

TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

Page 1 of 1

ALL Districts

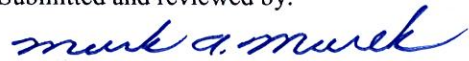
The Texas Transportation Commission (commission) finds it necessary to adopt the repeal of §§9.30-9.43 and adopt new §§9.30-9.39, all relating to contracting for architectural, engineering, and surveying services to be codified under Title 43, Texas Administrative Code, Part 1.

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

IT IS THEREFORE ORDERED by the commission that the repeal of §§9.30-9.43 and new §§9.30-9.39 are adopted and are authorized for filing with the Office of the Secretary of State.

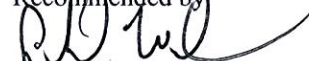
The executive director is directed to take the necessary steps to implement the actions as ordered in this minute order, pursuant to the requirements of the Administrative Procedure Act, Government Code, Chapter 2001.

Submitted and reviewed by:



Director, Design Division

Recommended by



Executive Director

113432 JAN 31 13

Minute
Number

Date
Passed

Adoption Preamble

1
2 The Texas Department of Transportation (department) adopts the
3 repeal of §§9.30-9.31, §§9.33-9.39, and §§9.41-9.43 and new
4 §§9.30-9.39, concerning Subchapter C, Contracting for
5 Architectural, Engineering, and Surveying Services. The repeal
6 of §§9.30-9.31, §§9.33-9.39, and §§9.41-9.43 and new §§9.30-9.32
7 §9.35, and §§9.37-9.39 are adopted without changes to the
8 proposed text as published in the November 9, 2012 issue of the
9 *Texas Register* (37 TexReg 8944) and will not be republished.
10 Sections 9.33, 9.34, and 9.36 are adopted with changes to the
11 proposed text as published in the November 9, 2012 issue of the
12 *Texas Register* (37 TexReg 8944).

13

14 EXPLANATION OF ADOPTED REPEALS AND NEW SECTIONS

15 Architectural, engineering, and surveying services are procured
16 by the department in accordance with Government Code, Chapter
17 2254, Subchapter A (Professional Services Procurement Act). The
18 new sections reorganize the structure of the rules to follow a
19 logical sequence of precertification, provider selection,
20 contract negotiation, and contract administration. The new
21 structure permits easier location of and access to the
22 information as needed and makes the subchapter as a whole more
23 understandable.

24

25 Substantive changes address two areas, administrative

1 qualification and provider selection. First, the department
2 proposes a procedure to allow providers to become
3 administratively qualified through self-certification, in
4 accordance with the Federal Highway Administration (FHWA)
5 regulations. Second, the department proposes two new provider
6 selection processes, the federal process and the small contract
7 process.

8
9 The department requested input from FHWA and the American
10 Council of Engineering Companies-Texas (ACEC-TX) to help
11 formulate the new rules.

12
13 New §9.30, Purpose, is based on current §9.30. The rule is
14 reorganized to improve understandability, and the text is
15 revised for clarity. The text pertaining to precertification is
16 not incorporated into new §9.30 because the topic of
17 precertification is secondary to the overall purpose of the
18 subchapter and precertification is addressed in new §9.33. New
19 §9.30 includes the citations for the applicable federal laws
20 because new §9.35 establishes a provider selection process
21 specifically for contracts reimbursed with federal-aid highway
22 program (FAHP) funds.

23
24 New §9.31, Definitions, is based on current §9.31. Terms deemed
25 to be sufficiently defined elsewhere are not incorporated into

1 the new definitions section. These terms include: "AASHTO,"
2 "administrative qualification," "available personnel," "border
3 district," "close out," "consultant," "debarment certification,"
4 "DBE/HUB goal participation," "Disadvantaged Business Enterprise
5 (DBE)," "department project manager," "firm," "indefinite
6 deliverable contract," "Historically Underutilized Business
7 (HUB)," "indirect cost rate guidance," "interview contract guide
8 (ICG)," "licensed state land surveyor," "lower tier debarment
9 certification," "lower tier participant," "metropolitan
10 district", "professional engineer,"; "professional services
11 provider," "registered architect," "registered professional land
12 surveyor," "request for proposal," "short list meeting,"
13 "specific deliverable contract," and "team." The definitions of
14 the remaining terms are revised for clarity. New §9.31 adds
15 seven new terms: "executive director," "non-listed category,"
16 "provider," "request for qualification," "standard work
17 category," "statement of qualification," and "solicitation."
18
19 New §9.32, Selection Processes, Contract Types, Selection Types,
20 and Projected Contracts, is based on current §9.39. The
21 subsections are reorganized to improve understandability, and
22 the text is revised for clarity. The text in current
23 §9.39(a)(3), pertaining to emergency contracts, is not
24 incorporated into new §9.32 because new §9.37 addresses the
25 emergency contract process. The text of current §9.39(b)(1)

1 pertaining to the dollar limits for indefinite deliverable
2 contracts is also not incorporated into new §9.32. The dollar
3 limits will instead be controlled through management directives.
4 New §9.32(a) introduces the department's four selection types,
5 standard process, federal process, small contract process, and
6 emergency process.

7
8 New §9.33, Precertification, is based on current §9.41 and
9 §9.43. The subsections are reorganized to improve
10 understandability, and the text is revised for clarity. New
11 §9.33(c)(3) clarifies that a firm's precertification status is
12 only applicable to the incorporated business entity that employs
13 the individual on whom the firm's precertification status is
14 based and does not extend to a subsidiary, affiliate, or parent
15 of the incorporated entity.

16
17 New §9.34, Standard Process, is based on several current
18 subsections, detailed below. The subsections are reorganized to
19 improve understandability, and the text is revised for clarity.
20 It should be noted that new §9.34 encapsulates the department's
21 core provider selection process.

22
23 New §9.34(b), pertaining to administrative qualification, is
24 based on current §9.42. New §9.34(b)(2) clarifies that indirect
25 cost rates must be based on entire incorporated entities and not

1 on their individual units or divisions. New §9.34(b)(3)
2 establishes provisions for administrative qualification through
3 self-certification. New §9.34(b)(4) clarifies that
4 administrative qualification is only applicable to the
5 incorporated business entity upon which the indirect cost rate
6 is based and does not extend to a subsidiary, affiliate, or
7 parent of the incorporated entity.

