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**XX.**

**TEXAS WORKFORCE COMMISSION**

The rules are adopted under Texas Labor Code §§301.0015 and 302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

## Chapter 800. GENERAL ADMINISTRATION

### SUBCHAPTER A. GENERAL PROVISIONS

#### §800.1. Short Title and Purpose

These rules may be cited as the General Provisions Rules. The purpose of this subchapter is to set forth the general provisions applicable to the Commission.

*The provisions of this §800.1 adopted to be effective December 20, 1998, as published in the Texas Register, December 11, 1998, 23 TexReg 12691.*

#### §800.2. Definitions

The following words and terms, when used in this part, relating to the Texas Workforce Commission, shall have the following meanings, unless the context clearly indicates otherwise.

- (1) Agency--The unit of state government established under Texas Labor Code Chapter 301 that is presided over by the Commission and administered by the Executive Director to operate the integrated workforce development system and administer the unemployment compensation insurance program in this state as established under the Texas Unemployment Compensation Act, Texas Labor Code Annotated, Title 4, Subtitle A, as amended. The definition of "Agency" shall apply to all uses of the term in rules contained in this part, or unless otherwise defined, relating to the Texas Workforce Commission that are adopted after February 1, 2001.
- (2) Allocation--The amount approved by the Commission for expenditures to a local workforce development area during a specified program year, according to specific state and federal requirements.
- (3) Board--A Local Workforce Development Board created pursuant to Texas Government Code §2308.253 and certified by the Governor pursuant to Texas Government Code §2308.261. This includes such a Board when functioning as the Local Workforce Investment Board as described in the Workforce Investment Act §117 (29 U.S.C.A. §2832), including those functions required of a Youth Council, as provided for under the Workforce Investment Act §117(i). The definition of "Board" shall apply to all uses of the term in the rules contained in this part, or unless otherwise defined, relating to the Texas Workforce Commission that are adopted after February 1, 2001.
- (4) Child Care--Child care services funded through the Commission, which may include services funded under the Child Care and Development Fund, WIA, and other funds available to the Commission or a Board to provide quality child care to assist families seeking to become independent from, or who are at risk of becoming dependent on, public assistance while parents are either working or participating in educational or training activities in accordance with state and federal statutes and regulations.
- (5) Choices--The employment and training activities created under §31.0126 of the Texas Human Resources Code and funded under TANF (42 U.S.C.A. 601 *et seq.*) to assist persons who are receiving temporary cash assistance, transitioning off, or at risk of becoming dependent on temporary cash assistance or other public assistance in obtaining and retaining employment.

- (6) Commission--The body of governance of the Texas Workforce Commission composed of three members appointed by the Governor as established under Texas Labor Code §301.002 that includes one representative of labor, one representative of employers and one representative of the public. The definition of "Commission" shall apply to all uses of the term in rules contained in this part, or unless otherwise defined, relating to the Texas Workforce Commission that are adopted after February 1, 2001.
- (7) Formal Measures--Workforce development services performance measures adopted by the Governor and developed and recommended through the Texas Workforce Investment Council (TWIC).
- (8) Employment Service--A program to match qualified job seekers with employers through a statewide network of one-stop career centers. (The Wagner-Peyser Act of 1933 (Title 29 U.S.C., Chapter 4B) as amended by the Workforce Investment Act of 1998 (P.L. 105-220))
- (9) Executive Director--The individual appointed by the Commission to administer the daily operations of the Agency, which may include a person delegated by the Executive Director to perform a specific function on behalf of the Executive Director.
- (10) Local Workforce Development Area (workforce area)--Workforce areas designated by the Governor pursuant to Texas Government Code §2308.252 and functioning as a Local Workforce Investment Area, as provided for under the Workforce Investment Act §116 and §189(i)(2) (29 U.S.C.A., §2831 and §2939).
- (11) One-Stop Service Delivery Network--A one-stop-based network under which entities responsible for administering separate workforce investment, educational and other human resources programs and funding streams collaborate to create a seamless network of service delivery that shall enhance the availability of services through the use of all available access and coordination methods, including telephonic and electronic methods. Also referred to as the Texas Workforce Network.
- (12) Performance Measure--An expected performance outcome or result.
- (13) Performance Standard--A contracted numerical value setting the acceptable and expected performance outcome or result to be achieved for a performance measure, including Core Outcome Formal Measures.
- (14) Program Year--The twelve-month period applicable to the following as specified:
  - (A) Child Care: October 1 - September 30;
  - (B) Choices: October 1 - September 30;
  - (C) Employment Service: October 1 - September 30;
  - (D) Supplemental Nutrition Assistance Program Employment and Training: October 1 - September 30;
  - (E) Project RIO: October 1 - September 30;
  - (F) Trade Act Services: October 1 - September 30;
  - (G) Veterans' Employment and Training: October 1 - September 30;
  - (H) Workforce Investment Act (WIA) Adult, Dislocated Worker, and Youth formula funds: July 1 - June 30;
  - (I) WIA Alternative Funding for Statewide Activities: October 1 - September 30; and
  - (J) WIA Alternative Funding for One-Stop Enhancements: October 1 - September 30.

- (15) Project Reintegration of Offenders (RIO)--A program that prepares and transitions ex-offenders released from Texas Department of Criminal Justice or Texas Youth Commission incarceration into gainful employment as soon as possible after release, consistent with provisions of the Texas Labor Code, Chapter 306, Texas Government Code §2308.312, and the Memorandum of Understanding with the Texas Department of Criminal Justice and the Texas Youth Commission.
- (16) Supplemental Nutrition Assistance Program Employment and Training (SNAP E&T)--A program to assist SNAP recipients to become self-supporting through participation in activities that include employment, job readiness, education, and training, activities authorized and engaged in as specified by federal statutes and regulations (7 U.S.C.A. §2011), and Chapter 813 of this title relating to Supplemental Nutrition Assistance Program Employment and Training.
- (17) TANF--Temporary Assistance for Needy Families, which may include temporary cash assistance and other temporary assistance for eligible individuals, as defined in the Personal Responsibility and Work Opportunities Reconciliation Act of 1996, as amended (7 U.S.C.A. §201.1 *et seq.*) and the Temporary Assistance for Needy Families statutes and regulations (42 U.S.C.A. §601 *et seq.*, 45 C.F.R. Parts 260 - 265). TANF may also include the TANF State Program (TANF SP), relating to two-parent families, which is codified in Texas Human Resources Code, Chapter 34.
- (18) Trade Act Services--Programs authorized by the Trade Act of 1974, as amended (and 20 C.F.R. Part 617) providing services to dislocated workers eligible for Trade benefits through Texas Workforce Centers.
- (19) TWIC--Texas Workforce Investment Council appointed by the Governor pursuant to Texas Government Code §2308.052 and functioning as the State Workforce Investment Board (SWIB), as provided for under the Workforce Investment Act §111(e) (29 U.S.C.A. §2821(e)). In addition, pursuant to the Workforce Investment Act §194(a)(5) (29 U.S.C.A. §2944(a) (5)), TWIC maintains the duties, responsibilities, powers, and limitations as provided in Texas Government Code §§2308.101 - 2308.105. Formerly known as the Texas Council on Workforce and Economic Competitiveness (TCWEC), any references to TCWEC when used in this part are now considered references to TWIC.
- (20) Texas Workforce Center Partner--An entity that carries out a workforce investment, educational, or other human resources program or activity, and that participates in the operation of the One-Stop Service Delivery Network in a workforce area consistent with the terms of a memorandum of understanding entered into between the entity and the Board.
- (21) Veterans' Employment and Training--Services established under the Jobs for Veterans Act of 2002 (P.L. 107-288, 38 U.S.C.A. §§4100, 4201, and 4301) the Disabled Veterans Outreach Program (DVOP) and the Local Veterans Employment Representative (LVER) program to provide employment services to disabled veterans, veterans of the Vietnam era, and other eligible veterans and family members.
- (22) WIA--Workforce Investment Act (P.L. 105-220, 29 U.S.C.A. §2801 *et seq.*). References to WIA include references to WIA formula allocated funds unless specifically stated otherwise.
- (23) WIA Formula Allocated Funds--Funds allocated by formula to workforce areas for each of the following separate categories of services: WIA Adult, Dislocated Worker and Youth (excluding the Secretary's and Governor's reserve funds and rapid response funds).

*The provisions of this §800.2 adopted to be effective September 14, 2009, as published in the Texas Register, September 11, 2009, 34 TexReg 6341.*

### **§800.3. Historically Underutilized Businesses**

- (a) The Commission is committed to assisting Historically Underutilized Businesses (HUBs) as defined in Texas Government Code §2161.001, Definitions, in their efforts to participate in contracts to be awarded by the Commission. This includes assisting HUBs to meet or exceed the procurement utilization goals set forth in the Texas Administrative Code at 1 TAC Chapter 111 (relating to Executive Administration Division) incorporated herein by reference. Chapter 111 was promulgated by the Texas Building and Procurement Commission and sets out the State's Historically Underutilized Business Certification Program.
- (b) The Commission shall take positive steps to inform HUBs of opportunities to provide identified state services that it determines may better be provided through a competitive process.

*The provisions of this §800.3 adopted to be effective February 12, 2007, as published in the Texas Register, February 9, 2007, 32 TexReg 553.*

### **§800.4. Gifts**

The Commission shall adhere to the Texas Ethics Commission's rules relating to the acceptance of gifts or other benefits from persons appearing before or regulated by the Commission pertaining to the Commission officers and employees and as adopted by the Texas Ethics Commission at 1 TAC Part II.

*The provisions of this §800.4 adopted to be effective December 20, 1998, as published in the Texas Register, December 11, 1998, 23 TexReg 12691.*

### **§800.5. Commission Professional Development Program**

- (a) Scope and Purpose. The Commission provides training opportunities to enhance job skills and to retain a well qualified, trained, professional workforce dedicated to the Commission's mission. The Professional Development Program training includes instruction, teaching, or other education received by a state employee that is not normally received by other state employees and that is designed to enhance the ability of the employee to perform the employee's job. This section establishes eligibility and related requirements for employee participation in the Commission's Professional Development Program.
- (b) Eligibility. The executive director or the executive director's designee will determine an employee's eligibility for the professional development program. Factors to be considered include, but are not limited to:
  - (1) an employee's job performance;
  - (2) a recommendation from the employee's supervisor;
  - (3) the relationship of the training to the employee's position; and
  - (4) any other factor deemed relevant by the executive director or his designee.
- (c) Restitution from Employees for Training Costs. The employee training is conditional upon all of the following:
  - (1) The employee shall attend and satisfactorily complete the training, including passing tests or other types of performance measures where required.
  - (2) At the discretion of the executive director or the executive director's designee, the employee shall complete and file with the Commission prior to the commencement of the training, on forms prescribed by the Commission, an employee training agreement that sets forth the



terms and conditions of the training assistance, including a provision for working for the Agency for a prescribed period of time or paying back the amount of the assistance.

- (3) For any training paid for by the Commission, where the employee does not perform the employee's regular duties for three or more months due to the training, the employee shall:
  - (A) work for the agency following the training for at least one month for each month of the training period, prorated as appropriate; or
  - (B) pay the Commission for all costs associated with the training that were paid before, during, or after the training, including any amounts of the employee's salary that were paid and that were not accounted for as paid vacation or compensation leave.

*The provisions of this §800.5 adopted to be effective February 12, 2007, as published in the Texas Register, February 9, 2007, 32 TexReg 553.*

### **§800.6. Charges for Copies of Public Records.**

- (a) General Procedure. Except as otherwise specified in this chapter, the Commission hereby adopts by reference the definitions, methods, procedures, and charges for copies of public records required under the Office of the Attorney General rules (1 TAC, Chapter 70), as may be amended.
- (b) Methods of Making Requests. Requests may be submitted in writing to the following mailing address: Officer for Public Information, Texas Workforce Commission, 101 East 15th Street, Austin, Texas 78778-0001. Requests also may be submitted by e-mail or facsimile to designated e-mail and facsimile locations.
- (c) Standard Fees. The Commission may establish a standard fee for the handling of certain types of repetitive requests when the costs of responding to such requests are substantially similar in most cases. The standard fee will be the average costs of handling that type of request. The average cost is calculated using the personnel, resource, and overhead charges set forth in the Office of the Attorney General rules (1 TAC, Chapter 70) governing charges for copies of public records and will be based upon a survey of a representative sample of requests.
- (d) Adjustments for Actual Cost. In the event that the actual costs of responding to a given request are significantly lower or higher than the standard fee charged for that type of request, actual costs will be charged in lieu of the standard fee.
- (e) Program-Related Requests. No charge will be assessed to an individual or an employing unit for copies of records pertaining to that individual or employing unit when the provision of records is deemed by the Commission to be reasonably required for the proper administration of the Texas Unemployment Compensation Act, found at the Texas Labor Code, Title 4, Subtitle A.
- (f) De Minimis Requests. No charge will be assessed to any individual or entity for providing copies of records in response to a request for public information under Texas Government Code, Chapter 552 when the total records provided in response to all requests made by that same individual or entity in any given 30-day period consist of fewer than 50 pages of readily available, standard-size pages maintained as paper documents, except that charges for materials, labor, and overhead may be assessed if the records are located in two or more separate buildings that are not physically connected to each other or are in a remote storage facility.
- (g) Requests by Other Governmental Entities. Notwithstanding any other provision in this section, provision of information to other governmental agencies for purposes other than the administration of the Texas Unemployment Compensation Act will be made only on a cost reimbursable basis, with all costs being calculated in accordance with OMB Circular A-87, as

required by federal law at 20 Code of Federal Regulations §603 *et seq.* Charges to other governmental entities can only be waived when the request is of an isolated or infrequent nature and when the costs of responding to a particular request are negligible.

- (h) Certified Records. In addition to the fees the Commission may charge for providing copies of records, the Commission shall charge a fee of \$5.00 for preparation of a certification instrument which may be attached to one or more pages of records covered by the certification instrument.

*The provisions of this §800.6 adopted to be effective February 12, 2007, as published in the Texas Register, February 9, 2007, 32 TexReg 553.*

### **§800.7. Agency Vehicles.**

- (a) Purpose and Intent. The purpose of this rule is to implement the provisions of Texas Government Code §2171.1045. The intent of the Commission is to ensure that the use and management of vehicles by the Agency is consistent with the State Vehicle Fleet Management Plan (Plan) as adopted by the Office of Vehicle Fleet Management of the Texas Building and Procurement Commission. The Plan may be viewed on the Internet at <http://www.tbpc.state.tx.us/fleet>, or a copy may be requested from the Agency.
- (b) The Commission adopts by reference and shall implement the provisions contained in the Plan as referenced in subsection (a) of this section including the following general provisions on use of vehicles by the Agency.
  - (1) Vehicles, with the exception of vehicles assigned to field employees, are assigned to the Agency motor pool and may be available for checkout.
  - (2) The Agency may assign a vehicle to an individual administrative or executive employee on a regular or everyday basis only if there is a documented finding that the assignment is critical to the needs and mission of the Agency.
  - (3) The Agency will work with the Texas Building and Procurement Commission to identify, apply for, and if possible, utilize any waiver or exemption provisions where the recognition of conditions specific to the Agency would further the general purpose of fiscal efficiency and good business practices.

*The provisions of this §800.7 adopted to be effective February 12, 2007, as published in the Texas Register, February 9, 2007, 32 TexReg 553.*

### **§800.8. Suspension of Rules.**

The Commission may suspend the operation of one or more of the provisions in this title, on either a statewide or other basis, if the Commission finds a public emergency or imperative public necessity exists, and the Commission finds that the suspension will best serve the public health, safety, or welfare.

