

TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

Page 1 of 1

ALL Districts

The Texas Transportation Commission (commission) finds it necessary to adopt the repeal of §§9.50-9.57 and new Subchapter J, Disadvantaged Business Enterprise (DBE) Program, new §§9.200-9.242; new Subchapter K, Small Business Enterprise (SBE) Program, new §§9.300-9.302 and §§9.304-9.333; the withdrawal of previously proposed new §9.303; and new Subchapter L, Historically Underutilized Business (HUB) Program, new §§9.350-9.367, to be codified under Title 43, Texas Administrative Code, Part 1.

The preamble and the adopted repeals, withdrawal, and new sections, attached to this minute order as Exhibits A - E, 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 §§9.50-9.57; new Subchapter J, Disadvantaged Business Enterprise (DBE) Program, new §§9.200-9.242; new Subchapter K, Small Business Enterprise (SBE) Program, new §§9.300-9.302 and §§9.304-9.333; the withdrawal of §9.303; and new Subchapter L, Historically Underutilized Business (HUB) Program, new §§9.350-9.367 are adopted and are authorized for filing with the Office of the Secretary of State.

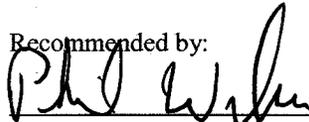
The executive director is directed to take the necessary steps to implement the actions as ordered in this minute order, pursuant to the requirements of the Administrative Procedure Act, Government Code, Chapter 2001.

Submitted and reviewed by:



Interim Director, Office of Civil Rights

Recommended by:



Executive Director

113147 JUN 28 12

Minute
Number

Date
Passed

Adoption Preamble

1
2 The Texas Department of Transportation (department) adopts the
3 repeal of §§9.50-9.57, concerning Business Opportunity Programs,
4 in its entirety and simultaneously adopts new Subchapter J,
5 Disadvantaged Business Enterprise (DBE) Program, new §§9.200-
6 9.242; new Subchapter K, Small Business Enterprise (SBE)
7 Program, new §§9.300-9.333; and new Subchapter L, Historically
8 Underutilized Business (HUB) Program, new §§9.350-9.367. The
9 repeal of §§9.50-9.57 and new §§9.200-9.207, 9.209-9.211, 9.213-
10 9.219, 9.221, 9.223-9.226, 9.229-9.232, 9.234, 9.236-9.242,
11 9.300, 9.302, 9.304-9.317, 9.319-9.321, 9.323-9.329, 9.332,
12 9.333, and 9.350-9.367 are adopted without changes to the
13 proposed text as published in the April 13, 2012 issue of the
14 *Texas Register* (37 TexReg 2584) and will not be republished.
15 New §§9.208, 9.212, 9.220, 9.222, 9.227, 9.228, 9.233, 9.235,
16 9.301, 9.318, 9.322, 9.330, and 9.331 are adopted with changes
17 to the proposed text as published in the April 13, 2012 issue of
18 the *Texas Register* (37 TexReg 2584). Proposed new §9.303 is
19 withdrawn.

20

21 EXPLANATION OF ADOPTED REPEALS AND NEW SECTIONS

22 Transportation Code, §201.702, entitled "Disadvantaged Business
23 Program," requires the department to establish a business
24 opportunities program to assist disadvantaged businesses. This
25 program includes: setting goals for the awarding of state and

1 federally funded contracts to disadvantaged businesses; making
2 sure that disadvantaged businesses have full access to the
3 department's contract bidding process; informing the businesses
4 about the process; offering businesses assistance concerning the
5 process; and identifying barriers to the businesses'
6 participation in the process.

7
8 The department previously developed rules establishing a
9 business opportunities program, consisting of the Disadvantaged
10 Business Enterprise (DBE) Program, the Historically
11 Underutilized Business (HUB) Program, and the Small Business
12 Enterprise (SBE) Program, to perform its statutory duty under
13 Transportation Code, §201.702, and satisfy federal regulatory
14 requirements as a condition of receiving federal funds.

15
16 The DBE program is a federal program established under 49 Code
17 of Federal Regulations (C.F.R.) Part 26, which sets out the
18 requirements for a state to follow in setting participation
19 goals and assuring that disadvantaged businesses have equal
20 access to contracts paid with federal funds from the U.S.
21 Department of Transportation. The HUB program is a state
22 program established under Government Code, Chapter 2161 that is
23 managed by the state comptroller and the purpose of which is to
24 promote full and equal procurement opportunities for small
25 minority- and women-owned businesses. The SBE program is a

1 program established by the department under Transportation Code,
2 §201.702 to assist small disadvantage businesses in the
3 specialized areas of highway construction and maintenance.

4
5 To provide clarity and delineation between the various related
6 programs, the department is repealing Subchapter D (§§9.50-9.57)
7 in its entirety and proposing new Subchapter J (§§9.200-9.242),
8 concerning the DBE program, new Subchapter K (§§9.300-9.333),
9 concerning the SBE program, and new Subchapter L (§§9.350-
10 9.367), concerning the HUB program. The structure of the rules
11 has been changed to make the department's operations relating to
12 the DBE, HUB, and SBE programs more easily understandable. In
13 addition, several wording and grammatical revisions have been
14 incorporated for clarification. The following section by
15 section analysis for each new subchapter more specifically
16 explains the substantive revisions that will appear in the new
17 subchapters and sections.

18
19 New Subchapter J provides rules relating to the department's
20 federally required DBE program, which applies to all contracts
21 funded in whole or in part with federal funds. Existing rules
22 relating to the DBE program are contained in §9.53. As a
23 recipient of federal funds, the department must implement a DBE
24 program in accordance with 49 C.F.R. Part 26. The proposed new
25 sections provide clarity, address revisions to the federal

1 regulations, and refine the language to be consistent with the
2 interpretation of 49 C.F.R. Part 26.

3

4 New §9.200, Purpose of Subchapter; Applicability of Program,
5 explains that the purpose of Subchapter J is to implement the
6 existing DBE program to comply with Transportation Code,
7 §201.702, and 49 C.F.R. Part 26. The section also explains that
8 the DBE program applies only to department contracts and
9 purchases funded with federal money from the U. S. Department of
10 Transportation. Information in the new section is contained in
11 existing §9.50(a).

12

13 New §9.201, Policy, outlines the department's policy related to
14 the DBE program. Existing §9.52 states the department's policy
15 for the DBE, HUB, and SBE programs. New §9.201 restates the
16 policy information for only the DBE program.

17

18 New §9.202, Definitions, provides definitions for terms
19 associated with the department's DBE program. In this new
20 section, certain definitions have been added or revised from
21 existing §9.51 to provide clarification and consistency with
22 those definitions described in 49 C.F.R. §26.5.

23

24 New §9.203, Program Administration, replaces existing §9.53(a)
25 and outlines the administration of the department's DBE program

1 and the responsibilities of the department DBE Liaison Officer
2 in accordance with 49 C.F.R. §26.25. New §9.203 also provides
3 that the DBE Liaison can delegate the day-to-day operation of
4 the DBE program.

5
6 New §9.204, Discriminatory Actions Prohibited, outlines
7 prohibited discriminatory actions associated with the
8 department's DBE program and contracting activities in
9 accordance with 49 C.F.R. §26.7.

10

11 New §9.205, Department Information, outlines required DBE
12 information the department will maintain in an appropriate
13 database in accordance with 49 C.F.R. §26.11.

14

15 New §9.206, Contract Assurances Provisions, outlines the
16 contract assurance statements that must be included in each
17 financial assistance agreement with the U. S. Department of
18 Transportation, and in each contract involving federal funds, at
19 all tiers, in accordance with 49 C.F.R. §26.13. New §9.206
20 replaces existing §9.53(e) and is revised to comply with federal
21 regulations relating to required contract provisions.

22

23 New §9.207, Use of Financial Institutions, outlines the criteria
24 for the use of financial institutions owned by socially and
25 economically disadvantaged individuals in accordance with 49

1 C.F.R. §26.27.

2

3 New §9.208, Payment, Prompt Payment, Joint Checks replaces
4 existing §9.53(e)(8) and (9) and adds language regarding the
5 department's joint check policy. This new section outlines
6 provisions for timely subcontractor payments, including written
7 provisions that must be incorporated into each contract,
8 subcontract, or material purchase agreement involving federal
9 funds in accordance with 49 C.F.R. §26.29. This new section
10 also provides requirements for the use of joint checks. The
11 department acknowledges that joint checks are a customary
12 practice in the construction industry. However, to ensure
13 compliance with commercially useful function requirements the
14 section sets out specific requirements for the use of joint
15 checks.

16

17 New §9.209, DBE Directory, replaces existing §9.53(d)(12) and
18 outlines the requirements pertaining to the department's DBE
19 directory in accordance with 49 C.F.R. §26.31.

20

21 New §9.210, Overconcentration of DBEs, outlines the steps the
22 department must take to address the overconcentration of DBEs in
23 defined types of work in accordance with 49 C.F.R. §26.33.

24

25 New §9.211, Business Development Program, provides for the

1 administration of a DBE business development and supportive
2 service program in accordance with 23 C.F.R. §230, Subpart B.
3
4 New §9.212, Monitoring and Enforcement, provides the process
5 used by the department to monitor and enforce contract DBE
6 requirements, including verification procedures to ensure that
7 work committed to DBE subcontractors at contract award is
8 honored by the prime contractor in accordance with 49 C.F.R.
9 §26.37. This section also provides for the designation of
10 District Disadvantaged Business Enterprise Coordinators for each
11 of the department's districts, development of District DBE
12 Coordinator standard operating procedures, and annual district
13 DBE program compliance audits to be conducted by the department.
14 New §9.212 provides greater detail about department monitoring
15 and enforcement methodology than existing §9.53(e)(5)(B), which
16 addresses department on-site reviews in determining whether DBE
17 subcontractors perform a commercially useful function, and
18 existing §9.56, Contract Compliance, which addresses overall
19 contract compliance requirements for the DBE, HUB, and SBE
20 programs combined.
21
22 New §§9.213-9.220 replaces existing §9.53(b)(1). These new
23 sections outline the methodology used by the department to
24 establish an annual overall DBE Goal in accordance with 49
25 C.F.R. §26.45 and §26.51. New §9.213, Overall DBE Goal,

1 describes the basis and criteria for establishing the
2 department's overall annual DBE goal. New §9.214, Proposed
3 Overall Goal, outlines the process the department uses to
4 consult with stakeholders regarding the establishment of the
5 department's overall annual DBE goal. New §9.215, Public
6 Participation in Establishing Overall Goal, outlines the steps
7 used to invite public involvement in establishing the overall
8 annual DBE goal. New §9.216, Setting Overall Goal, states that
9 the department will establish the overall annual DBE goal after
10 considering public comment. New §9.217, Submission of Overall
11 Goal, describes the process by which the department will submit
12 the proposed DBE goal, and related methodology, to the
13 appropriate U. S. Department of Transportation Operating
14 Administration for approval. New §9.218, Review by Operating
15 Administration (OA), describes the approval and goal adjustment
16 process associated with the U. S. Department of Transportation
17 Operating Administration's review. New §9.219, Interim Steps,
18 outlines the steps employed by the department in establishing
19 interim DBE goals pending U. S. Department of Transportation
20 Operating Administration approval of the department's overall
21 annual DBE goal. New §9.220, Use of Race-neutral Means,
22 outlines the methodology and process used by the department in
23 satisfying DBE goals through race-neutral means. These new
24 sections comply with federal regulations and provide greater
25 detail regarding the department's overall annual goal

1 establishment process than the existing rule.

2

3 New §§9.221-9.225 replaces existing §9.53(b)(2). These new
4 sections outline the methodology used by the department to
5 establish contract specific goals. New §9.221, Establishment of
6 Contract Goals, describes the basis and criteria for
7 establishing the department's contract specific DBE goals. New
8 §9.222, Adjustment of Contract Goals, describes the process used
9 by the department to adjust contract specific goals if a
10 determination is made that the overall annual DBE goal will be
11 exceeded. This section also includes the process for how
12 construction contract change orders will affect a contract
13 specific DBE goal. New §9.223, Prohibition on Use of Contract
14 Goals, describes those conditions under which the department
15 will not set contract specific goals. New §9.224, Reduction on
16 Use of Contract Goals, describes the process used in reducing
17 contract specific goals in specified circumstances. New §9.225,
18 Maintaining and Reporting Data on Contract Goals, outlines the
19 maintenance and reporting of data associated with contract
20 specific DBE goals. These new sections comply with 49 C.F.R.
21 §26.51(d)-(g) and provide greater detail regarding the
22 department's contract specific goal establishment process than
23 the existing rule.

24

25 New §§9.226-9.229 replaces existing §9.53(c), §9.53(e)(2)(B),

1 and §9.53(e)(7). These new sections outline the good faith
2 effort procedures that must be followed by successful bidders
3 when contract specific goals are established in accordance with
4 49 C.F.R. §26.53. New §9.226, Contract Goal Good Faith Efforts,
5 provides information regarding good faith effort to meet
6 applicable contract goal requirements. New §9.227, Information
7 from Bidders, outlines the good faith effort information
8 required from bidders submitting bids on department contracts.
9 New §9.228, Reconsideration of the Department's Good Faith
10 Efforts Determination Before the Execution of the Contract,
11 outlines the process employed by the department when a bidder
12 requests a reconsideration of the department's decision in those
13 instances when a determination is made that the bidder failed to
14 satisfy the good faith effort requirements associated for the
15 contract. New §9.229, DBE Substitutions and Terminations,
16 provides criteria whereby the department will review and approve
17 contractor requests for DBE subcontractor substitutions and
18 terminations. These new sections comply with 49 C.F.R. §26.53
19 and provide greater detail regarding contractor good faith
20 efforts than the existing rule.

21
22 New §9.230, Labor-only Subcontracts, provides for the
23 contractor's option to use DBE subcontractors that provide labor
24 only services as stipulated in the contractual agreement between
25 the prime contractor and subcontractor.

1

2 New §9.231, Computing Work Performed by DBE, replaces existing
3 §9.53(e)(4) and provides information concerning the eligibility
4 of work that may be counted towards a DBE contract specific goal
5 in accordance with 49 C.F.R. §26.55. The section also provides
6 the criteria concerning the consideration of DBE subcontractor
7 work for computation of goal credit. This section addresses
8 fees and services charged by a DBE performing a bona fide
9 service, requirements concerning the cost associated with
10 supplies and materials and DBE subcontracting, and joint venture
11 limitations. Existing §9.53(e)(4) simply refers to the federal
12 regulation concerning credit for expenditures to DBEs.

13

14 New §9.232, Commercially Useful Function, replaces existing
15 §9.53(e)(5) and provides detailed information regarding the
16 criteria involved in the performance of a commercially useful
17 function. The section also outlines the criteria used by the
18 department to determine if a DBE subcontractor is performing a
19 commercially useful function in accordance with 49 C.F.R.
20 §26.55.

21

22 New §9.233, Commercially Useful Function by DBE Trucking Firm,
23 applies specifically to DBE trucking firms. This section is
24 similar to new §9.232 in outlining the criteria used by the
25 department to determine if a DBE trucking firm is performing a

1 commercially useful function in accordance with 49 C.F.R.
2 §26.55.

3

4 New §9.234, Counting Materials or Supplies Provided by DBE
5 Manufacturer or Regular Dealer, replaces existing §9.53(e)(4)
6 and applies specifically to DBE material suppliers. Existing
7 §9.53(e)(4) simply refers to federal regulation concerning
8 credit for expenditures to DBEs. This new section provides
9 information regarding the criteria concerning the computation of
10 DBE goal credit in accordance with 49 C.F.R. §26.55. This
11 section provides information regarding the criteria in
12 determining whether a DBE material is a manufacturer or a
13 regular dealer, and the associated factors used to determine
14 goal credit satisfaction for both manufacturers and regular
15 dealers.

16

17 New §9.235, Limitations on Amounts Counted toward DBE Goals,
18 replaces existing §9.53(e)(4) and outlines those situations that
19 may limit the DBE goal credit in accordance with 49 C.F.R.
20 §26.55. Specifically, this section addresses those instances
21 when a subcontractor or material supplier is not certified, or
22 whose certification as a DBE is no longer valid.

23

24 New §9.236, Reporting of DBE Participation, replaces existing
25 §9.53(e)(3) and outlines criteria used by the department to

1 report DBE participation to the appropriate U. S. Department of
2 Transportation Operating Administration.

3

4 New §9.237, Determination of Noncompliance; Sanctions, provides
5 the process for how the department will determine compliance
6 with DBE contract requirement, the available sanctions, and
7 notify the contractor. The sanctions include participation in
8 DBE outreach and mentor programs that are not available
9 sanctions under the existing rules. The department believes
10 that use of sanctions that benefit the DBE program will help
11 increase awareness and involvement. These new sanction will
12 also allow the department more flexibility in matching the
13 severity of the violation with an appropriate sanction.

14

15 New §9.238, Reconsideration of the Department's Noncompliance
16 Determination, provides the reconsideration process. The
17 process provides the contractor an opportunity to have a
18 noncompliance determination or the particular sanction reviewed
19 by a person not involved in the original decision. This process
20 streamlines the existing reconsideration and appeal process and
21 allows the final determination to be made at the end of the
22 contract.

23

24 New §9.239, Submission of Program Changes to Operating
25 Administration (OA), provides the procedure used by the

1 department to request approval of significant DBE program
2 revisions from the appropriate U. S. Department of
3 Transportation Operating Administration.

4
5 New §9.240, Certification of DBEs, replaces existing §9.53(d)
6 and provides information regarding the DBE certification process
7 under the Texas Unified Certification Program (TUCP). The TUCP
8 establishes standard operating procedures that must be followed
9 by all members regarding the certification process for DBEs. The
10 department is a member of the TUCP by memorandum of agreement.
11 Existing §9.53(d) provides detailed information specific to the
12 department's process in certifying firms as DBEs before the
13 development of the TUCP. New §9.240 refers to the TUCP as
14 established and approved by the U. S. Department of
15 Transportation. Information regarding the TUCP is available on
16 the department's website at www.txdot.gov.

17
18 New §9.242, Complaint Process; Review, replaces existing §9.57
19 regarding filing a complaint with the department or U.S DOT. The
20 section details the process of review for complaints and the
21 available remedies.

22
23 New Subchapter K provides rules relating to the department's
24 Small Business Enterprise (SBE) Program, which applies to
25 construction and maintenance contracts funded entirely with

1 state and local funds or federally funded project in which a DBE
2 goal is not provided. Existing rules specific to the SBE
3 program are contained in §9.55. The department previously
4 developed the SBE program to assist small businesses in the
5 highly specialized fields of highway construction and
6 maintenance. The department's SBE program is open to all small
7 businesses that meet the required size limitations and applies
8 only to highway construction and maintenance contracts.

9
10 New §9.300, Policy, explains the purpose of this subchapter,
11 which involves implementing the existing SBE program to comply
12 with Transportation Code, §201.702. Existing §9.52 addressed
13 department policy for the department's DBE, HUB, and SBE
14 programs combined. Proposed new §9.300 provides policy
15 information relative to the SBE program as previously contained
16 at existing §9.52.

