

TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

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ALL Districts

The Texas Transportation Commission (commission) finds it necessary to propose amendments to §9.11, §9.13, §9.15, §9.17, and §9.18 relating to Highway Improvement Contracts and §9.227, Information from Bidders, relating to Disadvantaged Business Enterprise (DBE) Program, to be codified under Title 43, Texas Administrative Code, Part 1.

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

IT IS THEREFORE ORDERED by the commission that the amendments to §9.11, §9.13, §9.15, §9.17, §9.18 and §9.227 are proposed for adoption and are authorized for publication in the *Texas Register* for the purpose of receiving public comments.

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

Submitted and reviewed by:

Ray Cain, P.E.
Director, Construction Division

Recommended by:

James M. Boss
Executive Director

114712 SEPT. 29 '16

Minute Number Date Passed

1 Proposed Preamble

2 The Texas Department of Transportation (department) proposes
3 amendments to §§9.11, 9.13, 9.15, 9.17, and 9.18, concerning
4 Highway Improvement Contracts and §9.227, Information from
5 Bidders, concerning the Disadvantaged Business Enterprise (DBE)
6 Program.

7

8 EXPLANATION OF PROPOSED AMENDMENTS

9 These rules amend the department's rules relating to highway
10 improvement contracts to improve compliance with federal
11 regulations concerning the participation of disadvantaged
12 business enterprises (DBE) in those types of contracts.
13 Additionally, the amendments correct citations within the rules
14 to other rule provisions.

15

16 Amendments to §9.11, Definitions, update section references in
17 the definitions of disadvantaged business enterprise,
18 historically underutilized business, and small business
19 enterprise to the appropriate rules.

20

21 Amendments to §9.13, Notice of Letting and Issuance of Bid
22 Forms, add subsection (e)(1)(B)(vii), which prohibits the
23 department from issuing a bid form for a highway construction or
24 maintenance contract to an individual or entity that is
25 prohibited from submitting a bid on the project under §9.18(b).

1
2 Amendments to §9.15, Acceptance, Rejection, and Reading of Bids,
3 update a rule citation and conform wording within the section to
4 the terminology used in the cited section.

5
6 Amendments to §9.17, Award of Contract, add subsections (i) and
7 (j), which set out the periods during which an apparent
8 successful bidder is required to submit the DBE information
9 required by §9.227 to be awarded the contract. This change is
10 necessary to comply with the DBE bidding requirements of federal
11 regulation, 49 C.F.R. §26.53.

12
13 Amendments to §9.18, After Contract Award, clarify that for a
14 construction contract containing a DBE goal, failure to submit
15 the DBE information required by §9.227 within the period
16 described by §9.17(i), as added in this rulemaking, will result
17 in forfeiture of the bid guaranty. This change is necessary to
18 comply with the DBE bidding requirements of federal regulation,
19 49 C.F.R. §26.53. The amendments also change the heading of the
20 section to "Contract Execution, Forfeiture of Bid Guaranty, and
21 Bond Requirement" to more clearly describe the contents of the
22 section.

23
24 Amendments to §9.227, Information from Bidders, reorganize,
25 without substantive change, the section for additional clarity

1 and conform the section to the changes made by this rulemaking
2 to §9.17 and §9.18.

3

4 FISCAL NOTE

5 Brian Ragland, Chief Financial Officer, has determined that for
6 each of the first five years in which the amendments as proposed
7 are in effect, there will be no fiscal implications for state or
8 local governments as a result of enforcing or administering the
9 amendments.

10

11 Mr. Tracy Cain, P.E., Director, Construction Division, has
12 certified that there will be no significant impact on local
13 economies or overall employment as a result of enforcing or
14 administering the amendments.

15

16 PUBLIC BENEFIT AND COST

17 Mr. Cain has also determined that for each year of the first
18 five years in which the sections are in effect, the public
19 benefit anticipated as a result of enforcing or administering
20 the amendments will be efficiency and compliance with federal
21 regulations. There are no anticipated economic costs for
22 persons required to comply with the sections as proposed. There
23 will be no adverse economic effect on small businesses.