*The provisions of this §800.8 adopted to be effective January 23, 2006, as published in the Texas Register, January 20, 2006, 31 TexReg 405.*

## **SUBCHAPTER B. ALLOCATIONS**

### **§800.51. Scope and Purpose**

- (a) The purpose of this rule is to interpret Texas Labor Code, §302.062, relating to the allocation of available funds for workforce training and services from the Texas Workforce Commission to workforce areas, as well as Texas Labor Code, §301.001 and §302.002, which establish the Texas

Workforce Commission to operate an integrated workforce development system in this state, in particular through the consolidation of job training, employment, and employment-related programs, and direct the Executive Director to consolidate the administrative and programmatic functions under the authority of the Commission, to achieve efficient and effective delivery of services. It is the intent of the Commission to allocate funds to workforce areas for the purpose of meeting or exceeding statewide performance measures as set forth in the state General Appropriations Act and consistent with the authority reflected in Texas Labor Code Section 302.004, satisfying federal program requirements, and operating an integrated workforce development system. This subchapter sets forth the funding to be allocated to workforce areas and the methods and procedures to be followed, in order to accomplish the consolidation and integration of workforce development programs. The Commission is committed, whenever possible, to allocating an amount of funds available for workforce training and services greater than the minimum level set by law.

- (b) Funds allocated or reallocated under this subchapter will only be made available under the terms of a properly executed contract between the Commission and a certified workforce board with an approved plan.
- (c) The allocation formulas described in this subchapter will only be applicable for allocations and executed contracts for a complete program year. For contract periods of less than a complete program year, the allocated amounts will be negotiated between the Commission and the Board, based upon the remaining months of the program year.
- (d) Subsections (a)-(c) of this section shall apply to all sections contained in this subchapter unless a section specifically states otherwise.
- (e) Funds available to the Commission that are not otherwise allocated or reallocated under this subchapter, may be used by the Commission for purposes authorized by state and federal laws and regulations.
- (f) Notwithstanding any other provision of the rules contained in this part, the level of funding allocated to a workforce area may be determined, modified or reallocated by the Commission for one or more of the following reasons:
  - (1) to ensure full utilization of the funding;
  - (2) to ensure compliance with State and federal requirements applicable to the State;
  - (3) to meet the State's federal participation rates;
  - (4) to respond to caseload changes; or
  - (5) to respond to unforeseen demographic or economic changes.

*The provisions of this §800.51 adopted to be effective August 23, 2004, as published in the Texas Register, August 20, 2004, 29 TexReg 8148.*

## **§800.52. Definitions**

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise:

- (1) **Accrued Expenditures** - Charges incurred during a given period for goods and tangible property received and services performed that cause decreases in net financial resources.
- (2) **All-Family Participation Rate** -The percentage of all families receiving TANF benefits that a state must engage in an approved work activity for a specified number of hours per week as

provided by the Personal Responsibility and Work Opportunities Reconciliation Act of 1996, §407, as amended.

- (3) Contract Closeout Settlement Package - Financial, performance and other reports required as a condition of the contract, which must be submitted when one of the following conditions is met:
  - (A) the contract has expired;
  - (B) all available funds for the contract period have been paid out;
  - (C) all accrued expenditures chargeable to the specific contract have been incurred; or
  - (D) the period of available funds has expired or been terminated.
- (4) Contract Period - The length of time in which a contract for allocated funds between the Commission and a Board is in effect and during which funds may be expended for a specified purpose, unless prohibited by a federal grantor agency. A contract period longer than a program year shall be specified under the terms of a properly executed contract.
- (5) Deobligation - An action adopted by the Commission to decrease an amount for a specific program and contract period in a contract with a Board for allocated funds, on the basis of provisions as set forth in §800.73 and §800.74 of the Commission rules.
- (6) Equal Base Amount - An amount equivalent to .10% (one-tenth of one percent) of a total allocation which shall be provided equally to each workforce area.
- (7) Hold Harmless/Stop Gain - A procedure that assures that a relative proportion of an allocation to a workforce area is not below 90% of the corresponding proportion for the past two years, or that the current year proportion is not above 125% of the prior two-year relative proportion.
- (8) Monthly expenditure report - A written or electronically submitted report by a Board that contains information regarding services for each category of funding allocated by the Commission, and in which the Board lists expenditures and obligations by category of funding.
- (9) Obligation - A debt established by a legally binding contract, letter of agreement, sub-grant award, or purchase order, which has been executed prior to the end of a contract period, for goods and services provided by the end of the contract period, and which will be liquidated 60 calendar days after the end of a contract period, unless such definition is superseded by federal requirements.
- (10) Relative proportion of the program year - The corresponding part of the program year that is used to compare expenditures. That is, if 50% of the program year has transpired, then the relative proportion of the program year is 50%.
- (11) WIA Formula Allocated Funds - Funds allocated by formula to workforce areas for each of the following separate categories of funding: WIA Adult, Dislocated Worker, and Youth.

*The provisions of this §800.52 adopted to be effective July 12, 2006, as published in the Texas Register, July 7, 2006, 31 TexReg 5465.*

### **§800.53. Choices**

- (a) Funds available to the Commission to provide Choices services will be allocated to the workforce areas using a need-based formula, in order to meet state and federal requirements, as set forth in subsection (b) of this section.

- (b) At least 80% of the Choices funds, will be allocated to the workforce areas on the basis of:
  - (1) the relative proportion of the total number of all families with Choices work requirements residing within the workforce area during the most recent calendar year to the statewide total number of all families with Choices work requirements;
  - (2) an equal base amount; and
  - (3) the application of a hold harmless/stop gain procedure.
- (c) No more than 10% of Choices funds expended as part of a workforce area's allocation shall be used for administrative costs, as defined by the appropriate federal regulations and Commission policy.

*The provisions of this §800.53 adopted to be effective August 23, 2004, as published in the Texas Register, August 20, 2004, 29 TexReg 8148.*

#### **§800.54. Supplemental Nutrition Assistance Program Employment and Training**

- (a) Funds available to the Commission to provide SNAP E&T services under 7 U.S.C.A. §2015(d) will be allocated to the workforce areas using a need-based formula, as set forth in subsection (b) of this section.
- (b) At least 80% of the SNAP E&T funds will be allocated to the workforce areas on the basis of:
  - (1) of the relative proportion of the total unduplicated number of mandatory work registrants receiving SNAP benefits residing within the workforce area during the most recent calendar year to the statewide total unduplicated number of mandatory work registrants receiving SNAP benefits;
  - (2) an equal base amount; and
  - (3) the application of a hold harmless/stop gain procedure.
- (c) No more than 10% of the funds expended as part of a workforce area's allocation shall be used for administrative costs, as defined by federal regulations and Commission policy.

*The provisions of this §800.54 adopted to be effective September 14, 2009, as published in the Texas Register, September 11, 2009, 34 TexReg 6341.*

#### **§800.57. Employment Services**

- (a) Employment Services funds available to the Commission to provide Employment Services under §7(a) of the Wagner-Peyser Act (29 U.S.C.A. Chapter 4B) will be utilized by the Commission as set forth in subsection (b) of this section.
- (b) At least 80% of the Employment Services funds under §7(a) of the Wagner-Peyser Act (29 U.S.C.A. Chapter 4B, including §49(c)) will be utilized by the Commission within the workforce areas according to the established federal formula, as follows:
  - (1) Two-thirds will be based on the relative proportion of the total civilian labor force residing within the workforce area to the statewide total civilian labor force;
  - (2) One-third will be based on the relative proportion of the total number of unemployed individuals residing within the workforce area to the statewide total number of unemployed individuals; and
  - (3) the application of a hold harmless/stop gain procedure.

- (c) No more than 10% of the funds expended as part of a workforce area's allocation shall be used for administrative costs, as defined by appropriate federal regulations and Commission policy.

*The provisions of this §800.57 adopted to be effective August 23, 2004, as published in the Texas Register, August 20, 2004, 29 TexReg 8148.*

### **§800.58. Child Care**

- (a) Funds available to the Commission for child care services will be allocated to the workforce areas using need-based formulas, as set forth in this section.
- (b) Child Care and Development Fund (CCDF) Mandatory Funds authorized under the Social Security Act §418(a)(1), as amended, together with state general revenue Maintenance of Effort (MOE) Funds, Social Services Block Grant funds, TANF funds, and other funds designated by the Commission for child care (excluding any amounts withheld for state-level responsibilities) will be allocated on the following basis:
  - (1) 50% will be based on the relative proportion of the total number of children under the age of five years old residing within the workforce area to the statewide total number of children under the age of five years old, and
  - (2) 50% will be based on the relative proportion of the total number of people residing within the workforce area whose income does not exceed 100% of the poverty level to the statewide total number of people whose income does not exceed 100% of the poverty level.
- (c) CCDF Matching Funds authorized under the Social Security Act §418(a)(2), as amended, together with state general revenue matching funds and estimated appropriated receipts of donated funds, will be allocated according to the relative proportion of children under the age of 13 years old residing within the workforce area to the statewide total number of children under the age of 13 years old.
- (d) CCDF Discretionary Funds authorized under the Child Care and Development Block Grant Act of 1990 §658B, as amended, will be allocated according to the relative proportion of the total number of children under the age of 13 years old in families whose income does not exceed 150% of the poverty level residing within the workforce area to the statewide total number of children under the age of 13 years old in families whose income does not exceed 150% of the poverty level.
- (e) If SNAP E&T child care funding is determined to be available, then funds will be allocated among workforce areas on the basis of the relative proportion of the total number of children ages 6 - 12 years in households of mandatory SNAP work registrants residing within the workforce area to the statewide total number of children ages 6 - 12 years in households of mandatory SNAP work registrants.
- (f) The following provisions apply to the funds allocated in subsections (b) - (e) of this section:
  - (1) Sufficient funds must be used for direct child care services to ensure Commission-approved performance targets are met.
  - (2) Children eligible for Transitional and Choices child care shall be served on a priority basis to enable parents to participate in work, education, or training activities.
  - (3) No more than 5% of the total expenditure of funds may be used for administrative expenditures as defined in federal regulations contained in 45 Code of Federal Regulations §98.52, as may be amended unless the total expenditures for a workforce area are less than \$5,000,000. If a workforce area has total expenditures of less than \$5,000,000, then no

more than \$250,000 may be used for administrative expenditures.

- (4) Each Board shall set the amount of the total expenditure of funds to be used for quality activities consistent with federal and state statutes and regulations.
- (5) The Board shall comply with any additional requirements adopted by the Commission or contained in the Board contract.
- (6) Allocations of child care funds will include applications of hold harmless/stop gain procedures.

*The provisions of this §800.58 adopted to be effective September 14, 2009, as published in the Texas Register, September 11, 2009, 34 TexReg 6341.*

### **§800.61. Welfare to Work**

*The provisions of this §800.61 repealed effective August 23, 2004, as published in the Texas Register, August 20, 2004, 29 TexReg 8148.*

### **§800.62. School-to-Careers**

*The provisions of this §800.62 repealed effective August 23, 2004, as published in the Texas Register, August 20, 2004, 29 TexReg 8148.*

### **§800.63. Workforce Investment Act (WIA)**

- (a) Definitions. The following words and terms when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.
  - (1) Area of substantial unemployment--As defined in WIA §127(b)(2)(B) (29 U.S.C.A. §2852(b)(2)(B)) and WIA §132(b)(1)(B)(v)(III) (29 U.S.C.A. §2862(b)(1)(B)(v)(III)).
  - (2) Disadvantaged adult--As defined in WIA §132(b)(1)(B)(v)(IV) (29 U.S.C.A. §2862(b)(1)(B)(v)(IV)).
  - (3) Disadvantaged youth--As defined in WIA §127(b)(2)(C) (29 U.S.C.A. §2852(b)(2)(C)).
- (b) Scope and Authority. Funds available to the Commission under Title I of WIA for youth activities, adult employment and training activities, and dislocated worker employment and training activities shall be allocated to workforce areas or reserved for statewide activities in accordance with:
  - (1) the provisions of prior consistent state law as authorized by WIA §194(a)(1)(A) (29 U.S.C.A. §2944(a)(1)(A)), including but not limited to Texas Labor Code §302.062, as amended, and Subchapter B of this title (relating to Allocations and Funding);
  - (2) the WIA and related federal regulations as amended; and
  - (3) the WIA State Plan.
- (c) Reserves and Allocations for Youth and Adult Employment and Training Activities. The Commission shall reserve no more than 15% and shall allocate to workforce areas at least 85% of the youth activities and adult employment and training activities allotments from the United States Department of Labor.
- (d) Reserves and Allocations for Dislocated Worker Employment and Training Activities. The Commission shall allocate the dislocated worker employment and training allotment in the following manner:

- (1) reserve no more than 15% for statewide workforce investment activities;
  - (2) reserve no more than 25% for state level rapid response and additional local assistance activities and determine the proportion allocated to each activity; and
  - (3) allocate at least 60% to workforce areas.
- (e) State Adopted Elements, Formulas, and Weights. The Commission shall implement the following elements, formulas, and weights adopted for Texas in the WIA State Plan in allocating WIA funds to workforce areas.
- (1) WIA adult employment and training activities funds not reserved by the Commission under §800.63(c) of this section shall be allocated to the workforce areas as provided in WIA §132(b)(1)(B) and §133(b)(2) (29 U.S.C.A. §2863(b)(2)) based on the following:
    - (A) 33 1/3 percent on the basis of the relative number of unemployed individuals in areas of substantial unemployment in each workforce area, compared to the total number of unemployed individuals in areas of substantial unemployment in the State;
    - (B) 33 1/3 percent on the basis of the relative excess number of unemployed individuals in each workforce area, compared to the total excess number of unemployed individuals in the State; and
    - (C) 33 1/3 percent on the basis of the relative number of disadvantaged adults in each workforce area, compared to the total number of disadvantaged adults in the State.
  - (2) WIA dislocated worker employment and training activities funds not reserved by the State under §800.63(d) of this section shall be allocated to the workforce areas as provided in WIA §133(b)(2) (29 U.S.C.A. §2863(b)(2)) based on the following factors:
    - (A) insured unemployment;
    - (B) average unemployment;
    - (C) Worker Adjustment and Retraining Notification Act (29 U.S.C.A. §2101 *et seq.*) data;
    - (D) declining industries;
    - (E) farmer-rancher economic hardship; and
    - (F) long-term unemployment.
  - (3) WIA youth activities funds not reserved by the Commission under §800.63(c) of this section shall be allocated to the workforce areas as provided in WIA §128(b)(2) (29 U.S.C.A. §2853(b)(2)) based on the following:
    - (A) 33 1/3 percent on the basis of the relative number of unemployed individuals in areas of substantial unemployment in each workforce area, compared to the total number of unemployed individuals in all areas of substantial unemployment in the State;
    - (B) 33 1/3 percent on the basis of the relative excess number of unemployed individuals in each workforce area, compared to the total excess number of unemployed individuals in the State; and
    - (C) 33 1/3 percent on the basis of the relative number of disadvantaged youth in each workforce area, compared to the total number of disadvantaged youth in the State.
- (f) In making allocations of WIA formula funds, the Commission will apply hold harmless procedures, as set forth in federal regulations (20 CFR 667.135).