17
18 New §9.301, Applicability of Program, states that the
19 department's SBE program applies to all department highway
20 construction and maintenance contracts that are funded entirely
21 with state and local funds or federally funded projects that
22 that do not receive a DBE goal.

23
24 New §9.302, Definitions, provides definitions for terms
25 associated with the department's SBE program. Some definitions

1 have been added to those provided by existing §9.51 and others
2 have been added to provide clarification and consistency within
3 the proposed new rules.

4

5 New §§9.304-9.309 replace existing §9.55(d), SBE certification,
6 and provide for the SBE certification process.

7

8 New §9.304, Eligibility for Certification, prescribes the SBE
9 certification eligibility criteria, which primarily involve a
10 business's qualifying ownership interest and annual gross
11 receipts, including those gross receipts of any affiliate firms.

12

13 New §9.305, Application for SBE Certification, sets out the
14 application process. A business certified as a DBE by the
15 department under Texas Administrative Code, Title 43, Chapter 9,
16 Subchapter J, or a firm certified as a HUB under Texas
17 Administrative Code, Title 34, Chapter 20 does not have to
18 submit an application for consideration as a SBE but may be
19 required by the department to submit any information necessary
20 to demonstrate qualification as an SBE.

21

22 New §9.306, Reapplication after Withdrawal of Application,
23 provides that a business that withdraws its application may
24 subsequently reapply for SBE certification.

25

1 New §9.307, Review and Evaluation of Certification Application,
2 prescribes the process for the department to receive and review
3 of SBE certification applications.

4

5 New §9.308, Certification Decision, establishes the procedures
6 for the department to make SBE certification decisions. If
7 certification is denied, the department has to provide the
8 applicant with the reasons for denial.

9

10 New §9.309, Certification Period; Recertification, provides that
11 SBE certification is valid for three years. The section
12 provides that the process for recertification as an SBE is the
13 same as the initial application.

14

15 New §9.310, Applicant's Answer to Denial Notice, replaces
16 existing §9.55(d)(6)(C) and states the process that a firm
17 denied SBE certification may use to resolve eligibility of the
18 deficiencies associated with the certification denial decision
19 issued by the department.

20

21 New §9.311, Certification Challenges, replaces existing
22 §9.55(d)(7)(A) and describes the process for a person to
23 challenge the eligibility of a business either certified as an
24 SBE by the department or seeking certification, as well as the
25 process employed by the department in reviewing SBE

1 certification challenges. To the extent allowed by law, the
2 department will keep the identity of the challenger confidential
3 unless authorized otherwise by the challenger.

4

5 New §9.312, Department Challenges, replaces existing
6 §9.55(d)(7)(B) and provides the procedures to be used if the
7 department receives information that provides reasonable cause
8 to question a business's eligibility to be certified as a SBE.

9

10 New §9.313, SBE Directory, replaces existing §9.55(d)(8) and
11 references the SBE directory that will be maintained and made
12 available by the department.

13

14 New §9.314, SBE Overall Goals, replaces existing §9.55(b)(1) and
15 provides that the executive director will establish overall
16 annual SBE goals and that the department will make good faith
17 efforts to meet or exceed the annual goal.

18

19 New §9.315, Contract Goals, addresses the process involved in
20 assigning individual contract SBE goals as necessary to satisfy
21 the established overall annual SBE goals. Subsection (c)
22 provides that only work performed by an SBE can count towards
23 the goal.

24

25 New §9.316, Contractor Representative, replaces existing

1 §9.56(b) as it relates to the SBE program. The section requires
2 a contractor to designate an employee to serve as the SBE
3 contact person during the contract. The representative's
4 responsibilities include submitting reports, maintaining
5 records, and documenting good faith efforts to use SBEs.

6
7 New §9.317, Contract Provisions Providing SBE Requirements,
8 replaces existing §9.55(c) and requires that applicable
9 contracts contain provisions stating the HUB requirements
10 applicable to the contract.

11
12 New §9.318, Payment; Prompt Payment; Joint Checks adds language
13 to the SBE program to make it consistent with the DBE program.
14 This new section outlines provisions for timely subcontractor
15 payments, including written provisions that must be incorporated
16 into each contract, subcontract, or material purchase agreement.
17 This new section also provides requirements for the use of joint
18 checks. The department acknowledges that joint checks are a
19 customary practice in the construction industry.

20
21 New §§9.319-9.320 replace existing §9.55(c)(2) and provide a
22 contractor's SBE contractual obligations regarding the SBE
23 commitment and related good faith effort requirements associated
24 with contract specific SBE goals. New §9.319, Contractor's
25 Commitment Agreement, sets out the specific SBE commitment

1 agreement components, and new §9.320, Contractor's Good Faith
2 Efforts, and specifies the components required of a contractor
3 to demonstrate that good faith efforts were made to satisfy the
4 SBE goal or obtain SBE participation.

5
6 New §9.321, Subcontracting, replaces existing §9.55(c)(5), in
7 part, and specifies the subcontracting requirements and
8 limitations applicable to SBE subcontractors.

9
10 New §9.322, Leases, replaces existing §9.55(c)(5)(C) and
11 provides the limitations and requirements associated with the
12 leasing of equipment by a SBE subcontractor.

13
14 New §9.323, Withholding or Reducing Payments, replaces existing
15 §9.56(c) as it relates to the SBE program. The section
16 prohibits a contractor from withholding or reducing payments to
17 a SBE subcontractor without a reason that is recognized as a
18 standard industry practice.

19
20 New §9.324, SBE Subcontractor Termination, replaces existing
21 §9.56(e) as it relates to the SBE program and prohibits a
22 contractor from terminating a SBE subcontractor that was
23 submitted on a commitment agreement for a contract with an
24 assigned goal without the consent of the department. The
25 language tracks the requirements of new §9.229 to maintain

1 consistency between the SBE and DBE programs and to meet the
2 federal small business requirements.

3

4 New §9.325, Performance, replaces existing §9.56(d) as it
5 relates to the SBE program and requires that SBE contractors and
6 subcontractors comply with the terms of the contract or
7 subcontract.

8

9 New §9.326, Contractor Reports, replaces existing §9.55(c)(3)
10 and specifies the contractor reporting obligations associated
11 with the SBE program. This section addresses periodic and final
12 reports as outlined in the applicable contract.

13

14 New §9.327, Contractor Records, replaces existing §9.56(f) as it
15 relates to the SBE program and prescribes the contractor's
16 retention requirements for documents associated with the
17 contract.

18

19 New §9.328, Credits for Expenditures, replaces existing
20 §9.55(c)(4) and provides that a contractor receives credit for
21 all payments made to an SBE for work performed and costs
22 incurred under the contract, including subcontracted work.

23

24 New §9.329, Monitoring of Contract Compliance, replaces existing
25 §9.56(a) as it relates to the SBE program and provides that the

1 department will monitor compliance of a contract by reviewing
2 reports and on-site visits.

3

4 New §§9.330-9.331 replace existing §9.57 as it relates to the
5 SBE program and provide the process and procedures involved in
6 the submittal, review, and investigation of complaints related
7 to the SBE program.

8

9 New §9.330, Complaints, provides the process a person must use
10 to submit to the department a complaint for a violation of the
11 SBE program. The section does not apply to complaints
12 associated with purchase contracts or discrimination complaints
13 against employees of the department.

14

15 New §9.331, Review and Investigation of Complaints, prescribes
16 the process used by the department in the review and
17 investigation of any complaint received related to an SBE
18 program violation.

19

20 New §9.332, Determination of Noncompliance; Sanctions, replaces
21 existing §9.56(g) and (h) as it relates to the SBE program and
22 sets out department actions that will be taken if it is
23 determined that a contractor has not complied with the contract
24 SBE requirements. Subsection (b) includes the possibility for
25 declaring a default if a responder does not provide the required

1 SBE information as specified in the contract's special
2 provisions. Subsection (d) provides the types of sanctions
3 available for noncompliance. These sanctions include written,
4 reprimand, damages, contract termination, and any other remedy
5 authorized by law.

6
7 New §9.333, Reconsideration of the Department's Noncompliance
8 Determination, also replaces existing §9.56(g) as it relates to
9 the SBE program and describes the process for reconsideration of
10 the department's decision or to challenge the proscribed
11 sanction. The section sets out the timeline for requesting the
12 reconsideration for both respondents and contractors. The
13 section provides for the appeal process, allowing the department
14 the authority to schedule an in-person hearing if the department
15 feels a hearing is necessary.

16
17 New Subchapter L provides rules relating to the department's
18 Historically Underutilized Business (HUB) Program, which applies
19 to contracts, exclusive of construction and maintenance
20 contracts, and purchases funded entirely with state and local
21 funds. Existing rules specific to the HUB program are contained
22 in §9.54. The department's HUB program is modeled on, and where
23 practicable, consistent with the state Historically
24 Underutilized Business Program described in Government Code,
25 Chapter 2161 and procedures set forth at Texas Administrative

1 Code, Title 34, §§20.10 et seq.

2

3 New §9.350, Policy, explains the purpose of this subchapter,
4 which involves implementing the existing HUB program to comply
5 with Transportation Code, §201.702, and is intended to be
6 consistent where practicable with Government Code, Chapter 2161.
7 Existing §9.52 addressed department policy for the department's
8 DBE, HUB, and SBE programs combined. Proposed new §9.350
9 provides policy information relative to the HUB program as
10 contained in existing §9.52.

11

12 New §9.351, Application of Subchapter, replaces existing
13 §9.54(a) and explains the applicability of the department's HUB
14 program to certain department contracts and purchases.

15

16 New §9.352, Definitions, provides definitions for terms
17 associated with the department's HUB program. In this new
18 section, certain definitions have been added or revised from
19 existing §9.51 to provide clarification and consistency with
20 statutory revisions concerning the statewide HUB program as
21 administered by the Comptroller of Public Accounts.

22

23 New §9.353, Certification of HUBs, replaces existing §9.54(d)
24 and provides procedural information and criteria regarding the
25 HUB certification process.

1

2 New §9.354, HUB Overall Goals, replaces existing §9.54(b)(1) and
3 provides information regarding overall annual HUB goals.

4 Overall annual HUB goals are established by the executive
5 director in compliance with Government Code §2161.002 and 34 TAC
6 §20.13 (relating to Statewide Annual HUB Utilization Goals).

7

8 New §9.355, Contract Goals, replaces existing §9.54(b)(2) and
9 provides information regarding contract specific HUB goals.

10 Contract specific goals will be assigned as necessary in order
11 to meet the overall annual HUB goal. This section also provides
12 that if a contract specific goal is not set but there are HUB
13 subcontracting opportunities, the responders may be required by
14 the department to provide a HUB plan.

15

16 New §§9.356-9.362 reorganize and replace existing §9.54(c)
17 relating to contractor obligations.

18

19 New §9.356, HUB Plan, outlines the requirements associated with
20 the HUB plan to be submitted by businesses responding to an
21 invitation to bid, or request for proposal, involving more than
22 \$100,000 and having subcontracting opportunities, as a condition
23 of award. Failure to include the required HUB plan with a
24 response will result in the rejection of the bid by the
25 department. The section specifies the required components of

1 the HUB plan. The section includes an exemption for building
2 contracts that are based on the low bid procurement process.
3 The section also provides for reporting variances for
4 professional services contracts such as engineering, surveying,
5 and architecture to allow for the procurement process for those
6 types of contracts.

7
8 New §9.357, Good Faith Efforts Documentation, provides
9 information regarding the good faith effort requirements when a
10 contractor is not subcontracting any portion of the contract,
11 unable to obtain HUB participation, or unable to meet HUB
12 participation goals, including contract goals. The section
13 replaces existing §9.54(c)(1)(C) and §9.54(c)(3)(B) and adds new
14 language to comply with provisions of the statewide HUB program.

15
16 New §9.358, Required Contract Provisions, replaces existing
17 §9.54(c) and requires that contracts contain the HUB
18 requirements applicable to the contract.

19
20 New §9.359, Changes to and Monitoring of HUB Plan, provides that
21 the department must approve any changes to the HUB plan. The
22 section also contains the process and procedure for the
23 department to monitor the HUB plans submitted by respondents.
24 Additionally, the section provides information concerning the
25 various possible consequences should a respondent fail to

1 implement their HUB plan in good faith.

2

3 New §9.360, HUB Commitment Agreement, specifies the terms of a
4 HUB commitment agreement that is required, in addition to the
5 HUB plan, as a condition of award when a specific HUB contract
6 goal is assigned.

7

8 New §9.361, Reporting, contains the various contractor reporting
9 obligations associated with the HUB program. This section
10 addresses periodic and final reports as contained in the
11 applicable contract.

12

13 New §9.362, Credit for HUB Expenditures, provides information
14 concerning HUB subcontractor payments for goal credit.

15

16 New §9.363, Monitoring of Contractor Compliance, provides that
17 the department will monitor compliance of a contract by
18 reviewing reports and on-site visits. The section reorganizes
19 existing §9.56, relating to department procedures in monitoring
20 contractor compliance with HUB program requirements, as it
21 relates to the HUB program.

22

23 New §9.364 and §9.365 reorganize and replace existing §9.57,
24 relating to the submission of HUB complaints to the department
25 and its investigation of those complaints.

1

2 New §9.364, Complaints, provides the process to be used by an
3 aggrieved person to submit a claim to the department for review
4 and consideration. The section does not apply to complaints
5 associated with purchase contracts or discrimination complaints
6 against employees of the department.

7

8 New §9.365, Review and Investigation of Complaints, prescribes
9 the process and procedures used by the department in its review
10 and investigation of complaints received under new §9.365.

11

12 New §9.366, Determination of Noncompliance; Sanctions, states
13 the actions the department will take if it determines that a
14 contractor has not complied with the HUB contracting
15 requirements. The section describes the sanctions that may be
16 imposed by the department on contractors found not to be in
17 compliance of their HUB requirements and lists factors that will
18 be considered by the department in determining the sanctions to
19 be imposed. This section also provides that the department will
20 notify the contractor within 10 days of making the
21 determination.

22

23 New §9.367, Reconsideration of the Department's Noncompliance
24 Determination, replaces existing §9.56(h) and §9.57(d) as they
25 relate to the HUB program. The section prescribes the

1 procedures that a person must follow to appeal a noncompliance
2 determination imposed under new §9.366 and the process to be
3 followed by the department in receiving and considering such a
4 request.

5

6 COMMENTS

7 On May 9, 2012, the department held a public hearing regarding
8 these rules. Oral comments at the hearing were received from
9 Kay Turner, Megatronics International Corporation (MIC); Alayne
10 Johnson, All Points Inspection Services, Inc (APIS); Renee
11 Watson, Bexar County Small, Minority, and Women-owned Business
12 Enterprise (SMWBE); Jerry Jackson; and Georgia Noel, Arizpe
13 Architects and Engineers (Arizpe). The department also received
14 written comments from Roger Albert, Associated General
15 Contractors of Texas (AGC); Britanie Olvera, Building Integrity
16 & Total Quality (B.I.T.); Mario L. Carlin, Mario Carlin
17 Management, LLC. (MCM); and Laura K. Culin, Austin Lumber
18 Company, Inc. (ALC). Jim Wyatt, Texas Association of African
19 American Chambers of Commerce (TAAACC) and Kevin Kennedy,
20 Kennedy Consulting - Innovative (KCI) provided comments at the
21 public hearing and submitted written comments.

22

23 Comment: TAAACC, KCI, AGC, B.I.T., MCM, and ALC all raised
24 issues regarding the placing of the DBE/SBE/HUB program in the
25 Office of Civil Rights (OCR). The issues raised were that being

1 included in OCR sends the wrong message to participants in the
2 program, that DBE/SBE/HUB are procurement programs not civil
3 rights issues and whether OCR would have the funding, resources,
4 and authority necessary to oversee the programs. In addition,
5 the AGC recommended the department create a separate office
6 focused exclusively on DBE/SBE/HUB programs.

7
8 Response: The scope of the rules does not address the
9 organizational structure of the department. However, to provide
10 the department administration with the flexibility to make
11 organizational structure changes, all references to the Office
12 of Civil Rights have been removed from these rules. This has
13 resulted in changes to §§9.212, 9.330, and 9.331 and to the
14 deletion of proposed §9.303 as unnecessary. In addition, §9.303
15 is withdrawn as it pertained to administration of the SBE
16 program by the department's Office of Civil Rights (OCR). Since
17 all references to OCR are removed due to comments, the proposed
18 new section is obsolete and is, therefore, withdrawn.

19
20 Comment: KCI commented on §9.301 and argued the rule changes do
21 not establish a race-neutral small business set-aside for
22 professional service contracts as required by 49 C.F.R. §26.39.

23
24 Response: The department disagrees as set asides are prohibited
25 according to 49 C.F.R. §26.43 and is making no changes to the

1 rules based on this comment. In regards to the 49 C.F.R. §26.39
2 requirement, the department must include a federal SBE component
3 as a part of the department's DBE program. One element of the
4 federal SBE program component is to place a federal SBE goal on
5 projects where a DBE goal is not justified. The language of
6 §9.301, as proposed, allows SBE participation in federally
7 funded projects that did not receive a DBE goal.

8
9 Comment: KCI commented on §9.301 and argued that the HUB program
10 relating to professional service contracts conflicts with 49
11 C.F.R. §26.39.

12
13 Response: The department disagrees. The HUB program is a state
14 program and is not subject to 49 C.F.R. §26.39 or any other
15 aspects of the federal DBE program.

16
17 Comment: KCI and APIS commented on §9.301 and requested that the
18 SBE rules be modified to include professional service contracts.

19
20 Response: The department disagrees. The state SBE program does
21 not apply to professional services contracts. However, as
22 stated in the response to a preceding comment on §9.301 related
23 to the requirements of 49 C.F.R. §26.39, the department must
24 include a federal SBE component as a part of the department's
25 DBE program. The federal SBE component applies to professional

1 services and §9.301 is changed, accordingly, to exclude
2 federally funded projects in which a DBE goal is provided from
3 the application of the Small Business Enterprise program.

4

5 Comment: KCI and APIS commented on §§9.301 and requested SBE/HUB
6 participation goals be combined into a single goal.

7

8 Response: The department disagrees. Federal and state laws vary
9 greatly with regards to how credit towards contract goals can be
10 counted and how the agency must report goal achievement.

11

12 Comment: AGC commented on §9.212(a) and (c) stating the rules
13 are insufficient in details pertaining to whom responsibilities
14 ultimately fall to regarding monitoring and enforcement of the
15 DBE provisions. AGC requests decision making be handled and
16 determined by the project's district engineer or designee.

17

18 Response: The department disagrees. Project monitoring is done
19 throughout the project by various staff. The district engineer
20 is responsible for all aspects of the project, including
21 monitoring and enforcement, and coordinates decisions related to
22 the DBE program with the DBE staff who must also be involved in
23 the process. The department believes that combining both
24 project and program staff in decisions will achieve more
25 consistent enforcement throughout the state. The section is

1 consistent with the language and intent of 49 C.F.R. Part 26.

2

3 Comment: AGC commented on §9.237(a) and (b) and recommends that
4 decisions involving extreme sanctions should be made by a panel
5 consisting of an impartial district engineer (or designee), the
6 director of the DBE program, and a member of the department's
7 executive team that has substantive knowledge of the DBE program
8 and those decisions should be appealable to the department's
9 executive director.

