TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

ALL Districts

The Texas Transportation Commission (commission) finds it necessary to adopt amendments to §9.42, Administrative Qualifications, to be codified under Title 43, Texas Administrative Code, Part 1.

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

IT IS THEREFORE ORDERED by the commission that the amendments to §9.42 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:

Mark A. Marek

Director, Design Division

Recommended by:

Amadeo Saenz

Executive Director

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Minute Number | Date Passed

Adoption Preamble

The Texas Department of Transportation (department) adopts amendments to §9.42, concerning Administrative Qualifications. The amendments to §9.42 are adopted without changes to the proposed text as published in the May 13, 2011 issue of the *Texas Register* (36 TexReg 3073) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

Architectural, engineering, and surveying services are procured by the department in accordance with Government Code, Chapter 2254, Subchapter A, and Title 23, Code of Federal Regulations, §172.5.

The amendments clarify and refine the language to improve consistency in the interpretation and application of procedures for administrative qualifications. The amendments change the deadline for submission of information regarding administrative qualifications; extend the length of time that an audit report will remain valid by extending the interval from twenty-four to thirty months; and provide an option for those firms lacking an indirect cost rate audit to accept an indirect cost rate developed by the department's Audit Office. These amendments reduce the administrative qualifications burden on firms with smaller contracts or those that have a smaller participation in larger contracts.

Section 9.42(b) is amended to change the deadline for submitting the administrative qualifications information to either prior to selection or after selection, but before contract execution. Currently, the deadline to submit the information is prior to the closing date of the letter of interest, which is early in the selection process. Requiring firms to submit the administrative qualifications information early in the process reduces the potential for delays in executing a contract should a firm lacking the administrative qualification information be on a selected team. However, by requiring this information early in the process, it places a burden on firms with smaller contracts, those that have a smaller participation in larger contracts, and firms that compete for contracting opportunities, but are not successful.

Section 9.42(c) is reorganized and changes are made to correct cross references and citations. The language from current subsection (c) is added under re-lettered subsection (c) concerning indirect cost rate. The language from current subsection (c)(1), concerning an adequate accounting system, is removed and the requirement is incorporated into amended subsection (c)(1). The demonstration of the adequacy of the accounting system is not performed through a separate audit, but is performed by the auditor conducting the indirect cost rate

audit. The amendment is made to clarify that it is the auditor performing the indirect cost rate audit who will evaluate and confirm that the prime provider or subprovider has a job cost accounting system. Renumbered subsection (c)(3) is amended by extending the period during which an audit report remains valid from twenty-four months to thirty months. This change will reduce the administrative qualifications burden on providers by extending the time between required audits.

New paragraph (4) of §9.42(c) is subdivided into subparagraphs (A) and (B). The language in new subparagraph (A) is added to allow the department to contract with a prime provider or subprovider lacking an indirect cost rate audit if the firm has been in operation for less than one year or its portion of the contract is not more than $500,000 provided an indirect cost rate developed by the Audit Office is accepted. With this adoption the department has changed the word "established" to "developed" in subsection (c)(4)(A) and (B) to make it clear that the Audit Office has no management role in directing the operations of the department. The language in new subparagraph (B) is added to allow the department to contract with a firm lacking an indirect cost rate audit if the firm elects to accept an indirect cost rate developed by the Audit Office. The preference is for a firm to have an indirect cost rate audit. However, this provides an option if there are circumstances

preventing a firm from obtaining an indirect cost rate audit or obtaining the audit within a reasonable time frame.

New subsection (d) is created from former subsection (c)(3) and (4) and changed. The language from current subsection (c)(3) and (4) is deleted because the existing language is not clear concerning costs to be considered during negotiations. The costs to be considered during negotiations are to be associated with salary and non-salary costs for personnel and equipment proposed for use on the solicited contract. The language in renumbered paragraphs (1) and (2) is changed to clarify that these are actual salary rates for employees proposed for work on the contract and non-salary costs proposed for the contract.

COMMENTS

No comments on the proposed amendments were received.

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §223.041, regarding the use by the department of private sector professional services for transportation projects, and Government Code, Chapter 2254, Subchapter A (Professional

Services Procurement Act), which sets forth requirements for selection and contracting of architectural and engineering services.

CROSS REFERENCE TO STATUTE

Government Code, Chapter 2254, Subchapter A (Professional Services Procurement Act) and Transportation Code, §223.041.

SUBCHAPTER C. CONTRACTING FOR ARCHITECTURAL, ENGINEERING, AND SURVEYING SERVICES

§9.42. Administrative Qualification.