- (g) No more than 10% of the funds expended as part of a workforce area's allocation shall be used for administrative costs, as defined by federal regulations and Commission policy.
- (h) Reserved Funds. The Commission shall make available the funds reserved under §§800.63(c) and 800.63(d)(1) of this section to provide required and, if funds are available, allowable statewide activities as outlined in WIA §§129 and 134 (29 U.S.C.A. §§2854 and 2864).
- (i) The Commission may allocate such proportion of available WIA Alternative Funding for Statewide Activities as it determines appropriate, utilizing a distribution methodology that is based on the proportionality of all amounts of WIA formula funds allocated during the same program year, as well as an equal base amount.
- (j) The Commission may allocate such amounts of available WIA Alternative Funding for Statewide Activities as funding for One-Stop Enhancements, as it determines appropriate.
- (k) Expenditure Level for Statewide Activity Funding. A Board shall demonstrate an 80 percent expenditure level of prior year WIA allocated funds in order to be eligible to receive WIA Alternative Funding for Statewide Activities and WIA Alternative Funding for One-Stop Enhancements. The Commission may reduce the amount of WIA Alternative Funding for Statewide Activities and WIA Alternative Funding for One-Stop Enhancements if a Board fails to achieve an 80 percent expenditure level of prior year WIA formula allocated funds.

*The provisions of this §800.63 adopted to be effective August 23, 2004, as published in the Texas Register, August 20, 2004, 29 TexReg 8148.*

#### **§800.65. Project Reintegration of Offenders (RIO)**

- (a) Funds available to the Commission to provide Project RIO services shall be allocated to workforce areas using a need-based formula, as set forth in subsection (b) of this section.
- (b) At least 80% of the Project RIO funds will be allocated to workforce areas on the basis of:
  - (1) the relative proportion of the total number of parolees residing within the workforce area during the most recent calendar year to the statewide total number of parolees;
  - (2) an equal base amount; and
  - (3) the application of a hold harmless/stop gain procedure.
- (c) No more than 10% of the funds expended as part of a workforce area's allocation shall be used for administrative costs, as defined by federal regulations and Commission policy.

*The provisions of this §800.65 adopted to be effective August 23, 2004, as published in the Texas Register, August 20, 2004, 29 TexReg 8148.*

#### **§800.66. Trade Act Services**

- (a) Funds available to the Commission to provide Trade Act Services shall be allocated to workforce areas using a need-based formula, as set forth in subsection (b) below.
- (b) At least 80% of available Trade Act Services funds will be allocated to workforce areas on the basis of:
  - (1) the relative proportion of equally weighted proportions of the average number of workers residing in those workforce areas included on trade petitions for the two most recent calendar years to the statewide total number of workers included on trade petitions, and the average number of trade-affected workers residing in those workforce areas who are

approved for training for the two most recent calendar years to the statewide total number of trade-affected workers approved for training;

- (2) an equal base amount; and
  - (3) the application of a hold harmless/stop gain procedure.
- (c) An amount not to exceed 10% of the funds expended for Trade Act training, services, and other allowable program activities shall be used for administrative costs, as defined by federal regulations and Commission policy.

*The provisions of this §800.66 adopted to be effective August 23, 2004, as published in the Texas Register, August 20, 2004, 29 TexReg 8148.*

### **§800.67. Veterans' Employment and Training**

- (a) Funds available to the Commission to provide Veterans' Employment and Training services shall be allocated to workforce areas using a need-based formula, as set forth in subsection (b) of this section.
- (b) At least 80% of the Veterans' Employment and Training funds will be allocated to workforce areas on the basis of:
- (1) the relative proportion of the total number of veterans residing within the workforce area who registered in the Texas Workforce Commission job matching system during the most recent calendar year to the statewide total number of veterans registered in the Texas Workforce Commission job matching system;
  - (2) an equal base amount; and
  - (3) the application of a hold harmless/stop gain procedure.
- (c) No more than 10% of the funds expended as part of a workforce area's allocation shall be used for administrative costs, as defined by federal regulations and Commission policy.

*The provisions of this §800.67 adopted to be effective August 23, 2004, as published in the Texas Register, August 20, 2004, 29 TexReg 8148.*

### **§800.71. General Deobligation and Reallocation Provisions**

- (a) Purpose. The purpose of this rule is to promote effective service delivery, financial planning, and management to ensure full utilization of funding, and to reallocate funds to populations in need.
- (b) Scope. Sections 800.71 - 800.77 of this subchapter shall apply to funds provided to workforce areas under a contract between the Board and the Commission for the following categories of funding:
- (1) Child Care
  - (2) Choices
  - (3) Employment Service
  - (4) SNAP E&T
  - (5) Project RIO
  - (6) Trade Act Services
  - (7) WIA Formula Allocated Funds

- (8) WIA Alternative Funding for Statewide Activities
- (9) WIA Alternative Funding for One-Stop Enhancements

*The provisions of this §800.71 adopted to be effective September 14, 2009, as published in the Texas Register, September 11, 2009, 34 TexReg 6341.*

### **§800.72. Reporting Requirements**

- (a) A Board shall submit a monthly financial report, including accrued expenditures and obligations, on or before the 20th calendar day of the following month that list information as required by the Commission for the reporting period.
- (b) The Commission may require that a Board amend expenditure reports as the result of Commission reviews, audits, or other evaluations.
- (c) A Board shall submit a contract closeout settlement package on or before 60 days following the end of the contract period.
- (d) The Commission may suspend payments, advances, or reimbursements to Boards in the cash draw system if required financial reports or contract closeout settlement packages are not submitted by the deadline.
- (e) The Executive Director may approve a Board's request of extension for the submission of a required financial report or contract closeout settlement package, if such extension request is received on a timely basis with sufficient justification.

*The provisions of this §800.72 adopted to be effective August 23, 2004, as published in the Texas Register, August 20, 2004, 29 TexReg 8148.*

### **§800.73. Child Care Match Requirements and Deobligation**

- (a) A Board shall meet the following requirements for unmatched federal Child Care funds that are contingent upon a Board securing local funds.
  - (1) By the end of the fourth month following the beginning of the program year, a Board shall secure donations, transfers, and certifications totaling at least 100% of the amount it needs to secure in order to access the unmatched federal Child Care funds available to the workforce area at the beginning of the program year.
  - (2) Throughout the program year and by the end of the twelfth month, a Board shall ensure completion of all donations, transfers, and certifications consistent with the contribution schedules and payment plans specified in the local agreements.
- (b) The Commission may deobligate, at any time following the fourth month of the program year, all or part of the difference between a Board's actual level of secured and completed match and the level of performance that is required, as set forth in §800.73(a).

*The provisions of this §800.73 adopted to be effective July 12, 2006, as published in the Texas Register, July 7, 2006, 31 TexReg 5465.*

### **§800.74. Midyear Deobligation of Funds**

- (a) The Commission may deobligate funds from a workforce area during the program year if a workforce area is not meeting the expenditure thresholds set forth in subsections (b) and (c) of this section.

- (1) Workforce areas that fail to meet the expenditure thresholds set forth in subsection (b) of this section at the end of months five, six, seven, or eight of the program year (i.e., midyear) will be reviewed to determine the causes for the underexpenditure of funds, except as set forth in subsection (e) of this section.
  - (2) The Commission shall not deobligate more than the difference between a workforce area's actual expenditures and the amount corresponding to the relative proportion of the program year.
  - (3) The Commission shall not deobligate funds from a workforce area that failed to meet the expenditure thresholds set forth in subsections (b) and (c) of this section, if within 60 days prior to the potential deobligation period the Commission executes a contract amendment for a supplemental allocation or reallocation of funds in the same program funding category.
- (b) The Commission may deobligate the following funds midyear, as set forth in subsection (a) of this section, if a workforce area fails to achieve the expenditure of an amount corresponding to 90% or more of the relative proportion of the program year:
- (1) Child care (with the exception of unmatched federal child care funds that are contingent upon a workforce area securing local funds, as set forth in §800.73 of this subchapter)
  - (2) Choices
  - (3) Employment Service
  - (4) SNAP E&T
  - (5) Project RIO
  - (6) Trade Act Services
  - (7) WIA Alternative Funding for Statewide Activities
  - (8) WIA Alternative Funding for One-Stop Enhancements
- (c) The Commission may deobligate WIA formula funds midyear, as set forth in subsection (a) of this section, if a workforce area fails to achieve the expenditure of an amount corresponding to 80% or more of the relative proportion of the program year for each category of WIA formula funds.
- (d) A workforce area subject to deobligation for failure to meet the requirements set forth in this section shall, upon request by the Commission, submit a written justification with a copy to the Board Chair. The written justification shall provide sufficient detail regarding the actions a workforce area will take to address its deficiencies, including:
- (1) expansion of services proportionate to the available resources;
  - (2) projected service levels and related performance;
  - (3) reporting outstanding obligations; and
  - (4) any other factors a workforce area would like the Commission to consider.
- (e) To the extent this section is found not to comply with federal requirements, or should any related federal waivers expire, the Commission will be subject to federal requirements in effect, as applicable.

*The provisions of this §800.74 adopted to be effective September 14, 2009, as published in the Texas Register, September 11, 2009, 34 TexReg 6341.*

### **§800.75. Second-Year WIA Deobligation of Funds**

- (a) In each month of the second year in which the WIA formula funds are available, the Commission may deobligate funds if a workforce area's unexpended WIA formula funds exceed 20% of the allocation for each category of WIA formula funds for the program year.
- (b) The Commission shall not deobligate more than the difference between a workforce area's actual expenditures and the amount of unexpended funds that exceed 20% of the allocation for each category of WIA formula funds for the program year.
- (c) The Commission shall not deobligate funds from a workforce area that failed to meet the expenditure thresholds set forth in subsection (a) of this section if within 60 days prior to the potential deobligation period, the Commission executes a contract amendment for a supplemental allocation or reallocation of funds in the same program funding category.

*The provisions of this §800.75 adopted to be effective September 14, 2009, as published in the Texas Register, September 11, 2009, 34 TexReg 6341.*

### **§800.76. Voluntary Deobligation of Funds**

To request a voluntary deobligation of funds allocated to the workforce area, a workforce area's executive director shall submit a written request to the Commission with a copy to the Board Chair.

*The provisions of this §800.76 adopted to be effective September 14, 2009, as published in the Texas Register, September 11, 2009, 34 TexReg 6341.*

### **§800.77. Reallocation of Funds**

- (a) Reallocation. A workforce area may be eligible for reallocation of the following funds allocated by the Commission:
  - (1) Child care (including unmatched federal child care funds that are contingent upon a workforce area securing local funds)
  - (2) Choices
  - (3) Employment Service
  - (4) SNAP E&T
  - (5) Project RIO
  - (6) Trade Act Services
  - (7) WIA Formula Funds
  - (8) WIA Alternative Funding for Statewide Activities
  - (9) WIA Alternative Funding for One-Stop Enhancements
- (b) Eligibility.
  - (1) For a workforce area to be eligible for a reallocation of child care funds (excluding unmatched federal funds that are contingent upon a workforce area securing local funds), and the funds set forth in subsection (a)(2) - (9) of this section, the Commission may consider whether a workforce area:
    - (A) has met targeted expenditure levels as required by §800.74(a) of this subchapter, as applicable, for that period;

- (B) has not expended or obligated more than 100% of the workforce area's allocation for the category of funding;
  - (C) has demonstrated that expenditures conform to cost category limits for funding;
  - (D) has demonstrated the need for and ability to use additional funds;
  - (E) has an established plan for working with at least one of the Governor's industry clusters, as specified in the local Board plan;
  - (F) is current on expenditure reporting;
  - (G) is current with all single audit requirements; and
  - (H) is not under sanction.
- (2) For a workforce area to be eligible for a reallocation of unmatched federal child care funds that are contingent upon a workforce area securing local funds, the Commission may consider:
- (A) whether a workforce area has met the level for securing and completing local match requirements set out in §800.73(a) of this subchapter; and (B) the applicable factors listed in paragraph (1) of this subsection, including factors in paragraph (1)(B) - (H) of this subsection.
- (c) The Commission may reallocate funds to an eligible workforce area based on the applicable method of allocation, as set forth in this subchapter, and may modify the amount to be reallocated by considering the following:
- (1) the amount specified in a workforce area's written request for additional funds;
  - (2) the amount available for reallocation versus the total dollar amount of requests;
  - (3) the demonstrated ability of a workforce area to effectively expend funds to address the need for services in the workforce area;
  - (4) the extent to which the project supports activities related to the Governor's industry clusters;
  - (5) the workforce area's performance during the current and prior program year; and
  - (6) related factors, as necessary, to ensure that funds are fully used.
- (d) To the extent this section is found not to comply with federal requirements, or should any related federal waivers expire, the Commission will be subject to federal requirements in effect, as applicable.

*The provisions of this §800.77 adopted to be effective September 14, 2009, as published in the Texas Register, September 11, 2009, 34 TexReg 6341.*

## **SUBCHAPTER C. PERFORMANCE AND CONTRACT MANAGEMENT**

### **§800.81. Performance**

- (a) A Board shall meet or exceed performance targets as referenced in contracts with the Agency.
- (b) The Commission shall determine the performance targets based on federal and state performance standards and by using factors that may be necessary to achieve the mission of the Commission and reflect local conditions. The Commission approves individual Board performance targets annually, which may be adjusted based on local conditions including, but not limited to, specific economic conditions and demographic characteristics of the workforce area.

- (c) A Board and other subrecipients shall comply with all Commission rules, Workforce Development (WD) Letters, the Financial Manual for Grants and Contracts, and guidance letters of the Agency, including rules contained in other chapters of Part 20 of this title applicable to specific services and activities performed by a Board and other subrecipients.
- (d) A Board's achievement of high levels of performance may result in the Commission providing incentives for the Board.
- (e) A Board's failure to meet minimum levels of performance as referenced in the Board's contract may result in corrective actions, penalties, or sanctions as specified in:
  - (1) Part 20 of this title (relating to the Texas Workforce Commission), including Chapter 800, Subchapter E, relating to Sanctions;
  - (2) the Board's contract with the Commission; or
  - (3) federal or state statute or rule.
- (f) A Board may submit to the Commission a request for an adjustment to the minimum levels of performance.
- (g) The Commission may determine what constitutes a necessary adjustment to local performance targets and may consider specific economic conditions and demographic characteristics to be served in the workforce area and other factors the Commission deems appropriate including the anticipated impact of the adjustment on the state's performance.
- (h) The Governor may adopt additional performance incentives and sanctions provisions as provided in WIA.

*The provisions of this §800.81 adopted to be effective September 18, 2006, as published in the Texas Register, September 15, 2006, 31 TexReg 8013.*

### **§800.83. Performance Review and Assistance**

- (a) Intent. The intent of the Commission is to define the role of performance review and assistance provided by the Agency. The role of performance review and assistance is to ensure successful service delivery outcomes and provide accountability through technical assistance and contract management.
- (b) Goal. The goal of the Commission is to provide successful interventions to increase employment or reemployment opportunities for participants as well as providing quality applicants for Texas employers.
- (c) Purpose. The Agency offers a sequence of interventions including basic technical assistance, contract management, and development of a Performance Improvement Plan.
- (d) Boards and Subrecipients of the Agency. Boards and their contractors and subrecipients of the Agency shall ensure cooperation and compliance with the Agency's performance review and assistance activities and services.
- (e) Performance Improvement Plan. A Performance Improvement Plan is a plan that is jointly developed between the Agency and a Board or contract service provider to assist a Board with improving compliance or performance through specific technical assistance or training, which may include the following:
  - (1) identification of one or more specific performance improvement issues:

- (2) assessment of specific technical assistance or training needs;
  - (3) selection of one or more specific technical assistance or training activities to be implemented;
  - (4) identification of the appropriate entities to provide the technical assistance or training, including the Board, the Commission, other Boards or other entities;
  - (5) identification of a timeline for completion of the technical assistance or training; and
  - (6) specific dates for reassessment of technical assistance or training needs and completion of the specific technical assistance or training.
- (f) Compliance. Failure to cooperate and comply with the Agency's performance review and assistance activities and services, including the Performance Improvement Plan, may subject a Board or a subrecipient of the Agency to the assignment of sanction status and penalty.