8
9 New §9.34(c), pertaining to the consultant selection team (CST),
10 is based on current §9.34(a). New §9.34(c)(4) clarifies that if
11 a CST member leaves the CST, the selection process may continue
12 subject to the professional registration requirements.

13
14 New §9.34(d), pertaining to the notice of intent (NOI), is based
15 on current §9.33(a). Current §9.33(a)(1)-(9) is not
16 incorporated into new §9.34 because the text is overly
17 prescriptive for the purposes of the subchapter.

18
19 New §9.34(e), pertaining to the letter of interest (LOI),
20 simplifies procedures by eliminating the requirements under
21 current §9.33(b), as the text is overly prescriptive for the
22 purposes of the subchapter.

23
24 New §9.34(f) clarifies that an individual proposed as a
25 replacement for the prime provider project manager or a task

1 leader must be designated in the LOI and must satisfy the
2 applicable precertification and non-listed category
3 requirements.

4

5 New §9.34(g), pertaining to long list qualification, is based on
6 current §9.34(b).

7

8 New §9.34(h), pertaining to long list evaluation, is based on
9 current §9.34(c) and (d). New §9.34(h)(1) establishes a
10 permissive approach to the long list evaluation criteria,
11 thereby providing greater flexibility. Also, current §9.34(e),
12 pertaining to scoring the letters of interest, is not
13 incorporated into new §9.34 because the text is unnecessary for
14 the purposes of the subchapter. New §9.34(h)(2), pertaining to
15 the short list, is based on current §9.34(f). New §9.34(h)(3),
16 pertaining to notifying short-listed prime providers, is based
17 on current §9.34(g).

18

19 New §9.34(i), pertaining to short list evaluation, is based on
20 current §9.35 and §9.36. Current §9.35(a) and (b) and §9.36(a)-
21 (c) are not incorporated into new §9.34 because the text is
22 overly prescriptive for the purposes of the subchapter. New
23 §9.34(i)(1)(A) clarifies that interview attendance requirements
24 will be specified in the NOI. New §9.34(i)(2) is based on
25 current §9.35(d) and §9.36(e). New §9.34(i)(2) establishes a

1 permissive approach to the short list evaluation criteria,
2 thereby providing greater flexibility.

3

4 New §9.34(j), pertaining to provider selection, is based on
5 current §9.37. Current §9.37(a)(1) is not incorporated into new
6 §9.34, removing the requirement for a 70/30 split in scoring
7 interviews and proposals and providing greater flexibility.

8 Current §9.37(b) is not incorporated into new §9.34, because new
9 §9.34(j)(2) establishes a tie-breaking mechanism based on the
10 relative importance factor of each short list criterion.

11 Current §9.37(c), pertaining to selection summary, is not
12 incorporated into new §9.34 because the text is unnecessary for
13 the purposes of the subchapter. New §9.34(j)(3) and (4),
14 pertaining to submittal of selection and notification, is based
15 on current §9.37(d) and (e). New §9.34(j)(5), pertaining to an
16 appeal, is based on current §9.37(g) and references 43 TAC §9.7,
17 pertaining to Protest of Contract Practices or Procedures.

18

19 New §9.35, Federal Process, establishes a provider selection
20 process for engineering or design related contracts directly
21 related to a construction project and reimbursed with federal-
22 aid highway program (FAHP) funds. New §9.35 is substantively
23 similar to new §9.34, with the exception that new §9.35(b)
24 establishes that, under the federal process, firms providing
25 engineering and design related services must be administratively

1 qualified, in accordance with Federal Highway Administration
2 regulations.

3

4 New §9.36, Small Contract Process, establishes a provider
5 selection process for architectural, engineering, or surveying
6 services contracts that meet the following requirements: (1) the
7 contract is not subject to the federal process; (2) the contract
8 value does not exceed \$750,000 in total; (3) the selection type
9 is single contract; and (4) the contract type is specific
10 deliverable. New §9.36 incorporates certain elements of the
11 standard process, including new §9.34(b), pertaining to
12 administrative qualification, and new §9.34(c), pertaining to
13 the CST. A key distinction between the two processes is that
14 the small contract process does not utilize a short list phase.
15 The department issues a solicitation, known as a request for
16 qualification. A provider responds by submitting a statement of
17 qualification (SOQ). A provider is evaluated and selected
18 solely on the information presented in its SOQ, without
19 participating in an interview or submitting a proposal.

20

21 New §9.37, Emergency Contract Process, is based on current
22 §9.39(a)(3). The current subsection is reorganized to improve
23 understandability, and the current text is revised for clarity.
24 Current §9.39(a)(3)(C), pertaining to the negotiation of
25 emergency contracts, is not incorporated into new §9.37 because

1 new §9.38(b) addresses this matter.

2

3 New §9.38, Negotiations, is based on current §9.37(f). The
4 current subsection is reorganized to improve understandability,
5 and the current text is revised for clarity. Current
6 §9.37(f)(2)(A)-(C) is not incorporated into new §9.38 because
7 the text is overly prescriptive for the purposes of the
8 subchapter. Current §9.37(g), pertaining to appealing the
9 selection process, is not incorporated into new §9.38 because
10 new §9.34(j)(5) addresses this matter. New §9.38(a) establishes
11 the negotiations requirements for contracts subject to the
12 standard, federal, and small contract processes. New §9.38(b)
13 establishes the negotiations requirements for contracts subject
14 to the emergency contract process. New §9.38(c) establishes the
15 negotiations requirements for indefinite deliverable work
16 authorizations.

17

18 New §9.39, Contract Administration, is based on current §9.38.
19 The current subsections are reorganized to improve
20 understandability, and the current text is revised for clarity.
21 Current §9.38(b)(1)(A) and (B), pertaining to the department
22 project manager and prime provider project manager, are not
23 incorporated into new §9.39 because the text is unnecessary for
24 the purposes of the subchapter. Similarly, current §9.38(c),
25 pertaining to supplemental agreements, and §9.38(e), pertaining

1 to contract close out, are not incorporated into new §9.39.
2 Current §9.38(d), pertaining to indefinite deliverable work
3 authorization negotiation is not incorporated into new §9.39
4 because new §9.38(c) addresses this matter.