10

11 Response: The department disagrees that a panel is necessary to
12 issue sanctions for a DBE violation. The parties involved in
13 monitoring the contract will be included in making the sanction
14 determinations. It is this staff that has the understanding of
15 the issues necessary to make the initial finding and sanction
16 decision. A prime who disagrees with the sanction can request a
17 reconsideration of the determination. This reconsideration will
18 be conducted by an administrative level employee who was not
19 involved in the original decision.

20

21 Comment: AGC commented on the definition of "work" in §9.208(2)
22 and §9.318. It argues that the terms "location" and "approved
23 by the department" are irrelevant to the prompt payment
24 requirements of the DBE/SBE programs and it requested they be
25 removed.

1
2 Response: The department disagrees. The term "location" and
3 "approved" are relevant to the prompt pay provisions. For the
4 purposes of §9.208 and §9.318, the term "subcontractor" includes
5 suppliers and the term "work" includes materials provided by
6 suppliers at a location approved by the department. "Approved"
7 is relevant as it pertains to the completion of a contractor's
8 and subcontractor's work and whether approved by the department
9 for payment.

10
11 Comment: AGC commented on §9.208(f)(6) and §9.318(f)(6)
12 regarding joint checks. It argues that the two-year limitation
13 is not adequate because some projects are longer than two years.
14 AGC disagrees with the time limitation and recommends allowing
15 the agreement to exist for the term of the contract and subject
16 to review by the department every two years.

17
18 Response: The department agrees in part. Once the use of joint
19 checks is approved for a particular contract, the joint check
20 agreement should be approved for the life of the contract. The
21 paragraphs limiting approval for two years have been deleted and
22 subsequent paragraphs in each subsection have been renumbered.
23 The department referenced the two years to indicate the
24 department would review a DBE's use of joint checks to determine
25 if the DBE has made a reasonable effort to obtain credit with

1 suppliers. This requirement is met by other language in the
2 rules.

3

4 Comment: AGC commented on §9.208(f)(2) and §9.318(f)(2)
5 regarding joint checks. It argues that determining whether "the
6 subcontractor earns a profit from the material purchased" is
7 difficult to administer and imposes a higher industry standard
8 on the DBE/SBE. The AGC recommends deletion of this
9 requirement.

10

11 Response: The department disagrees that the requirement imposes
12 a higher industry standard on the DBE. In cases where joint
13 checks have been utilized, the DBE receives the price the
14 supplier provided to the prime contractor. Without allowing the
15 sharing of prices between prime and DBE, the supplier might not
16 grant the DBE the more economical price. The fact that the
17 determination might be difficult for the prime contractor does
18 not eliminate the need to establish that the DBE was performing
19 a commercially useful function in its inclusion in the
20 purchasing process.

21

22 Comment: AGC commented on §9.214(b) regarding the DBE goal and
23 believes the three-year goal assignment is not conducive to the
24 ultimate goal of the program of creating a business atmosphere
25 that needs no race-conscious requirements. AGC recommends race-

1 conscious goals be reviewed and amended every year the overall
2 goal is exceeded.

3

4 Response: The department disagrees. Federal regulations, 49
5 C.F.R. §26.45, require the department to set a DBE goal every
6 three years. The department will continue to monitor the goal
7 and can submit goal modifications to the appropriate Operating
8 Administration within the three-year goal period.

9

10 Comment: AGC disagrees with the requirement in §9.222(c)
11 regarding increasing a contract goal due to a change order. AGC
12 argues that this action could force a contractor to break or
13 terminate existing purchase orders and subcontracts issued in
14 good faith. AGC recommends the department revise the language
15 to state the goals "may" be increased in the event a change
16 order adds "new scope" to the project.

17

18 Response: The department disagrees in part. The department
19 disagrees that rules require a change in an assigned contract
20 DBE goal based on a change order. The assigned contract goal is
21 set as a percentage of the dollar amount of the contract and a
22 change order will not modify the original assigned goal
23 percentage. The language in the rule states that the original
24 goal applies to the value of the change order. However, the
25 department did not intend for all change orders to affect the

1 DBE participation. For example, if the change order increases
2 the dollar amount of a line item of work that was not
3 subcontracted to a DBE, then the change order will not impact
4 the DBE participation. However, if the change order impacts a
5 line of work that was originally committed to a DBE or is a line
6 item not included in the original contract (new scope), then the
7 overall DBE participation will also be increased. Therefore,
8 the department has changed the language to state that "the
9 increased contract value may become subject to these same goal
10 requirements."

11
12 Comment: AGC commented on §9.227(b)(2) regarding good faith
13 effort documentation. AGC argues that the use of "all" for good
14 faith efforts in "all necessary and reasonable steps referenced
15 in the federal Appendix A," is misleading and may result in a
16 misinterpretation of the rules. AGC recommends the word "all"
17 be removed to align with the intent of Appendix A.

18
19 Response: The department agrees. Appendix A is not intended to
20 be a mandatory checklist, nor is it intended to be an exclusive
21 or exhaustive list. The language will be revised to "the bidder
22 took the types of action that may be considered as good faith
23 efforts as referenced in 49 C.F.R. Part 26" to reflect this
24 interpretation.

25

1 Comment: AGC believes the time limits in §9.228(f) regarding the
2 timing of the reconsideration hearing are unreasonable. AGC
3 argues that requiring a meeting within 20 days of the date of
4 notice can be as little as 10 days from the time of the appeal
5 request. AGC recommends amending the language to "meeting will
6 be held within 20 days of the date of appeal, unless otherwise
7 mutually agreed upon."

8
9 Response: The department agrees in part and is modifying the
10 rule. The department agrees that it may be difficult to
11 schedule a hearing within 10 days, therefore, the language is
12 amended to provide a hearing within 30 days of the hearing
13 request. The department does not agree to allow the date to be
14 extended past this 30-day period. The review will be conducted
15 prior to the award of the contract. To extend the time
16 indefinitely could result in the delay of needed construction
17 and maintenance projects.

18
19 Comment: AGC commented that the §9.229(c) and §9.324(c)
20 requirement of a five-day notice for termination is unreasonable
21 for time sensitive work. AGC recommends a contractor be able to
22 provide written documentation of attempts to contact a DBE/SBE
23 in order to address immediate impacts to the progress of a
24 project.

25

1 Response: The department disagrees. New federal regulations
2 require the department to provide the notice and termination
3 provisions outlined in the rules. The department does not have
4 the authority to decrease the five-day limit under the DBE
5 program. For consistency the department has carried this
6 federal DBE requirement to the state's SBE program. This will
7 allow the SBE program to apply to the federally funded projects
8 that do not receive a DBE goal as well as the state funded SBE
9 projects. It will also allow for the same procedures and
10 processes for all parties regardless of the type of funding used
11 for the project.

12

13 Comment: AGC argues that §9.233(c) and §9.315 do not include the
14 currently approved FHWA equivalent match for DBEs that control
15 an equal value of non-DBE truckers. AGC recommends that
16 language be added.

17

18 Response: The department agrees that FHWA allows additional
19 truck hauling match. The department adds the following language
20 to §9.233 and §9.322: "The DBE that leases trucks from a non-DBE
21 is entitled to credit for the total value of transportation
22 services provided by non-DBE lessees, not to exceed the value of
23 transportation services provided by the DBE-owned trucks on the
24 contract. Additional participation by non-DBE lessees receive
25 credit only for the fee or commission the DBE receives as a

1 result of the lease arrangement."

2

3 Comment: AGC recommends clarifying the word "contract" as being
4 a "subcontract" in §9.235(a).

5

6 Response: The department agrees. Clarification will be added
7 that borrows language from the current DBE Provision 1966
8 contact provision. "Only DBE firms certified at the time of
9 execution of the contract, subcontract, or purchase order, as
10 appropriate, are eligible for DBE goal participation."

11

12 Comment: AGC recommends adding the statement to §9.235 that
13 race-neutral DBEs or DBE work and payments in excess of the
14 original goal may be used for substitution purposes.

15

16 Response: The department agrees in part that some DBE work and
17 payments may be used in goal credit calculations. Elements of
18 this comment are currently a part of the department's practice
19 but were not specifically stated in the rules. The department
20 adds language to the rule to specify that payment made to a DBE
21 that was not on the original commitment may be counted toward
22 the contract goal if that DBE was certified as a DBE before the
23 execution of the subcontract and has performed a CUF.

24

25 Comment: AGC recommends adding language to §9.235 that provides

1 federal rules allowance in that a contractor is excused from the
2 portion of the goal remaining after a DBE is decertified.

3

4 Response: The department agrees with the comment but does not
5 agree that it requires a change to the rule language if the
6 comment is referencing the overall contract goal or the
7 individual DBE commitment amount. The current DBE procedure
8 allows the prime to continue to receive goal credit for a DBE
9 that is decertified after subcontract execution as long as the
10 DBE continues to perform a CUF. The prime is not penalized and,
11 thus, there is no need to excuse the portion of the goal
12 remaining. The rule indicates that the department will not
13 count the work by the decertified DBE towards the overall state
14 DBE goal.

15

16 Comment: AGC argues the authority for the decision of varying
17 degrees of sanctions needs clarification in §9.237(a) and (b)
18 and §9.332(a) and (b). AGC believes that the district engineer
19 should retain the authority for project level decisions but,
20 with regard to due course of appeal, only the appropriate level
21 of administration should have termination and debarment
22 authority.

23

24 Response: The department disagrees. The rules establish that
25 the "department" will make the sanction determination and this

1 will allow all appropriate department staff involved in the
2 contract to participate in the sanction determination. This
3 will include the relevant district engineer and the DBE liaison
4 officer. In addition, the reconsideration process of §9.238
5 provides that an employee that holds a senior leadership
6 position will be included in the review of the sanction.
7 Current policy and procedures provide that the executive
8 director is the decision maker in cases where termination and/or
9 debarment are considered. This process is handled outside of
10 the DBE program under the general contract procedures.

11
12 Comment: AGC commented on §9.301 regarding funding applicability
13 being unclear. AGC states that in 43 TAC Chapter 9, Subchapter
14 J, projects with federal funds are subject to the provisions
15 whereas in §9.301 the rules are subject to projects not subject
16 to 43 TAC Chapter 9, Subchapter J. AGC recommends adding a
17 statement, in accordance with US DOT rules, that the SBE rules
18 are applicable to federally funded projects without DBE goals.

19
20 Response: The department agrees that the language could be
21 restated to provide more clarity and has included language to
22 state that the SBE program applies to federally funded projects
23 in which a DBE goal is not provided.

24
25 Comment: AGC argues §9.318(a)(4) defines "contractor" for this

1 section as a subcontractor that contracts work to another tier
2 of subcontractors and this definition is inconsistent and
3 confusing with the term "contractor" in other portions of the
4 proposed rules. AGC recommends deletion of those portions or
5 further clarification.

6
7 Response: The department disagrees with this comment. The
8 different extended definition of contractor, which applies only
9 in this section, is needed to fully implement the payment,
10 prompt payment, and joint check provisions. All contractors,
11 whether the prime contractor or a subcontractor, that further
12 subcontract must meet the requirements of this section.

13
14 Comment: The AGC argues §9.318 broadens the scope of prompt
15 payment, joint checks, and retainage to all SBE projects whether
16 they contain federal funds or not. AGC recommends language be
17 included to specify the portions of federal law specific to
18 prompt payment, joint checks, and retainage apply only to SBE
19 projects with federal money.

20
21 Response: The department disagrees. To increase opportunities
22 to SBEs, afford all SBEs working on department contracts the
23 same level of commitment by the department while working on
24 contracts, and to be as efficient as possible in the
25 administration of the program, the department has broadened the

1 scope of the state SBE program to include joint checks and
2 prompt pay and retainage on state funded SBE projects. There is
3 a state prompt pay requirement and the department has written
4 these rules to meet the requirements of both the state and
5 federal provisions. Joint checks, prompt pay, and retainage
6 also apply to the federal SBE program element of the DBE program
7 as contracts that have a federal SBE goal must also meet the
8 same requirements as contracts that are assigned a DBE goal.
9 The department has elected to run the state SBE program
10 corollary to the federal DBE program where applicable to allow
11 for increased opportunities for small businesses and to assist
12 with the ease of program administration.

13

14 Comment: AGC argues that the provisions of §9.325 are US DOT
15 based and not specifically related to the SBE program. AGC
16 believes the department's contract provisions address
17 performance for the contract.

18

19 Response: The department disagrees. Although §9.325 are US DOT
20 requirements of the DBE program, the department has revised the
21 rules to assure that these provisions not only apply to the
22 federal SBE program component but are also a requirement of the
23 state SBE program. The department has elected to run the state
24 SBE program parallel to the federal DBE program, where
25 applicable, to allow for increased opportunities for small

1 businesses and to assist with the ease of program
2 administration.

3
4 Comment: SMWBE recommends further definition of "entity,"
5 "TxDOT," and "the department" in §§9.200-9.242, §§9.300-9.333,
6 and §§9.350-9.367. SMWBE believes this is necessary because the
7 "department" could also reference a local government provider.

8
9 Response: The department disagrees with the comment. The
10 DBE/HUB/SBE rules are addressing administrative procedures that
11 the department will follow. All references to the department
12 are meant to mean only the Texas Department of Transportation
13 and in each subchapter "department" is defined to mean the Texas
14 Department of Transportation. Other organizations that adopt
15 the department's DBE program will do so through an agreement
16 with the department that will define and clarify definitions of
17 the individual entity. Organizations through the signed
18 agreement adopt the department's DBE program and not the
19 department's rules.

20
21 Comment: SMWBE argues that FHWA, FTA, and FAA funding sources
22 are used inconsistently throughout §§9.200-9.242, §§9.300-9.333,
23 and §§9.350-9.367.

24
25 Response: The department disagrees. The program is administered

1 by the three US DOT administrations (i.e., FHWA, FTA, and FAA)
2 with the Federal Highway Administration (FHWA) maintaining a
3 significant stewardship role for the program administered by the
4 department. FTA and FAA are referenced where applicable and
5 references are made to the Operating Administration, which is
6 defined as FTA, FAA, or FHWA, as appropriate.

7

8 Comment: SMWBE argues there is confusion in the implementation
9 at the local government level and recommends §9.202(7) further
10 clarify "appropriate flexibility to entities" and state how it
11 applies to entities implementing a DBE program and providing DBE
12 opportunities.

13

14 Response: The department disagrees. This comment references the
15 department's policy and objectives, which are to work in
16 partnership with industry stakeholders to provide alternatives
17 that are efficient and flexible to meet the needs of DBEs as
18 well as the mutual interest of parties involved where possible.
19 This language is in the spirit of 49 C.F.R. §26.1(g), which
20 allows some degree of flexibility for recipients to administer
21 the DBE program.

22

23 Comment: SMWBE requests further clarification in §9.202
24 regarding definitions to "department," "division," and
25 "executive director."

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Response: The department disagrees. The rules are guidelines and requirements for the departments DBE/SBE/HUB programs. Once a local government adopts the department's DBE program the contract special provision will reflect local government reference as well as monitoring entities and their roles.

Comment: SMWBE requests further clarification in §9.205 regarding the referenced bidders list provided on the TUCP website. SMWBE requests that the department disseminate to all members of the TUCP information that the directory is available in an electronic format accessible to the public at no cost.

Response: The department disagrees that a change to the language is required. The department provides the DBE directory online, at no cost. The department feels that this database provides the information requested by the commenter.

Comment: SMWBE appreciates the clarification the department has given to the FHWA regarding the ability to have one consistent master database of DBEs for the State of Texas.

Response: The department agrees that one master DBE database will be beneficial to the program.

1 Comment: SMWBE requests further clarification in §9.208(b)
2 regarding "retainage" and how that relates to administering the
3 program at a local government level.

4
5 Response: The department declines to make the requested
6 addition. The department's administrative rules will not
7 address the administration of the DBE program at the local
8 level. Local government entities may adopt the department's DBE
9 program, however, that does not mean that the entity is adopting
10 the department's rules. The department's rules lay out how the
11 department will administer its federally approved DBE program
12 and may be used as guidance by local government entities,
13 however, those entities may adopt administrative procedures as
14 to how the program will be coordinated at the local level.

15
16 Comment: SBWBE argues that because the department collects
17 payment reports and certified payrolls, the amount paid to the
18 DBEs should be included as a part of compliance in §9.212(b).

19
20 Response: The department disagrees. If the comment is
21 referencing the department's monitoring and enforcement process
22 and the collection of data related to monthly payment reports on
23 the departments contracts, this is administratively impossible
24 at this time. Further, the verification of DBE payment is an
25 internal process and the department has identified internal

1 procedures to verify payment and those are specified in the DBE
2 SOP.

3

4 Comment: SMWBE recommends further clarification of Small
5 Business Rules in 43 TAC Subchapter K with regard to the HUB
6 rules and certification reciprocity.

7

8 Response: The department disagrees. Subchapter K relates to the
9 reciprocity between the department and the State Comptroller's
10 Office regarding certification procedures between the two state
11 agencies. The process and procedures between the two agencies
12 are identified in an MOU between the department and the
13 Comptroller of Public Accounts.

14

15 Comment: SMWBE recommends the same language that is included in
16 §9.320 regarding documentation of good faith be included in
17 §9.227(b).

18

19 Response: The department disagrees. The department has elected
20 to execute elements of 49 C.F.R. Part 26, Appendix A in
21 reference to §9.320 of the SBE program for ease of program
22 administration. However, the department rules will not be
23 changed to add additional considerations to 43 TAC Subchapter K
24 as 49 C.F.R. Part 26, Appendix A provides good faith effort
25 guidelines for the DBE program. Those guidelines are required

1 by federal law and cannot be changed.

2

3 Comment: Mr. Jackson argues that performing compliance
4 reconsideration at the end of a contract does not work per 49
5 C.F.R. §26.39.

6

7 Response: The department does not understand how monitoring
8 performance at the end of the contract has any bearing on 49
9 C.F.R. §26.39 regarding fostering small business participation,
10 and has no response for this comment.

11

12 Comment: Mr. Jackson commented that professional participation
13 in the SBE program does exist.

14

15 Response: The comment is unclear but if the intent was to add
16 professional services to the federal SBE program component of
17 the DBE program in accordance with 49 C.F.R. §26.39, then the
18 department agrees and has made this change per the request of
19 other commenters.

20

21 Comment: Mr. Jackson argued the SBE program does not
22 differentiate between the SBE program required by FHWA or US
23 DOT, which he states are both totally different programs.

24

25 Response: The department disagrees. The SBE program for both

1 federal and state funded projects will fall under 43 TAC
2 Subchapter K, the SBE program rules.

3
4 Comment: TAAACC and MCM favor the contract compliance monitoring
5 changes in the proposed rules. They believe the changes are
6 going in the right direction.

7
8 Response: The department agrees that these rule changes will
9 improve these programs.

10
11 Comment: MIC and APIS favor the complaint process changes in the
12 proposed rules.

13
14 Response: The department agrees that a well defined complaint
15 process will improve the program.