*The provisions of this §800.83 adopted to be effective September 24, 2001, as published in the Texas Register, September 21, 2001, 26 TexReg 7273.*

## **SUBCHAPTER D. INCENTIVE AWARD RULES**

### **§800.101. Scope and Purpose**

The purpose of the incentive award is to reward Local Workforce Development Boards (Boards) that meet or exceed the performance benchmarks identified in each incentive award and accomplish the goals of the Texas Workforce Commission (Commission) to fulfill the workforce needs of employers and to put Texans to work. The Board is responsible for providing strategic and operational planning for its local workforce development area. The development of an integrated and coherent workforce development system at the local level is the primary focus of Boards. Thus, this policy seeks to recognize Boards for achieving high performance as a system, as well as high performance on behalf of employers and the populations annually targeted by the Commission during the budget process. Incentives will emphasize accountability, high performance, and continuous improvement and support the state in achieving workforce development goals.

*The provisions of this §800.101 adopted to be effective September 29, 2003, as published in the Texas Register, September 26, 2003, 28 TexReg 8379.*

### **§800.102. Definitions.**

The following words and terms when used in this chapter shall have the following meanings, unless the context clearly indicates otherwise.

- (1) Allocation of Funds--The total yearly funds initially identified for allocation to a Board for all programs. This does not include consideration of adjustments in funding made to a specific program(s) by the Commission for purposes of reallocating or redistributing those funds. This may include new allocations or distributions made during a year that result from changes in law or new funding made available to the Boards during a year.
- (2) Classification--Grouping of Boards with one or more common characteristics (i.e., size) for the purpose of evaluating performance and giving incentive awards.
- (3) Extraordinary Circumstances--conditions that may have an impact on the determination of which Boards may receive or be excluded from receiving incentive awards which may include, but is not limited to, matters such as serious unforeseen events, unresolved audit or monitoring findings, sanctions, unanticipated changes in economic conditions, the



occurrence of a disaster, or legislative changes having a direct impact on the Commission or Boards.

- (4) Local coordination--Boards fostering leadership and cooperation to achieve the most effective customer service results for its employers and residents through one or more of the following:
  - (A) Memoranda of Understanding with required partners that achieve active implementation and integration of related services;
  - (B) Memoranda of Understanding with partners required by WIA §121(b)(1) but not required by §801.27(b) of this title that include active implementation and integration of related services;
  - (C) ongoing and regular communication and training on the best practices and benchmarks in building systems or delivering services; or
  - (D) demonstrating local coordination through other means as determined by the Commission, such as by demonstrating coordination with demonstration grants, youth opportunity grants, self-sufficiency grants, and skills development grants.
- (5) Regional cooperation--Boards working together as a cooperative unit in a region to provide excellence in customer service through one or more of the following:
  - (A) submitting joint plans or agreements;
  - (B) engaging in ongoing and regular communication regarding the best practices and working together to implement those practices by sharing ideas, data, staff, and other resources;
  - (C) providing opportunities for joint training, conferences, and staff interaction; or
  - (D) demonstrating regional cooperation through other means as determined by the Commission.
- (6) Workforce development programs--Job-training, employment and employment-related educational programs and functions as listed in Texas Labor Code §302.021.

*The provisions of this §800.102 adopted to be effective September 29, 2003, as published in the Texas Register, September 26, 2003, 28 TexReg 8379.*

### **§800.103. Types of Awards.**

- (a) There are two types of awards: non-monetary and monetary.
- (b) Non-monetary awards may be awarded annually based on high-performance achievement and/or continuous improvement in meeting performance measures and may include plaques, certificates of achievement, or other formalized recognition accolades.
- (c) Monetary awards include:
  - (1) Best Overall Performance Awards issued under §800.106 of this subchapter;
  - (2) WIA Local Incentive Awards issued under §800.107 of this subchapter;
  - (3) Job Placement Incentive Awards issued under §800.108 of this subchapter; and
  - (4) other awards designated by the Commission.

*The provisions of this §800.103 adopted to be effective September 29, 2003, as published in the Texas Register, September 26, 2003, 28 TexReg 8379.*

#### **§800.104. Data Collection.**

- (a) Boards are responsible for complete and accurate data entry prior to Commission established deadlines.
- (b) The Commission reserves the right not to consider data submitted after the deadline or data that it finds to be inaccurate in its evaluation of performance for awards.

*The provisions of this §800.104 adopted to be effective September 29, 2003, as published in the Texas Register, September 26, 2003, 28 TexReg 8379.*

#### **§800.105. Board Classification.**

- (a) The Commission may group Boards in classifications for comparison purposes such as for awarding incentives.
- (b) In classifying Boards, the Commission may group Boards based on similarities or differences among the Boards relating to:
  - (1) allocations of funds;
  - (2) prior performance; or
  - (3) demographic, economic, or other characteristics of the individual local workforce development areas.

*The provisions of this §800.105 adopted to be effective September 29, 2003, as published in the Texas Register, September 26, 2003, 28 TexReg 8379.*

#### **§800.106. Performance Awards.**

- (a) The Commission may determine the amount of funds for use to reward performance annually.
- (b) Incentive Awards for performance may be given in each classification and the Commission may give more than one award in each classification.
- (c) The Commission may use any combination of existing state or federal performance measures and may develop its own measures to evaluate performance.
  - (1) If the Commission includes a measure, which does not already have a target, the Commission may:
    - (A) set an incentive target for the sole purpose of evaluating eligible Boards for the incentive awards (failure to meet an incentive target would not subject the Board to sanction);
    - (B) rate performance based on each Board's "relative improvement" in performance from the prior year; or
    - (C) compare exhibited performance among the Boards in a classification if the measure allows comparability across Boards of different sizes. (For example, the "percent of job orders timely posted" would allow performance to be measured across Boards of different sizes, but the "number of job orders timely posted" would not.)
  - (2) The Commission may use a measure and a subset of a measure in the same year. For example, the Commission could include one measure that considers employers with job postings in the job matching system and another measure that considers employers with job postings in targeted occupations.

- (d) If the Commission is considering issuing awards under this section, the Commission shall notify Boards of the method by which performance shall be evaluated for the purpose of giving awards under this rule for that year.
  - (1) Other than in the first year of the implementation of this rule, the notice required under this subsection shall be provided to the Boards concurrent with their yearly contracts.
  - (2) The notice may include:
    - (A) a listing of the Boards assigned to each classification;
    - (B) a listing of the performance measures to be included in each evaluation category including:
      - (i) the period of evaluation for each performance measure; and
      - (ii) the method of evaluation for each performance measure;
    - (C) the weightings to be used to aggregate the performance measures to allow each Board's overall performance to be ranked and also encourage an emphasis on employer-focused measures;
    - (D) the anticipated amount of funds available to be awarded; and
    - (E) other criteria to be used to identify superior performance.
- (e) The Commission shall rank a Board's performance for each performance measure as follows.
  - (1) For measures that have performance targets, the Commission shall determine each Board's "success rate" by dividing the Board's actual performance by its target for the measure.
  - (2) For measures that have no performance targets, the Commission shall determine each Board's actual performance (or change in performance if that was the method identified as the method for evaluation) and call this the "performance rate."
  - (3) For each measure, the Commission shall replace the "success rate" or the "performance rate" with a ranking. The Board with the "best" rating in its classification shall be ranked "1," the second best ranked "2," etc. If two Boards in a classification are tied for a position, such as second place, both shall be ranked "2" and the Board with the next "best" rate shall be ranked "4."
- (f) The Commission shall assign each Board a final rank as follows.
  - (1) The Commission shall use the weightings identified in subsection (d)(3) of this section to determine the weighted rank of the performance rankings assigned under subsection (e) of this section.
  - (2) Each Board's weighted rank shall be converted to an overall ranking within the Board's classification. That is, the Board with the lowest weighted rank in a classification is ranked "1," the second lowest ranked "2," etc. If two Boards are tied for a position such as second place, both shall be ranked "2" and the next "best" Board will be ranked "4."
- (g) The award for each classification shall be given to the Board in the classification with the best overall ranking. If the Commission is assigning more than one award in a classification, the Boards with the highest rankings shall receive the award. However, the Commission may modify assignments of awards based on factors that the Commission identifies as extraordinary circumstances.
- (h) Boards that receive the performance award shall use the incentive award to carry out workforce activities as allowed by state and federal laws.

*The provisions of this §800.106 adopted to be effective September 29, 2003, as published in the Texas Register, September 26, 2003, 28 TexReg 8379.*

**§800.107. Workforce Investment Act Local Incentive Awards.**

- (a) The Commission shall determine annually the total amount of funds to be awarded from funds available through the Workforce Investment Act (WIA) §128(a) and §133(a)(1) for local incentive awards.
- (b) WIA Local Incentive Awards may be awarded for one or more of the following:
  - (1) regional cooperation among local workforce development areas;
  - (2) local coordination of activities carried out under WIA; and
  - (3) exemplary performance on performance measures.
- (c) The application for WIA Local Incentive Awards shall be as follows.
  - (1) Only those Boards submitting a written application shall be eligible for WIA Local Incentive Awards (other than awards for exemplary performance, which shall not require a written application).
  - (2) The Commission shall issue instructions annually identifying the amount of funds available for awards, the maximum number of awards, and instructions for submitting applications for WIA Local Incentive Awards.
- (d) Awards may be made based on consideration of various factors consistent with goals of WIA such as:
  - (1) identified changes in economic conditions, population characteristics, and the service delivery system in the local workforce development area;
  - (2) reported performance for each contract performance measure relative to other Boards;
  - (3) demonstrated performance in the elements considered most critical in accomplishing overall system goals, which includes performance related to each of the items listed in §800.108(b) of this subchapter;
  - (4) improved performance relative to the preceding year;
  - (5) demonstrated compliance with all expenditure requirements as required by §800.63(h) of this chapter; and
  - (6) finalized monitoring reports and resolution activities.
- (e) Boards that receive a Workforce Investment Act Local Incentive Award shall use the incentive award to carry out workforce activities as allowed by state and federal laws.

*The provisions of this §800.107 adopted to be effective September 29, 2003, as published in the Texas Register, September 26, 2003, 28 TexReg 8379.*

**§800.108. Job Placement Incentive Awards.**

- (a) The Commission may set aside an amount of funds for job placement incentive awards during the annual budget process or at other times during the year as deemed appropriate by the Commission based on the funds available to meet the objectives of the Commission. For the purposes of this rule, the term "Choices individuals" shall have the same meaning as set forth in §811.2 of this title.

- (b) Administration through Boards shall be as follows.
- (1) The Commission shall administer the job placement incentive awards through the Boards by distributing funds to Boards that demonstrate the highest percentage of increase in employment of Choices individuals in higher wage jobs. Awards may be given in each classification and the Commission may give more than one award in each classification.
  - (2) Boards receiving a distribution of funds shall establish policies and procedures to create incentives for their contractors. The Boards shall determine how the local awards of funds are expended to provide incentives to contractors within the local workforce development area for effective employment of Choices individuals in higher wage jobs. The Boards shall ensure that contractor(s) receiving the job placement incentive awards use the funds for expenses relating to education, training and support services as necessary to prepare, place, and maintain Choices individuals in employment leading to self-sufficiency.
- (c) The criteria for distributing award funds to Boards shall be the same as the measure of higher wage jobs. The measure of higher wage jobs shall use the most recent available Unemployment Insurance (UI) wages reported quarterly by employers for Choices individuals in employment and be determined by:
- (1) each local workforce development area's baseline average quarterly reported UI wages for all Choices individuals in employment during a twelve-month period designated by the Commission;
  - (2) each local workforce development area's average quarterly UI wages for all Choices individuals in employment during the twelve-month period subsequent to the baseline measurement period; and
  - (3) comparing the average quarterly UI wages for all Choices individuals in employment for the two measurement periods to determine Boards that have achieved the highest percent increase in overall wages to Choices individuals.

*The provisions of this §800.108 adopted to be effective September 29, 2003, as published in the Texas Register, September 26, 2003, 28 TexReg 8379.*

## **SUBCHAPTER E. SANCTIONS**

### **§800.151. Scope and Purpose**

- (a) The purpose of this subchapter is to:
- (1) ensure accountability of Boards and other subrecipients of the Agency in meeting the needs of employers and job seekers;
  - (2) ensure performance in reaching outcome measures;
  - (3) ensure adequate returns on state investments; and
  - (4) support the state in achieving its goals.
- (b) The Agency may review financial, administrative, and performance data to evaluate a Board and subrecipients of the Agency to determine the need for sanctions.
- (c) To accomplish the purposes of this subchapter, the Agency may require at any point during the year that a Board or subrecipients of the Agency cooperate with remedial actions, including, but not limited to, entering into a Performance Improvement Plan and other performance review and assistance activities.

*The provisions of this §800.151 adopted to be effective September 18, 2006, as published in the Texas Register, September 15, 2006, 31 TexReg 8013.*

### **§800.152. Definitions**

The following words and terms when used in this chapter shall have the following meanings, unless the context clearly indicates otherwise.

- (1) Corrective Action Plan -- A plan developed and imposed by the Agency that requires a Board or other entity to take Agency-identified actions within a specified time frame designed to correct specific instances of noncompliance or other failures.
- (2) Hearing -- An informal, orderly, and readily available proceeding held before an impartial hearing officer at which a party or hearing representative may present evidence to show that the Agency's determination of sanctions shall be reversed, affirmed, or modified.
- (3) Hearing officer -- An Agency employee designated to conduct hearings and issue proposals for decision.
- (4) Hearing representative -- Any individual authorized by a party to assist the party in presenting the party's appeal. A hearing representative may be legal counsel or another individual. Each party may have a hearing representative to assist in presenting the party's appeal.
- (5) Level One Sanction Status -- A sanction status assigned by the Agency to a Board or other subrecipient of the Agency for significant inability or failure to perform as required by the Agency, including performing or failing to perform due to a sanctionable act as described in this subchapter. A Level One Sanction Status may be associated with the assessment of one or more penalties as referenced in this subchapter.
- (6) Level Two Sanction Status -- A higher sanction status than Level One assigned by the Agency to a Board or other subrecipient of the Agency for severe inability or failure to perform as required by the Agency, including performing or failing to perform due to a sanctionable act as described in this subchapter. A Level Two sanction may be associated with the assessment of more severe penalties than those assessed to a Board or subrecipient of the Agency in Level One Sanction Status.
- (7) Level Three Sanction Status -- The highest sanction status assigned by the Agency to a Board or other subrecipient of the Agency for extreme inability or failure to perform as required by the Agency, including performing or failing to perform due to a sanctionable act as described in this subchapter. A Level Three Sanction may be associated with the assessment of the most severe penalties being assessed against the Board or subrecipient of the Agency.
- (8) Party -- The person or entity with the right to participate in a hearing authorized by applicable statute or rule.