5
6 COMMENTS

7 Comments were received from Steve Stagner of ACEC-TX.

8
9 Comment: Section 9.34(g)(1) provides that the department may
10 disqualify an LOI if the department has knowledge that a firm or
11 an employee has a record of unprofessional conduct. This
12 provision is overly vague and provides no due process. ACEC-TX
13 suggests that any disqualification be tied to the department's
14 existing process for sanctions.

15
16 Response: Sections 9.33(e)(2)(D), §9.34(g)(1), and §9.36(g)(1)
17 are modified to clarify their original intent. Under
18 §9.34(g)(1), as changed in response to the comment, the
19 department may disqualify an LOI if the department has knowledge
20 that a firm or employee, after the exhaustion of available
21 appeals, has been determined by a state licensing entity or a
22 court to have violated a statute or rule of the licensing entity
23 related to occupational or professional conduct. Additionally,
24 provisions in §9.33(e)(2)(D) and §9.36(g)(1) that are similar to
25 §9.34(g)(1) have been changed for clarity and consistency.

1
2 Comment: Section 9.34(i)(2)(E) provides that one of the short-
3 list evaluation criteria is the provider's past performance
4 scores in the department's CCIS database that reflect less than
5 satisfactory performance. Ideally, past performance with the
6 department is important but ACEC-TX has concerns about how
7 valid, complete, and useful this database is given the lack of
8 consistency and universality. ACEC-TX suggests that the current
9 database should not be used and that this provision should be
10 deleted. If it is to be used, there should be some
11 clarification of how the database will be used. If a project
12 manager was with a different firm and received a satisfactory
13 score but the firm received a less than satisfactory one, how
14 will that be considered? Will the proposing firm be allowed to
15 offer a rebuttal and how will that be considered?

16
17 Response: The department intends to maintain §9.34(i)(2)(E) as
18 proposed, as the evaluation of performance is required under the
19 federal Brooks Act and 23 C.F.R. §172. However, ACEC-TX's
20 concern regarding consistency and universality is
21 understandable. To address this concern, the department is
22 developing a software application that calculates an average
23 score for each project manager and each firm based on individual
24 evaluations in the CCIS database. The scoring methodology will
25 be applied universally, across the database. Also, firms and

1 project managers will continue to be scored independently of
2 each other; a firm's past performance is not a factor in a
3 project manager's score, and vice versa. For a given pairing,
4 the software application will combine the firm's and project
5 manager's scores to generate a composite score. This composite
6 score will be applied by the consultant selection team during
7 the short list stage of the selection process.

8

9 Comment: ACEC-TX suggests that the proposed rules be amended in
10 sections relating to the consultant selection team to require
11 that CST members be from the district in which the project is
12 located. These members will better understand key project
13 issues.

14

15 Response: The department intends to maintain §9.34(c) as
16 proposed. On average, for contracts utilized by districts,
17 district employees on CSTs outnumber non-district employees by a
18 2:1 ratio. CSTs have been, and will continue to be, composed of
19 mostly district employees. Also, the department must have the
20 flexibility to include non-district employees when necessary.
21 While district representation is important, specialized
22 knowledge is sometimes required. Certain selections require a
23 level of expertise beyond that of the district. An example is
24 specialized bridge design; for such projects, representation by
25 the Bridge Division is required. Further, not all contracts

1 selected under this process are utilized by districts; the
2 department's divisions have specialized contracting needs that
3 utilize this process.

4

5 STATUTORY AUTHORITY

6 The repeals and new sections are adopted under Transportation
7 Code, §201.101, which provides the Texas Transportation
8 Commission with the authority to establish rules for the conduct
9 of the work of the department, and more specifically,
10 Transportation Code, §223.041, regarding the use by the
11 department of private sector professional services for
12 transportation projects, and Government Code, Chapter 2254,
13 Subchapter A (Professional Services Procurement Act), which sets
14 forth requirements for selection and contracting of
15 architectural and engineering services.

16

17 CROSS REFERENCE TO STATUTE

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

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

3 §9.30. Purpose. This subchapter establishes standard
4 procedures for the selection of providers of architectural,
5 engineering, and surveying services and the negotiation and
6 management of contracts that require a registered architect,
7 professional engineer, or registered professional land surveyor,
8 in accordance with Transportation Code, §223.041; Government
9 Code, Chapter 2254, Subchapter A; 23 U.S.C. §112(b)(2); 40
10 U.S.C. §§1101-1104; and 23 C.F.R. Part 172.

11
12 §9.31. Definitions. The following words and terms, when used
13 in this subchapter, have the following meanings, unless the
14 context clearly indicates otherwise.

15 (1) Audit Office--An office of the department whose
16 internal function is to conduct independent reviews of
17 departmental operations and procedures to ensure that they are
18 functioning as intended and whose external function is to audit
19 negotiated contracts including the review of cost reimbursement
20 and indirect cost rate data.

21 (2) Consultant Certification Information System (CCIS)--A
22 computer system used to collect and store information related to
23 the department's certification of providers.

1 (3) Consultant selection team--The department's team that
2 evaluates letters of interest, statements of qualification,
3 interviews, and proposals and selects the provider based on
4 demonstrated qualifications.

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

6 (5) Design Division--A division of the department whose
7 functions include providing guidance and oversight for the
8 department's contracting processes and procedures for
9 architectural, engineering, or surveying services.

10 (6) Executive director--The executive director of the
11 department.

12 (7) Letter of interest--A document submitted by a prime
13 provider in response to a notice of intent and evaluated by the
14 consultant selection team, used as part of the long list stage
15 in the standard and federal processes.

16 (8) Long list--The list of prime providers submitting
17 responsive letters of interest, used as part of the standard and
18 federal processes.