16
17 Comment: AGC favors joint checks driven by the supplier and the
18 DBE/SBE.

19
20 Response: The department agrees that the new joint check
21 provisions address input from outside parties.

22
23 Comment: Arizpe commented that it receives solicitations for
24 services it does not provide and is not clear who could take
25 this complaint.

1

2 Response: This comment is outside the scope of the rules and
3 cannot be addressed by a change in these rules.

4

5 Comment: Arizpe is concerned that the department certification
6 requires a password to change every 45 days.

7

8 Response: This comment is outside the scope of the rules and
9 cannot be addressed by a change in these rules.

10

11 Comment: Arizpe recommends the department solicitations be
12 posted in one resource.

13

14 Response: This comment is outside the scope of the rules and
15 cannot be addressed by a change in these rules.

16

17 In addition to the changes made in response to comments, §9.220
18 is changed by adding a reference to DBE's in subsection (b)(2),
19 (3), and (4). Those references were inadvertently left out of
20 the proposed section.

21

22 STATUTORY AUTHORITY

23 The repeals and new sections are adopted under Transportation
24 Code, §201.101, which provides the Texas Transportation
25 Commission with the authority to establish rules for the conduct

1 of the work of the department, and more specifically,
2 Transportation Code, §201.702, and 49 C.F.R. Part 26, which
3 require the department to establish a program to give
4 disadvantaged businesses full access to the department's
5 contract bidding process.

6

7 CROSS REFERENCE TO STATUTE

8 Transportation Code, §201.702.

1 SUBCHAPTER J. DISADVANTAGED BUSINESS ENTERPRISE (DBE) PROGRAM

2 **§9.200. Purpose of Subchapter; Applicability of Program.**

3 (a) This subchapter establishes policies and procedures
4 related to the department's Disadvantaged Business Enterprise
5 (DBE) program in compliance with Transportation Code, §201.702,
6 and Title 49, Code of Federal Regulations, Part 26, and
7 consistent, to the extent possible, with Government Code,
8 Chapter 2161.

9 (b) The department's DBE program is applicable to all
10 department contracts and purchases funded in whole or in part
11 with federal funds received from the U.S. Department of
12 Transportation through the Federal Highway Administration,
13 Federal Transit Administration, or the Federal Aviation
14 Administration.

15

16 **§9.201. Policy.**

17 (a) It is the policy of the department to:

18 (1) ensure nondiscrimination in the award and
19 administration of contracts in the department's highway,
20 transit, and airport financial assistance programs;

21 (2) create a level playing field on which DBEs can
22 compete fairly for contracts;

1 (3) ensure that the department's DBE program is narrowly
2 tailored in accordance with applicable law;

3 (4) ensure that only firms that fully meet the program's
4 eligibility standards are permitted to participate as DBEs;

5 (5) help remove barriers to the participation of DBEs in
6 contracts;

7 (6) assist the development of firms that can compete
8 successfully in the marketplace outside the DBE program; and

9 (7) provide appropriate flexibility to entities that
10 receive federal financial assistance through the department in
11 establishing and providing opportunities for DBEs.

12 (b) The department will circulate the policy statement
13 provided by this section throughout the department's
14 organization. The department will provide the statement to
15 contractors, including DBE contractors, trade associations,
16 community organizations, minority chambers of commerce, and
17 appropriate special interest groups within the state.

18

19 **§9.202. Definitions.** The following words and terms, when used in
20 this subchapter, shall have the following meanings, unless
21 specified otherwise.

22 (1) Contract--A legally binding relationship obligating a

1 seller to furnish supplies or services, including construction
2 and professional services, and the buyer to pay for them. The
3 term includes a lease.

4 (2) Contractor--One who participates, through a contract
5 or any tier of subcontract, in a highway, transit, or airport
6 program.

7 (3) Department--The Texas Department of Transportation.

8 (4) Disadvantaged Business Enterprise (DBE)--A for-profit
9 small business:

10 (A) that is at least 51 percent owned by one or more
11 individuals who are both socially and economically disadvantaged
12 or, in the case of a corporation, in which 51 percent of the
13 stock is owned by one or more such individuals; and

14 (B) whose management and daily business operations are
15 controlled by one or more of the socially and economically
16 disadvantaged individuals who own it.

17 (5) District engineer--The chief administrative officer
18 in charge of a district of the department.

19 (6) Division--An organizational unit of the department
20 located in the department's Austin headquarters.

21 (7) DOT--The U.S. Department of Transportation, including
22 the Office of the Secretary of Transportation, the Federal
23 Highway Administration (FHWA), the Federal Transit

1 Administration (FTA), and the Federal Aviation Administration
2 (FAA).

3 (8) Executive director--The executive director of the
4 department.

5 (9) Good faith efforts--Efforts that by their scope,
6 intensity, and appropriateness to the objective can reasonably
7 be expected to fulfill the DBE program requirement.

8 (10) Native Hawaiian--Any individual whose ancestors were
9 natives, prior to 1778, of the area that now comprises the State
10 of Hawaii.

11 (11) Operating Administration (OA)--Any of the following
12 components of DOT: the Federal Aviation Administration (FAA),
13 Federal Highway Administration (FHWA), and Federal Transit
14 Administration (FTA).

15 (12) Race-conscious means--A method that is focused
16 specifically on assisting only businesses that are DBEs,
17 including women-owned DBEs.

18 (13) Race-neutral means--A method that is, or can be,
19 used to assist all small businesses rather than only DBEs. The
20 term includes gender-neutral means.

21 (14) Recipient--A public or private entity that:

22 (A) receives DOT financial assistance directly or
23 through another recipient, through the programs of the FAA,

1 FHWA, or FTA; or

2 (B) has applied for the assistance described by
3 subparagraph (A) of this paragraph.

4 (15) Socially and economically disadvantaged individual--
5 An individual who is a citizen or lawfully admitted permanent
6 resident of the U.S. and:

7 (A) whom a recipient finds to be a socially and
8 economically disadvantaged individual on a case-by-case basis;
9 or

10 (B) who is a member of one of the following groups,
11 whose members are rebuttably presumed to be socially and
12 economically disadvantaged:

13 (i) "Black Americans," which includes persons having
14 origins in any of the Black racial groups of Africa;

15 (ii) "Hispanic Americans," which includes persons of
16 Mexican, Puerto Rican, Cuban, Dominican, Central or South
17 American, or other Spanish or Portuguese culture or origin,
18 regardless of race;

19 (iii) "Native Americans," which includes persons who
20 are American Indians, Eskimos, Aleuts, or Native Hawaiians;

21 (iv) "Asian-Pacific Americans," which includes
22 persons whose origins are from Japan, China, Taiwan, Korea,
23 Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand,

1 Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the
2 U.S. Trust Territories of the Pacific Islands (Republic of
3 Palau), the Commonwealth of the Northern Mariana Islands, Macao,
4 Fiji, Tonga, Kiribati, Juvalu, Nauru, Federated States of
5 Micronesia, or Hong Kong;

6 (v) "Subcontinent Asian Americans," which includes
7 persons whose origins are from India, Pakistan, Bangladesh,
8 Bhutan, the Maldives Islands, Nepal, or Sri Lanka;

9 (vi) women; and

10 (vii) any additional groups whose members are
11 designated as socially and economically disadvantaged by the
12 Small Business Administration (SBA), at such time as the SBA
13 designation becomes effective.

14

15 **§9.203. Program Administration.**

16 (a) The department's DBE program is administered by the DBE
17 liaison officer who is appointed by and has direct access to the
18 executive director.

19 (b) The DBE liaison officer is responsible for developing,
20 implementing, and monitoring the DBE program and ensuring that
21 the department complies with applicable federal law. The DBE
22 liaison officer:

1 (1) works with divisions of the department to set overall
2 annual goals;

3 (2) directs the department's division directors and
4 district engineers in determining contractor compliance with DBE
5 requirements;

6 (3) plans and may participate in DBE training seminars;

7 (4) approves or denies contractual remedies associated
8 with non-compliance with the DBE program; and

9 (5) acts as the department's liaison with the Texas
10 Unified Certification Program (TUCP).

11 (c) The DBE liaison officer may delegate the day-to-day
12 duties associated with the administration of the DBE program.

13 These duties include:

14 (1) gathering and reporting statistical data and other
15 information to DOT;

16 (2) distributing bid notices, including instructions to
17 requests for proposal, to DBEs in a timely manner;

18 (3) identifying the contracts and procurements in the
19 solicitations for which DBE goals are to be included;

20 (4) analyzing the department's progress toward DBE goal
21 attainment and identifying ways to improve that progress;

22 (5) participating with the department's division
23 directors and district engineers in determining contractor

1 compliance with DBE requirements; and

2 (6) assisting with outreach activities to DBEs and

3 community organizations to advise them of opportunities.

4

5 **§9.204. Discriminatory Actions Prohibited.**

6 (a) An individual or entity may not exclude any person from
7 participating in, deny any person the benefits of, or otherwise
8 discriminate against anyone in connection with the award and
9 performance of a contract covered by this subchapter on the
10 basis of race, color, religion, sex, age, disability, or
11 national origin.

12 (b) An individual or entity may not use criteria or methods
13 of administration, directly or through contractual or other
14 arrangements, that have the effect of defeating or substantially
15 impairing accomplishment of the objectives of the DBE program
16 with respect to individuals of a particular race, color,
17 religion, sex, age, disability, or national origin.

18

19 **§9.205. Department Information.** In addition to any other DBE
20 information, the department will maintain:

21 (1) data associated with the DBE program as directed by
22 OAs;

1 (2) a bidders list that provides accurate data about the
2 DBE and non-DBE contractors and subcontractors who seek to work
3 on federally-assisted department contracts that can be used in
4 establishing overall DBE goals;

5 (3) for each DBE and non-DBE contractor or subcontractor
6 who seeks to work on federally-assisted department contracts:

7 (A) the firm's name;

8 (B) the firm's address;

9 (C) the firm's e-mail address, if any;

10 (D) the firm's telephone number;

11 (E) the firm's DBE certification status;

12 (F) type of work the firm has been certified to
13 perform; and

14 (G) the firm's length of existence; and

15 (4) for each DBE contractor or subcontractor who seeks to
16 work on federally-assisted department contracts, the firm's
17 annual gross receipts.

18

19 **§9.206. Contract Assurances Provisions.**

20 (a) Each agreement with the department or other recipient
21 that involves DOT funding must include: "The recipient shall not
22 discriminate on the basis of race, color, national origin, or

1 sex in the award and performance of any DOT-assisted contract or
2 in the administration of its DBE program or the requirements of
3 49 Code of Federal Regulations (C.F.R.) Part 26. The recipient
4 shall take all necessary and reasonable steps under 49 C.F.R.
5 Part 26 to ensure nondiscrimination in the award and
6 administration of DOT-assisted contracts. The recipient's DBE
7 program, as required by 49 C.F.R. Part 26 and as approved by
8 DOT, is incorporated by reference into this agreement.
9 Implementation of this program is a legal obligation and failure
10 to carry out its terms shall be treated as a violation of this
11 agreement. Upon notification to the recipient of its failure to
12 carry out its approved program, the DOT may impose sanctions as
13 provided for under 49 C.F.R. Part 26 and may, in appropriate
14 cases, refer the matter for enforcement under 18 U.S. Code
15 (U.S.C.) Chapter 1001 or the Program Fraud Civil Remedies Act of
16 1986 (31 U.S.C. §3801 et seq.)."

17 (b) Any contract or subcontract that involves DOT funding
18 must contain: "The contractor or subcontractor shall not
19 discriminate on the basis of race, color, national origin, or
20 sex in the performance of this contract. The contractor shall
21 carry out applicable requirements of 49 C.F.R. Part 26 in the
22 award and administration of DOT-assisted contracts. Failure by
23 the contractor to carry out these requirements is a material

1 breach of this contract, that may result in the termination of
2 this contract or such other remedy as the recipient deems
3 appropriate."

4
5 **§9.207. Use of Financial Institutions.**

6 (a) The department will, to the extent feasible, use
7 services offered by financial institutions that are owned and
8 controlled by socially and economically disadvantaged
9 individuals.

10 (b) The department encourages contractors to use services
11 offered by financial institutions that are owned and controlled
12 by socially and economically disadvantaged individuals.

13
14 **§9.208. Payment; Prompt Payment; Joint Checks.**

15 (a) For the purposes of this section:

16 (1) "subcontractor" includes a supplier;

17 (2) "work" includes materials that are provided by a
18 supplier at a location approved by the department;

19 (3) "satisfactory completion" occurs when:

20 (A) the subcontractor has fulfilled the contract
21 requirements of both the department and the subcontract for the
22 subcontracted work, including the submittal of all information

1 required by the specifications or by the department and
2 including any vegetative establishment, testing, maintenance,
3 and performance of other work that is the responsibility of the
4 subcontractor; and

5 (B) the work done by the subcontractor has been
6 inspected, approved, and paid for by the department; and

7 (4) "contractor" refers to a subcontractor that contracts
8 work to another tier of subcontractors.

9 (b) The department will not withhold retainage on a
10 contract executed and administered by the department. A
11 contractor that withholds retainage on a subcontractor's work
12 shall pay that retainage in full within 10 days after the date
13 of satisfactory completion of all of the subcontractor's work.

14 (c) Each DOT-assisted contract, subcontract, or material
15 purchase agreement must include provisions that substantively
16 provide that:

17 (1) within 10 days after the date that the contractor
18 receives payment for work performed by a subcontractor, the
19 contractor will pay the subcontractor for the work performed;
20 and

21 (2) the contractor will pay to a subcontractor any
22 retainage on the subcontractor's work within 10 days after the
23 date of satisfactory completion of all of the subcontractor's

1 work.

2 (d) The inspection and approval of work done by the
3 subcontractor for determining substantial completion does not
4 eliminate the contractor's responsibilities for all of the work,
5 as defined in the contract.

6 (e) The department may pursue actions against a contractor,
7 including withholding of estimates and suspending the work, for
8 noncompliance with the subcontract requirements of this section
9 on receipt of written notice with sufficient details showing the
10 subcontractor has complied with the subcontractor's obligations,
11 as described in the contract.

12 (f) Based on the department's assessment of the construction industry
13 usage of joint check agreements between contractors and subcontractors
14 working on federal-aid construction projects, the department has implemented
15 procedures for the use of joint checks on the DBE contracts executed and
16 administered by the department. The department will accept the use of a joint
17 check issued by a contractor to a subcontractor and its supplier but only if:

18 (1) the contractor does not require the subcontractor to use a supplier
19 specified by the contractor or to use the contractor's negotiated unit price;

20 (2) the subcontractor earns a profit from the material purchased;

21 (3) the subcontractor, not the contractor, negotiates the quantities, price,

1 and delivery of the materials;

2 (4) the contractor issuing the check acts solely as a guarantor;

3 (5) the subcontractor signs the joint check and releases it to the material
4 supplier, not to the contractor;

5 (6) the subcontractor is responsible both to furnish and install the
6 material;

7 (7) the subcontractor has applied for a line of credit with the supplier and
8 was either denied credit or denied a sufficient increase in its line of credit;

9 (8) the supplier is not the contractor or an affiliate of the contractor; and

10 (9) the subcontractor's account with the supplier is in the subcontractor's
11 name alone.

12 (g) The department will conduct prompt pay audits and prompt pay
13 verifications to monitor compliance with this section.

14

15 §9.209. DBE Directory.

16 (a) The department will maintain and make available to
17 interested persons a directory identifying all firms eligible to
18 participate as DBEs on department contracts.

19 (b) The DBE directory lists, at a minimum for each firm:

20 (1) the firm's address;

21 (2) the firm's phone number; and

1 (3) the types of work the firm has been certified to
2 perform as a DBE.

3 (c) The department will update the DBE directory quarterly
4 or more frequently if needed.

5

6 **§9.210. Overconcentration of DBEs.**

7 (a) The department from time to time may evaluate whether
8 there is an overconcentration of DBE firms in a certain type of
9 work.

10 (b) If the department determines that there is an
11 overconcentration of DBE firms that unduly burdens the
12 opportunity of non-DBE firms to participate in that type of
13 work, the department will implement appropriate measures, as
14 approved by the appropriate OA, to address the condition.

15

16 **§9.211. Business Development Program.** The department has
17 implemented a DBE technical assistance and supportive services
18 program to assist firms with the ability to compete successfully
19 in the highway construction industry.

20

21 **§9.212. Monitoring and Enforcement.**

22 (a) The department will monitor and enforce contract

1 requirements and verify that work committed to DBEs at contract
2 award is actually performed by the DBEs.

3 (b) The department will keep a current total of payments to
4 DBE firms for work committed to the firms at the time of
5 contract award and compare the amounts to the amounts committed
6 to DBE firms.

7 (c) The department will designate a District Disadvantaged
8 Business Enterprise Coordinator for each of the department's
9 districts. The coordinator will monitor and enforce DBE
10 contract requirements in the district for which the coordinator
11 is designated. The department will develop, disseminate, and
12 update as appropriate, standard operating procedures to be
13 followed by the coordinators.

14 (d) The department will develop, disseminate, and perform
15 an annual district DBE Program compliance audit on districts,
16 prime contractors, local governments, and other entities that
17 are recipients of federal funds, that have adopted the
18 department's DBE Program, or that assist with the administration
19 of various components of the DBE Program.

20 (e) The department will notify DOT and any appropriate
21 state or federal agency of any false, fraudulent, or dishonest
22 conduct in connection with the DBE Program.

23

1 **§9.213. Overall DBE Goal.**

2 (a) Every third year the department will set overall annual
3 goals for DBE participation in DOT-assisted contracts for the
4 following three federal fiscal years. The department may adjust
5 an overall annual goal during the three-year period if
6 circumstances warrant such an adjustment.

7 (b) An overall goal will be based on demonstrable evidence
8 of the availability of ready, willing, and able DBEs relative to
9 all businesses that are ready, willing, and able to participate
10 on the department's DOT assisted contracts and reflect the level
11 of DBE participation that the department would expect absent the
12 effects of discrimination.

13 (c) An overall goal will provide for participation by all
14 certified DBEs and will not be subdivided into group-specific
15 goals.

16

17 **§9.214. Proposed Overall Goal.**

18 (a) The department will consult with contractors; contract
19 consultants; DBEs', minority, women's, and general contractor
20 groups; community organizations; and other officials or
21 organizations that have information concerning:

22 (1) the availability of disadvantaged and non-

1 disadvantaged businesses;

2 (2) the effects of discrimination on opportunities for
3 DBEs; and

4 (3) the department's efforts to establish a level playing
5 field for the participation of DBEs.

6 (b) The department will set proposed overall annual goals
7 for the following three federal fiscal years based on evidence
8 obtained by the department.

9 (c) For FHWA-assisted contracts, an overall goal will be
10 expressed as a percentage of all Federal-aid highway funds that
11 the department will spend on those contracts in the fiscal year
12 for which is it effective.

13 (d) For FTA-assisted or FAA-assisted contracts, an overall
14 goal will be expressed as a percentage of all FTA funds, other
15 than those to be used for the purchase of transit vehicles, or
16 FAA funds that the department will spend in FTA-assisted or FAA-
17 assisted contracts, respectively, in the fiscal year for which
18 it is effective, unless the FTA or FAA Administrator permits the
19 overall goal to be expressed as a percentage of funds for a
20 particular grant or project or group of grants or projects.