24

25 SUBMITTAL OF COMMENTS

1 Written comments on the proposed amendments to §9.17 may be
2 submitted to Rule Comments, General Counsel Division, Texas
3 Department of Transportation, 125 East 11th Street, Austin,
4 Texas 78701-2483 or to RuleComments@txdot.gov with the subject
5 line "Award of Contract Rules." The deadline for receipt of
6 comments is 5:00 p.m. on November 14, 2016. In accordance with
7 Transportation Code, §201.811(a)(5), a person who submits
8 comments must disclose, in writing with the comments, whether
9 the person does business with the department, may benefit
10 monetarily from the proposed amendments, or is an employee of
11 the department.

12

13 STATUTORY AUTHORITY

14 The amendments are proposed under Transportation Code, §201.101,
15 which provides the Texas Transportation Commission (commission)
16 with the authority to establish rules for the conduct of the
17 work of the department, and more specifically, Transportation
18 Code, §223.004, which authorizes the commission to adopt rules
19 to prescribe conditions under which a bid may be rejected by the
20 department.

21

22 CROSS REFERENCE TO STATUTE

23 Transportation Code, Chapter 223, Subchapter A.

1 SUBCHAPTER B. HIGHWAY IMPROVEMENT CONTRACTS

2 §9.11. Definitions. The following words and terms, when used
3 in this subchapter, shall have the following meanings, unless
4 the context clearly indicates otherwise.

5 (1) Advertisement--The public announcement required by
6 law inviting bids for work to be performed or materials to be
7 furnished.

8 (2) Alternate bid item--A bid item identified by the
9 department as an acceptable substitute for a regular bid item.

10 (3) Apparent low bidder--The bidder determined to have
11 the numerically lowest total bid as a result of the tabulation
12 of bids by the department.

13 (4) Available bidding capacity--The contractor's
14 approved bidding capacity less uncompleted work on department
15 contracts.

16 (5) Award--The commission's acceptance of a
17 contractor's bid for a proposed contract that authorizes the
18 department to enter into a contract.

19 (6) Bid--The offer of the bidder for performing the
20 work described in the plans and specifications including any
21 changes made by addenda.

22 (7) Bid bond--The security executed by the contractor
23 and the surety furnished to the department to guarantee payment

1 of liquidated damages if the contractor fails to enter into an
2 awarded contract.

3 (8) Bidder--An individual, partnership, limited
4 liability company, corporation, or joint venture submitting a
5 bid for a proposed contract.

6 (9) Bidder's Questionnaire--A prequalification form
7 that reflects detailed equipment and experience data but waives
8 audited financial data.

9 (10) Bidding capacity--The maximum dollar value a
10 contractor may have under contract with the department at any
11 given time.

12 (11) Bid error--A mathematical mistake by the bidder
13 in the unit bid price entered in the bid.

14 (12) Bid guaranty--The security furnished by the
15 bidder as a guaranty that the bidder will enter into a contract
16 if awarded the work.

17 (13) Building contract--A contract entered under
18 Transportation Code, Chapter 223, Subchapter A, for the
19 construction or maintenance of a department building or
20 appurtenant facilities. Building contracts are considered to be
21 highway improvement contracts.

22 (14) Certificate of insurance--A form approved by the
23 department covering insurance requirements stated in the

1 contract.

2 (15) Certification of Eligibility Status form--A
3 notarized form describing any suspension, voluntary exclusion,
4 ineligibility determination actions by an agency of the federal
5 government, indictment, conviction, or civil judgment involving
6 fraud, official misconduct, each with respect to the bidder or
7 any person associated with the bidder in the capacity of owner,
8 partner, director, officer, principal investor, project
9 director/supervisor, manager, auditor, or a position involving
10 the administration of federal funds, covering the three-year
11 period immediately preceding the date of the qualification
12 statement.

13 (16) Commission--The Texas Transportation Commission
14 or authorized representative.

15 (17) Confidential Questionnaire--A prequalification
16 form reflecting detailed financial and experience data.

17 (18) Construction contract--A contract entered under
18 Transportation Code, Chapter 223, Subchapter A, for the
19 construction or reconstruction of a segment of the state highway
20 system.

21 (19) Department--The Texas Department of
22 Transportation.