19 (9) Managing office--The department's organizational sub-
20 unit responsible for overseeing the provider selection, leading
21 the contract negotiations, administering the contract, and
22 processing invoices.

23 (10) Managing officer--The head of a managing office.

1 (11) Non-listed category (NLC)--A formal classification,
2 developed by a managing office, used to define a specific sub-
3 discipline of work and provide the minimum technical
4 qualifications for performing the work. NLCs address project-
5 specific work categories not covered by the standard work
6 categories.

7 (12) Notice of intent--A public announcement that
8 advertises the department's intent to enter into one or more
9 architectural, engineering, or surveying contracts and provides
10 instructions for preparation and submittal of a letter of
11 interest, used as part of the standard and federal processes.

12 (13) Precertification--A department process conducted to
13 verify that a provider meets the minimum technical requirements
14 to perform work under a standard work category.

15 (14) Prime provider--A firm that provides or proposes to
16 provide architectural, engineering, or surveying services under
17 contract with the state.

18 (15) Provider--A prime provider or subprovider.

19 (16) Relative importance factor (RIF)--The numerical
20 weight assigned to an evaluation criterion, used by the
21 consultant selection team to score letters of interest,
22 statements of qualification, interviews, and proposals.

23 (17) Request for qualification (RFQ)--A public

1 announcement that advertises the department's intent to enter
2 into an architectural, engineering, or surveying contract and
3 provides instructions for the preparation and submittal of a
4 statement of qualification, used as part of the small contract
5 process.

6 (18) Short list--The list of prime providers most
7 qualified to perform the services specified in a notice of
8 intent, as demonstrated by the letter of interest scores.

9 (19) Solicitation--A notice of intent or request for
10 qualification.

11 (20) Standard work category--A formal classification,
12 developed by the department, used to define a specific sub-group
13 of work and provide the minimum technical qualifications for
14 performing the work.

15 (21) Statement of qualification (SOQ)--A document
16 prepared by a prime provider, submitted in response to a request
17 for qualification.

18 (22) Subprovider--A firm that provides or supports, or
19 proposes to provide or support, architectural, engineering, or
20 surveying services under contract with a prime provider.

21

22 §9.32. Selection Processes, Contract Types, Selection Types,
23 and Projected Contracts.

1 (a) Selection processes. The department will use four
2 selection processes: federal, standard, small contract, and
3 emergency.

4 (b) Contract types. The department will offer two types of
5 contracts: indefinite deliverable and specific deliverable.

6 (1) An indefinite deliverable contract may be used for a
7 single project or for multiple projects. The notice of intent
8 will describe the typical work types to be performed under the
9 contract.

10 (A) Categorical limitations on contract dollar value
11 may be established by the executive director or the executive
12 director's designee.

13 (B) The contract period in which initial work
14 authorizations may be issued may not be longer than two years
15 after the date of contract execution, unless approved by the
16 Texas Transportation Commission before the notice of intent
17 posting date.

18 (C) Supplemental agreements may be issued to extend the
19 contract period beyond two years, but only as necessary to
20 complete work on an initial work authorization.

21 (2) A specific deliverable contract may be used for a
22 single project or for multiple projects. The solicitation will
23 specify the specific deliverables to be provided under the

1 contract.

2 (c) Selection types.

3 (1) Single contract selection. One contract will result
4 from the solicitation.

5 (2) Multiple contract selection. More than one contract
6 of similar work types will result from the notice of intent.
7 The notice of intent will indicate the number and type of
8 contracts and specify a range of scores for prime providers that
9 will be considered qualified to perform the work.

10 (A) If more prime providers fall within the specified
11 range than the anticipated number of contracts, the prime
12 providers will be selected in order of ranking in the evaluation
13 process.

14 (B) If the anticipated number of contracts is greater
15 than the number of prime providers that fall within the
16 specified range, each prime provider will be selected for one
17 contract. The remaining contracts will be awarded to the prime
18 providers in order of ranking in the evaluation process, until
19 each prime provider has two contracts or all of the contracts
20 have been awarded. If there is still an excess of contracts,
21 the process for awarding the second round of contracts will be
22 repeated until all contracts are awarded.

23 (d) Projected contracts list. Quarterly, the department

1 will publish on the department's website a list of projected
2 contracts for architectural, engineering, and surveying
3 services.

4

5 §9.33. Precertification.

6 (a) Standard work categories. Precertification establishes
7 the minimum technical qualifications to perform work under a
8 standard work category. The Texas Transportation Commission, by
9 minute order, may add, revise, or delete a standard work
10 category.

11 (b) Contract eligibility.

12 (1) To be eligible to perform work under a standard work
13 category, a provider must have active precertification status in
14 that work category by the closing date of the solicitation.

15 (2) The department will not delay the selection process
16 or the contract execution to accommodate a provider that is not
17 in active precertification status.

18 (c) Precertification status of firms and employees.

19 (1) A firm is precertified in a standard work category
20 only if it employs an individual precertified in that category.

21 (2) A firm that employs an individual who is precertified
22 in multiple standard work categories is, by extension,
23 precertified in each of those categories.

1 (3) A firm's precertification status is only applicable
2 to the incorporated business entity that employs the individual
3 upon whom the firm's precertification status is based and does
4 not extend to a subsidiary, affiliate, or parent of the
5 incorporated entity.

6 (4) An employee's precertification status is based solely
7 on the individual's qualifications. A firm's qualifications may
8 not serve as a basis for precertifying an employee.

9 (5) Precertification status shall transfer with the
10 employee, should the employee leave the firm.

11 (d) Precertification website. The department will maintain
12 a precertification website that will include:

13 (1) the definitions of the standard work categories;

14 (2) the minimum technical qualifications to perform work
15 under the standard work categories; and

16 (3) the precertification application form, with
17 instructions.

18 (e) Application and review process.

19 (1) To apply for precertification in a standard work
20 category, a firm must employ an individual qualified to become
21 precertified in that category and present the individual's
22 qualifications in a precertification application.