21

22 **§9.215. Public Participation in Establishing Overall Goal.**

1 (a) After setting proposed overall goals under **§9.214** of this
2 **subchapter (relating to Proposed Overall Goal)**, the department will
3 publish in general circulation media, available minority-focused
4 media, and trade association publications a notice that
5 announces the department's proposed overall goals.

6 (b) The notice must:

7 (1) state that the proposed goals and their rationale are
8 available for inspection during normal business hours at the
9 department's principal office on or before the 30th day after
10 the date of the notice;

11 (2) state that the department and the DOT will accept
12 comments on the proposed goals on or before the 45th day after
13 the date of the notice; and

14 (3) include addresses to which comments may be sent.
15

16 **§9.216. Setting Overall Goal.** After considering public comments on
17 the proposed goals, the department will set the overall annual
18 DBE goals for the following three federal fiscal years.

19

20 **§9.217. Submission of Overall Goal.**

21 (a) The department will submit the overall goals for the
22 following three federal fiscal years and the information

1 described by subsection (b) of this section to the appropriate
2 OA for review by August 1 of the year in which the three-year
3 period begins, unless a different submission date is provided
4 under federal law.

5 (b) The department will submit with the overall goals a
6 description of the methodology used to establish the goals,
7 including:

8 (1) the evidence with which the base figure was
9 calculated;

10 (2) a summary listing of the relevant available evidence
11 in the state and, if not used, an explanation of why it was not
12 used to adjust the base figure; and

13 (3) a projection of the part of each overall goal that
14 the department expects to meet through race-neutral means and
15 through race-conscious means.

16 (c) Any changes to an annual goal that has been set by the
17 department must be submitted to the appropriate OA for review
18 under **§9.218** of this subchapter (relating to Review by Operating Administration
19 (OA)).

20

21 **§9.218. Review by Operating Administration (OA).**

22 (a) Prior approval of the department's overall DBE goal by

1 the OA is not required.

2 (b) The OA may adjust the overall goal or require that the
3 department adjust the overall goal if the OA determines that:

4 (1) the overall goal has not been calculated correctly;

5 or

6 (2) the department's method for calculating the goals is
7 inadequate.

8 (c) If the overall goal is adjusted under subsection (b) of
9 this section, the adjusted overall goal is binding.

10 (d) The projection of the part of the overall goal that the
11 department expects to meet through race-neutral means submitted
12 under §9.217(b)(3) of this subchapter (relating to **Submission of**
13 **Overall Goal**) is subject to approval by the appropriate OA.

14 (e) The goal becomes effective October 1 of the year in
15 which it begins to apply unless otherwise provided by DOT.

16

17 **§9.219. Interim Steps.**

18 (a) The department will request the approval of the
19 appropriate OA for an interim goal or goal-setting mechanism if
20 the department needs additional time to collect data or take
21 other steps to develop an approach to setting overall goals.

22 (b) A goal-setting mechanism must:

1 (1) reflect the relative availability of DBEs in the
2 state to the maximum extent feasible given the available data;
3 and

4 (2) avoid imposing undue burdens on non-DBEs.
5

6 **§9.220. Use of Race-neutral Means.**

7 (a) The department will meet as much of its overall goal as
8 feasible by using race-neutral means of facilitating DBE
9 participation.

10 (b) Race-neutral means include:

11 (1) arranging solicitations, times for the presentation
12 of bids, quantities, specifications, and delivery schedules in
13 ways that facilitate DBE and other small business participation;

14 (2) providing assistance to DBEs and other small
15 businesses in overcoming limitations such as the inability to
16 obtain bonding or financing;

17 (3) providing technical assistance and other services to
18 DBEs and other small businesses;

19 (4) carrying out information and communications programs
20 on contracting procedures and specific contract opportunities to
21 ensure the inclusion of DBEs and other small businesses;

22 (5) implementing a supportive services program to develop

1 and improve immediate and long-term business management, record
2 keeping, and financial and accounting capability for DBEs and
3 other small businesses;

4 (6) providing services to help DBEs, and other small
5 businesses, improve long-term development, increase
6 opportunities to participate in a variety of kinds of work,
7 handle increasingly significant projects, and achieve eventual
8 self-sufficiency;

9 (7) establishing a program to assist new, start-up firms,
10 particularly in fields in which DBE participation has
11 historically been low;

12 (8) ensuring distribution of the DBE directory to the
13 widest feasible number of potential contractors; and

14 (9) assisting DBEs and other small businesses in
15 developing their capability to use emerging technology and
16 conduct business through electronic media.

17

18 **§9.221. Establishment of Contract Goals.**

19 (a) The department will establish contract goals for DOT-
20 assisted contracts that have subcontracting possibilities to
21 meet any part of the department's overall goal that the
22 department does not project being met using race-neutral means.

1 The department will determine which of those contracts will have
2 a contract goal.

3 (b) The goal for a specific contract may be higher or lower
4 than that percentage level of the overall goal, depending on
5 factors such as the type of work involved, the location of the
6 work, and the availability of DBEs for the work of the
7 particular contract.

8 (c) Contract goals will be set so that cumulatively they
9 will result in meeting the part of the annual overall goal that
10 is not projected as being met through the use of race-neutral
11 means.

12 (d) OA approval of each contract goal is not required.
13 However, an OA may review and approve or disapprove any contract
14 goal established.

15 (e) A contract goal will provide for participation by all
16 certified DBEs and will not be subdivided into group-specific
17 goals.

18

19 **§9.222. Adjustment of Contract Goals.**

20 (a) If the department determines that the overall goal will
21 be exceeded, the department will reduce or eliminate the use of
22 contract goals for the remainder of the fiscal year to the

1 extent necessary to ensure that the use of contract goals does
2 not result in exceeding the overall goal.

3 (b) If the department determines that it will not meet the
4 overall goal, the department will make appropriate modifications
5 in the use of race-neutral or race-conscious means to meet the
6 overall goal.

7 (c) If a contract change order increases the contract value
8 of a contract that includes federal funding, the increased
9 contract value may become subject to these same goal
10 requirements applicable to the original contract value,
11 requiring an increase in the total DBE participation for the
12 contract.

13

14 **§9.223. Prohibition on Use of Contract Goals.** The department will not
15 set contract goals in a year:

16 (1) in which the department projects that it will meet
17 its overall goal using race-neutral means; or

18 (2) if for the two years preceding that year the
19 department has met or exceeded its overall goal using only race-
20 neutral means.

21

22 **§9.224. Reduction on Use of Contract Goals.** If the department obtains,

1 through the use of contract goals, DBE participation that
2 exceeds the overall goal in two consecutive years, the
3 department in the following year will reduce the use of contract
4 goals by the percentage that the overall goals were exceeded
5 during that two-year period.

6

7 **§9.225. Maintaining and Reporting Data on Contract Goals.** In a year in
8 which the department projects the use of contract goals, the
9 department will maintain data separately on DBE achievements in
10 the contracts with contract goals and contracts without contract
11 goals. The data will be reported to the appropriate OA under
12 §9.236 of this subchapter (relating to **Reporting of DBE**
13 **Participation**).

14

15 **§9.226. Contract Goal Good Faith Efforts.** If a DBE contract goal has
16 been established, the department will award the contract only to
17 a bidder that makes good faith efforts to meet the goal as
18 described in 49 C.F.R. Part 26, Appendix A.

19

20 **§9.227. Information from Bidders.**

21 (a) Before the execution of a contract, the apparent
22 successful bidder must submit to the department:

1 (1) the names and addresses of each subcontractor,
2 identifying DBEs that will participate in the contract;

3 (2) a description of the work that each DBE will perform;

4 (3) the dollar amount of the participation of each DBE;

5 (4) written documentation of the bidder's commitment to
6 use each DBE subcontractor whose participation the bidder
7 submits to meet a contract goal;

8 (5) written confirmation from each DBE that it is
9 participating in the contract as provided in the bidder's
10 commitment; and

11 (6) if the contract goal is not met by DBE commitments,
12 evidence of the bidder's good faith efforts to obtain DBE
13 participation to meet the contract goal.

14 (b) Each bidder shall document the bidder's good faith
15 efforts to obtain commitment to meet the contract goal. Good
16 faith efforts are shown if the bidder documents that:

17 (1) sufficient DBE participation has been obtained to
18 meet the contract goal; or

19 (2) the bidder took the types of action that may be
20 considered as good faith efforts as referenced in 49 C.F.R. Part
21 26, Appendix A, to obtain the commitments to meet the contract
22 goal even though the bidder did not succeed in obtaining
23 sufficient DBE participation to meet the contract goal.

1 (c) If the bidder to whom the contract is conditionally
2 awarded refuses, neglects, or fails to obtain the commitments to
3 meet the DBE goal or to comply with good faith efforts
4 requirements, the proposal guaranty filed with the bid is
5 forfeited to the department.

6

7 **§9.228. Reconsideration of the Department's Good Faith Efforts Determination**
8 **before the Execution of the Contract.**

9 (a) If the department determines that a bidder failed to
10 satisfy the good faith efforts requirements before the execution
11 of the contract, the department will notify the bidder of the
12 failure and will give the bidder an opportunity for
13 administrative reconsideration.

14 (b) The bidder must request an administrative
15 reconsideration of that determination within 10 days of the date
16 of receipt of the notice provided under subsection (a) of this
17 section.

18 (c) If a reconsideration request is timely received, the
19 reconsideration decision will be made by the department's DBE
20 liaison officer or, if the DBE liaison officer took part in the
21 original determination that the bidder failed to satisfy the
22 good faith effort requirements, a department employee who holds

1 a senior leadership position of the department and reports
2 directly to the executive director, who did not take part in the
3 original determination, and who is appointed by the executive
4 director to make the reconsideration decision.

5 (d) The bidder may provide written documentation or
6 argument concerning whether the assigned DBE contract goal was
7 met or whether adequate good faith efforts were made to meet the
8 contract goal.

9 (e) The DBE liaison or other department employee making the
10 reconsideration determination may request a meeting with the
11 bidder to discuss whether the goal commitments were met or
12 whether adequate good faith efforts were made to obtain the
13 commitments to meet the contract goal.

14 (f) The meeting must be held within 30 days of the date of
15 the request submitted under subsection (b) of this section. If
16 the bidder is unavailable to meet during the 30-day period, the
17 reconsideration decision will be made on the written information
18 provided by the bidder.

19 (g) The department will provide to the bidder a written
20 decision that explains the basis for finding that the bidder did
21 or did not meet the contract goal or make adequate good faith
22 efforts to meet the contract goal within 30 days of the date of
23 the notice issued in subsection (a) of this section.

1 (h) The reconsideration decision is final and is not
2 administratively appealed to DOT.

3

4 **§9.229. DBE Substitutions and Terminations.**

5 (a) A contractor may not substitute for or terminate a DBE
6 subcontractor listed in the information provided under §9.227 of
7 this subchapter (relating to Information from Bidders), without
8 the written consent of the department.

9 (b) Before requesting the department's approval to
10 terminate or substitute for a DBE, the contractor must give
11 written notice to the listed DBE with a copy to the department
12 of the contractor's intent to request the termination or
13 substitution of the DBE and provide a detailed explanation for
14 the request.

15 (c) The contractor must give the listed DBE five days to
16 respond to the notice and to advise the department and the
17 contractor of the reasons the listed DBE objects to the proposed
18 termination or substitution. The department may provide a
19 shorter response time if required in a particular case as a
20 matter of public necessity.

21 (d) When a DBE subcontractor is terminated or fails to
22 complete its work on the contract for any reason, the contractor

1 shall make good faith efforts to find, as a substitute for the
2 original DBE, another DBE to perform, at least to the extent
3 needed to meet the established contract goal the work that the
4 original DBE was to have performed under the contract. If the
5 contractor cannot find another DBE to perform the work
6 originally committed to the terminated DBE the contractor shall
7 make good faith efforts to obtain DBEs to perform other work
8 under the contract equal to the work originally committed to the
9 terminated DBE.

10 (e) The contractor must submit for approval the name of the
11 DBE subcontractor that is to replace the DBE subcontractor
12 listed in the original commitment agreement. Work performed by
13 a substitute before the department has approved the substitution
14 will not be counted toward the DBE goal.

15 (f) If the department determines there is good cause for
16 the termination or replacement the department will provide
17 written consent for the action.

18 (g) Each contract will contain provisions that state the
19 appropriate administrative remedies that apply if the contractor
20 fails to comply with this section.

21

22 **§9.230. Labor-only Subcontracts.**

1 (a) The department may allow labor-only DBE subcontract
2 arrangements for appropriate work categories.

3 (b) A contractor must clearly outline the labor-only status
4 in the subcontract with the DBE subcontractor.

5

6 §9.231. Computing Work Performed by DBE.

7 (a) To be counted toward a DBE goal:

8 (1) the work must actually be performed by a DBE; and

9 (2) the DBE must perform a commercially useful function.

10 (b) The entire amount of the fee or commission charged by a
11 DBE for providing a bona fide service, such as professional,
12 technical, consultant, or managerial services, or for providing
13 bonds or insurance specifically required for the performance of
14 a DOT-assisted contract, will be counted toward DBE goals,
15 provided that the fee or commission is determined to be
16 reasonable and not excessive as compared with those customarily
17 allowed for similar services.

18 (c) The amount of the part of a construction contract or
19 other contract not covered by subsection (a) of this section
20 that is performed by the DBE's own forces may be counted toward
21 the DBE goal. The cost of supplies and material obtained by the
22 DBE for the contract work, including supplies purchased or
23 equipment leased by the DBE, other than supplies and equipment

1 the DBE purchases or leases from the prime contractor or its
2 affiliate, is included.

3 (d) If a DBE subcontracts a part of the work of its
4 contract to another firm, the value of the subcontracted work
5 will be counted toward the DBE goal only if the DBE's
6 subcontractor is a DBE.

7 (e) If a DBE is a participant in a joint venture, only the
8 part of the total value of the contract equal to the distinct,
9 clearly defined part of the contract work that the DBE performs
10 with its own forces may be counted toward the DBE goal. For the
11 purposes of this subsection, a "joint venture" is an association
12 of a DBE firm and one or more other firms to carry out a single,
13 for-profit business enterprise, for which the parties combine
14 their property, capital, efforts, skills, and knowledge, and in
15 which the DBE is responsible for a distinct, clearly defined
16 portion of the work of the contract and whose share in the
17 capital contribution, control, management, risks, and profits of
18 the joint venture are commensurate with its ownership interest.

19

20 **§9.232. Commercially Useful Function.**

21 (a) A DBE is considered to perform a commercially useful
22 function (CUF) if the DBE is responsible for:

1 (1) the performance of the work subject to the contract
2 and for the execution of its responsibilities by actually
3 performing, managing, and supervising the work involved; and

4 (2) the provision of the materials and supplies used in
5 the performance of its contract, unless the contract provides
6 for labor services only and is approved by the department, and
7 includes:

8 (A) the negotiation of the price of the materials and
9 supplies;

10 (B) the determination of the quality, if applicable,
11 and quantity of the materials and supplies;

12 (C) the ordering of the material and supplies;

13 (D) the installation of the material, if applicable;

14 and

15 (E) payment for the material.

16 (b) In determining whether a DBE is performing a CUF, the
17 department will consider:

18 (1) the amount of work subcontracted by the DBE;

19 (2) industry practices;

20 (3) whether the amount the DBE is paid under the contract
21 is commensurate with the work actually being performed by the
22 DBE;

23 (4) the amount of DBE credit claimed for the DBE's

1 performance; and

2 (5) any other factor that the department determines to be
3 relevant.

4 (c) A DBE does not perform a commercially useful function
5 if its role is limited to that of an extra participant in a
6 transaction, contract, or project through which funds are passed
7 in order to obtain the appearance of DBE participation. In
8 determining whether a DBE is an extra participant, the
9 department will examine similar transactions, particularly those
10 in which DBEs do not participate.

11 (d) A DBE is presumed not to be performing a CUF if the
12 DBE:

13 (1) does not perform or exercise responsibility for at
14 least 30 percent of the total cost of its contract with its own
15 work force; or

16 (2) subcontracts a greater portion of the work of a
17 contract than would be expected on the basis of normal industry
18 practice for the type of work involved.

19 (e) A DBE may present evidence to the department to rebut
20 the presumption provided under subsection (d) of this section.

21 (f) A decision regarding a DBE's CUF is subject to review
22 by the appropriate OA, but is not administratively appealable to
23 DOT.

1

2 **§9.233. Commercially Useful Function by DBE Trucking Firm.**

3 (a) A DBE trucking firm is considered to perform a CUF if
4 the DBE:

5 (1) is responsible for the management and supervision of
6 the entire trucking operation for its part of the contract and
7 is not part of a contrived arrangement for the purpose of
8 meeting DBE goals; and

9 (2) owns and operates at least one fully licensed,
10 insured, and operational truck used on the contract.

11 (b) A DBE receives credit for the total value of the
12 transportation services it provides on the contract using trucks
13 it owns, insures, and operates using drivers it employs.

14 (c) A DBE that leases trucks from another DBE, including an
15 owner-operator who is certified as a DBE, receives credit for
16 the total value of the transportation services provided on the
17 contract using the leased trucks.

18 (d) The DBE that leases trucks from a non-DBE is entitled
19 to credit for the total value of transportation services
20 provided by non-DBE lessees, not to exceed the value of
21 transportation services provided by the DBE-owned trucks on the
22 contract. Additional participation by non-DBE lessees receive

1 credit only for the fee or commission the DBE receives as a
2 result of the lease arrangement.

3 (e) If a DBE trucking firm enters into a lease for one or
4 more trucks, the lease must provide that the DBE has control of
5 the truck. A leased truck may be used, with the consent of the
6 DBE, for work for a person other than the DBE during the term of
7 the lease. A leased truck must display the name and
8 identification number of the DBE.

9

10 **§9.234. Counting Materials or Supplies Provided by DBE Manufacturer or**
11 **Regular Dealer.**

12 (a) For the purposes of this section:

13 (1) a DBE manufacturer is a firm that operates or
14 maintains a factory or establishment that produces, on the
15 premises, the materials or supplies that are required under the
16 contract and are of the general character described by the
17 specifications; and

18 (2) subject to subsections (b) and (c) of this section, a
19 DBE regular dealer is an established, regular firm that:

20 (A) engages, as its principal business and under its
21 own name, in the purchase and sale or lease of the materials or
22 supplies described by paragraph (1) of this subsection; and

1 (B) owns, operates, or maintains a store, warehouse, or
2 other establishment in which those materials or supplies are
3 bought, kept in stock, and regularly sold or leased to the
4 public in the usual course of business.

5 (b) For the purposes of this section, a person may be a
6 regular dealer in bulk items such as petroleum products, steel,
7 cement, gravel, stone, or asphalt without owning, operating, or
8 maintaining a place of business as provided by subsection
9 (a)(2)(B) of this section if the person both owns and operates
10 distribution equipment for the products or materials. Any
11 supplementing of a regular dealer's own distribution equipment
12 must be by a long-term lease and not on an ad hoc or contract-
13 by-contract basis.