23 (20) Disadvantaged business enterprise (DBE)--Has the

1 meaning assigned by §9.202(4) [~~§9.51(10)~~] of this chapter
2 (relating to Definitions).

3 (21) District engineer--The chief executive officer in
4 each of the designated district offices of the department.

5 (22) Electronic Bidding System (EBS)--The department's
6 automated system that allows bidders to enter and submit their
7 bid information electronically.

8 (23) Electronic vault--The secure location where
9 electronic bids are stored prior to bid opening.

10 (24) Emergency--Any situation or condition of a
11 designated state highway, resulting from a natural or man-made
12 cause, that poses an imminent threat to life or property of the
13 traveling public or which substantially disrupts or may disrupt
14 the orderly flow of traffic and commerce.

15 (25) Executive director--The executive director of the
16 Texas Department of Transportation or the director's designee
17 not below the level of district engineer or division director.

18 (26) Highway improvement contract--A contract entered
19 into under Transportation Code, Chapter 223, Subchapter A, for
20 the construction, reconstruction, or maintenance of a segment of
21 the state highway system, or for the construction or maintenance
22 of a building or other facility appurtenant to a building.

23 (27) Historically underutilized business (HUB)--Has

1 the meaning assigned by §9.352 [~~§9.51(16)~~] of this
2 chapter (relating to Definitions).

3 (28) Joint venture--Any combination of individuals,
4 partnerships, limited liability companies, or corporations
5 submitting a single bid.

6 (29) Letting official--The executive director or any
7 department employee empowered by the executive director to
8 officially receive bids and close the receipt of bids at a
9 letting.

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

13 (31) Materially unbalanced bid--A bid which generates
14 a reasonable doubt that award to the bidder submitting a
15 mathematically unbalanced bid will result in the lowest ultimate
16 cost to the state.

17 (32) Mathematically unbalanced bid--A bid containing
18 lump sum or unit bid items that do not reflect reasonable actual
19 costs plus a reasonable proportionate share of the bidder's
20 anticipated profit, overhead costs, and other indirect costs.

21 (33) Regular bid item--A bid item contained in a bid
22 form and not designated as an alternate bid item.

23 (34) Routine maintenance contract--Contracts let

1 through the routine maintenance contracting procedure to
2 preserve and repair roadways and rights of way, with all its
3 components, to its designed or accepted configuration.

4 (35) Small business enterprise (SBE)--Has the meaning
5 assigned by §9.302 [~~§9.51(22)~~] of this chapter (relating to
6 Definitions).

7

8 §9.13. Notice of Letting and Issuance of Bid Forms.

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

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

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

17 (2) other state agencies;

18 (3) other state departments of transportation;

19 (4) disadvantaged business enterprises and
20 historically underutilized businesses;

21 (5) offices of the federal government; and

22 (6) organizations performing work under supportive
23 service contracts awarded by the commission.

1 (c) Notice of Bids. The department will advertise
2 contracts on the Electronic State Business Daily maintained and
3 operated by the Comptroller of Public Accounts.

4 (d) Bid form.

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

6 (A) the location and description of the proposed
7 work;

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

11 (C) a schedule of items for which unit prices are
12 requested;

13 (D) the time within which the work is to be
14 completed; and

15 (E) the special provisions and special
16 specifications.

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

19 (e) Issuance of bid form.

20 (1) Construction and maintenance contracts.

21 (A) Issuance. Except where prohibited under
22 subparagraph (B) of this paragraph, the department will, upon
23 receipt of a request, issue a bid form for a construction or

1 maintenance contract as follows:

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

6 (ii) for a project on which audited
7 financial qualification is waived under §9.12(c) of this
8 subchapter, only if the estimated cost of the project is within
9 that bidder's available bidding capacity.

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

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

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

20 (iii) is prohibited from rebidding a
21 specific project because of default of the first awarded
22 contract;

23 (iv) has not fulfilled the requirements for

1 qualification under §9.12 of this subchapter;

2 (v) is prohibited from rebidding that
3 project as a result of having previously submitted a
4 mathematically and materially unbalanced bid resulting in the
5 rejection of the bid by the commission; [~~or~~]

6 (vi) is prohibited from rebidding that
7 project as a result of having submitted a bid containing an
8 error resulting in the rejection of bids by the commission; or

9 (vii) is prohibited from rebidding that
10 project under §9.18(b) of this subchapter (relating to Contract
11 Execution, Forfeiture of Bid Guaranty, and Bond Requirements).