23 (2) The department will consider the following factors in

1 reviewing an application:

2 (A) the minimum technical qualifications as applicable;

3 (B) the individual's professional license or
4 registration;

5 (C) the individual's experience and training; and

6 (D) any record that shows that [~~of unprofessional~~
7 ~~conduct, on the part of either~~] the individual or the firm is
8 the subject of a final administrative or judicial determination
9 that the employee or firm has violated a statute or rule of a
10 state licensing entity related to occupational or professional
11 conduct.

12 (3) If a submitted application is incomplete or
13 inaccurate, the firm will be given an opportunity to correct the
14 application and provide additional information. The firm must
15 provide the information within 30 days after the day that it
16 receives the department's notice that the application is
17 incomplete or inaccurate.

18 (4) If the information is not provided under paragraph
19 (3) of this subsection within the 30-day period prescribed by
20 that paragraph, the application will be processed at the end of
21 that 30-day period with the information available.

22 (5) The department will make a good faith effort to make
23 a precertification determination within 60 days after the day

1 that the department receives a complete and accurate application
2 or if paragraph (4) of this subsection applies, within 60 days
3 after the day that the 30-day period prescribed by that
4 paragraph ends.

5 (f) Appeal. A firm may appeal a precertification denial to
6 the Design Division by submitting additional information within
7 30 days after the day that it receives written notification of
8 the denial. The information must justify why precertification
9 should be granted. The department will review the information
10 and make a second precertification determination. A firm may
11 file a written complaint regarding a second precertification
12 denial to the executive director or the executive director's
13 designee.

14 (g) Updates. A firm must report any change in its
15 application information no later than 45 days after the day that
16 the change occurs.

17 (h) Data management. A firm's application information will
18 be maintained in the CCIS.

19 (i) Annual renewal. To maintain contract eligibility, a
20 firm must renew its precertification status no later than March
21 31 of each year. The firm must submit its annual renewal
22 through the CCIS.

23 (1) A firm that has renewed its precertification status

1 by the annual deadline will maintain an active precertification
2 status in the standard work categories in which it is
3 precertified.

4 (2) A firm that has not renewed its precertification by
5 the annual deadline will be placed in inactive status.

6

7 §9.34. Standard Process.

8 (a) Applicability. The standard process, described under
9 this section, may be used for any architectural, engineering, or
10 surveying services contract not subject to §9.35 of this
11 subchapter (relating to Federal Process).

12 (b) Administrative qualification.

13 (1) Administrative qualification is a process used by the
14 department to verify that a provider has an indirect cost rate
15 that meets department requirements. Except as provided by
16 paragraph (8) of this subsection, to compete for a contract
17 under this section a provider either must be administratively
18 qualified or must accept an indirect cost rate under paragraph
19 (7) of this subsection.

20 (2) Factors in determining administrative qualification.

21 (A) A provider may demonstrate administrative
22 qualification by an audit or by self-certification of its
23 incorporated entity. Indirect cost rates must be based on the

1 entire incorporated entity and may not be based on the entity's
2 units or divisions.

3 (i) An audit may be performed by an independent
4 certified public accountant (CPA), an agency of the federal
5 government, another state transportation agency, or a local
6 transit agency. An audit performed by an independent CPA must
7 be conducted in accordance with the current versions of 48
8 C.F.R. Part 31, the Generally Accepted Government Auditing
9 Standards (GAGAS), and the American Association of State Highway
10 Transportation Officials (AASHTO) Uniform Audit and Accounting
11 Guide. The provider must provide the department with
12 unrestricted access to the audit work papers, records, and other
13 information as requested by the Audit Office.

14 (ii) Self-certification may be conducted by the
15 provider and must include a cost report and an internal controls
16 report. The self-certified cost report must comply with the
17 current versions of 48 C.F.R. Part 31, the GAGAS, and the AASHTO
18 Uniform Audit and Accounting Guide. The self-certified internal
19 control report must certify the provider has internal controls
20 in place within its organization. Both the cost report and the
21 internal control report must be signed by a company officer and
22 notarized.

23 (B) The audit or self-certification shall be based on

1 the provider's fiscal year. The indirect cost rate, as approved
2 by the Audit Office, shall become effective six months after the
3 end of the provider's fiscal year, or immediately if filed more
4 than six months after the end of the provider's fiscal year. It
5 shall be effective no more than twelve months and shall expire
6 eighteen months after the end of the fiscal year upon which it
7 is based.

8 (C) A provider must submit on an annual basis a
9 compensation analysis for all executives in accordance with the
10 AASHTO Uniform Audit and Accounting Guide.

11 (D) The department may audit the indirect cost rate of
12 a provider under contract with, or seeking to do business with,
13 the department. These audits will be conducted in accordance
14 with the criteria outlined in this subsection.

15 (E) A provider must submit a signed Certification of
16 Final Indirect Costs with the audit report or self-
17 certification. The certification must follow the requirements of
18 the Federal Highway Administration.

19 (3) Submittal and review process for administrative
20 qualification.

21 (A) A provider must submit its administrative
22 qualification information to the Audit Office in accordance with
23 the instructions on the department's website. Administrative

1 qualification submittals will not be received by the Design
2 Division.

3 (B) Upon review of an audit report or self-
4 certification received from a provider, the Audit Office may
5 request additional information from the provider. If the
6 submittal is not complete and accurate, the Audit Office will
7 return it to the provider for correction. Upon request for
8 additional information by the Audit Office, the provider shall
9 submit the information within 15 days after the day that it
10 receives the Audit Office's request. If the information is not
11 provided within the 15-day period, the submittal will be placed
12 on pending status for an additional 15 days. If the information
13 is not received within the additional 15-day period, the
14 submittal will not be processed for administrative
15 qualification.

16 (4) Administrative qualification is applicable only to
17 the incorporated business entity upon which the indirect cost
18 rate is based and does not extend to a subsidiary, affiliate, or
19 parent of the incorporated entity.

20 (5) The Audit Office will provide a selected firm's
21 indirect cost rate information to the managing office on
22 notification from the Design Division, for use in negotiations
23 under §9.38 of this subchapter (relating to Negotiations).

1 (6) The Audit Office will not provide a firm's
2 administrative qualification information to the managing office
3 or the consultant selection team before the selection of that
4 firm.