14 (c) For the purposes of this section, a packager, broker,
15 manufacturer's representative, or other person who arranges or
16 expedites transactions is not a regular dealer.

17 (d) The total cost of the materials and supplies purchased
18 from a DBE manufacturer may be counted toward the DBE goals.

19 (e) Sixty percent of the total cost of the materials and
20 supplies purchased from a DBE regular dealer may be counted
21 toward the DBE goals.

22 (f) The following may be counted toward the DBE goals to
23 the extent the amounts are determined to be reasonable and not

1 excessive as compared with fees customarily allowed for similar
2 services and subject to subsection (g) of this section:

3 (1) the total amount of fees or commissions charged for
4 assistance in the procurement of the materials and supplies
5 provided by a DBE that is neither a DBE manufacturer nor a DBE
6 regular dealer; and

7 (2) the total amount of fees or transportation charges
8 for the delivery to the job site of those materials or supplies
9 required on a job site.

10 (g) None of the cost of the materials or supplies may be
11 counted toward DBE goals under subsection (f) of this section.

12

13 **§9.235. Limitations on Amounts Counted toward DBE Goals.**

14 (a) Only DBE firms certified at the time of execution of
15 the contract, subcontract, or purchase order, as appropriate,
16 are eligible for DBE goal participation.

17 (b) Work performed on a contract by a firm after it has
18 ceased to be certified as a DBE will not be counted toward the
19 overall annual DBE goal.

20 (c) Participation by a DBE on a contract will not be
21 counted toward DBE goals until the amount of the participation
22 has been paid to the DBE.

1 (d) Payments made to a DBE that was not on the original
2 commitment may be counted toward the contract goal if that DBE
3 was certified as a DBE before the execution of the subcontract
4 and has performed a CUF.

5

6 **§9.236. Reporting of DBE Participation.**

7 (a) The department annually will report DBE participation
8 to each OA.

9 (b) The report will provide the payments made to DBEs and
10 contract goal shortfalls on DOT-assisted contracts.

11 (c) During any year in which the department's DBE goals are
12 satisfied through race-neutral and contract specific means, the
13 department will report the DBE achievements separately for
14 achievements on contracts with goals and those without goals.

15

16 **§9.237. Determination of Noncompliance; Sanctions.**

17 (a) The department may determine that the contractor failed
18 to satisfy the good faith efforts requirements in the
19 performance of the contract, or violated any provision of this
20 subchapter, the DBE provisions of the contract, or 49 C.F.R.
21 Part 26.

22 (b) The department may impose any of the following

1 sanctions:

2 (1) a letter of reprimand;

3 (2) contract termination;

4 (3) required participation in DBE outreach programs;

5 (4) required participation in DBE mentor program;

6 (5) liquidated damages; and

7 (6) any other remedy available by law.

8 (c) Factors to be considered in imposing sanctions include:

9 (1) the magnitude and the type of noncompliance described
10 by subsection (a) of this section;

11 (2) the degree of the contractor's culpability;

12 (3) any steps taken to rectify the situation;

13 (4) the contractor's record of performance on other
14 projects including:

15 (A) the contractor's annual DBE participation above the
16 DBE goals;

17 (B) the contractor's annual DBE participation on
18 projects without goals;

19 (C) the number of complaints the department has
20 received from DBEs about the contractor; and

21 (D) the number of times the contractor has been
22 previously sanctioned by the department under this section; and

23 (5) whether a contractor falsified, misrepresented, or

1 withheld information.

2 (d) The department will notify the contractor in writing of
3 the determination under this section. The notice will include
4 the reasons for that determination and specify the resulting
5 sanctions, if any.

6

7 §9.238. Reconsideration of the Department's Noncompliance
8 Determination.

9 (a) A contractor may request an administrative
10 reconsideration of the determination made under §9.237 of this
11 subchapter (relating to Determination of Noncompliance;
12 Sanctions), including any sanctions imposed, within 30 days
13 after the date that the notice of the determination is sent to
14 the contractor.

15 (b) If a request for reconsideration of a determination is
16 not filed within the period specified in subsection (a) of this
17 section, the determination made under §9.237 of this chapter and
18 any imposed sanction is final and further administrative appeal
19 is barred.

20 (c) A contractor that requests administrative
21 reconsideration of a determination under subsection (a) of this
22 section must provide with the request written documentation or
23 argument to support its position that the noncompliance

1 determination was made in error by the department.

2 (d) The department may withhold final payment on the
3 contract until the compliance determination is final.

4 (e) The executive director will appoint a department
5 employee to perform the administrative reconsideration of the
6 determination. The employee must hold a senior leadership
7 position in the department and report directly to the executive
8 director. A person who took part in the original determination
9 is not eligible for appointment under this subsection. The
10 appointed employee will act as an administrative hearing
11 officer.

12 (f) The person appointed under subsection (e) of this
13 section will make the final reconsideration decision. The
14 sanctions to be imposed may be changed in the final
15 reconsideration decision.

16 (g) Before making the final reconsideration decision, the
17 person appointed under subsection (e) of this section may decide
18 that an in-person hearing is needed to make a final
19 reconsideration decision, in which event the person will act as
20 the administrative hearing officer. The department will contact
21 the contractor or respondent to schedule the in-person hearing.
22 The hearing will be scheduled for a date that is within 30 days
23 after the date that the determination to hold an in-person

1 hearing is made. The hearing may be rescheduled at the request
2 of either party but must be rescheduled for a date that is
3 within 180 days after the date of the original in-person
4 hearing.

5 (h) The department will provide to the contractor a written
6 decision that explains the reconsideration decision and if the
7 decision is a finding of non-compliance, the basis for that
8 finding.

9 (i) A reconsideration decision under subsection (g) of this
10 section, including sanctions imposed under that decision, is
11 final and further administrative appeal is barred.

12

13 **§9.239. Submission of Program Changes to Operating Administration (OA).** If
14 the department proposes significant changes to a DBE program
15 that has been approved by an OA, the department will submit
16 those changes to the OA for approval.

17

18 **§9.240. Certification of DBEs.**

19 (a) The department is a member of the Texas Unified
20 Certification Program (TUCP), established by a memorandum of
21 agreement approved by DOT and affective February 7, 2012.

22 (b) The TUCP is responsible for all of the certification of

1 DBEs in the state.

2 (c) An application for DBE certification must be made as
3 provided by the TUCP.

4 (d) Under federal law, an inconsistency or ambiguity in the
5 TUCP agreement will be resolved by giving precedence, in order
6 of priority, to:

7 (1) 49 C.F.R. Part 23, Subpart C;

8 (2) 49 C.F.R. Part 26, Subpart E;

9 (3) applicable DOT Directives;

10 (4) the DOT approved DBE Program;

11 (5) any applicable state law; and

12 (6) TUCP Standard Operating Procedures.

13

14 §9.241. Business Development Program. The department has
15 implemented a DBE technical assistance and supportive services
16 program to provide firms resources needed to bid and participate
17 in highway construction contracts.

18

19 §9.242. Complaint Process; Review.

20 (a) A DBE certification complaint may be filed directly
21 with the U.S. Department of Transportation or with the
22 department if the department is the TUCP member that certified
23 or denied certification to the entity at issue. The complaint

1 must be in writing and filed within 180 days after:

2 (1) the date of an alleged discrimination or violation of
3 the DBE program; or

4 (2) the date on which a continuing course of conduct in
5 violation of the DBE program was discovered.

6 (b) A person may file a complaint with the department of
7 any DBE program violation. The complaint must be made in
8 writing and filed within 90 days after:

9 (1) the date of the alleged discrimination or violation
10 of the DBE program; or

11 (2) the date on which a continuing course of conduct in
12 violation of the DBE program was discovered.

13 (c) To be filed with the department, a complaint must be
14 sent to the executive director.

15 (d) The department will make an initial determination of
16 whether an investigation is warranted based on the information
17 provided in the complaint. If a decision is made that the
18 complaint does not warrant an investigation, the department will
19 notify the complainant in writing of that decision.

20 (e) If a complaint that the department has determined
21 warrants an investigation is against a DBE, contractor, or sub-
22 recipient, the department will notify that entity of the pending
23 complaint and provide that entity an opportunity to respond to

1 the allegations.

2 (f) The department will notify the complainant and
3 respondent of the outcome of the complaint investigation.

4 (g) If the department's finding confirms the complaint, the
5 department may take any action warranted under this subchapter,
6 the contract, or the TUCP agreement, or may meet with all
7 complainants and respondents to discuss a conciliation
8 agreement. If the department holds a conciliation agreement
9 discussion and all parties agree to a resolution of the
10 complaint, the department will prepare a conciliation agreement
11 for execution and will monitor compliance with the agreement.
12 If the parties fail to agree or do not execute the agreement,
13 the department will decide which corrective action is warranted.

1 SUBCHAPTER K. SMALL BUSINESS ENTERPRISE (SBE) PROGRAM

2 §9.300. Policy. It is the policy of the department to:

3 (1) ensure that Small Business Enterprises shall have an
4 equal opportunity to participate in the performance of
5 contracts;

6 (2) create a level playing field on which Small Business
7 Enterprises can compete fairly for contracts and subcontracts;

8 (3) help remove barriers to the participation of Small
9 Business Enterprises in department contracts;

10 (4) assist in the development of firms that can compete
11 successfully in the market place outside the Small Business
12 Enterprise program; and

13 (5) develop and maintain a program in order to facilitate
14 contracting opportunities for small businesses.

15

16 §9.301. Applicability of Program. The Small Business
17 Enterprise program applies to all highway construction and
18 maintenance contracts that are funded entirely with state and
19 local funds and all federally funded projects in which a DBE
20 goal is not provided.

21

22 §9.302. Definitions. The following words and terms, when used
23 in this subchapter, shall have the following meanings, unless

NOTE: New Sections

Exhibit C

OGC: 06/16/12 10:22 AM

1 the context clearly indicates otherwise.

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

3 (2) Construction contract--A contract entered under
4 Transportation Code, Chapter 223, Subchapter A, for the
5 construction or reconstruction of a segment of the state highway
6 system.

7 (3) Contract--A highway construction or maintenance
8 contract that is subject to this subchapter.

9 (4) Contractor--One who participates, through a contract
10 or any tier of subcontract, in a highway, transit, or airport
11 program.

12 (5) Department--The Texas Department of Transportation.

13 (6) Disadvantage Business Enterprise (DBE)--A business
14 certified as a disadvantaged business in accordance with the
15 Texas Unified Certification Program (TUCP).

16 (7) Executive director--The executive director of the
17 department.

18 (8) Firm--A business entity, including a sole
19 proprietorship, partnership, or other association, or
20 corporation.

21 (9) Historically Underutilized Business (HUB)--Any
22 business certified as a historically underutilized business by
23 the Texas Comptroller of Public Accounts.

NOTE: New Sections

Exhibit C

OGC: 06/16/12 10:22 AM

1 (10) Maintenance contract--A contract entered under
2 Transportation Code, Chapter 223, Subchapter A, for the
3 maintenance of a segment of the state highway system.

4 (11) Respondent--A person that responds to an invitation
5 to bid, request for proposal, or comparable solicitation related
6 to a contract to which this subchapter applies.

7 (12) Small business enterprise (SBE)--A firm that is
8 certified as a small business enterprise under this subchapter.

9

10 §9.304. Eligibility for Certification. To be eligible for
11 certification as an SBE:

12 (1) a firm's annual gross receipts, including the annual
13 gross receipts of all of the firm's affiliates, for the three
14 preceding completed fiscal years may not have exceeded the
15 United States Small Business Administration's size standard for
16 the North American Industry Classification Code, as provided by
17 13 C.F.R. §121.201, that is designated as the principal business
18 of the firm; and

19 (2) at least 51 percent of the firm's assets and interest
20 and classes of stock and equitable securities, if applicable,
21 must be owned by one or more persons who are United States
22 citizens or lawfully admitted permanent residents.

23

NOTE: New Sections

Exhibit C

OGC: 06/16/12 10:22 AM

1 §9.305. Application for SBE Certification.

2 (a) To be certified as an SBE, a firm must submit to the
3 department, except as provided by subsection (b) of this
4 section, a written application on a form prescribed by the
5 department that affirms under penalty of perjury that the firm
6 qualifies as an SBE.

7 (b) A firm certified as a disadvantaged business enterprise
8 (DBE) or a Historically Underutilized Business (HUB) is eligible
9 to be considered for SBE certification without submitting an SBE
10 application.

11 (c) If requested by the department, an applicant must
12 provide the requested materials and information necessary to
13 demonstrate the qualifications as an SBE.

14 (d) A firm seeking certification has the burden of
15 demonstrating by a preponderance of the evidence that it meets
16 the certification standards.

17

18 §9.306. Reapplication after Withdrawal of Application. An
19 applicant that withdraws its application for SBE certification
20 may reapply at any time.

21

22 §9.307. Review and Evaluation of Certification Application.

23 (a) The department will review and evaluate applications

NOTE: New Sections

Exhibit C

OGC: 06/16/12 10:22 AM

1 for SBE certification and may perform on-site inspections to
2 verify eligibility.

3 (b) The department may deny an application if:

4 (1) the application is not satisfactorily completed;

5 (2) the applicant is not eligible to be certified as an

6 SBE;

7 (3) the application contains false information; or

8 (4) the applicant does not provide the required

9 information.

10

11 §9.308. Certification Decision.

12 (a) The department shall certify the applicant as an SBE or

13 deny the application within 90 days after the date that the

14 department receives a satisfactorily completed application.

15 (b) If the application is denied, the department will

16 notify an applicant in writing and state the reasons for the

17 denial.

18 (c) A firm may not reapply for SBE certification within 12

19 months after the date of a denial notice.

20

21 §9.309. Certification Period; Recertification.

22 (a) An SBE certification is valid for three years.

23 (b) To be recertified as an SBE, a firm must submit an

NOTE: New Sections

Exhibit C

OGC: 06/16/12 10:22 AM

1 application for certification and any requested documentation
2 under §9.305 of this subchapter (relating to Application for SBE
3 Certification).

4

5 §9.310. Applicant's Answer to Denial Notice.

6 (a) An applicant may send to the department a written
7 response to an application denial within 15 working days after
8 the date that the department sends notice of denial under §9.308
9 of this subchapter (relating to Certification Decision).

10 (b) If the applicant does not send a written response
11 within the 15-day period, the denial of certification is final.

12 (c) If an applicant responds within the period provided
13 under subsection (a) of this section, the department will:

14 (1) certify the applicant if the response resolves the
15 eligibility deficiencies; or

16 (2) deny the application if the response does not resolve
17 the eligibility deficiencies.

18

19 §9.311. Certification Challenges.

20 (a) A person may challenge the eligibility of a firm
21 certified or seeking to be certified as an SBE.

22 (b) A challenge must be in writing, signed and dated by the
23 challenger, and set forth the factual basis for the challenge.

NOTE: New Sections

Exhibit C

OGC: 06/16/12 10:22 AM

1 (c) After receiving a challenge, the department will
2 determine if there is reason to believe, on the basis of the
3 information provided by the challenger, that the firm is not
4 eligible.

5 (d) To the extent allowed by law, the department will keep
6 the identity of a challenger confidential unless otherwise
7 authorized by the challenger. The department will advise the
8 challenger that if keeping the identity of the challenger
9 confidential hinders the investigation, the investigation may be
10 closed.

11 (e) The department will review the challenged firm's
12 record, any material provided by that firm and the challenger,
13 and other available information. All parties to the challenge
14 must cooperate with the review.

15 (f) If the department determines that there is reasonable
16 cause to believe that the challenged firm is ineligible, the
17 department will provide a written notice to the firm proposing
18 to find the firm ineligible, stating the reasons for the
19 proposed determination, and offering the firm the opportunity to
20 present information and arguments in writing. If the challenged
21 firm fails to respond to the notice before the 15th working day
22 after the date that the notice is sent, the certification is
23 withdrawn or the application is denied, as appropriate.

NOTE: New Sections

Exhibit C

OGC: 06/16/12 10:22 AM

1 (g) If the department determines that there is not
2 reasonable cause to believe that the challenged firm is
3 ineligible, the department will notify the challenger in writing
4 of the determination and the reason for it.

5

6 §9.312. Department Challenges.

7 (a) If the department receives information that provides
8 reasonable cause to believe that the firm has become ineligible
9 to be certified as an SBE, other than information provided by a
10 challenger under §9.311 of this subchapter (relating to
11 Certification Challenges), the department will provide a written
12 notice to the firm proposing to find the firm ineligible and
13 stating the reasons for it.

14 (b) The department will give the firm an opportunity to
15 present information and arguments in writing concerning its
16 eligibility.

17

18 §9.313. SBE Directory.

19 (a) The department will maintain and make available to
20 interested persons a directory identifying all firms eligible to
21 participate as SBEs on department contracts.

22 (b) The SBE directory lists, at a minimum for each firm:

23 (1) the firm's address;

- 1 (2) the firm's e-mail address, if any;
- 2 (3) the firm's phone number; and
- 3 (4) the types of work the firm has been certified to
- 4 perform as an SBE.

5 (c) The department will update the SBE directory quarterly

6 or more frequently if needed.

7

8 §9.314. SBE Overall Goals.

9 (a) The executive director will establish overall annual

10 SBE contracting goals for the department based on the

11 availability of certified SBEs and an estimation of SBE

12 opportunities in the contracts that will be entered into in the

13 year.

14 (b) The department will make a good faith effort to meet or

15 exceed the annual goal.

16

17 §9.315. Contract Goals.

18 (a) The department may assign individual contract goals for

19 SBE participation contracts as necessary to cumulatively meet

20 the overall annual SBE goals.

21 (b) Contract goals will be based on the availability of

22 qualified SBEs, work site location, dollar value of the

23 contract, and type of work items specified in the contract.

NOTE: New Sections

Exhibit C

OGC: 06/16/12 10:22 AM

1 (c) For work to be counted toward an SBE goal the work must
2 actually be performed by an SBE.

3 (d) The entire amount of the fee or commission charged by
4 an SBE for providing a bona fide service, such as professional,
5 technical, consultant, or managerial services, or for providing
6 bonds or insurance specifically required for the performance of
7 a U.S. Department of Transportation assisted contract, will be
8 counted toward SBE goals if that fee or commission is determined
9 to be reasonable and not excessive as compared with those
10 customarily allowed for similar services.

11 (e) The amount of the part of a construction contract or
12 other contract not covered by subsection (c) of this section
13 that is performed by the SBE's own forces may be counted toward
14 the SBE goal. The cost of supplies and material obtained by the
15 SBE for the contract work, including supplies purchased or
16 equipment leased by the SBE, other than supplies and equipment
17 the SBE purchases or leases from the prime contractor or its
18 affiliate, is included.

19 (f) If an SBE subcontracts a part of the work of its
20 contract to another firm, the value of the subcontracted work
21 will be counted toward the SBE goal only if the SBE's
22 subcontractor is an SBE.

23 (g) If an SBE is a participant in a joint venture, only the

1 part of the total value of the contract equal to the distinct,
2 clearly defined part of the contract work that the SBE performs
3 with its own forces may be counted toward the SBE goal.