*The provisions of this §800.152 adopted to be effective November 26, 2007, as published in the Texas Register, November 23, 2007, 32 TexReg 8535.*

### **§800.161. Intent to Sanction**

- (a) An Intent to Sanction letter may be issued by the Agency. The purpose of the Intent to Sanction letter is to describe technical assistance available and a specific timeline for the implementation by a Board or subrecipient of the Agency and to provide an opportunity to cure the sanctionable acts.

- (b) An Intent to Sanction letter shall not be required prior to the Agency placing a Board in sanction status or assessing a penalty.
- (c) There shall be no appeal to an Intent to Sanction letter.

*The provisions of this §800.161 adopted to be effective September 24, 2001, as published in the Texas Register, September 21, 2001, 26 TexReg 7274.*

### **§800.171. Sanctionable Acts**

- (a) The Agency may place a Board in sanction status or assess a corrective action or penalty for failure to ensure at any time during the program year compliance with the following:
  - (1) one or more contracted performance measures;
  - (2) one or more contract provisions; and
  - (3) one or more federal or state statutes, regulations, guidances, directives, or circulars, including the Commission rules contained in Part 20 of this title.
- (b) The Agency may assess penalties for sanctionable acts listed in this subchapter. Notwithstanding the list of sanctionable acts appearing after each specific level of sanction in §800.172 of this title, the Agency may assign a higher or lower level of sanction status based on the severity or mitigating circumstances surrounding the sanctionable acts.

*The provisions of this §800.171 adopted to be effective September 24, 2001, as published in the Texas Register, September 21, 2001, 26 TexReg 7274.*

### **§800.172. Sanction Status**

- (a) The Agency may place a Board or subrecipient of the Agency in Level One Sanction Status for sanctionable acts as described in this section.
  - (1) Sanctionable acts that occur during the program, grant, fiscal, contract, or calendar year, including but not limited to the following:
    - (A) failure to submit timely and accurate required financial or performance reports;
    - (B) failure to take corrective action to resolve findings identified during monitoring, investigative, or program reviews, including failing to comply with a Performance Improvement Plan developed by the Agency;
    - (C) failure to rectify or resolve all independent audit findings or questioned costs within required time frames;
    - (D) failure to submit the annual audit required by OMB Circular A-133, as may be amended;
    - (E) breach of administrative and service contract requirements;
    - (F) failure to retain required service delivery and financial records; or
    - (G) failure of a Board to meet its targeted Temporary Assistance for Needy Families (TANF) participation rate for two consecutive quarters.
  - (2) Sanctionable acts that occur after the end of a program, grant, fiscal, contract, or calendar year that may include, but are not limited to, one or more of the following acts:

- (A) failure to attain and maintain performance within 90% of any contracted performance measure; or
  - (B) failure to attain and maintain participation rates within 90% of any contracted performance measure.
- (b) The Agency may place a Board or subrecipient of the Agency in Level Two Sanction Status for sanctionable acts as described in this section.
- (1) Sanctionable acts that occur during the program, grant, fiscal, contract, or calendar year including but not limited to the following:
    - (A) failure to rectify a Level One sanction within 180 days of notice;
    - (B) committing a second violation within the same fiscal year; or
    - (C) failure to rectify reported threats to health and safety of program participants within 30 days of notice.
  - (2) Sanctionable acts that occur after the end of a program, grant, fiscal, contract, or calendar year including, but not limited to, one or more of the following:
    - (A) failure to attain and maintain performance within 75% of any contracted performance measure; or
    - (B) failure to attain and maintain participation rates within 75% of any contracted performance measure.
- (c) The Agency may place a Board or subrecipient of the Agency in Level Three Sanction Status for sanctionable acts as described in this section.
- (1) Sanctionable acts that occur during the program, grant, fiscal, contract, or calendar year including but not limited to the following:
    - (A) failure to rectify a Level One sanction within 360 days of notice;
    - (B) failure to rectify a Level Two sanction within 180 days of notice;
    - (C) committing three or more Level One violations or two or more Level Two violations within the same fiscal year; or
    - (D) failure to rectify reported threats to health and safety of program participants within 90 days of notice. Rectifying health and safety may include investigating a complaint, taking appropriate corrective action or making referrals to appropriate authorities.
  - (2) Sanctionable acts that occur after the end of a program, grant, fiscal, contract, or calendar year including, but not limited to, one or more of the following acts:
    - (A) failure to return annual performance to 75% of any contracted performance measure within two program years; or
    - (B) failure to return annual participation rates to 75% of any contracted performance measure within two program years.
- (d) Notwithstanding subsections (a), (b) and (c) of this section the Agency may use the criteria set forth in §800.171(a) of this title (relating to Sanctionable Acts) to determine the appropriate level of sanction.

*The provisions of this §800.172 adopted to be effective September 24, 2001, as published in the Texas Register, September 21, 2001, 26 TexReg 7274.*



## **§800.174. Corrective Actions and Penalties**

- (a) The Agency may assess corrective actions and penalties on a Board or subrecipient of the Agency based on the following criteria as determined appropriate by the Agency given the totality of the circumstances surrounding the occurrence of the sanctionable act or acts:
  - (1) severity, nature, duration, and extent;
  - (2) previous occurrences of sanctionable acts; and
  - (3) efforts by the Board or subrecipient of the Agency to prevent the occurrence of the sanctionable act, including efforts to: obtain technical assistance, training, or other assistance from the Agency or another entity; resolve monitoring findings; and prevent potential sanctionable acts.
- (b) To assist the Board or subrecipients of the Agency in correcting any deficiencies, the Agency may assess for each occurrence of a sanctionable act as described in this subchapter, including, but not limited to, one or more of the following corrective actions or penalties including the penalties listed in subsection (c) (1) - (4) of this section:
  - (1) participation in technical and quality assurance activities;
  - (2) mandatory participation in training;
  - (3) on-site visits by the Agency to monitor and assist with daily operations of a Board, Board's contractor, or subrecipient of the Agency;
  - (4) an Agency-developed and Board-implemented corrective action plan to address the weaknesses identified;
  - (5) timely implementation of the corrective action plan;
  - (6) submission of additional or more detailed financial or performance reports;
  - (7) designation as a high-risk Board or subrecipient of the Agency requiring additional monitoring visits;
  - (8) appearances by the Board's Executive Director, other administrative officer or the subrecipient of the Agency to report on activities and progress in Commission meetings until performance is satisfactory;
  - (9) meetings with the local workforce development area's Chief Elected Officials, Board Chair, Board members, Board's Executive Director, or the subrecipients of the Agency;
  - (10) formal Agency presentation to Chief Elected Officials or Board members;
  - (11) Agency oversight and management of problem situations, such as the appointment of a steward;
  - (12) Agency approval of specified Board actions (i.e., prohibition against entering into specific contracts or engaging in certain activities without explicit prior approval of the Agency);
  - (13) prohibiting the use of designated service providers, including state agencies and Texas Workforce Center operators;
  - (14) payment by reimbursement only, with required supporting documentation;
  - (15) delay, suspension, or denial of contract payments;
  - (16) reduction or deobligation of Board funds such as may occur when the Commission reduces a Board's contracted TANF funds in an amount not to exceed 25% of the funding allocated to

- the local workforce development area and applies those funds to assisting the sanctioned Board in meeting the contracted participation rates;
- (17) ineligibility for additional discretionary or other funds;
  - (18) contract cancellation or termination; and
  - (19) other actions deemed appropriate by the Agency to assist the Board or subrecipient of the Agency in correcting deficiencies.
- (c) The Commission may recommend to TCWEC pursuant to Texas Government Code Chapter 2308 that one or more of the following penalties be imposed:
- (1) prohibiting the use of particular service providers, including state agencies and Texas Workforce Center operators;
  - (2) requiring payment by reimbursement;
  - (3) selecting an alternative provider;
  - (4) issuing a notice of intent to cease immediately reimbursement of local program costs;
  - (5) requiring modification of the Board's local plan;
  - (6) issuing a notice of intent to revoke all or part of the affected local plan;
  - (7) imposing a reorganization plan under Texas Government Code, §2308.268 for the local workforce development area;
  - (8) restructuring the Board, including decertification of the current Board and appointment and certification of a new Board;
  - (9) merging the local workforce development area into one or more other local workforce development areas; or
  - (10) any other act deemed appropriate by the Commission.
- (d) More than one penalty may be assessed in response to one occurrence of a sanctionable act. The number and severity of penalties assessed for one or more occurrences of sanctionable acts may correlate with the sanction status level assigned to a Board or subrecipient of the Agency. If a Board is already in sanction status when another sanctionable act occurs or is discovered, the Agency may assign a higher level of sanction to the Board or subrecipient of the Agency.

*The provisions of this §800.174 adopted to be effective September 24, 2001, as published in the Texas Register, September 21, 2001, 26 TexReg 7274.*

### **§800.175. Corrective Actions and Penalties Under the Workforce Investment Act (WIA)**

- (a) Corrective Actions.
- (1) If a Board fails to meet contract performance measures for youth activities in WIA, Title I, Chapter 4; adult employment and training activities in WIA, Title I, Chapter 5; or dislocated worker employment and training activities in WIA, Title I, Chapter 5, in any WIA program year, the Commission may require that, within a specified period of time, the Board:
    - (A) complete a performance improvement plan;
    - (B) modify its local plan; or
    - (C) take other action designed to improve the Board's performance.

- (2) A Board's failure to complete the corrective actions described in paragraph (1) of this subsection within the specified time limits may result in the Agency imposing penalties under this subchapter and withholding WIA payments to the Board.
- (b) Penalties for Second-Year Nonperformance. If a Board falls below 80% of the contracted performance level on at least 25% of all WIA contracted measures for two consecutive program years, the Commission shall review the performance deficiencies and shall make a recommendation to TWIC that it impose a reorganization plan for the local workforce development area. The Commission's recommendation to TWIC for reorganization of a local workforce development area may include one or more of the corrective actions or penalties included in §800.174(c)(1)-(10) of this subchapter. Notwithstanding this subsection, the Commission may take other action as deemed appropriate as consistent with federal law.
- (c) Penalties for Noncompliance with Requirements.
- (1) Each local workforce development area, including the Board, chief elected officials, one-stop operators and service providers receiving WIA funds, shall comply with the appropriate uniform administrative requirements for grants and agreements applicable for the type of entity receiving funds as promulgated in circulars or rules of the Office of Management and Budget's Uniform Grant Management Standards.
  - (2) Each local workforce development area, including the Board, Chief Elected Officials, Texas Workforce Center operators, and service providers receiving WIA funds, must comply with Title I of WIA, as well as all other federal and state laws and regulations.
  - (3) If the Agency finds that a Board is not in compliance with the requirements of paragraph (1) of this subsection, or is in substantial violation of paragraph (2) of this subsection, the Agency shall require corrective action to secure prompt compliance and may assess penalties as provided under this subchapter.
  - (4) If the Agency finds that a Board has not taken the required corrective action in the time specified, the Commission shall make recommendations to TWIC.
- (d) Penalties for Failures Regarding the One-Stop Service Delivery Network. Failure of a Board to ensure the establishment and operation of a one-stop service delivery network as required by WIA §121 and Chapter 801, Subchapter B, One-Stop Service Delivery Network of this title, may result in the imposition of penalties as provided in this subchapter, and the Agency's withholding of payment for any WIA administrative expenses until the Board can demonstrate to the satisfaction of the Agency that all of the required elements of a One-Stop Service Delivery Network are operational.
- (e) Repayment. The Board and Chief Elected Officials shall be jointly and severally liable for repayment to the Agency from nonfederal funds for WIA expenditures in the local workforce development area that are found by the Agency not to have been expended in accordance with the WIA.
- (f) Other Penalties. In addition to the penalties provisions in subsections (a)-(e) of this section, in the administration and provision of WIA services, a Board and contractor receiving WIA funds shall also be subject to all sections of Subchapter E, relating to Sanctions Rules.

*The provisions of this §800.175 adopted to be effective December 22, 2003, as published in the Texas Register, December 19, 2003, 28 TexReg 11357.*

## **§800.176. Informal Conferences and Informal Dispositions**

An informal conference is defined as an informal meeting between a Board or subrecipient of the Agency and person(s) designated by the Director of the Workforce Division, held for the purpose of agreeing on a proposed informal disposition of a penalty action. An informal conference shall be voluntary and shall not be a prerequisite to a hearing in an appeal of a penalty.

*The provisions of this §800.176 adopted to be effective September 24, 2001, as published in the Texas Register, September 21, 2001, 26 TexReg 7274.*

## **§800.181. Sanction Determination**

- (a) The Director of Workforce Development of the Agency determines whether a sanction shall be assessed, including whether it is appropriate to place the Board in a sanction status level and whether it is appropriate to assign a penalty.
- (b) The Commission shall work in concert with the Texas Council on Workforce and Economic Competitiveness, whenever necessary, to assess sanctions as required by Texas Government Code, §2308.268 and §2308.269.
- (c) The Agency shall send a written Notice of Sanction Determination (Sanction Determination) to the following:
  - (1) the Board's Executive Director or administrative officer;
  - (2) the Board's chair; and
  - (3) the lead Chief Elected Official of the local workforce development area.
- (d) The Sanction Determination date of notice shall be the date the Sanction Determination is sent to the Board's executive director by certified mail. All notices of sanctions shall be sent by facsimile (fax) transmission and letter by certified mail, return receipt requested.
- (e) The Sanction Determination shall include the following information:
  - (1) the sanctionable act upon which the sanction was based;
  - (2) the sanction status level in which the Board is placed and the conditions upon which the Board may be removed from sanction status;
  - (3) the penalty and the effective date of the penalty; and
  - (4) the corrective action required, including the timeline for completing the corrective action; and
  - (5) the technical assistance from the Agency or other entity to assist in completing the corrective action.
- (f) The Agency shall send the Sanction Determination at least ten working days in advance of the effective date of the sanction.

*The provisions of this §800.181 adopted to be effective September 24, 2001, as published in the Texas Register, September 21, 2001, 26 TexReg 7274.*

## **§800.191. Appeal.**

- (a) A Board may appeal a Sanction Determination; however, a recommendation to another entity by the Agency or Commission under §800.174 and §800.175 of this chapter, may not be appealed under this section.

- (b) A request for appeal of a Sanction Determination shall be filed within 10 working days following the receipt of the Sanction Determination. The appeal shall be in writing and filed with the General Counsel, Texas Workforce Commission, 101 East 15th Street, Room 614, Austin, Texas 78778.
- (c) The Agency shall refer the request for appeal to an impartial hearing officer for a hearing.
- (d) The Agency shall mail a notice of hearing to the Board as provided in §800.181(c) and to its representative, if any. The notice of hearing shall be in writing and include:
  - (1) a statement of the date, time, place, and nature of the hearing;
  - (2) a statement of the legal authority under which the hearing is to be held; and
  - (3) a short and plain statement of the issues to be considered during the hearing.