5 (7) Providers not administratively qualified. The
6 department may contract with a prime provider or allow the use
7 of a subprovider that is not administratively qualified if:

8 (A) the provider has been in operation, as currently
9 organized, for less than one fiscal year and the provider
10 accepts an indirect cost rate developed by the Audit Office; or

11 (B) on request by the department during the selection
12 process, the prime provider provides written certification that
13 the prime provider or subprovider, as applicable, does not have
14 an indirect cost rate audit and will accept an indirect cost
15 rate developed by the Audit Office.

16 (8) Exemptions to administrative qualification.

17 (A) A non-engineering firm is exempt from the
18 administrative qualification requirement of this section.

19 (B) A provider performing a service under standard work
20 category 18.2.1, subsurface utilities engineering, or any of the
21 following work groups, as listed on the department's
22 precertification website, is exempted from administrative
23 qualification, to the extent of the service being performed:

- 1 (i) Group 6, bridge inspection;
- 2 (ii) Group 12, materials inspection and testing;
- 3 (iii) Group 14, geotechnical services;
- 4 (iv) Group 15, surveying and mapping; and
- 5 (v) Group 16, architecture.

6 (C) The Audit Office and Design Division may exempt
7 services other than those indicated in subparagraph (B) of this
8 paragraph on a case-by-case basis. Any request for an exemption
9 must be received by the Audit Office by the closing date of the
10 solicitation.

11 (c) Consultant selection team (CST).

12 (1) The department shall use a CST in selecting providers
13 under this section.

14 (2) The CST shall be composed of the department employee
15 designated as the CST chair, the department employee designated
16 as the project manager, and at least one other department
17 employee.

18 (3) At least one CST member must be a professional
19 engineer, for engineering contracts; a registered architect, for
20 architectural contracts; and either a professional engineer or
21 registered professional land surveyor, for surveying contracts.

22 (4) If a CST member leaves the CST during the selection
23 process, the process may continue with the remaining members,

1 subject to paragraph (3) of this subsection.

2 (d) Notice of intent (NOI). Not fewer than 21 calendar
3 days before the solicitation closing date, the department will
4 post on a web-based bulletin board an NOI providing the contract
5 information and specifying the requirements for preparing and
6 submitting a letter of interest.

7 (e) Letter of interest (LOI). To be considered, an LOI
8 must comply with the requirements specified in the NOI.

9 (f) Replacements. An individual proposed as a replacement
10 for the prime provider project manager or a task leader must be
11 designated in the LOI and must satisfy the applicable
12 precertification and NLC requirements.

13 (g) Long list qualification.

14 (1) The department may disqualify an LOI if the
15 department has knowledge that a firm on the project team or an
16 employee of a firm on the project team is the subject of a final
17 administrative or judicial determination that the firm or
18 employee has violated a statute or rule of a state licensing
19 entity related to occupational or professional conduct [~~has a~~
20 ~~record of unprofessional conduct~~].

21 (2) If an LOI is not disqualified under paragraph (1) of
22 this subsection, the CST will screen the LOI to determine
23 whether it complies with the requirements specified in the NOI.

1 Each LOI that meets these requirements will be considered
2 responsive to the NOI, placed on a long list, and evaluated.

3 (h) Long list evaluation.

4 (1) Long list evaluation criteria. The CST will evaluate
5 the long-listed LOIs to establish a short list according to the
6 long list evaluation criteria specified in the NOI. These
7 criteria may include:

8 (A) project understanding and approach;

9 (B) project manager's experience with similar projects;

10 (C) similar project related experience of the task
11 leaders responsible for the major work categories identified in
12 the NOI; and

13 (D) other qualifications-based criteria approved by the
14 Design Division.

15 (2) Short list. The short list will consist of the most
16 qualified providers, as indicated by the long list scores.

17 (A) For single contract selections, the minimum number
18 of short-listed prime providers is three, unless fewer than
19 three prime providers submitted responsive LOIs.

20 (B) For multiple contract selections, the minimum
21 number of short-listed prime providers is the number of desired
22 contracts plus three, unless fewer than the desired number of
23 prime providers submitted responsive LOIs.

1 (3) Notification.

2 (A) The department will notify each prime provider that
3 submitted an LOI whether it was short-listed.

4 (B) The department will notify each short-listed prime
5 provider whether a short list meeting will be held.

6 (i) Short list evaluation.

7 (1) Interviews and proposals. The department will
8 evaluate the short-listed providers through interviews,
9 proposals, or both.

10 (A) For interviews, the department will issue an
11 Interview and Contract Guide (ICG) to each short-listed prime
12 provider. The ICG will provide contract information and specify
13 the requirements for the interview. Any requirements pertaining
14 to interview attendance will be specified in the NOI.

15 (B) For proposals, the department will issue a Request
16 for Proposal (RFP) to each short-listed prime provider. The RFP
17 will provide contract information and specify the requirements
18 for the preparation and submittal of a proposal.

19 (2) Short list evaluation criteria. The CST will
20 evaluate the interviews and proposals according to the short
21 list evaluation criteria specified in the ICG and RFP. These
22 criteria may include:

23 (A) understanding of the scope of services;

1 (B) experience of the project manager and project team;

2 (C) ability to meet the project schedule;

3 (D) prime provider's quality assurance/quality control
4 program;

5 (E) prime provider's past performance scores in the
6 CCIS database for department contracts reflecting less than
7 satisfactory performance; and

8 (F) other qualifications-based criteria approved by the
9 Design Division.

10 (j) Selection.

11 (1) Basis of final selection. The CST will select the
12 best qualified provider, as indicated by the short list scores.

13 (2) Tie scores. The managing officer will break a tie
14 using the following method.

15 (A) Interviews only.

16 (i) The first tie breaker will be the scores for the
17 interview criterion with the highest RIF.

18 (ii) The remaining interview criteria shall be
19 compared in the order of decreasing RIF until the tie is broken.

20 (iii) If the providers have identical scores on all
21 of the interview criteria, the provider will be chosen by random
22 selection.

23 (B) Proposals only.