(a) Exception. Administrative qualification is not necessary for non-engineering firms and provider services included in Group 6 - bridge inspection, Group 12 - materials inspection and testing, Group 14 - geotechnical services, Group 15 - surveying and mapping, or Group 16 - architecture as listed on the department's web site for precertification. Provider compensation for these services is typically based on units of service rates. The Audit Office and the Design Division may agree to grant exceptions for other provider services on a case by case basis. In determining whether to grant an exception, the Audit Office and the Design Division may consider the nature of the services to be provided, the method of payment to be used, the reasonableness and feasibility of requiring an audited indirect cost rate, and any other relevant factors. Any request for an exception must be received by the Audit Office prior to the due date of the letter of interest.

(b) Time to provide information. Each prime provider and subprovider should [~~must~~] submit the information described in this section before the final selection of the prime provider [~~no later than the LOI due date~~]. If the information is not

furnished before the selection, it must be submitted after the selection and before contract execution. The administrative qualification submittal is a separate submittal from the precertification submittal, and is submitted to the Texas Department of Transportation, Audit Office, 125 E. 11th Street, Austin, Texas 78701-2483. Administrative qualification submittals will not be received by the Design Division.

[~~(c) Evaluation factors. The department will consider the following [factors] in determining administrative qualifications of prime providers or subproviders.~~]

[~~(1) Adequate accounting system. The prime provider or subproviders must demonstrate the existence of an adequate accounting system that meets the department's audit requirements, as evidenced by certification by an independent certified public accountant or governmental agency. The system must be adequate to support all billings made to the department and other clients.~~]

(c) [~~(2)~~] Indirect cost rate audit. The department will consider the factors described in this subsection in determining administrative qualifications of prime providers or subproviders. The prime provider or subprovider must submit an indirect cost rate audit for the time period specified in paragraph 3 [~~subparagraph (C)~~] of this subsection [~~paragraph~~]

performed by an independent certified public accountant, an agency of the federal government, another state transportation agency, or a local transit agency except as provided in paragraph 4 [~~subparagraph (D)~~] of this subsection [~~paragraph~~]. If the audit is performed by an independent certified public accountant, the provider or subprovider must assure that the department will be given access to the audit work papers.

(1) [~~(A)~~] The audit report shall include statements that confirm the prime provider or subprovider has a job cost accounting system, the audit was performed in accordance with generally accepted government auditing standards, and the indirect cost rate was developed in accordance with the Federal Acquisition Regulations, 48 CFR Part 31.

(A) [~~(i)~~] AASHTO Uniform Audit and Accounting Guide is acceptable guidance for the audit of the indirect cost rate.

(B) [~~(ii)~~] Department requirements that differ from the AASHTO guide are contained in the Indirect Cost Rate Guidance available through the department's website.

(2) [~~(B)~~] The department may perform indirect cost rate audits of any prime provider or subprovider under contract to, or desiring to do business with, the department. These audits will be conducted consistent with the criteria outlined in this subsection.

(3) [~~(C)~~] The end of the fiscal period of the audit report must be within thirty [~~twenty four~~] months of the date the notice was posted.

(4) [~~(D)~~] The department may contract with a prime provider or allow utilization of a subprovider lacking an approved indirect cost rate audit if: [~~the prime provider or subprovider has been in operation, as currently organized, for less than one fiscal year or the estimated value of its portion of the contract is not more than $500,000.~~]

(A) the prime provider or subprovider, as applicable, has been in operation, as currently organized, for less than one fiscal year or the estimated value of its portion of the contract is not more than $500,000, and the prime provider or subprovider accepts an indirect cost rate developed by the Audit Office; or

(B) after selection the prime provider provides written certification to the Audit Office that the prime provider or subprovider, as applicable, does not have an indirect cost rate audit and will accept an indirect cost rate developed by the Audit Office.

(d) Additional information. The selected prime provider shall submit to the managing office for consideration in contract negotiations:

(1) [~~(3)~~] the actual salary rates for the proposed team members; and [~~Salary rates. The department will consider current salary rates, range of rates, or average rates by job classification.~~]

(2) [~~(4)~~] non-salary costs, generated internally, to be billed directly. [~~Direct costs. The department will consider costs such as copies, Computer Aided Design and Drafting (CADD), or other direct costs.~~]

(e) [~~(d)~~] Provision of administrative qualification information. The department's Audit Office will provide administrative qualification information to the managing office when notified by the Design Division upon selection approval of a provider for the contract, for use in negotiations as identified in §9.37 of this subchapter (relating to Selection).

(f) [~~(e)~~] Prohibited actions. Administrative qualification information obtained through this section will not be made available to the CST by the department's Audit Office prior to contract selection.