*The provisions of this §800.191 adopted to be effective November 26, 2007, as published in the Texas Register, November 23, 2007, 32 TexReg 8535.*

### **§800.192. Hearing Procedures.**

- (a) The sanction determination hearing shall be conducted in person in Austin, Texas, unless the parties agree to a telephonic hearing or request a different location.
- (b) The hearing shall be conducted informally and in such manner as to ascertain the substantial rights of the parties. All issues relevant to the appeal shall be considered and addressed, and may include:
  - (1) **Presentation of Evidence.** The parties to an appeal may present evidence that is material and relevant, as determined by the hearing officer. In conducting a hearing, the hearing officer shall actively develop the record on the relevant circumstances and facts to resolve all issues. To be considered as evidence in a decision, any document or physical evidence must be entered as an exhibit at the hearing.
  - (2) **Examination of Parties and Witnesses.** The hearing officer shall examine parties and any witnesses, and shall allow cross-examination to the extent the hearing officer deems necessary to afford the parties due process.
  - (3) **Additional Evidence.** The hearing officer, with or without notice to any of the parties, may take additional evidence as deemed necessary, provided that a party shall be given an opportunity to rebut the evidence if it is to be used against the party's interest.
  - (4) **Appropriate Hearing Behavior.** All parties shall conduct themselves in an appropriate manner. The hearing officer may expel any individual, including a party, who fails to correct behavior the hearing officer identifies as disruptive. After expulsion, the hearing officer may proceed with the hearing and render a decision.
- (c) **Records.**
  - (1) The hearing record shall include the audio recording of the proceeding and any other relevant evidence relied on by the hearing officer, including documents and other physical evidence entered as exhibits.
  - (2) The hearing record shall be maintained in accordance with federal and state law.
  - (3) Confidentiality of information contained in the hearing record shall be maintained in accordance with federal and state law.

*The provisions of this §800.192 adopted to be effective November 26, 2007, as published in the Texas Register, November 23, 2007, 32 TexReg 8535.*

### **§800.193. Postponements, Continuances, and Withdrawals.**

- (a) The hearing officer may grant a postponement of a sanction determination hearing for good cause at a party's request.
- (b) A continuance of a hearing may be ordered at the discretion of the hearing officer to consider additional, necessary evidence or for any other reason the hearing officer deems appropriate.
- (c) A Board may withdraw an appeal at any time prior to the issuance of the final decision.

*The provisions of this §800.193 adopted to be effective November 26, 2007, as published in the Texas Register, November 23, 2007, 32 TexReg 8535.*

### **§800.194. Evidence.**

- (a) Evidence Generally. Evidence, including hearsay evidence, shall be admitted if it is relevant and if in the judgment of the hearing officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. However, the hearing officer may exclude evidence if its probative value is outweighed by the danger of unfair prejudice, by confusion of the issues, or by reasonable concern for undue delay, waste of time, or needless presentation of cumulative evidence.
- (b) Exchange of Exhibits. Any documentary evidence to be presented during a telephonic hearing shall be exchanged with all parties and a copy shall be provided to the hearing officer in advance of the hearing. Any documentary evidence to be presented at an in-person hearing shall be exchanged at the hearing.
- (c) Stipulations. The parties, with the consent of the hearing officer, may agree in writing to relevant facts. The hearing officer may decide the appeal based on such stipulations or, at the hearing officer's discretion, may set the appeal for hearing and take such further evidence as the hearing officer deems necessary.
- (d) Experts and Evaluations. If relevant and useful, testimony from an independent expert or a professional evaluation from a source satisfactory to the parties and the Agency may be ordered by hearing officers, on their own motion, or at a party's request. Any such expert or evaluation shall be at the expense of one or more of the parties.
- (e) Subpoenas.
  - (1) The hearing officer may issue subpoenas to compel the attendance of witnesses and the production of records. A subpoena may be issued either at the request of a party or on the hearing officer's own motion.
  - (2) A party requesting a subpoena shall state the nature of the information desired, including names of any witnesses and the records that the requestor feels are necessary for the proper presentation of the case.
  - (3) The request shall be granted only to the extent the records or the testimony of the requested witnesses appears to be relevant to the issues on appeal.
  - (4) A denial of a subpoena request shall be made in writing or on the record, stating the reasons for such denial.

*The provisions of this §800.194 adopted to be effective November 26, 2007, as published in the Texas Register, November 23, 2007, 32 TexReg 8535.*

### **§800.195. Hearing Officer Independence and Impartiality.**

- (a) A hearing officer presiding over a hearing shall have all powers necessary and appropriate to conduct a full, fair, and impartial hearing. Hearing officers shall remain independent and impartial in all matters regarding the handling of any issues during the pendency of a case and in issuing their written proposals for decision.
- (b) A hearing officer shall be disqualified if the hearing officer has a personal interest in the outcome of the appeal or if the hearing officer directly or indirectly participated in the determination on appeal. Any party may present facts to the Agency in support of a request to disqualify a hearing officer.
- (c) The hearing officer may withdraw from a hearing to avoid the appearance of impropriety or partiality.
- (d) Following any disqualification or withdrawal of a hearing officer, the Agency shall assign an alternate hearing officer to the case. The alternate hearing officer shall not be bound by any findings or conclusions made by the disqualified or withdrawn hearing officer.

*The provisions of this §800.195 adopted to be effective November 26, 2007, as published in the Texas Register, November 23, 2007, 32 TexReg 8535.*

### **§800.196. Ex Parte Communications.**

- (a) The hearing officer shall not participate in ex parte communications, directly or indirectly, in any matter in connection with any substantive issue, with any interested person or party. Likewise, no person shall attempt to engage in ex parte communications with the hearing officer on behalf of any interested person or party.
- (b) If the hearing officer receives any such ex parte communication, the other parties shall be given an opportunity to review any such ex parte communication.
- (c) Nothing shall prevent the hearing officer from communicating with parties or their representatives about routine matters such as requests for continuances or opportunities to inspect the file.
- (d) The hearing officer may initiate communications with an impartial Agency employee who has not participated in a hearing or any determination in the case for the limited purpose of using the special skills or knowledge of the Agency and its staff in evaluating the evidence.

*The provisions of this §800.196 adopted to be effective November 26, 2007, as published in the Texas Register, November 23, 2007, 32 TexReg 8535.*

### **§800.197. Hearing Decision.**

- (a) Following the conclusion of the hearing, the hearing officer shall promptly prepare a written proposal for decision.
- (b) The proposal for decision shall be based exclusively on the evidence of record in the hearing and on matters officially noticed in the hearing. The decision shall include:
  - (1) a list of the individuals who appeared at the hearing;
  - (2) the findings of fact and conclusions of law reached on the issues; and
  - (3) the affirmation, reversal, or modification of the sanctions.
- (c) The proposal for decision shall be submitted to the Agency's executive director for issuance of a written decision on behalf of the Agency.

- (d) Unless a party files a timely motion for rehearing, the Agency may assume continuing jurisdiction to modify or correct a decision until the expiration of 30 calendar days from the mailing date of the decision.

*The provisions of this §800.197 adopted to be effective November 26, 2007, as published in the Texas Register, November 23, 2007, 32 TexReg 8535.*

#### **§800.198. Motion for Reopening.**

- (a) If a party does not appear for a hearing, the party may request a reopening of the hearing within 30 calendar days from the date the decision is mailed.
- (b) The motion for reopening shall be in writing and detail the reason for failing to appear at the hearing.
- (c) The hearing officer may schedule a hearing on whether to grant the reopening.
- (d) The motion may be granted if the hearing officer determines that the party has shown good cause for failing to appear at the hearing.

*The provisions of this §800.198 adopted to be effective November 26, 2007, as published in the Texas Register, November 23, 2007, 32 TexReg 8535.*

#### **§800.199. Motion for Rehearing.**

- (a) A Board may file a motion for rehearing for the presentation of new evidence within 30 days from the date the decision is mailed. A rehearing shall be granted only for the presentation of new evidence.
- (b) A motion for rehearing shall be in writing and allege the new evidence to be considered.
- (c) If the hearing officer determines that the alleged new evidence warrants a rehearing, a rehearing shall be scheduled at a reasonable time and place.
- (d) The hearing officer shall issue a written proposal for decision in response to a timely filed motion for rehearing. The proposal for decision shall be submitted to the Agency's executive director for issuance of a final decision.

*The provisions of this §800.199 adopted to be effective November 26, 2007, as published in the Texas Register, November 23, 2007, 32 TexReg 8535.*

#### **§800.200. Finality of Decision.**

- (a) The decision of the executive director is the final administrative decision of the Agency after the expiration of 30 calendar days from the mailing date of the decision, unless within that time :
  - (1) a request for reopening is filed with the Agency;
  - (2) a request for rehearing is filed with the Agency; or
  - (3) the Agency assumes continuing jurisdiction to modify or correct the decision.
- (b) Any decision issued in response to a request for reopening or rehearing or a modification or correction issued by the Agency shall be final on the expiration of 30 calendar days from the mailing date of the decision, modification, or correction.

*The provisions of this §800.200 adopted to be effective November 26, 2007, as published in the Texas Register, November 23, 2007, 32 TexReg 8535.*



## **SUBCHAPTER F. INTERAGENCY MATTERS**

### **§800.201. Title and Purpose**

- (a) These rules may be cited as Interagency Matters.
- (b) The purpose of these rules is to implement and interpret the provisions of the Texas Administrative Code, Chapter 40, Interagency Matters, and to provide notice to the public of the contents of the Memorandums of Understanding.

*The provisions of this §800.201 adopted to be effective March 19, 1998, as published in the Texas Register, March 13, 1998, 23 TexReg 2829.*

### **§800.202. Memorandum of Understanding with Texas Commission for the Deaf and Hard of Hearing**

The Texas Workforce Commission hereby adopts by reference the terms of a memorandum of understanding entered into with the Texas Commission for the Deaf set out in 40 TAC §181.912(a) and (b) and 40 TAC §181.915 of this title (relating to the Texas Department of Correction and the Texas Workforce Commission). Copies of the memorandum of understanding are available at the Texas Workforce Commission, 101 East 15<sup>th</sup> Street, Room 614, Austin, Texas 78778.

*The provisions of this §800.202 adopted to be effective March 19, 1998, as published in the Texas Register, March 13, 1998, 23 TexReg 2829.*

### **§800.203. Memorandum of Understanding with Texas Education Agency**

The Texas Workforce Commission hereby adopts by reference the terms of a memorandum of understanding on transition planning for students enrolled in special education. Said memorandum of understanding is set out at 19 TAC §89.1110. Copies are available at the Texas Workforce Commission, 101 East 15<sup>th</sup>, Room 614, Austin, Texas 78778.

*The provisions of this §800.203 adopted to be effective March 19, 1998, as published in the Texas Register, March 13, 1998, 23 TexReg 2829.*

### **§800.204. Memorandum of Understanding with Texas Department of Economic Development**

The Texas Workforce Commission hereby adopts by reference the terms of a memorandum of understanding on program planning and budgeting relating to workforce development programs. Said memorandum of understanding is set out at 10 TAC §195.10. Copies are available at the Texas Workforce Commission, 101 East 15<sup>th</sup>, Room 614, Austin, Texas 78778.

*The provisions of this §800.204 adopted to be effective March 19, 1998, as published in the Texas Register, March 13, 1998, 23 TexReg 2829.*

## **SUBCHAPTER G. PETITION FOR ADOPTION OF RULES**

### **§800.251. Title and Purpose**

- (a) Title. These rules may be cited as the Petition for the Adoption of Rules.
- (b) Purpose. The purpose of these rules is to implement the provisions of Texas Government Code §2001.21 regarding agency procedure for addressing petitions for the adoption of rules.

*The provisions of this §800.251 adopted to be effective April 19, 1998, as published in the Texas Register, April 10, 1998, 23 TexReg 3700.*

### **§800.252. Definitions**

The following words and terms, when used in this subchapter, shall have the following meaning, unless the context clearly indicates otherwise.

**Commission**--The Texas Workforce Commission.

*The provisions of this §800.252 adopted to be effective April 19, 1998, as published in the Texas Register, April 10, 1998, 23 TexReg 3700.*

### **§800.253. Submission and Petition Requirements**

Any interested person may petition the Texas Workforce Commission (Commission) requesting the adoption of a rule. Petitioners should submit petitions in writing to the General Counsel of the Commission. The petition may be in any legible form but must contain at least the following information.

- (1) **Petitioner's Name and Address.** The petitioners' name, complete mailing address, and signature should appear in the request.
- (2) **Explanation and Justification.** A petitioner should include an explanation and justification of the proposed rule. The explanation should include a concise statement of the relevant background information necessary to understand the need for the rule, the existing problem that the proposed rule is to correct, and the foreseeable effects of the requested rule.
- (3) **Text.** A petitioner should include the text of the proposed rule reflecting added or deleted words. A reference to any existing rule including the title, chapter and section number, if applicable, should appear on the request.
- (4) **Authority.** A statement of the statutory or other authority for taking the requested action should also appear on the request.

*The provisions of this §800.253 adopted to be effective April 19, 1998, as published in the Texas Register, April 10, 1998, 23 TexReg 3700.*

### **§800.254. Review of Petition**

Upon receipt of a substantially complete petition, the general counsel will forward a copy of the petition to the appropriate division director for a response.

- (1) **Division Response.** Within 20 days after receiving the petition from the general counsel, the division director shall respond in writing to the General Counsel recommending either denying the request or initiating the rulemaking process. The division director's response shall contain the reasons for the recommendation.
- (2) **General Counsel Recommendation.** Within 20 days after receiving the division director's response, the general counsel shall submit to the commissioners the petition, the division director's response and a written recommendation by the general counsel specifying the reasons for the recommendation.

*The provisions of this §800.254 adopted to be effective April 19, 1998, as published in the Texas Register, April 10, 1998, 23 TexReg 3700.*

### **§800.255. Commission Decision and Action**

- (a) The Commissioners shall issue the final decision regarding the petition within 60 days after receipt of the petition from the petitioner to either:
  - (1) deny the petition in writing, stating the reasons for the denial; or
  - (2) initiate rulemaking proceedings in accordance with Texas Government Code, Chapter 2001, Administrative Procedure, Subchapter B, Rulemaking, as it may be amended.
- (b) The Commission may modify any proposed rule to ensure that it conforms to the format of commission rules, adequately addresses the perceived problem, and conforms to the filing requirements of the *Texas Register*.

*The provisions of this §800.255 adopted to be effective April 19, 1998, as published in the Texas Register, April 10, 1998, 23 TexReg 3700.*

## **SUBCHAPTER H. AGENCY MONITORING ACTIVITIES.**

### **§800.301. Purpose.**

- (a) The purpose of this subchapter is to set forth the Agency's monitoring provisions and respective responsibilities of Boards, subrecipients, and contract service providers.
- (b) The rules contained in this subchapter apply in addition to any program-specific rules to all programs administered by the Agency, except that to the extent of any conflict, the program-specific rules will govern.

*The provisions of this §800.301 adopted to be effective February 8, 2001, as published in the Texas Register, February 2, 2001, 26 TexReg 1176.*

### **§800.302. Definitions.**

In addition to the definitions found in §800.2, the following words or terms when used in this subchapter shall have the following meanings, unless the context clearly indicates otherwise.

- (1) Contract Service Provider--An entity other than a vendor as defined in the *Office of Management and Budget Circular A-133* engaged to provide goods, services, or both under a contract with a subrecipient, or other provider of services pursuant to an executed contract that is funded with funds administered by the Agency.
- (2) Subrecipient--An entity other than a vendor as defined in the *Office of Management and Budget Circular A-133* receiving funds through a direct contract with the Agency. Boards are subrecipients.