12 (C) Exception. The department may issue a bid
13 form under a temporary approval to a bidder who would be
14 ineligible under subparagraph (B)(iv) of this paragraph if the
15 bidder has substantially complied with the requirements of §9.12
16 of this subchapter.

17 (2) Building contracts.

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

22 (B) Non-issuance. The department will not issue
23 a bid form requested by a bidder for a building contract if, at

1 the time of the request, the bidder:

2 (i) is disqualified by an agency of the
3 federal government as a participant in programs and activities
4 involving federal assistance and benefits and the contract is a
5 federal-aid project;

6 (ii) is suspended or debarred by order of
7 the commission; or

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

10 (3) All contracts. The department will not issue a
11 bid form for a highway improvement contract to a bidder if the
12 bidder or a subsidiary or affiliate of the bidder has received
13 compensation from the department to participate in the
14 preparation of the plans or specifications on which the bid or
15 contract is based.

16

17 §9.15. Acceptance, Rejection, and Reading of Bids.

18 (a) Public reading. Bids will be opened and read in
19 accordance with Transportation Code, §223.004 and §223.005. Bids
20 for contracts with an engineer's estimate of less than \$300,000
21 may be filed with the district engineer at the headquarters for
22 the district, and opened and read at a public meeting conducted
23 by the district engineer, or his or her designee on behalf of

1 the commission.

2 (b) Bids not read.

3 (1) The department will not accept and will not read a
4 bid if:

5 (A) the bid is submitted by an unqualified
6 bidder;

7 (B) the bid is in a form other than the official
8 bid form issued to the bidder;

9 (C) the certification and affirmation are not
10 signed;

11 (D) the bid was not in the hands of the letting
12 official at the time and location specified in the
13 advertisement;

14 (E) the bidder modifies the bid in a manner that
15 alters the conditions or requirements for work as stated in the
16 bid;

17 (F) the bid guaranty, when required, does not
18 comply with §9.14(d) of this subchapter;

19 (G) the bidder did not attend a specified
20 mandatory pre-bid conference;

21 (H) the bid does not include a fully
22 completed HUB [~~historically underutilized business~~
23 ~~subcontracting~~] plan in accordance with §9.356 [~~§9.54(e)(1)~~] of

1 this chapter when required;

2 (I) a computer printout bid, when used, does not
3 have the unit bid prices entered in designated spaces, is not
4 signed in the name of the firm or firms to whom the bid was
5 issued, or omits required bid items or includes items not shown
6 in the bid;

7 (J) the bidder was not authorized to be issued a
8 bid form under §9.13(e) of this subchapter;

9 (K) the bid did not otherwise conform with the
10 requirements of §9.14 of this subchapter;

11 (L) the bidder fails to properly acknowledge
12 receipt of all addenda;

13 (M) the bid submitted has the incorrect number of
14 bid items; or

15 (N) the bidder bids more than the maximum or less
16 than the minimum number of allowable working days shown on the
17 plans when working days is a bid item.

18 (2) If bids are submitted on the same project
19 separately by a joint venture and one or more members of that
20 joint venture, the department will not accept and will not read
21 any of the bids submitted by the joint venture and those members
22 for that project.

23 (3) If bids are submitted on the same project by

1 affiliated bidders as determined under §9.12(d) of this
2 subchapter, the department will not accept and will not read any
3 of the bids submitted by the affiliated bidders for that
4 project.

5 (c) Revision of bid.

6 (1) For a manually submitted bid, a bidder may change
7 a bid price before it is submitted to the department by changing
8 the price in the printed bid form and initialing the revision in
9 ink;

10 (2) For a manually submitted bid, a bidder may change
11 a bid price after it is submitted to the department by
12 requesting return of the bid in writing prior to the expiration
13 of the time for receipt of bids, as stated in the advertisement.
14 The request must be made by a person authorized to bind the
15 bidder. The department will not accept a request by telephone
16 or telegraph, but will accept a properly signed facsimile
17 request. The revised bid must be resubmitted prior to the time
18 specified for the close of the receipt of bids.

