
11 removed the specific requirement for the department to use
12 newspapers to advertise projects on which the department is
13 seeking bids. Transportation Code, §223.002 was re-titled
14 "Notice of Bids." The amended section also creates a
15 requirement for the Texas Transportation Commission (commission)
16 by rule to determine the most effective method for providing
17 notice of bids.

18

19 Current §9.13(c), Advertising, references Transportation Code,
20 §223.002 rather than duplicating the requirements of that
21 section. To comply with the changes made to Transportation
22 Code, §223.002 by the 82nd Legislature, it is necessary to amend
23 §9.13(c).

24

25 Amendments to § 9.13(c) re-title the subsection as "Notice of

1 Bids" to provide consistency with the amended section heading of
2 Transportation Code, §223.002.

3

4 Additionally, amendments to §9.13(c) require the department to
5 advertise highway improvement contracts on the Electronic State
6 Business Daily. The Electronic State Business Daily (business
7 daily) is published each day on the Internet by the Comptroller
8 of Public Accounts. Most state agencies are required under
9 Government Code, §2155.083, to post a procurement that will
10 exceed a value of \$25,000 on the business daily. The business
11 daily was created to provide one-stop access to all state
12 procurement opportunities over \$25,000 and to increase
13 opportunities to compete for State of Texas business. The
14 commission has determined that publishing notice of contracts on
15 the business daily is the most effective method of providing the
16 notice required under Transportation Code, §223.002 because the
17 publication is widely known to contractors, used by virtually
18 all state agencies, and easily accessed by potential bidders.

19

20 FISCAL NOTE

21 James Bass, Chief Financial Officer, has determined that for
22 each of the first five years the amendments as proposed are in
23 effect, there will be a fiscal impact to state government.
24 There will be a net savings to state government of \$1,713,860.00
25 per year because the Electronic State Business Daily publishes

1 notices free of charge and the department will no longer
2 purchase newspaper advertisements. The proposed amendments
3 present no fiscal implications for local governments.

4

5 Russell Lenz, P.E., Director, Construction Division, has
6 certified that there will be no significant impact on local
7 economies or overall employment as a result of enforcing or
8 administering the amendments.

9

10 PUBLIC BENEFIT AND COST

11 Mr. Lenz has also determined that for each year of the first
12 five years in which the sections are in effect, the public
13 benefit anticipated as a result of enforcing or administering
14 the amendments will be enhanced competition due to easier access
15 to and greater statewide availability of bid notices. There are
16 no anticipated economic costs for persons required to comply
17 with the sections as proposed. There will be no adverse
18 economic effect on small businesses.

19

20 SUBMITTAL OF COMMENTS

21 Written comments on the proposed amendments to §9.13 may be
22 submitted to Russell Lenz, P.E., Director, Construction
23 Division, Texas Department of Transportation, 125 East 11th
24 Street, Austin, Texas 78701-2483. The deadline for receipt of
25 comments is 5:00 p.m. on September 12, 2011.

1

2 STATUTORY AUTHORITY

3 The amendments are proposed under Transportation Code, §201.101,
4 which provides the commission with the authority to establish
5 rules for the conduct of the work of the department, and more
6 specifically, Transportation Code, §223.002, which requires the
7 commission to adopt rules for providing notice of highway
8 improvement contracts.

9

10 CROSS REFERENCE TO STATUTE

11 Transportation Code, §223.002.

1 SUBCHAPTER B. HIGHWAY IMPROVEMENT CONTRACTS

2 §9.13. Notice of Letting and Issuance of Bid Forms.

3 (a) Notice to bidders. A person may apply to have his or
4 her name placed on a mailing list to receive the Notice to
5 Contractors for a fee of \$65 per year to cover costs of mailing
6 the notices.