1 (i) The first tie breaker will be the scores for the
2 proposal criterion with the highest RIF.

3 (ii) The remaining proposal criteria shall be
4 compared in the order of decreasing RIF until the tie is broken.

5 (iii) If the providers have identical scores on all
6 of the proposal criteria, the provider will be chosen by random
7 selection.

8 (C) Interviews and proposals, both.

9 (i) If the interviews are weighted at 50 percent or
10 more of the short list score, subparagraph (A)(i) and (ii) of
11 this paragraph applies. If the providers have identical scores
12 on all of the interview criteria, subparagraph (B)(i)-(iii) of
13 this paragraph applies.

14 (ii) If the proposals are weighted at more than 50
15 percent of the short list score, subparagraph (B)(i) and (ii) of
16 this paragraph applies. If the providers have identical scores
17 on all of the proposal criteria, subparagraph (A)(i)-(iii) of
18 this paragraph applies.

19 (D) Order of comparison. If the interview or proposal
20 criteria have equal RIFs, the criteria will be compared in the
21 order listed in the ICG or RFP.

22 (3) Submittal of selection. The managing officer will
23 submit the evaluation documentation and recommendation for

1 selection to the Design Division director for review. If the
2 procedural review is acceptable, the executive director or the
3 executive director's designee will concur with the selection.

4 (4) Notification. The department will:

5 (A) provide written notification to the prime provider
6 selected for contract negotiation and arrange a meeting to begin
7 contract negotiations;

8 (B) provide written notification to each short-listed
9 prime provider that was not selected, notifying the provider of
10 the non-selection; and

11 (C) publish the short list and the selected provider on
12 a web-based bulletin board.

13 (5) Appeal. A provider may file a written appeal
14 concerning the selection process with the executive director or
15 the executive director's designee as provided under §9.7 of this
16 chapter (relating to Protest of Contract Practices or
17 Procedures).

18
19 §9.35. Federal Process.

20 (a) This section applies to an engineering or design
21 related service contract directly related to a highway
22 construction project and reimbursed with federal-aid highway
23 program (FAHP) funding.

1 (b) A firm providing engineering and design related
2 services must be administratively qualified under §9.34(b)(2)-
3 (6) of this subchapter (relating to Standard Process) by the
4 closing date of the NOI to compete for contracts under this
5 section. Paragraphs (7) and (8) of §9.34(b) of this subchapter
6 do not apply to a contract under this section.

7 (c) Except as provided in subsection (b) of this section,
8 the process described in §9.34 of this subchapter applies to
9 contracts under this section.

10

11 §9.36. Small Contract Process.

12 (a) Applicability. The small contract process described
13 under this section may be used for an architectural,
14 engineering, or surveying services contract that meets the
15 following requirements:

16 (1) the contract is not subject to §9.35 of this
17 subchapter (relating to Federal Process);

18 (2) the contract value does not exceed \$750,000 in total;

19 (3) the selection type is single contract; and

20 (4) the contract type is specific deliverable.

21 (b) Administrative qualification. Section 9.34(b) of this
22 subchapter (relating to Standard Process) applies to contracts
23 under this section.

1 (c) Consultant selection team. Section 9.34(c) of this
2 subchapter applies to contracts under this section.

3 (d) Request for qualifications (RFQ). Not fewer than 14
4 calendar days before the solicitation closing date, the
5 department will post on a web-based bulletin board an RFQ
6 providing the contract information and specifying the
7 requirements for preparing and submitting a statement of
8 qualification.

9 (e) Statement of qualification (SOQ). To be considered, an
10 SOQ must comply with the requirements specified in the RFQ.

11 (f) Replacements. An individual proposed as a replacement
12 for the prime provider project manager or a task leader must be
13 designated in the SOQ and must satisfy the applicable
14 precertification and NLC requirements.

15 (g) Qualification for evaluation.

16 (1) The department may disqualify an SOQ if the
17 department has knowledge that a firm on the project team or an
18 employee of a firm on the project team is the subject of a final
19 administrative or judicial determination that the firm or
20 employee has violated a statute or rule of a state licensing
21 entity related to occupational or professional conduct [~~has a~~
22 ~~record of unprofessional conduct~~].

23 (2) If an SOQ is not disqualified under paragraph (1) of

1 this subsection, the CST will screen the SOQ to determine
2 whether it complies with the requirements specified in the RFQ.
3 Each SOQ that meets these requirements will be considered
4 responsive to the RFQ and evaluated.

5 (h) SOQ evaluation. The CST will evaluate the responsive
6 SOQs according to the following selection criteria specified in
7 the RFQ. These criteria may include:

8 (1) project understanding and approach;

9 (2) the prime provider project manager's experience with
10 similar projects;

11 (3) similar project-related experience of the task
12 leaders responsible for the major work categories identified in
13 the RFQ;

14 (4) past performance scores in the CCIS database for
15 department contracts reflecting less than satisfactory
16 performance; and

17 (5) other qualifications-based criteria approved by the
18 Design Division.

19 (i) Selection.

20 (1) Basis of final selection. The CST will select the
21 best qualified provider, as indicated by the SOQ scores.

22 (2) Tie scores. The managing officer will break a tie
23 using the following method.

1 (A) The first tie breaker is the scores for the
2 selection criterion with the highest RIF.

3 (B) The remaining selection criteria will be compared
4 in the order of decreasing RIF until the tie is broken.

5 (C) If the providers have identical scores on all of
6 the selection criteria, the provider will be chosen by random
7 selection.

8 (3) Submittal of selection. Section 9.34(j)(3) of this
9 subchapter applies to this section.

10 (4) Notification. The department will:

11 (A) provide written notification to a prime provider
12 selected for contract negotiation and arrange a meeting to begin
13 contract negotiations;

14 (B) provide written notification to each prime provider
15 that was not selected, notifying the provider of the non-
16 selection; and

17 (C) publish the selected provider on a web-based
18 bulletin board.

19 (5) Appeal. Section 9.34(j)(5) of this subchapter
20 applies to this section.

21

22 §9.37. Emergency Contract Process.