19 (3) For an electronically submitted bid, a bidder may
20 change a unit bid price in EBS and resubmit electronically to
21 the electronic vault until the time specified for the close of
22 the receipt of bids. Each bid submitted will be retained in the
23 electronic vault. The electronic bid with the latest date and

1 time stamp by the vault will be used for bid tabulation
2 purposes.

3 (d) Withdrawal of bid.

4 (1) A bidder may withdraw a manually submitted bid by
5 submitting a request in writing before the time and date of the
6 bid opening. The request must be made by a person authorized to
7 bind the bidder. The department will not accept telephone or
8 telegraph requests, but will accept a properly signed facsimile
9 request. Except as provided in §9.16(c) of this subchapter and
10 §9.17(d) of this subchapter, a bidder may not withdraw a bid
11 subsequent to the time for the receipt of bids.

12 (2) A bidder may withdraw an electronically submitted
13 bid by submitting an electronic or written request to withdraw
14 the bid. An electronic withdrawal request must be submitted
15 using EBS. The request, whether electronic or written, must be
16 submitted by a person who is authorized by the bidder to submit
17 the request and received by the department before the time and
18 date of the bid opening.

19 (e) Unbalanced bids. The department will examine the unit
20 bid prices of the apparent low bid for reasonable conformance
21 with the department's estimated prices. The department will
22 evaluate a bid with extreme variations from the department's
23 estimate, or where obvious unbalancing of unit prices has

1 occurred. For the purposes of the evaluation, the department
2 will presume the same retainage percentage for all bidders. In
3 the event that the evaluation of the unit bid prices reveals
4 that the apparent low bid is mathematically and materially
5 unbalanced, the bidder will not be considered in future bids for
6 the same project.

7

8 §9.17. Award of Contract.

9 (a) The commission may reject any and all bids opened,
10 read, and tabulated under §9.15 and §9.16 of this subchapter
11 (relating to Acceptance, Rejection, and Reading of Bids and
12 Tabulation of Bids, respectively). It will reject all bids if:

13 (1) there is reason to believe collusion may have
14 existed among the bidders;

15 (2) the lowest bid is determined to be both
16 mathematically and materially unbalanced;

17 (3) the lowest bid is higher than the department's
18 estimate and the commission determines that re-advertising the
19 project for bids may result in a significantly lower low bid;

20 (4) the lowest bid is higher than the department's
21 estimate and the commission determines that the work should be
22 done by department forces; or

23 (5) the lowest bid is determined to contain a bid

1 error that meets the notification requirements contained in
2 §9.16(e)(1) of this subchapter and satisfies the criteria
3 contained in §9.16(e)(2) of this subchapter.

4 (b) Except as provided in subsection (c), (d), (e), [~~ex~~]
5 (f), or (i) of this section, if the commission does not reject
6 all bids, it will award the contract to the lowest bidder.

7 (c) In accordance with Government Code, Chapter 2252,
8 Subchapter A, the commission will not award a contract to a
9 nonresident bidder unless the nonresident underbids the lowest
10 bid submitted by a responsible resident bidder by an amount that
11 is not less than the greater of:

12 (1) the amount by which a resident bidder would be
13 required to underbid the nonresident bidder to obtain a
14 comparable contract in the state in which:

15 (A) the nonresident's principal place of business
16 is located; or

17 (B) the nonresident is a resident manufacturer;
18 or

19 (2) the amount by which a resident bidder would be
20 required to underbid the nonresident bidder to obtain a
21 comparable contract in the state in which a majority of the
22 manufacturing related to the contract will be performed.

23 (d) For a maintenance contract for a building or a segment

1 of the state highway system involving a bid amount of less than
2 \$300,000, if the lowest bidder withdraws its bid after bid
3 opening, the executive director may recommend to the commission
4 that the contract be awarded to the second lowest bidder.

5 (1) For purposes of this subsection, the term
6 "withdrawal" includes written withdrawal of a bid after bid
7 opening, failure to provide the required insurance or bonds, or
8 failure to execute the contract.