7 (b) Fee exemption. The following entities are not required
8 to pay the notice subscription fee:

9 (1) qualified bidders approved under §9.12 of this
10 subchapter (relating to Qualification of Bidders);

11 (2) other state agencies;

12 (3) other state departments of transportation;

13 (4) disadvantaged business enterprises and historically
14 underutilized businesses;

15 (5) offices of the federal government; and

16 (6) organizations performing work under supportive
17 service contracts awarded by the commission.

18 (c) Notice of Bids ~~[Advertising]~~. The department will
19 advertise contracts on the Electronic State Business Daily
20 maintained and operated by the Comptroller of Public Accounts.
21 ~~[Contracts will be advertised in accordance with Transportation~~
22 ~~Code, §223.002, Government Code, §2155.083(h)(1), and Title 23,~~
23 ~~Code of Federal Regulations, §635.112(b).]~~

1 (d) Bid form.

2 (1) Bid form content. A bid form may include:

3 (A) the location and description of the proposed work;

4 (B) an approximate estimate of the various quantities
5 and kinds of work to be performed or materials to be furnished;

6 (C) a schedule of items for which unit prices are
7 requested;

8 (D) the time within which the work is to be completed;
9 and

10 (E) the special provisions and special specifications.

11 (2) Form of request. A request for a bid form on a
12 highway improvement contract may be made orally or in writing.

13 (e) Issuance of bid form.

14 (1) Construction and maintenance contracts.

15 (A) Issuance. Except where prohibited under
16 subparagraph (B) of this paragraph, the department will, upon
17 receipt of a request, issue a bid form for a construction or
18 maintenance contract as follows:

19 (i) for a project on which audited financial
20 prequalification is not waived, only to a prequalified bidder,
21 and only if the estimated cost of the project is within that
22 bidder's available bidding capacity; and

23 (ii) for a project on which audited financial

1 qualification is waived under §9.12(c) of this subchapter, only
2 if the estimated cost of the project is within that bidder's
3 available bidding capacity.

4 (B) Non-issuance. Except as provided in subparagraph
5 (C) of this paragraph, the department will not issue a bid form
6 requested by a bidder for a construction or maintenance contract
7 if at the time of the request the bidder:

8 (i) is disqualified by an agency of the federal
9 government as a participant in programs and activities involving
10 federal assistance and benefits, and the contract is for a
11 federal-aid project;

12 (ii) is suspended or debarred by order of the
13 commission;

14 (iii) is prohibited from rebidding a specific project
15 because of default of the first awarded contract;

16 (iv) has not fulfilled the requirements for
17 qualification under §9.12 of this subchapter;

18 (v) is prohibited from rebidding that project as a
19 result of having previously submitted a mathematically and
20 materially unbalanced bid resulting in the rejection of the bid
21 by the commission; or

22 (vi) is prohibited from rebidding that project as a
23 result of having submitted a bid containing an error resulting

1 in the rejection of bids by the commission.

2 (C) Exception. The department may issue a bid form
3 under a temporary approval to a bidder who would be ineligible
4 under subparagraph (B)(iv) of this paragraph if the bidder has
5 substantially complied with the requirements of §9.12 of this
6 subchapter.

7 (2) Building contracts.

8 (A) Issuance. Except as provided in subparagraph (B)
9 of this paragraph, the department will issue, upon request, a
10 bid form to a bidder having complied with §9.12(e) of this
11 subchapter.

12 (B) Non-issuance. The department will not issue a bid
13 form requested by a bidder for a building contract if, at the
14 time of the request, the bidder:

15 (i) is disqualified by an agency of the federal
16 government as a participant in programs and activities involving
17 federal assistance and benefits and the contract is a federal-
18 aid project;

19 (ii) is suspended or debarred by order of the
20 commission; or

21 (iii) is prohibited from bidding that project because
22 of default of the first awarded contract.

23 (3) All contracts. The department will not issue a bid

1 form for a highway improvement contract to a bidder if the
2 bidder or a subsidiary or affiliate of the bidder has received
3 compensation from the department to participate in the
4 preparation of the plans or specifications on which the bid or
5 contract is based.