23 (a) Applicability. The emergency contract process

1 described in this section may be used when the executive
2 director or the executive director's designee certifies in
3 writing that an emergency situation, including a safety hazard,
4 a substantial disruption of the orderly flow of traffic and
5 commerce, or a risk of substantial financial loss to the
6 department, exists, and that an architectural, engineering, or
7 surveying services contract is needed to address the situation.

8 (b) Administrative qualification. If the emergency
9 contract is an engineering or design related services contract
10 directly related to a highway construction project and
11 reimbursed with federal-aid highway program (FAHP) funding, a
12 provider must be administratively qualified to compete for the
13 contract, and §9.34(b)(2)-(6) of this subchapter (relating to
14 Standard Process) applies to this section. If the contract is
15 not such a contract, a provider need not be administratively
16 qualified to compete for the contract, and §9.34(b) of this
17 subchapter applies to this section.

18 (c) Notification.

19 (1) After an emergency is certified, the department will
20 review its list of precertified firms. If there are a
21 sufficient number of firms, the department will notify at least
22 three of these firms.

23 (2) The department will inform the firms of the nature of

1 the emergency and will provide the firms with the specifications
2 for the remedy.

3 (d) Evaluation and selection. The department will evaluate
4 each firm's qualifications and select the best qualified firm to
5 perform the services.

6

7 §9.38. Negotiations.

8 (a) Contract negotiations.

9 (1) A contract that is subject to §§9.34, 9.35, or 9.36
10 of this subchapter (relating to Standard Process, Federal
11 Process, and Small Contract Process, respectively) will be
12 negotiated in accordance with this subsection.

13 (2) The department will enter negotiations with a
14 selected prime provider to establish a satisfactory contract
15 containing a fair and reasonable price for the services.

16 (3) A selected prime provider shall submit to the
17 department the actual salary rates for the proposed team members
18 and the non-salary costs, generated internally, to be billed
19 directly. The department will reference this information in the
20 negotiations.

21 (4) The department anticipates that a satisfactory
22 contract containing a fair and reasonable price for the services
23 may be negotiated within 30 days after the date that a selected

1 prime provider is notified of the selection. If a solicitation
2 specifies that more than one contract will be awarded, the time
3 for negotiating the contracts is automatically extended by a
4 period equal to the number of additional contracts to be awarded
5 under that solicitation multiplied by five days. The Design
6 Division director may grant additional extensions as required.
7 The solicitation may specify a shorter or longer time for the
8 negotiations.

9 (5) If the department determines that a fair and
10 reasonable price cannot be negotiated, the department will
11 terminate negotiations with the selected prime provider and
12 proceed under this paragraph.

13 (A) Single contract selection. The department will
14 begin negotiations with the next highest-ranked prime provider.
15 This process will continue as necessary through the three
16 highest-ranked prime providers. If a fair and reasonable price
17 cannot be negotiated with any of the three highest-ranked prime
18 providers, the proposed contract shall be canceled. If the
19 proposed contract is canceled, it may be re-advertised.

20 (B) Multiple contract selection. The department will
21 begin negotiations with the next highest-ranked prime provider
22 not selected for a contract. This process will continue as
23 necessary through the short-listed prime providers. If a fair

1 and reasonable price cannot be negotiated with any of the short-
2 listed prime providers, the proposed contract shall be canceled.
3 If the proposed contract is canceled, it may be re-advertised.

4 (b) Emergency contract negotiations.

5 (1) Contracts subject to §9.37 of this subchapter
6 (relating to Emergency Contract Process) will be negotiated in
7 accordance with this subsection.

8 (2) The department will enter negotiations with the
9 selected provider to establish a satisfactory contract
10 containing a fair and reasonable price for the services.

11 (3) If the department determines that a fair and
12 reasonable price cannot be negotiated, the department will
13 terminate negotiations with the provider and begin negotiations
14 with the next highest-ranked provider. This process will
15 continue as necessary through the notified firms.

16 (4) If a fair and reasonable price cannot be negotiated
17 with any of the notified firms, the department may take any
18 measure necessary to identify and solicit a firm that is able to
19 perform the services.

20 (c) Indefinite deliverable work authorization negotiations.

21 (1) Indefinite deliverable work authorizations will be
22 negotiated in accordance with this subsection.

23 (2) The department will enter negotiations with a

1 selected prime provider to establish a satisfactory work
2 authorization containing a fair and reasonable price for the
3 services.

4 (3) If the department determines that a fair and
5 reasonable price cannot be negotiated, the department will
6 terminate negotiations with the prime provider and begin
7 negotiations with another prime provider with an indefinite
8 deliverable contract.

9

10 §9.39. Contract Administration.

11 (a) Prime provider's percentage of work. A prime provider
12 shall perform at least 30 percent of the contracted work with
13 its own work force, unless otherwise approved by the Design
14 Division director.

15 (b) Project manager replacement. The prime provider
16 project manager may not be replaced without the prior written
17 consent of the department.

18 (c) Department audits. The department may perform interim
19 and final audits.

20 (d) Performance evaluations.

21 (1) The managing office will document the prime
22 provider's performance on the contract by evaluating the project
23 manager and the firm. Evaluations will be conducted during the

1 ongoing contract activity and at the completion of the contract.

2 (2) Further evaluations pertaining to project
3 constructability may be conducted during project construction
4 and at the completion of the construction contract.

5 (3) The department will give a copy of each completed
6 performance evaluation to the prime provider for review and
7 comment. The prime provider's comments will be entered into the
8 CCIS.

9 (4) Performance evaluation scores will be entered into
10 the CCIS and may be used for the purpose of provider selection.

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

3 §9.30. Purpose.

4 §9.31. Definitions.

5 §9.33. Notice of Intent and Letter of Interest.

6 §9.34. Short List Determination.

7 §9.35. Short List Proposals and Evaluation.

8 §9.36. Short List Interviews and Evaluation.

9 §9.37. Selection.

10 §9.38. Contract Administration.

11 §9.39. Selection Types, Contract Types, and Projected
12 Contracts.

13 §9.41. Precertification.

14 §9.42. Administrative Qualification.

15 §9.43. Precertification Requirements.

16