9 (2) The executive director may recommend award of the
10 contract to the second lowest bidder if he or she, in writing,
11 determines that the second lowest bidder is willing to perform
12 the work at the unit bid prices of the lowest bidder; and

13 (A) the unit bid prices of the lowest bidder are
14 reasonable, and delaying award of the contract may result in
15 significantly higher unit bid prices;

16 (B) there is a specific need to expedite
17 completion of the project to protect the health or safety of the
18 traveling public; or

19 (C) delaying award of the contract would
20 jeopardize the structural integrity of the highway system.

21 (3) The commission may accept the withdrawal of the
22 lowest bid after bid opening if it concurs with the executive
23 director's determinations.

1 (4) If the commission awards a contract to the second
2 lowest bidder and the department successfully enters into a
3 contract with the second lowest bidder, the department will
4 return the lowest bidder's bid guaranty upon execution of that
5 contract. The lowest bidder may be considered in default and
6 will be subject to debarment under §9.101, et seq. of this
7 chapter.

8 (e) If the lowest bidder is not a preferred bidder and the
9 contract will not use federal funds, the department, in
10 accordance with Transportation Code, Chapter 223, Subchapter B,
11 will award the contract to the lowest-bidding preferred bidder
12 if that bidder's bid does not exceed the amount equal to 105
13 percent of the lowest bid. For purposes of this subsection,
14 "preferred bidder" means a bidder whose principal place of
15 business is in this state or a state that borders this state and
16 that does not give a preference similar to Transportation Code,
17 §223.050.

18 (f) When additional information is required to make a final
19 decision, the commission may defer the award or rejection of the
20 contract until the next regularly scheduled commission meeting.

21 (g) Contracts with an engineer's estimate of less than
22 \$300,000 may be awarded or rejected by the executive director
23 under the same conditions and limitations as provided in

1 subsections (a)-(c) of this section.

2 (h) The commission may rescind the award of any contract
3 prior to contract execution upon a determination that it is in
4 the best interest of the state. In such an instance, the bid
5 guaranty will be returned to the bidder. No compensation will
6 be paid to the bidder as a result of this cancellation.

7 (i) If, for a contract with a DBE goal, the lowest bidder
8 fails to submit the DBE information required by §9.227 of this
9 chapter (related to Information from Bidders) within five
10 calendar days after the date that the bids are opened, the
11 commission may:

12 (1) reject all bids; or

13 (2) reject the bid of the lowest bidder and award the
14 contract to the next lowest bidder.

15 (j) If a contract is to be awarded to the next lowest
16 bidder under subsection (i) of this section, the next lowest
17 bidder shall submit the DBE information required by §9.227 of
18 this subchapter within one calendar day after the date of
19 receipt of the notification of bid acceptance.

20

21 §9.18. [~~After~~] Contract Execution, Forfeiture of Bid Guaranty,
22 and Bond Requirements [~~Award~~].

23 (a) Contract execution.

1 (1) Except as provided in paragraphs (2) and (3) of
2 this subsection, within 15 days after the bidder receives
3 written notification of the award of a contract, the
4 [~~successful~~] bidder must execute and furnish to the department
5 the contract with:

6 (A) a performance bond and a payment bond, if
7 required and as required by Government Code, Chapter 2253, with
8 powers of attorneys attached, each in the full amount of the
9 contract price except as provided by subsection (c) of this
10 section, executed by a surety company or surety companies
11 authorized to execute surety bonds under and in accordance with
12 state law. Department interpretations made in accordance with
13 §9.16(b)(2) of this subchapter (relating to Tabulation of Bids)
14 will be used to determine the contract amount for providing a
15 performance bond and payment bond, if required, and as required
16 by the Government Code, Chapter 2253;

17 (B) a certificate of insurance showing coverages
18 in accordance with contract requirements;

19 (C) when required, written evidence of current
20 good standing from the Comptroller of Public Accounts; and

21 (D) a list of all quoting subcontractors and
22 suppliers.

23 (2) A [~~successful~~] bidder awarded [~~on~~] a routine

1 maintenance contract will be required to provide the certificate
2 of insurance prior to the date the contractor begins work as
3 specified in the department's order to begin work.