*The provisions of this §800.302 adopted to be effective February 8, 2001, as published in the Texas Register, February 2, 2001, 26 TexReg 1176.*

### **§800.303. Program and Fiscal Monitoring.**

- (a) Subrecipients shall cooperate with the Agency's program and fiscal monitoring activities, site visits, reviews of documentation and requests for information. The Agency is committed to ensuring the accountability of subrecipients and contract service providers. Therefore, monitoring activities have been developed to:
  - (1) ensure programs achieve intended results;

- (2) ensure resources are efficiently and effectively used for authorized purposes and are protected from waste, fraud, and abuse; and
  - (3) ensure reliable and timely information is captured and reported to serve as the basis to improve decision-making.
- (b) Comprehensive monitoring activities are conducted by the Agency to assess subrecipient and contract service provider progress in achieving program goals and maintaining fiscal accountability. Program and fiscal monitoring activities include site visits, desk reviews, and analyses of both financial and program outcomes to help identify potential weaknesses before such weaknesses result in substandard performance or questioned costs. Monitoring activities shall assess a subrecipient's or contract service provider's compliance with applicable laws, regulations, contract provisions, and official directives including such documents as U.S. Department of Labor Training and Employment Guidance Letters, U.S. Department of Labor Training and Employment Informational Notices, U.S. Department of Health and Human Services Guidance Letters, and Texas Workforce Commission Workforce Development Letters. The Agency shall assess the subrecipient's or contract service provider's compliance with the appropriate uniform administrative requirements for grants and agreements applicable to the type of entity receiving funds, as promulgated in the circulars or rules of the Office of Management and Budget. Monitoring activities shall encompass both financial and programmatic monitoring and shall be evaluated on a periodic basis. Monitoring reviews result in recommendations that provide practical solutions used to take immediate corrective action.
- (c) Subrecipients and contract service providers are subject to audit and review by the Agency. The Agency may audit and review all relevant records or a sample of the records as needed to determine subrecipient and contract service provider performance.(d) Failure to comply with this subchapter shall result in corrective action and possible sanctions pursuant to Chapter 800, of this title, Subchapter E, (relating to Sanctions).

*The provisions of this §800.303 adopted to be effective February 8, 2001, as published in the Texas Register, February 2, 2001, 26 TexReg 1176.*

#### **§800.304. Program Monitoring Activities.**

The Agency shall conduct program monitoring activities to ensure that programs achieve both intended and expected results. Processes and procedures used to determine subrecipient and contract service provider performance may include review and evaluation of one or more of the following:

- (1) program results or outcomes;
- (2) performance measures;
- (3) reporting accuracy;
- (4) record keeping and file maintenance;
- (5) monitoring functions;
- (6) self-monitoring activities;
- (7) service delivery;
- (8) automated systems and reporting;
- (9) human resources; and
- (10) policies and procedures.

*The provisions of this §800.304 adopted to be effective February 8, 2001, as published in the Texas Register, February 2, 2001, 26 TexReg 1176.*

### **§800.305. Fiscal Monitoring Activities.**

- (a) The Agency shall conduct fiscal monitoring activities to ensure that resources are efficiently and effectively used for authorized purposes and are protected from waste, fraud, and abuse. Processes and procedures used to determine subrecipient and contract service provider performance may include the review and evaluation of one or more of the following:
- (1) accounting and reporting systems;
  - (2) budget methodologies;
  - (3) cash management practices;
  - (4) cost allocation plans and processes;
  - (5) cash disbursement compliance and documentation;
  - (6) program income identification and reporting;
  - (7) insurance coverage and risk exposure;
  - (8) oversight and monitoring functions;
  - (9) payroll administration;
  - (10) purchasing and procurement processes and procedures; and
  - (11) property accountability and safeguarding.
- (b) Processes and procedures used to determine subrecipient and contract service provider performance shall include a review, evaluation, and determination regarding compliance with the appropriate uniform administrative requirements for grants and agreements as well as the appropriate cost principles applicable for the type of entity receiving funds as listed in circulars or rules of the Office of Management and Budget.
- (c) For all WIA funds, processes and procedures used to determine subrecipient and contract service provider performance shall include a review, evaluation, and determination regarding compliance with the applicable requirements regarding cost categories and cost limitations.

*The provisions of this §800.305 adopted to be effective February 8, 2001, as published in the Texas Register, February 2, 2001, 26 TexReg 1176.*

### **§800.306. Agency Monitoring Reports.**

The Agency shall issue reports summarizing the results of monitoring activities, which may include the observations, findings, and recommendations of the monitoring team and the subrecipient's or contract service provider's responses to the observations, findings, and recommendations.

*The provisions of this §800.306 adopted to be effective February 8, 2001, as published in the Texas Register, February 2, 2001, 26 TexReg 1176.*

### **§800.307. Resolution.**

- (a) Resolution Activities.
- (1) By the date specified by the Agency, the subrecipient or contract service provider shall provide information and supporting documentation to the Agency's Resolution Section

regarding unresolved findings for review and evaluation. After such review and evaluation the Resolution Section shall issue an initial determination identifying both allowed and disallowed questioned costs, if any, as well as administrative findings. The initial determination shall also address the acceptability of corrective actions taken or planned to resolve administrative findings.

- (2) If costs are disallowed, or administrative findings are not resolved, the subrecipient or contract service provider shall, within 60 days of the date of the initial determination, submit an additional response and provide additional evidence or documentation to justify the costs or administrative actions.
  - (3) If questioned costs and administrative findings remain unresolved after the timeline specified in the initial determination, a final determination shall be issued identifying the allowed and disallowed costs as well as the unresolved administrative findings. If disallowed costs remain, the final determination will establish a debt against the subrecipient or contract service provider for the disallowed amount. If administrative findings are not resolved and debts are not paid, the subrecipient or contract service provider may be subject to corrective actions and sanctions pursuant to Chapter 800 of this title, Subchapter F (relating to Sanctions).
  - (4) For WIA funded activities, if there is a determination that there is a substantial violation of a specific provision of Title I of WIA and corrective action has not been taken within the time specified by the Agency or if there is a finding that a subrecipient or contract service provider is not in compliance with the applicable Office of Management and Budget uniform administrative requirements for grants and agreements, subrecipient or contract service provider shall be subject to sanctions under §800.178(d).
- (b) Appeal Process. All final determinations issued by the Agency may be appealed pursuant to the process provided in §800.191 of this title (relating to Appeals).

*The provisions of this §800.307 adopted to be effective February 8, 2001, as published in the Texas Register, February 2, 2001, 26 TexReg 1176.*

### **§800.308. Agency Access to Records.**

- (a) The Agency, or its authorized representatives, has the right of timely and reasonable access to any books, documents, papers, computer records, or other records of subrecipients and contract service providers that are pertinent to the use of any funds administered by the Agency, in order to conduct monitoring, audits, and examinations, and to make excerpts, transcripts, and photocopies of such documents.
- (b) The right of access also includes timely and reasonable access to subrecipient and contract service provider personnel for the purpose of interview and discussion related to such documents.
- (c) The right of access is not limited to any required record retention period but shall last as long as the records are retained.

*The provisions of this §800.308 adopted to be effective February 8, 2001, as published in the Texas Register, February 2, 2001, 26 TexReg 1176.*

### **§800.309 Commission Evaluation of Board Oversight Capacity.**

- (a) This section outlines the process and criteria used by the Commission to evaluate Board capacity to oversee and manage local funds and the delivery of local workforce services.

- (b) The Commission shall use oversight methods outlined in this chapter and elsewhere in the statute and rules to evaluate each Board's performance and compliance with applicable laws, regulations, provisions of contracts and Board plans, and official directives. Examples of official directives include such documents as U.S. Department of Labor Training and Employment Guidance Letters, U.S. Department of Labor Training and Employment Informational Notices, U.S. Department of Health and Human Services Guidance Letters, and Texas Workforce Commission Workforce Development Letters. In particular, the Commission shall evaluate and make findings as appropriate relating to Board fulfillment of responsibilities relating to:
- (1) developing, maintaining, and upgrading comprehensive fiscal management and accountability systems;
  - (2) hiring, training, and retaining qualified staff to carry out the Board's oversight activities;
  - (3) selection and oversight of local contractors to improve delivery of workforce services;
  - (4) oversight and improvement of operation of local career development centers in the area served by the Board;
  - (5) managing contractors' performance across multiple Board programs and achieving required performance standards; and
  - (6) identifying and resolving long-standing oversight problems of the Board and performance problems of contract providers.
- (c) The Commission shall rate each Board's capacity as Above Standards, Within Standards, or Below Standards. The following criteria shall be used to set the rating.
- (1) A Board will be rated as Above Standards if:
    - (A) the Board's performance on 90% of contracted measures is at or above 95% of target with no single measure at less than 90% of target;
    - (B) there are no disallowed costs since the prior evaluation; and
    - (C) there are no repeat findings.
  - (2) A Board will be rated as Within Standards if:
    - (A) the Board's performance on 80% of contracted measures is at or above 95% of target with no single measure at less than 85% of target;
    - (B) disallowed costs do not exceed 1% of allocation; and
    - (C) there are no repeat findings.
  - (3) A Board will be rated as Below Standards if the Board is found to not be Above or Within Standards or if there are significant findings.
  - (4) Notwithstanding any other provision of this section:
    - (A) "disallowed costs" as used in this section do not include such costs that meet the following three criteria: discovered, quantified, and self-reported to the Commission by a Board unless the Commission finds the disallowed costs were the result of gross mismanagement or other significant violation of Board responsibilities; and
    - (B) the Commission may exclude from consideration under this section performance on measures related to new Board responsibilities.
- (d) At least annually, the Commission shall post the results of its evaluation of each Board and each Board's performance on its internet site with explanation of the rating, rating criteria, and

performance measures in a format that is readily accessible to and understandable by a member of the public.

- (1) The explanation shall include specifically how each of the criteria were applied for each Board and how that affected the overall rating.
- (2) Evaluations shall be performed using information at the Commission's disposal at the time of the evaluation. If no updated information is available, the Commission is not obligated to schedule a review or visit to confirm or obtain new information.
- (3) The Commission may update the Board ratings when new information becomes available but does not intend to update them more often than quarterly.

*The provisions of this §800.309 adopted to be effective May 19, 2004, as published in the Texas Register, May 14, 2004, 26 TexReg 4895.*

## **SUBCHAPTER I. SUBRECIPIENT AND CONTRACT SERVICE PROVIDER MONITORING ACTIVITIES.**

### **§800.351. Scope and Purpose.**

- (a) The purpose of this subchapter is to set forth the provisions governing the monitoring responsibilities of subrecipients and contract service providers.
- (b) The rules contained in this subchapter apply in addition to any program-specific rules to all programs administered by the Agency, except that to the extent of any conflict, the program-specific rule will govern.

*The provisions of this §800.351 adopted to be effective February 8, 2001, as published in the Texas Register, February 2, 2001, 26 TexReg 1177.*

### **§800.352. Definitions.**

In addition to the definitions found in §800.2, the following words or terms when used in this subchapter shall have the following meanings, unless the context clearly indicates otherwise.

- (1) Contract Service Providers--An entity other than a vendor as defined in the *Office of Management and Budget Circular A-133* engaged to provide goods, services, or both under a contract with a subrecipient or other provider of services pursuant to an executed contract that is funded with funds administered by the Agency.
- (2) Subrecipient--An entity other than a vendor as defined in the *Office of Management and Budget Circular A-133* receiving funds through a direct contract with the Agency. Boards are subrecipients.

*The provisions of this §800.352 adopted to be effective February 8, 2001, as published in the Texas Register, February 2, 2001, 26 TexReg 1177.*

### **§800.353. Subrecipient and Contract Service Provider Monitoring.**

- (a) Subrecipients and contract service providers shall assure that regular oversight of their own activities and regular monitoring of the activities of their contract service providers which receive public funds administered by the Agency, is conducted and completed. Monitoring shall include monitoring of both the fiscal and program performance of the entities or contract service providers administering and delivering services. These monitoring activities should be designated to ensure programs achieve intended results and resources are efficiently and



effectively used for authorized purposes and are protected from waste, fraud, and abuse. Monitoring activities must be planned to focus on areas of highest risk to help ensure the most effective use of monitoring resources.

- (b) Monitoring activities shall assess a contract service provider's compliance with applicable laws, regulations, contract provisions, and official directives including such documents as U.S. Department of Labor Training and Employment Guidance Letters, U.S. Department of Labor Training and Employment Informational Notices, U.S. Department of Health and Human Services Guidance Letters, and Texas Workforce Commission Workforce Development Letters. The subrecipient shall assess the contract service provider's compliance with the appropriate uniform administrative requirements for grants and agreements applicable to the type of entity receiving funds, as promulgated in the circulars or rules of the Office of Management and Budget. These activities shall encompass both financial and programmatic monitoring and shall be evaluated on a periodic basis. Each subrecipient and contract service provider shall conduct regular oversight and monitoring of its subrecipients and contractors in order to:
  - (1) determine that expenditures have been charged to the cost categories and within the cost limitations specified in the applicable laws and regulations;
  - (2) determine whether or not there is compliance with other provisions of applicable laws and regulations; and
  - (3) provide technical assistance as necessary and appropriate.
- (c) The monitoring function shall include the development and implementation of:
  - (1) a risk assessment tool;
  - (2) a monitoring plan;
  - (3) a monitoring program, including established policies and procedures; and
  - (4) reporting and resolution processes.
- (d) The subrecipient shall develop and implement written policies and procedures that describe and support the monitoring process.

*The provisions of this §800.353 adopted to be effective February 8, 2001, as published in the Texas Register, February 2, 2001, 26 TexReg 1177.*

#### **§800.354. Risk Assessment.**

- (a) Subrecipients and contract service providers shall include the use of a risk assessment tool in their monitoring functions.
- (b) The risk assessment tool shall identify high-risk contract service providers and high areas of risk within an individual contract service provider's operation. The entity responsible for including the risk assessment tool in their monitoring functions shall be responsible for determining what constitutes high risk or an area of high risk.
- (c) Subrecipients and contract service providers shall establish monitoring schedules and monitoring programs that best utilize monitoring resources. Subrecipients and contract service providers shall quantify, as much as possible, and document areas of risk identified for assessment.

*The provisions of this §800.354 adopted to be effective February 8, 2001, as published in the Texas Register, February 2, 2001, 26 TexReg 1177.*

### **§800.355. Monitoring Plan.**

- (a) Subrecipients and contract service providers shall develop their own local-level monitoring plan based on the results of the risk assessment. This monitoring plan shall incorporate all of the following:
  - (1) a schedule or timetable for monitoring Agency funded activities, subrecipients, and contract service providers receiving funds under a contract with the subrecipient or contract service provider or a subcontractor of a subrecipient or contract service provider based upon risk assessment results;
  - (2) identification of the type of review planned for each subrecipient and contract service provider, such as on-site review, comparative financial analysis, desk review, staff analysis, or other type of appropriate review; and
  - (3) the estimated time budgeted to perform each review.
- (b) Subrecipients and contract service providers may perform monitoring reviews either formally or informally, but shall incorporate the risk assessment results in scheduling decisions.

*The provisions of this §800.355 adopted to be effective February 8, 2001, as published in the Texas Register, February 2, 2001, 26 TexReg 1177.*

### **§800.357. Controls Over Monitoring.**

To ensure comprehensive and effective monitoring, subrecipients and contract service providers shall:

- (1) require periodic reports from their contract service providers outlining monitoring reviews, noncompliance issues, and the status of corrective actions;
- (2) ensure that a briefing regarding monitoring activities and findings is provided to the Board or appropriate Board subcommittee at regularly scheduled meetings;
- (3) require an annual evaluation of the monitoring function to determine its effectiveness, by a person or entity independent of the monitoring function; and
- (4) develop a written monitoring procedure to be used in monitoring both program and fiscal operations.