4 (h) For the purposes of subsection (g) of this section, a
5 "joint venture" is an association of an SBE firm and one or more
6 other firms to carry out a single, for-profit business
7 enterprise, for which the parties combine their property,
8 capital, efforts, skills, and knowledge, and in which the SBE is
9 responsible for a distinct, clearly defined portion of the work
10 of the contract and whose share in the capital contribution,
11 control, management, risks, and profits of the joint venture are
12 commensurate with its ownership interest.

13

14 §9.316. Contractor Representative.

15 (a) A contractor that receives a contract with an SBE
16 contract goal must designate an employee to serve as the SBE
17 contact person during the contract.

18 (b) The contractor must inform the department of the
19 representative's name, title, e-mail address, if any, and
20 telephone number no later than five working days after the
21 contract is signed.

22 (c) The SBE representative is responsible for submitting
23 reports, maintaining records, and documenting good faith efforts

1 to use SBEs.

2

3 §9.317. Contract Provisions for SBE Requirements.

4 (a) Department contracts will include a contract provision
5 addressing SBE requirements.

6 (b) A contract without an assigned goal will include
7 provisions that:

8 (1) encourage the use of SBEs in subcontracting and
9 material supply activities; and

10 (2) prohibit discrimination.

11 (c) A contract with an assigned goal will include
12 provisions related to the requirements provided by §9.319 of
13 this subchapter (relating to Contractor's Commitment Agreement)
14 and §9.320 of this subchapter (relating to Contractor's Good
15 Faith Efforts).

16

17 **§9.318. Payment; Prompt Payment; Joint Checks.**

18 (a) For the purposes of this section:

19 (1) "subcontractor" includes a supplier;

20 (2) "work" includes materials that are provided by a
21 supplier at a location approved by the department;

22 (3) "satisfactory completion" occurs when:

1 (A) the subcontractor has fulfilled the contract
2 requirements of both the department and the subcontract for the
3 subcontracted work, including the submittal of all information
4 required by the specifications or by the department and
5 including any vegetative establishment, testing, maintenance,
6 and performance of other work that is the responsibility of the
7 subcontractor; and

8 (B) the work done by the subcontractor has been
9 inspected, approved, and paid for by the department; and

10 (4) "contractor" refers to a subcontractor that contracts
11 work to another tier of subcontractors.

12 (b) The department will not withhold retainage on a
13 contract executed and administered by the department. A
14 contractor that withholds retainage on a subcontractor's work
15 shall pay that retainage in full within 10 days after the date
16 of satisfactory completion of all of the subcontractor's work.

17 (c) Each contract, subcontract, or material purchase
18 agreement must include provisions that substantively provide
19 that:

20 (1) within 10 days after the date that the contractor
21 receives payment for work performed by a subcontractor, the
22 contractor will pay the subcontractor for the work performed;
23 and

NOTE: New Sections

Exhibit C

OGC: 06/16/12 10:22 AM

1 (2) the contractor will pay to a subcontractor any
2 retainage on the subcontractor's work within 10 days after the
3 date of satisfactory completion of all of the subcontractor's
4 work.

5 (d) The inspection and approval of work done by the
6 subcontractor for determining substantial completion does not
7 eliminate the contractor's responsibilities for all of the work,
8 as defined in the contract.

9 (e) The department may pursue actions against a contractor,
10 including withholding of estimates and suspending the work, for
11 noncompliance with the subcontract requirements of this section
12 on receipt of written notice with sufficient details showing the
13 subcontractor has complied with the subcontractor's obligations,
14 as described in the contract.

15 (f) Based on the department's assessment of the construction industry
16 usage of joint check agreements between contractors and subcontractors
17 working on federal-aid construction projects, the department has implemented
18 procedures for the use of joint checks on the SBE contracts executed and
19 administered by the department. The department will accept the use of a joint
20 check issued by a contractor to a subcontractor and its supplier but only if:

21 (1) the contractor does not require the subcontractor to use a supplier
22 specified by the contractor or to use the contractor's negotiated unit price;

- 1 (2) the subcontractor earns a profit from the material purchased;
- 2 (3) the subcontractor, not the contractor, negotiates the quantities, price,
3 and delivery of the materials;
- 4 (4) the contractor issuing the check acts solely as a guarantor;
- 5 (5) the subcontractor signs the joint check and releases it to the
6 supplier, not the contractor;
- 7 (6) the subcontractor is responsible both to furnish and install the
8 material;
- 9 (7) the subcontractor has applied for a line of credit with the supplier and
10 was either denied credit or denied a sufficient increase in its line of credit;
- 11 (8) the supplier is not the contractor or an affiliate of the contractor; and
- 12 (9) the subcontractor's account with the supplier is in the subcontractor's
13 name alone.
- 14 (g) The department will conduct prompt pay audits and prompt pay
15 verifications to monitor compliance with this section.

16

17 §9.319. Contractor's Commitment Agreement.

18 (a) Within the time specified in the contract or proposal,
19 the contractor shall furnish a commitment agreement for each
20 certified SBE that will be used to meet the contract goal.

21 (b) The commitment agreement must include:

- 1 (1) the items of work to be performed;
- 2 (2) the quantities of work or material;
- 3 (3) the unit measure, unit price, and total cost for each
- 4 item;
- 5 (4) the total amount of the SBE commitment;
- 6 (5) the name, address, and point of contact of each SBE
- 7 that will participate in the contract;
- 8 (6) the description and dollar amount of the work to be
- 9 performed by each SBE;
- 10 (7) the original signatures of the contractor and the
- 11 proposed SBE;
- 12 (8) documentation of the bidder's commitment to use each
- 13 SBE subcontractor for the dollar amount originally submitted;
- 14 and
- 15 (9) confirmation from each SBE that it is participating
- 16 in the contract as provided in the bidder's commitment.

17

18 §9.320. Contractor's Good Faith Efforts.

19 (a) If the contractor is unable to meet the SBE goal, the
20 contractor must document the good faith efforts taken to meet
21 the SBE goal and to obtain SBE participation.

22 (b) The department will consider as good faith efforts all
23 documented explanations that are submitted and that describe a

NOTE: New Sections

Exhibit C

OGC: 06/16/12 10:22 AM

1 contractor's failure to meet an SBE goal or obtain SBE
2 participation, including:

3 (1) advertising in general circulation, trade
4 association, or minority or women focus media concerning
5 subcontracting opportunities;

6 (2) providing written notice to at least five qualified
7 SBEs allowing sufficient time for SBEs to participate
8 effectively;

9 (3) dividing the contract work into reasonable portions
10 in accordance with standard industry practices;

11 (4) documenting reasons for rejection or meeting with the
12 rejected SBE to discuss the rejection;

13 (5) providing qualified SBEs with adequate information
14 about bonding, insurance, plans, specifications, scope of work,
15 and the requirements of the contract;

16 (6) negotiating in good faith with qualified SBEs, not
17 rejecting qualified SBEs who are also the lowest responsive
18 bidder; and

19 (7) using the services of available minorities and women,
20 community organizations, contractor groups, local, state, and
21 federal business assistance offices, and other organizations
22 that provide support services to SBEs.

23

NOTE: New Sections

Exhibit C

OGC: 06/16/12 10:22 AM

1 §9.321. Subcontracting.

2 (a) An SBE contractor or SBE subcontractor may subcontract
3 work but shall perform at least 25 percent of the value of the
4 contract work with:

5 (1) employees paid directly by the SBE;

6 (2) individuals whose services are obtained from a
7 licensed employee leasing company; and

8 (3) equipment owned or rented or leased directly by the
9 SBE.

10 (b) A contractor may not furnish work crews to an SBE
11 subcontractor.

12

13 §9.322. Leases.

14 (a) An SBE may lease equipment consistent with standard
15 industry practice.

16 (b) The SBE must provide the operator of the leased
17 equipment and must be responsible for all applicable payroll and
18 labor compliance requirements.

19 (c) The SBE that leases trucks from a non-SBE is entitled
20 to credit for the total value of transportation services
21 provided by non-SBE lessees, not to exceed the value of
22 transportation services provided by the SBE-owned trucks on the
23 contract. Additional participation by non-SBE lessees receive

1 credit only for the fee or commission the SBE receives as a
2 result of the lease arrangement.

3

4 §9.323. Withholding or Reducing Payments. A contractor may not
5 withhold or reduce payments to an SBE firm without a reason that
6 is accepted as standard industry practice.

7

8 §9.324. SBE Subcontractor Termination.

9 (a) If a contract has an SBE contract goal, the contractor
10 may not substitute or terminate an SBE subcontractor submitted
11 on a commitment agreement without the prior written consent of
12 the department.

13 (b) Before requesting the department's approval to
14 terminate or substitute for an SBE, the contractor must give
15 written notice to the listed SBE with a copy to the department
16 of the contractor's intent to request the termination or
17 substitution of the SBE and provide a detailed explanation for
18 the request.

19 (c) The contractor must give the listed SBE five days to
20 respond to the notice and to advise the department and the
21 contractor of the reasons the listed SBE objects to the proposed
22 termination or substitution. The department may provide a
23 shorter response time if required in a particular case as a

1 matter of public necessity.

2 (d) When an SBE subcontractor is terminated or fails to
3 complete its work on the contract for any reason, the contractor
4 shall make good faith efforts to find, as a substitute for the
5 original SBE, another SBE to perform, at least to the extent
6 needed to meet the established contract goal the work that the
7 original SBE was to have performed under the contract. If the
8 contractor cannot find another SBE to perform the work
9 originally committed to the terminated SBE the contractor shall
10 make good faith efforts to obtain SBEs to perform other work
11 under the contract equal to the work originally committed to the
12 terminated SBE.

13 (e) The contractor must submit for approval the name of the
14 SBE subcontractor that is to replace the SBE subcontractor
15 listed in the original commitment agreement. Work performed by
16 a substitute before the department has approved the substitution
17 will not be counted toward the SBE goal.

18 (f) If the department determines there is good cause for
19 the termination or replacement, the department will provide
20 written consent for the action.

21 (g) Each contract will contain provisions that state the
22 appropriate administrative remedies that apply if the contractor
23 fails to comply with this section.

NOTE: New Sections

Exhibit C

OGC: 06/16/12 10:22 AM

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2 §9.325. Performance.

3 (a) An SBE contractor or subcontractor shall comply with
4 the terms of the contract or subcontract for which it was
5 selected.

6 (b) Work products, services, and commodities must meet
7 contract specifications.

8 (c) The SBE's work performance must include being
9 responsible for:

10 (1) the performance of the work subject to the contract
11 and for the execution of its responsibilities by actually
12 performing, managing, and supervising the work involved; and

13 (2) the provision of the materials and supplies used in
14 the performance of its contract, unless the contract provides
15 for labor services only and is approved by the department, and
16 includes:

17 (A) negotiation of the price of the materials and
18 supplies;

19 (B) determination of the quality, if applicable, and
20 quantity of the materials and supplies;

21 (C) ordering of the material and supplies;

22 (D) installation of the material, if applicable; and

23 (E) payment for the material.

NOTE: New Sections

Exhibit C

OGC: 06/16/12 10:22 AM

1 (d) An SBE's performance should not include a role that is
2 limited to that of an extra participant in a transaction,
3 contract, or project through which funds are passed in order to
4 obtain the appearance of SBE participation. In determining
5 whether an SBE is an extra participant, the department will
6 examine similar transactions, particularly those in which SBEs
7 do not participate.

8 (e) An SBE's must be responsible for at least 25 percent of
9 the total cost of its contract with its own work force or, if a
10 lesser percentage is expected under normal industry practice for
11 the type of work involved, may not subcontract a greater portion
12 of the work of the contract than would be expected on the basis
13 of normal industry practice for that type of work.

14

15 §9.326. Contractor Reports.

16 (a) A contractor shall submit to the department monthly
17 reports that indicate the amount paid to each SBE.

18 (b) Reports under this section must be submitted in a form
19 acceptable to the department. Each report must include the
20 identification of the SBE by name and vendor number.

21 (c) If required by the department, the contractor shall
22 attach to a report under this section proof of payment,
23 including copies of canceled checks.

NOTE: New Sections

Exhibit C

OGC: 06/16/12 10:22 AM

1 (d) The contractor shall submit in accordance with the
2 contract and in a form acceptable to the department a final
3 report that shows the total paid to each SBE.

4

5 §9.327. Contractor Records.

6 (a) A contractor shall retain all records specified in the
7 contract for three years after the later of:

8 (1) the date that the final payment is made under the
9 contract; or

10 (2) the latest date of completion of any investigation,
11 audit, examination, or other review that began during the period
12 of the contract or within three years of the date described by
13 paragraph (1) of this subsection.

14 (b) The contractor shall make the records available to
15 representatives of the department and other interested state
16 agency representatives for inspection, audit, examination,
17 investigation, or other review at all reasonable times during
18 the retention period.

19

20 §9.328. Credits for Expenditures. A contractor will receive
21 credit for all payments made to an SBE for work performed and
22 costs incurred, including costs of materials and supplies, in
23 accordance with the contract, including all subcontracted work.

NOTE: New Sections

Exhibit C

OGC: 06/16/12 10:22 AM

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§9.329. Monitoring of Contract Compliance.

(a) The department will monitor contractor compliance by:

(1) reviewing contractor reports; and

(2) making on-site visits to the project and the offices
of a contractor or subcontractor.

(b) The department will keep a current total of payments to
SBE firms for work committed to the firms at the time of
contract award and compare the amounts to the amounts paid to
SBE firms.

§9.330. Complaints.

(a) This section does not apply to:

(1) a subcontractor's claim for additional payments or
time extensions; or

(2) a discrimination complaint made against a department
employee, which is handled in accordance with the department's
Human Resources Manual.

(b) A complaint alleging a violation of the SBE program,
including a claim of discrimination, may be filed by:

(1) an aggrieved person; or

(2) a person on behalf of another person or a specific
class of individuals.

1 (c) The complaint must in writing and must be sent to the
2 department within 90 days after the date that:

3 (1) the alleged discrimination or violation of the SBE
4 program occurred; or

5 (2) a continuing course of conduct in violation of the
6 SBE program was discovered.

7

8 §9.331. Review and Investigation of Complaints.

9 (a) The department will review each complaint filed under
10 §9.330 of this subchapter (relating to Complaints) and will
11 notify the complainant that the department has determined that:

12 (1) an investigation is warranted; or

13 (2) that an investigation is not necessary and the
14 reasons for that determination.

15 (b) If the complaint is made against a specific division,
16 the executive director will appoint another division or office
17 of the department to review and investigate the complaint.

18 (c) The reviewing entity will forward the written findings
19 to the complainant and respondent.

20 (d) If the finding confirms the complaint, the reviewing
21 entity will meet with the complainant and respondent to discuss
22 a conciliation agreement.

23 (e) If the parties concur, the reviewing entity will

1 prepare a conciliation agreement for execution and will monitor
2 the agreement to completion.

3 (f) If the parties do not agree to a conciliation
4 agreement, the director of the reviewing entity will make a
5 decision regarding corrective action needed and monitor the
6 corrective action, if any.

7

8 §9.332. Determination of Noncompliance; Sanctions.

9 (a) The department may determine that the contractor or
10 respondent failed to satisfy the requirements of this subchapter
11 or comply with the contract's SBE special provision
12 requirements.

13 (b) If a responder does not furnish the required SBE
14 information within the period specified in the contract's SBE
15 special provision, the department may declare the responder to
16 be in default and retain the bid guaranty as liquidated damages
17 in accordance with §9.18 of this chapter (relating to After
18 Contract Award).

19 (c) The department will impose sanctions if the contractor:

20 (1) is found to have discriminated against an SBE firm;

21 (2) has failed to meet the contract SBE goal and has
22 failed to demonstrate a good faith effort to meet the goal; or

23 (3) has not kept SBE commitments for the contracts

NOTE: New Sections

Exhibit C

OGC: 06/16/12 10:22 AM

1 assigned a goal and the department has not approved good faith
2 efforts or a substitution of the SBE firm.

3 (d) The department may impose any of the following
4 sanctions:

- 5 (1) written reprimand;
- 6 (2) liquidated damages;
- 7 (3) contract termination; or
- 8 (4) other remedies available by law.

9 (e) Factors to be considered in imposing sanctions include:

10 (1) the magnitude and the type of noncompliance described
11 by subsection (a) of this section;

12 (2) the degree of the contractor's culpability;

13 (3) any steps taken to rectify the situation;

14 (4) the contractor's record of performance on other
15 projects including:

16 (A) the contractor's annual SBE participation above SBE
17 goals;

18 (B) the contractor's annual SBE participation on
19 projects without goals;

20 (C) number of complaints the department has received
21 from SBEs about the contractor; and

22 (D) the number of times the contractor has been
23 previously sanctioned by the department under this section; and

NOTE: New Sections

Exhibit C

OGC: 06/16/12 10:22 AM

1 (5) whether a contractor falsified, misrepresented, or
2 withheld information.

3 (f) The department will notify the contractor or respondent
4 of its determination under this section. The notice will
5 include the reasons for that determination and specify the
6 resulting sanctions, if any.

7

8 §9.333. Reconsideration of the Department's Noncompliance
9 Determination.

10 (a) A contractor or respondent may request an
11 administrative reconsideration of the determination made under
12 §9.332 of this subchapter (relating to Determination of
13 Noncompliance; Sanctions), including any sanctions imposed,
14 within 10 days after the date that notice of the determination
15 is sent to the respondent or within 30 days after the date that
16 the notice of the determination is sent to the contractor.

17 (b) If a request for reconsideration of a determination is
18 not filed within the period specified in subsection (a) of this
19 section, the determination made under §9.332 of this subchapter
20 and any imposed sanction is final and further administrative
21 appeal is barred.

22 (c) A contractor or respondent that requests administrative
23 reconsideration of a determination under subsection (a) of this

1 section must provide with the request written documentation or
2 argument to support its position that the noncompliance
3 determination was made in error by the department.

4 (d) The executive director will appoint a department
5 employee to perform the administrative reconsideration of the
6 determination. The employee must hold a senior leadership
7 position in the department and report directly to the executive
8 director. A person who took part in the original determination
9 is not eligible for appointment under this subsection. The
10 appointed employee will act as an administrative hearing
11 officer.

12 (e) The person appointed under subsection (d) of this
13 section will make the final reconsideration decision. The
14 sanctions to be imposed may be changed in the final
15 reconsideration decision.

16 (f) Before making the final reconsideration decision, the
17 person appointed under subsection (d) of this section may decide
18 that an in-person hearing is needed to make a final
19 reconsideration decision, in which event the person will act as
20 the administrative hearing officer. The department will contact
21 the contractor or respondent to schedule the in-person hearing.
22 The hearing will be scheduled for a date that is within 30 days
23 after the date that the determination to hold an in-person

1 hearing is made. The hearing may be rescheduled at the request
2 of either party but must be rescheduled for a date that is
3 within 15 days after the date of the original in-person hearing
4 if the contract has not been awarded, or within 180 days after
5 the date of the original in-person hearing for all other
6 situations.

7 (g) The department will provide to the contractor or
8 respondent a written decision that explains the reconsideration
9 decision and if the decision is a finding of non-compliance, the
10 basis for that finding.