4 (3) The [~~Within the time specified in the contract,~~
5 ~~the successful~~] bidder selected for the award of [~~an~~] a
6 construction contract containing a DBE or SBE goal, who is not a
7 DBE or SBE, must submit all the information required by the
8 department in accordance with §9.227 [~~§9.53(e)~~] of this chapter
9 (relating to Information from Bidders [~~Disadvantaged Business~~
10 ~~Enterprise (DBE) Program~~]) within the period described by
11 §9.17(i) of this subchapter for a contract containing a DBE
12 goal, or §9.319 [~~and §9.55(e)~~] of this chapter (relating
13 to Contractor's Commitment Agreement [~~Small Business Enterprise~~
14 ~~(SBE) Program~~]) and §9.320 of this subchapter (relating to
15 Contractor's Good Faith Efforts) within the period specified in
16 the contract for a contract containing a SBE goal. The
17 [~~successful~~] bidder must comply with paragraph (1) of this
18 subsection within 15 days after written notification of
19 acceptance by the department of the [~~successful~~] bidder's
20 documentation to achieve the DBE or SBE goal.

21 (b) Bid guaranty. The department will retain the bid
22 guaranty of the [~~successful~~] bidder awarded a contract until
23 after the contract has been executed and bonded. If the

1 ~~[successful]~~ bidder selected for the award of a contract with a
2 DBE goal fails to submit the DBE information required by §9.227
3 of this chapter (related to Information from Bidders) within the
4 period described by §9.17(i) of this subchapter or if the bidder
5 awarded a contract does not comply with subsection (a) of this
6 section, the bid guaranty will become the property of the state,
7 not as a penalty but as liquidated damages [~~; provided, however,~~
8 ~~the department may, based on documentation submitted by the~~
9 ~~contractor, grant a 15 day extension to comply with the~~
10 ~~requirements under subsection (a)(3) of this section]~~. A bidder
11 who forfeits a bid guaranty will not be considered in future
12 bids for the same work unless there has been a substantial
13 change in the design of the project subsequent to the forfeiture
14 of the bid guaranty.

15 (c) Performance or payment bonds. For maintenance
16 contracts the department may require that a performance or
17 payment bond:

18 (1) be in an amount equal to the greatest annual
19 amount to be paid under the contract and remain in effect for
20 one year from the date work is resumed after any default by the
21 contractor; or

22 (2) be in an amount equal to the amount to be paid
23 the contractor during the term of the bond and be for a term of

1 two years, renewable annually in two-year increments.

1 SUBCHAPTER J. DISADVANTAGED BUSINESS ENTERPRISE (DBE) PROGRAM

2 §9.227. Information from Bidders.

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

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

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

9 (3) the dollar amount of the participation of each
10 DBE;

11 (4) written documentation of the bidder's commitment
12 to use each DBE subcontractor whose participation the bidder
13 submits to meet a contract goal; and

14 (5) written confirmation from each DBE that it is
15 participating in the contract as provided in the bidder's
16 commitment. [~~and~~]

17 [~~(6) if the contract goal is not met by DBE~~
18 ~~commitments, evidence of the bidder's good faith efforts to~~
19 ~~obtain DBE participation to meet the contract goal.]~~

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

23 (1) sufficient DBE participation has been obtained to

1 meet the contract goal; or

2 (2) the bidder took the types of action that may be
3 considered as good faith efforts as referenced in 49 C.F.R. Part
4 26, Appendix A, to obtain the commitments to meet the contract
5 goal even though the bidder did not succeed in obtaining
6 sufficient DBE participation to meet the contract goal.

7 (c) In addition to the information required under
8 subsection (a) of this section, if the contract goal is not met
9 by DBE commitments, the apparent successful bidder must submit
10 to the department, before the execution of a contract, evidence
11 of the bidder's good faith efforts to obtain DBE participation
12 to meet the contract goal.

13 (d) If the apparent successful bidder [~~to whom the~~
14 ~~contract is conditionally awarded refuses, neglects, or~~] fails
15 to obtain the commitments to meet the DBE contract goal and
16 fails [~~or~~] to comply with good faith efforts
17 requirements described by subsection (b) of this section, the
18 proposal guaranty filed with the bid is forfeited to the
19 department.