11 (h) A reconsideration decision under subsection (g) of this
12 section, including sanctions imposed under that decision, is
13 final and further administrative appeal is barred.

1 SUBCHAPTER L. HISTORICALLY UNDERUTILIZED BUSINESS (HUB) PROGRAM

2 §9.350. Policy. It is the policy of the department to:

3 (1) ensure that Historically Underutilized Businesses
4 have an equal opportunity to participate in the performance of
5 contracts;

6 (2) create a level playing field on which Historically
7 Underutilized Businesses can compete fairly for contracts and
8 subcontracts;

9 (3) ensure nondiscrimination on the basis of race, color,
10 national origin, or gender in purchasing activities and in the
11 award and administration of contracts;

12 (4) help remove barriers to the participation of
13 Historically Underutilized Businesses in department purchases
14 and contracts;

15 (5) assist in the development of firms that can compete
16 successfully in the market place outside the Historically
17 Underutilized Business program; and

18 (6) develop and maintain a program in order to facilitate
19 purchasing and contracting opportunities for historically
20 underutilized businesses.

21

22 §9.351. Application of Subchapter.

23 (a) This subchapter applies only to a contract that is

NOTE: New Sections

Exhibit D

OGC: 06/14/12 2:09 PM

1 funded entirely with state and local funds and is for:

2 (1) a building;

3 (2) professional, aviation, public transportation, or
4 private consultant services; or

5 (3) a purchase of goods or services that is made under
6 Government Code, Title 10, Subtitle D.

7 (b) This subchapter does not apply to a highway or railroad
8 construction or maintenance contract.

9

10 §9.352. Definitions. The following words and terms, when used
11 in this subchapter, shall have the following meanings, unless
12 the context clearly indicates otherwise.

13 (1) Contractor--One who participates, through a contract
14 or any tier of subcontract.

15 (2) Comptroller--The Texas Comptroller of Public
16 Accounts.

17 (3) Department--The Texas Department of Transportation.

18 (4) Executive director--The executive director of the
19 department.

20 (5) Historically Underutilized Business (HUB)--A business
21 certified as a historically underutilized business by the
22 comptroller.

23 (6) Respondent--A person that responds to an invitation

1 to bid, request for proposal, or comparable solicitation related
2 to a contract to which this subchapter applies.

3 (7) Vendor identification number (VID)--An identification
4 number used in state government to identify the bidder or
5 business for payment or award of contracts, certification as a
6 HUB, and registration on the bidders list.

7

8 §9.353. Certification of HUBs.

9 (a) The department and comptroller operate under a
10 memorandum of agreement that allows qualified businesses
11 certified as a Disadvantaged Business Enterprise (DBE) in
12 accordance with the Texas Unified Certification Plan (TUCP) to
13 be recognized as a HUB.

14 (b) The comptroller certifies businesses as HUBs using
15 procedures set forth at 34 TAC Chapter 20, Subchapter B
16 (relating to Historically Underutilized Business Program). The
17 comptroller maintains a directory of certified HUBs.

18 (c) The department will submit information regarding DBEs
19 who qualify as HUBs to the comptroller for certification.

20 (d) A challenge regarding a business's eligibility for HUB
21 certification that is based on the TUCP DBE certification must
22 be submitted to the department for referral and resolution.

23 (e) A business whose HUB certification is based on the TUCP

1 DBE certification loses its HUB certification if it is
2 ineligible to be certified as a DBE.

3

4 §9.354. HUB Overall Goals.

5 (a) The executive director will establish annual agency HUB
6 participation goals making use of disparity studies, including
7 the study described by Government Code, §2161.002(c), as well as
8 other relevant information and complying with 34 TAC §20.13
9 (relating to Statewide Annual HUB Utilization Goals).

10 (b) The department will make a good faith effort to meet or
11 exceed the goal established under subsection (a) of this
12 section.

13

14 §9.355. Contract Goals.

15 (a) The department will assign individual contract goals
16 for HUB participation contracts as necessary to meet the overall
17 annual HUB goals.

18 (b) Contract goals will be based on the availability of
19 qualified HUBs, work site location, dollar value of the
20 contract, and type of work items specified in the contract.

21 (c) If the department has not assigned an individual
22 contract goal for a contract but the department has identified
23 that HUB subcontracting opportunities exist, the department may

1 require a HUB plan under §9.356(a) of this subchapter (relating
2 to HUB Plan).

3

4 §9.356. HUB Plan.

5 (a) A contract that is estimated to involve more than
6 \$100,000 over the life of the contract, including renewals, and
7 that has subcontracting opportunities must include a HUB plan as
8 a condition of contract award. The department may require a HUB
9 plan as a condition of the award of a contract that is estimated
10 to involve not more than \$100,000 over the life of the contract,
11 including renewals, if the contract has subcontracting
12 opportunities.

13 (b) A business that responds to an invitation to bid,
14 request for proposal, or comparable solicitation related to a
15 contract other than building contracts to which this subchapter
16 applies must submit a HUB plan at the same time that the bid,
17 proposal, offer, or other applicable expression of interest is
18 submitted to the department. A response that does not include a
19 HUB plan will be rejected due to material failure to comply with
20 advertised specifications. For building contracts, the HUB plan
21 must be submitted after the conditional contract award as
22 specified in the contract or proposal.

23 (c) Except as modified by subsection (d) of this section,

NOTE: New Sections

Exhibit D

OGC: 06/14/12 2:09 PM

1 the HUB plan must include:

2 (1) a statement of whether the respondent is a certified
3 HUB;

4 (2) a certification that the respondent has made a good
5 faith effort to meet the requirements of this subchapter;

6 (3) identification of the subcontractors that will be
7 used during the course of the contract;

8 (4) the expected percentage of the work on the contract
9 that will be subcontracted; and

10 (5) the approximate dollar amount of the percentage of
11 work subcontracted.

12 (d) For an engineering, surveying, or architecture
13 contract, the percentage of work that will be subcontracted and
14 the approximate dollar amount of the percentage of work
15 subcontracted required under subsection (c)(4) and (5) of this
16 section cannot be obtained at the time of the contract bid and
17 is not required to be submitted before the execution of the
18 contract.

19 (e) If the department determines that a submitted HUB plan
20 contains minor deficiencies, such as the failure to sign or date
21 the plan, but contains sufficient information for the department
22 to determine that the plan was developed and submitted in good
23 faith, the department may contact the respondent for

NOTE: New Sections

Exhibit D

OGC: 06/14/12 2:09 PM

1 clarification of the deficiencies.

2

3 §9.357. Good Faith Efforts Documentation.

4 (a) If a respondent or contractor is not subcontracting any
5 portion of the contract, is unable to obtain HUB participation,
6 or is unable to meet the assigned goal for a contract, the
7 respondent or contractor must describe in writing the actions
8 that it has taken to obtain HUB participation in accordance with
9 applicable contract requirements. The actions that will be
10 considered to establish good faith effort include:

11 (1) dividing the contract work into reasonable portions
12 in accordance with standard industry practices;

13 (2) providing written justification of the selection
14 process if no HUB subcontractors are selected;

15 (3) providing notice to minority or women trade
16 organizations or development centers not later than the seventh
17 working day before submission of the response described by
18 §9.356(b) of this subchapter (relating to HUB Plan) unless the
19 department determines that circumstances require a different
20 period;

21 (4) negotiating in good faith with qualified HUBs and not
22 rejecting qualified HUBs that were also the best value
23 responsive bidder; and

NOTE: New Sections

Exhibit D

OGC: 06/14/12 2:09 PM

1 (5) participating in a mentor protégé program under
2 Government Code, §2161.065, and identifying the areas of the
3 subcontracting plan to be performed by the protégé under the HUB
4 plan.

5 (b) In addition to the description of actions listed under
6 subsection (a) of this section, the respondent or contractor may
7 provide documentation to establish one or more of the following:

8 (1) that notice was provided to three or more qualified
9 HUBs not later than the seventh working day before submission of
10 the response described by §9.356(b) of this subchapter for HUBs
11 to participate effectively, unless the department determines
12 that circumstances that are documented in the respondent's or
13 contractor's files require a shorter period;

14 (2) that 100 percent of all available subcontracting
15 opportunities will be performed by one or more HUBS; or

16 (3) that one or more HUB subcontractors will be used and
17 that the total value of those subcontracts will meet or exceed
18 the higher of the statewide or department goal for the
19 appropriate category.

20 (c) The department will consider the submitted description
21 of actions taken under subsection (a) of this section and
22 documentation submitted under subsection (b) of this section in
23 determining whether a respondent or contractor has made good

1 faith efforts to obtain HUB participation.

2 (d) If the respondent or contractor is able to fulfill all
3 of the identified subcontracting opportunities with its own
4 equipment, supplies, materials, or employees, the respondent or
5 contractor must provide a signed affidavit explaining how the
6 contractor intends to fulfill each subcontracting opportunity.
7 To verify the affidavit, the department may require:

8 (1) evidence of existing staffing to meet contract
9 obligations;

10 (2) monthly payroll records showing that the respondent's
11 or contractor's staff is fully engaged;

12 (3) on-site reviews of the respondent's or contractor's
13 headquarters or work site where services will be performed; and

14 (4) documentation showing employment of personnel with
15 necessary licenses and certifications to perform the contract
16 work.

17

18 §9.358. Required Contract Provisions. Each contract to which
19 this subchapter applies must include the HUB requirements
20 applicable to the contract.

21

22 §9.359. Changes to and Monitoring of HUB Plan.

23 (a) The department must approve any changes to the HUB

NOTE: New Sections

Exhibit D

OGC: 06/14/12 2:09 PM

1 plan. Amendments to the contract or other written approval of
2 the contract change must be recorded in the procurement file.

3 (b) If the original scope of work is expanded through a
4 change order or contract amendment, the department will
5 determine whether any additional opportunities exist for HUB
6 participation and will require submission of a revised HUB plan
7 for additional opportunities.

8 (c) The contractor may not implement a change in the HUB
9 plan before the change is approved by the department.

10 (d) The department will monitor the HUB plan monthly to
11 determine compliance with the plan. If the contractor fails to
12 fulfill the plan, the contractor, within 30 days after the date
13 that the contract is completed or terminated must explain to the
14 department why the failure should not be attributed to a lack of
15 good faith.

16 (e) To determine that the contractor is complying with the
17 HUB plan, the agency may consider:

18 (1) whether the contractor gave timely notice to the
19 subcontractor regarding the time and place of the subcontracted
20 work;

21 (2) whether the contractor facilitated access to the
22 resources needed to complete the work; or

23 (3) whether the contractor complied with the approved HUB

1 subcontracting plan.

2 (f) If the department determines that the contractor did
3 not implement the HUB plan in good faith, the department will
4 report the nonperformance to the comptroller in the manner
5 described by 34 TAC §§20.101-20.108 (relating to Procurement)
6 and may revoke the contract for breach of contract and make a
7 claim against the contractor.

8

9 §9.360. HUB Commitment Agreement.

10 (a) A contract with an assigned goal will include
11 provisions requiring that the contractor submit a HUB commitment
12 agreement in addition to the HUB Plan required by §9.356 of this
13 subchapter (relating to HUB Plan) as a condition of contract
14 award.

15 (b) Within the time specified in the contract or proposal,
16 the contractor must furnish a HUB commitment agreement for each
17 certified HUB that will be used to meet the contract goal.

18 (c) The commitment agreement must include:

19 (1) the items of work to be performed;

20 (2) the quantities of work or material;

21 (3) the unit measure, unit price, and total cost for each
22 item;

23 (4) the total amount of the HUB commitment;

NOTE: New Sections

Exhibit D

OGC: 06/14/12 2:09 PM

1 (5) the original signatures of the contractor and the
2 proposed HUB; and

3 (6) if the commitment involves a HUB material supplier,
4 an explanation of the function to be performed and a description
5 of any arrangements, including joint check agreements, made with
6 other material suppliers, manufacturers, distributors, hauling
7 firms, or freight companies.

8 (d) The contractor shall give the department a copy of each
9 subcontract award within ten days after the date that the
10 subcontract is awarded.

11

12 §9.361. Reporting.

13 (a) The contractor shall maintain business records
14 documenting compliance with the HUB plan.

15 (b) The contractor must submit monthly reports to the
16 department at intervals specified in the contract using a report
17 form acceptable to the department. The report must identify
18 each subcontractor, regardless of whether the subcontractor is a
19 HUB, by name and VID and must indicate the amount paid to each
20 subcontractor. The report must be submitted even if no payments
21 were made during the period being reported. If required by the
22 department, the contractor must attach proof of payment
23 including copies of cancelled checks.

NOTE: New Sections

Exhibit D

OGC: 06/14/12 2:09 PM

1 (c) The contractor must submit a final report in accordance
2 with the contract, using a form acceptable to the department.
3 The final report must show the total amount paid to each
4 subcontractor.

5
6 §9.362. Credit for HUB Expenditures. A contractor will receive
7 credit for all payments made to a HUB for work performed and
8 costs incurred in accordance with the contract, including all
9 subcontracted work.

10

11 §9.363. Monitoring of Contractor Compliance. The department
12 will monitor contractor compliance by:

13 (1) reviewing periodic HUB Subcontracting Plan Prime
14 Contractor Progress Assessment Reports; and

15 (2) making on-site visits to the project as applicable
16 and the offices of a contractor or subcontractor as needed to
17 verify compliance.

18

19 §9.364. Complaints.

20 (a) This section does not apply to:

21 (1) a claim for purchase contracts under §9.1 of this
22 chapter (relating to Claims for Purchase Contracts); or

23 (2) a discrimination complaint made against a department

1 employee, which is handled in accordance with the department's
2 Human Resources Manual.

3 (b) A complaint alleging a violation of the HUB program,
4 including a claim of discrimination, may be filed by:

5 (1) an aggrieved person; or

6 (2) a person on behalf of another person or a specific
7 class of individuals.

8 (c) The complaint must in writing and must be sent to the
9 department within 90 days after the date that:

10 (1) the alleged discrimination or violation of the HUB
11 program occurred; or

12 (2) a continuing course of conduct in violation of the
13 HUB program was discovered.

14

15 §9.365. Review and Investigation of Complaints.

16 (a) The department will review each complaint filed under
17 §9.364 of this subchapter (relating to Complaints) and will
18 notify the complainant that the department has determined that:

19 (1) an investigation is warranted; or

20 (2) an investigation is not necessary and the reasons for
21 that determination.

22 (b) The executive director will appoint a division or
23 office of the department to review and investigate the

NOTE: New Sections

Exhibit D

OGC: 06/14/12 2:09 PM

1 complaint.

2 (c) The reviewing entity will forward the written findings
3 to the complainant and respondent.

4 (d) If the finding confirms the complaint, the reviewing
5 entity will meet with the complainant and respondent to discuss
6 a conciliation agreement.

7 (e) If the parties concur, the reviewing entity will
8 prepare a conciliation agreement for execution and will monitor
9 the agreement to completion.

10 (f) If the parties do not agree to a conciliation
11 agreement, the director of the reviewing entity will make a
12 decision regarding corrective action needed and monitor the
13 corrective action, if any.

14

15 §9.366. Determination of Noncompliance; Sanctions.

16 (a) The department may determine that the contractor or
17 respondent failed to satisfy the requirements of this
18 subchapter.

19 (b) If a noncompliance determination is made under this section, the
20 department may impose a sanction. The available sanctions are:

21 (1) letter of reprimand;

22 (2) denial of the award of the contract;

1 (3) termination of the contract;
2 (4) required participation in HUB outreach programs;
3 (5) a report to the comptroller of noncompliance in the
4 manner described by 34 TAC §§20.101-20.108 (relating to
5 Procurement);

6 (6) require payment of liquidated damages; and

7 (7) any other remedy available by law.

8 (c) Factors to be considered in issuing sanctions include:

9 (1) the magnitude and type of the violation;

10 (2) the degree of the contractor's or respondent's
11 culpability;

12 (3) steps taken by the contractor or respondent to
13 rectify the situation;

14 (4) the contractor's or respondent's record of
15 performance on other department projects; and

16 (5) whether the contractor or respondent falsified,
17 misrepresented, or withheld information.

18 (d) Within ten days after the date of the final
19 determination under this section, the department will notify the
20 contractor or respondent in writing of the **determination**. The
21 notice will include the reasons for that determination and
22 specify any resulting sanctions.

1

2 §9.367. Reconsideration of the Department's Noncompliance
3 Determination.

4 (a) The contractor or respondent may request an
5 administrative reconsideration of the determination made under
6 §9.366 of this subchapter (relating to Determination of
7 Noncompliance), including the sanctions imposed, within 10 days
8 after the date that notice is sent to the respondent or within
9 30 days after the date that the notice is sent to the
10 contractor.

11 (b) If a request for reconsideration of a determination is
12 not filed within the period specified in subsection (a) of this
13 section, the determination made under §9.366 of this subchapter
14 and any imposed sanction is final and further administrative
15 appeal is barred.

16 (c) A contractor or respondent that requests administrative
17 reconsideration of a determination under subsection (a) of this
18 section must provide with the request written documentation or
19 argument to support its position that the noncompliance
20 determination was made in error by the department.

21 (d) The executive director will appoint a department
22 employee to perform the administrative reconsideration of the
23 determination. The employee must hold a senior leadership

NOTE: New Sections

Exhibit D

OGC: 06/14/12 2:09 PM

1 position in the department and report directly to the executive
2 director. A person who took part in the original determination
3 is not eligible for appointment under this subsection. The
4 appointed employee will act as an administrative hearing
5 officer.

6 (e) The person appointed under subsection (d) of this
7 section will make the final reconsideration decision. The
8 sanctions to be imposed may be changed in the final
9 reconsideration decision.

10 (f) Before making the final reconsideration decision, the
11 person appointed under subsection (d) of this section may decide
12 that an in-person hearing is needed to make a final
13 reconsideration decision, in which event the person will act as
14 the administrative hearing officer. The department will contact
15 the contractor or respondent to schedule the in-person hearing.
16 The hearing will be scheduled for a date that is within 30 days
17 after the date that the determination to hold an in-person
18 hearing is made. The hearing may be rescheduled at the request
19 of either party but must be rescheduled for a date that is
20 within 15 days after the date of the original in-person hearing
21 if the contract has not been awarded, or within 180 days after
22 the date of the original in-person hearing for all other
23 situations.

NOTE: New Sections

Exhibit D

OGC: 06/14/12 2:09 PM

1 (g) The department will provide to the contractor or
2 respondent a written decision that explains the reconsideration
3 decision and if the decision is a finding of non-compliance, the
4 basis for that finding.

5 (h) A reconsideration decision under subsection (g) of this
6 section, including sanctions imposed under that decision, is
7 final and further administrative appeal is barred.

- 1 SUBCHAPTER D. BUSINESS OPPORTUNITY PROGRAMS
- 2 §9.50. Purpose.
- 3 §9.51. Definitions.
- 4 §9.52. Policy.
- 5 §9.53. Disadvantaged Business Enterprise (DBE) Program.
- 6 §9.54. Historically Underutilized Business (HUB) Program.
- 7 §9.55. Small Business Enterprise (SBE) Program.
- 8 §9.56. Contract Compliance.
- 9 §9.57. Business Opportunity Programs Complaints.