*The provisions of this §800.357 adopted to be effective February 8, 2001, as published in the Texas Register, February 2, 2001, 26 TexReg 1177.*

### **§800.358. Reporting and Resolution Requirements.**

- (a) Subrecipients and contract service providers shall ensure that monitoring reports identify instances of noncompliance with federal and state laws and regulations and Agency policies; and provide recommendations for corrective action and program quality enhancements.
- (b) Subrecipients and contract service providers shall ensure that the contract service providers establish timelines for the completion of corrective action plans, based on the severity of the deficiency. The subrecipients shall work with the contract service providers to ensure implementation of corrective actions.
- (c) Subrecipients and contract service providers shall ensure that a copy of monitoring reports shall be provided to the governing Board, and that upon request copies shall be provided to the Agency.

*The provisions of this §800.358 adopted to be effective February 8, 2001, as published in the Texas Register, February 2, 2001, 26 TexReg 1177.*

### **§800.359. Independent Audit Requirements.**

- (a) Subrecipients and contract service providers subject to the Single Audit Act must have an independent audit performed in compliance with the *Office of Management and Budget Circular A-133*.
- (b) Subrecipients shall submit to the Agency for review and acceptance a complete copy of the audit within nine months of the end of the designated fiscal year. Contract service providers shall submit to the Board, from which contract funds originated, for review and acceptance a complete copy of the audit within nine months of the end of the designated fiscal year.
- (c) Subrecipients and contract service providers may be reimbursed by the Agency for their share of audit expenses if:
  - (1) funding is available and reimbursement is permitted by applicable funding sources;
  - (2) the audit is found to be acceptable upon review by the Agency; and
  - (3) the audit and reimbursement request follows Agency policies and procedures.

*The provisions of this §800.359 adopted to be effective February 8, 2001, as published in the Texas Register, February 2, 2001, 26 TexReg 1177.*

### **§800.360. Access to Records.**

- (a) A subrecipient, or its authorized representatives, has the right of timely and reasonable access to any books, documents, papers, computer records, or other records of contract service providers that are pertinent to the use of any funds administered by the Agency, in order to conduct monitoring, audits, and examinations; and to make excerpts, transcripts, and photocopies of such documents.
- (b) The right of access also includes timely and reasonable access to contract service provider personnel for the purpose of interview and discussion related to such documents.
- (c) The right of access is not limited to any required record retention period but shall last as long as the records are retained.

*The provisions of this §800.360 adopted to be effective February 8, 2001, as published in the Texas Register, February 2, 2001, 26 TexReg 1177.*

## **SUBCHAPTER K. CONTRACT NEGOTIATION, MEDIATION, AND OTHER ASSISTED NEGOTIATION OR MEDIATION PROCESSES.**

### **§800.451. Purpose and Applicability.**

- (a) Purpose. The Commission intends these rules to govern negotiation, mediation, and other assisted negotiation or mediation processes regarding a claim of breach of contract asserted by a contractor against the Agency under Texas Government Code, Chapter 2260. The Commission recognizes that the model rules of the Office of the Attorney General are voluntary guidelines that are not binding on the Commission. The Commission also recognizes that the rules contained in this subchapter are not intended to replace procedures relating to breach of contract claims that are mandated by state or federal law. The parties to a contract are encouraged to resolve any

disagreement concerning the contract in the ordinary course of contract administration under less formal procedures specified in the parties' contract.

(b) Applicability.

- (1) This chapter does not apply to an action of the Agency for which a contractor is entitled to a specific remedy pursuant to state or federal constitution or statute.
- (2) This chapter does not apply to a contract action proposed or taken by the Agency for which a contractor receiving Medicaid funds under that contract is entitled by state statute or rule to a hearing conducted in accordance with Texas Government Code, Chapter 2001.
- (3) This chapter does not apply to contracts:
  - (A) between the Agency and the federal government or its agencies, another state or nation;
  - (B) between the Agency and one or more other units of state government;
  - (C) between the Agency and a local governmental body, or a political subdivision of another state;
  - (D) between a subcontractor and a contractor;
  - (E) subject to §201.112 of the Transportation Code;
  - (F) within the exclusive jurisdiction of state or local regulatory bodies;
  - (G) within the exclusive jurisdiction of federal courts or regulatory bodies; or
  - (H) that are solely and entirely funded by federal grant monies other than for a project defined in §800.452(10) of this Chapter.

- (c) Remedies. The procedures contained in this subchapter are exclusive and required prerequisites to suit under the Civil Practice & Remedies Code, Chapter 107, and the Texas Government Code, Chapter 2260. This subchapter does not waive the Commission's or Agency's sovereign immunity to suit or liability.

*The provisions of this §800.451 adopted to be effective August 23, 2000, as published in the Texas Register, August 18, 2000, 25 TexReg 8063.*

**§800.452. Definitions.**

The following words and terms, when used in this chapter, shall have the following meaning, unless the context clearly indicates otherwise:

- (1) Claim -- A demand for damages by the contractor based upon the Agency's alleged breach of the contract.
- (2) Contract -- A written contract between the Agency and a contractor by the terms of which the contractor agrees either:
  - (A) to provide goods or services, by sale or lease, to or for the Agency; or
  - (B) to perform a project as defined by Texas Government Code, §2166.001.
- (3) Contractor -- Independent contractor who has entered into a contract directly with the Agency. The term does not include:
  - (A) The contractor's subcontractor, officer, employee, agent or other person furnishing goods or services to a contractor;

- (B) An employee of the Agency; or
  - (C) A student at an institution of higher education.
- (4) Counterclaim -- A demand by the Agency based upon the contractor's claim.
- (5) Event -- An act or omission or a series of acts or omissions giving rise to a claim, including but not limited to the following:
- (A) for goods or services:
    - (i) the failure of the Agency to timely pay for goods and services;
    - (ii) the failure to pay the balance due and owing on the contract price, including orders for additional work, after deducting any amount owed the Agency for work not performed under the contract or in substantial compliance with the contract terms;
    - (iii) the suspension, cancellation, or termination of the contract;
    - (iv) final rejection of the goods or services tendered by the contractor, in whole or in part;
    - (v) repudiation of the entire contract prior to or at the outset of performance by the contractor; or
    - (vi) withholding liquidated damages from final payment to the contractor.
  - (B) for a project:
    - (i) the failure to timely pay the unpaid balance of the contract price following final acceptance of the project;
    - (ii) the failure to make timely progress payments required by the contract;
    - (iii) the failure to pay the balance due and owing on the contract price, including orders for additional work, after deducting any amount owed the Agency for work not performed under the contract or in substantial compliance with the contract terms;
    - (iv) the failure to grant time extensions to which the contractor is entitled under the terms of the contract;
    - (v) the failure to compensate the contractor for occurrences for which the contract provides a remedy;
    - (vi) suspension, cancellation or termination of the contract;
    - (vii) rejection by the Agency, in whole or in part, of the "work," as defined by the contract, tendered by the contractor;
    - (viii) repudiation of the entire contract prior to or at the outset of performance by the contractor;
    - (ix) withholding liquidated damages from final payment to the contractor; or
    - (x) refusal, in whole or in part, of a written request made by the contractor in strict accordance with the contract to adjust the contract price, the contract time, or the scope of work.
- (6) Goods -- Supplies, materials or equipment.

- (7) Mediation -- A consensual process in which an impartial third party, the mediator, facilitates communication between the parties to promote reconciliation, settlement, or understanding among them.
- (8) Negotiation -- A consensual bargaining process in which the parties attempt to resolve a claim and counterclaim.
- (9) Parties -- The contractor and the Agency that have entered into a contract in connection with which a claim of breach of contract has been filed under this chapter.
- (10) Project -- As defined in Texas Government Code §2166.001, a building construction project that is financed wholly or partly by a specific appropriation, bond issue or federal money, including the construction of:
  - (A) a building, structure, or appurtenant facility or utility, including the acquisition and installation of original equipment and original furnishing; and
  - (B) an addition to, or alteration, modification, rehabilitation, or repair of an existing building, structure, or appurtenant facility or utility.
- (11) Services -- The furnishing of skilled or unskilled labor or consulting or professional work, or a combination thereof, excluding the labor of an employee of the Agency.

*The provisions of this §800.452 adopted to be effective August 23, 2000, as published in the Texas Register, August 18, 2000, 25 TexReg 8063.*

**§800.453. Contractor Claim.**

- (a) A contractor asserting a claim of breach of contract under the Texas Government Code, Chapter 2260, shall file notice of the claim as provided by this section that shall:
  - (1) be in writing and signed by the contractor or the contractor's authorized representative;
  - (2) be delivered by hand, certified mail return receipt requested, or other verifiable delivery service to the officer of the Agency designated in the contract to receive a notice of claim of breach of contract under the Texas Government Code, Chapter 2260; if no person is designated in the contract, the notice shall be delivered to the executive director; and
  - (3) state in detail:
    - (A) the nature of the alleged breach of contract, including the date of the event that the contractor asserts as the basis of the claim and each contractual provision allegedly breached;
    - (B) a description of damages that resulted from the alleged breach, including the amount and method used to calculate those damages; and
    - (C) the legal theory of recovery, i.e., breach of contract, including the causal relationship between the alleged breach and the damages claimed.
- (b) In addition to the mandatory contents of the notice of claim as required by subsection (a) of this section, the contractor may submit supporting documentation or other tangible evidence to facilitate the Agency's evaluation of the contractor's claim.
- (c) The notice of claim shall be delivered no later than 180 days after the date of the event that the contractor asserts as the basis of the claim.

*The provisions of this §800.453 adopted to be effective August 23, 2000, as published in the Texas Register, August 18, 2000, 25 TexReg 8063.*

#### **§800.454. Agency Counterclaim.**

- (a) The Agency asserting a counterclaim under the Texas Government Code, Chapter 2260, shall file notice of the counterclaim as provided by this section that shall:
  - (1) be in writing;
  - (2) be delivered by hand, certified mail return receipt requested, or other verifiable delivery service to the contractor or representative of the contractor who signed the notice of claim of breach of contract; and
  - (3) state in detail:
    - (A) the nature of the counterclaim;
    - (B) a description of damages or offsets sought, including the amount and method used to calculate those damages or offsets; and
    - (C) the legal theory supporting the counterclaim.
- (b) In addition to the mandatory contents of the notice of counterclaim required by subsection (a) of this section, the Agency may submit supporting documentation or other tangible evidence to facilitate the contractor's evaluation of the unit's counterclaim.
- (c) The notice of counterclaim shall be delivered to the contractor no later than 90 days after the Agency's receipt of the contractor's notice of claim.
- (d) Nothing herein precludes the Agency from initiating a lawsuit for damages against the contractor in a court of competent jurisdiction.

*The provisions of this §800.454 adopted to be effective August 23, 2000, as published in the Texas Register, August 18, 2000, 25 TexReg 8063.*

#### **§800.455. Request for Voluntary Disclosure of Additional Information.**

- (a) Upon the filing of a claim or counterclaim, parties may request to review and copy information in the possession or custody or subject to the control of the other party that pertains to the contract claimed to have been breached, including, without limitation:
  - (1) accounting records;
  - (2) correspondence, including, without limitation, correspondence between the Agency and outside consultants it utilized in preparing its bid solicitation or any part thereof or in administering the contract, and correspondence between the contractor and its subcontractors, materialmen, and vendors;
  - (3) schedules;
  - (4) the parties' internal memoranda; and
  - (5) documents created by the contractor in preparing its offer to the Agency and documents created by the Agency in analyzing the offers it received in response to a solicitation.
- (b) Subsection (a) of this section applies to all information in the parties' possession regardless of the manner in which it is recorded, including, without limitation, paper and electronic media.
- (c) The contractor and the Agency may seek additional information directly from third parties, including, without limitation, the Agency's third-party consultants and the contractor's subcontractors.

- (d) Nothing in this section requires any party to disclose the requested information or any matter that is privileged under Texas law.
- (e) Material submitted pursuant to this subsection and claimed to be confidential by the contractor shall be handled pursuant to the requirements of the Public Information Act.

*The provisions of this §800.455 adopted to be effective August 23, 2000, as published in the Texas Register, August 18, 2000, 25 TexReg 8063.*

#### **§800.456. Costs.**

Unless the contractor and the Agency agree otherwise, each party shall be responsible for its own costs incurred in connection with the negotiation, mediation, and other assisted negotiation or mediation processes, including costs of document reproduction for documents requested by such party, attorney's fees, and consultant or expert fees. The costs of the mediation process itself shall be divided equally between the parties.

*The provisions of this §800.456 adopted to be effective August 23, 2000, as published in the Texas Register, August 18, 2000, 25 TexReg 8063.*

#### **§800.461. Duty to Negotiate.**

The parties shall negotiate in accordance with the timetable set forth in §800.462 of this subchapter to attempt to resolve all claims and counterclaims. No party is obligated to settle with the other party as a result of the negotiation.

*The provisions of this §800.461 adopted to be effective August 23, 2000, as published in the Texas Register, August 18, 2000, 25 TexReg 8063.*

#### **§800.462. Negotiation Timetable.**

- (a) Following receipt of a contractor's notice of claim, the executive director of the Agency or other designated representative shall review the contractor's claim(s) and the Agency's counterclaim(s), if any, and initiate negotiations with the contractor to attempt to resolve the claim(s) and counterclaim(s).
- (b) Subject to subsection (c) of this section, the parties shall begin negotiations within a reasonable period of time, not to exceed 60 days following the later of:
  - (1) the date of termination of the contract;
  - (2) the completion date, or substantial completion date in the case of construction projects, in the original contract; or
  - (3) the date the Agency receives the contractor's notice of claim.
- (c) The Agency may delay negotiations until after the 180th day after the date of the event giving rise to the claim of breach of contract by:
  - (1) delivering written notice to the contractor that the commencement of negotiations will be delayed; and
  - (2) delivering written notice to the contractor when the Agency is ready to begin negotiations.
- (d) The parties may conduct negotiations according to an agreed schedule as long as they begin negotiations no later than the deadlines set forth in subsections (b) or (c) of this section, whichever is applicable.



- (e) Subject to subsection (f) of this section, the parties shall complete the negotiations that are required by this subchapter as a prerequisite to a contractor's request for contested case hearing no later than 270 days after the Agency receives the contractor's notice of claim.
- (f) The parties may agree in writing to extend the time for negotiations on or before the 270th day after the Agency receives the contractor's notice of claim. The agreement shall be signed by representatives of the parties with authority to bind each respective party and shall provide for the extension of the statutory negotiation period until a date certain. The parties may enter into a series of written extension agreements that comply with the requirements of this section.
- (g) The contractor may request a contested case hearing before the State Office of Administrative Hearings (SOAH) pursuant to §800.492 of this subchapter (relating to Request for Contested Case Hearing) after the 270th day after the Agency receives the contractor's notice of claim, or the expiration of any extension agreed to under subsection (f) of this section.
- (h) The parties may agree to mediate the dispute at any time before the 270th day after the Agency receives the contractor's notice of claim or before the expiration of any extension agreed to by the parties pursuant to subsection (f) of this section. The mediation shall be governed by §§800.471-800.473 of this subchapter.
- (i) Nothing in this section is intended to prevent the parties from agreeing to commence negotiations earlier than the deadlines established in subsections (b) and (c) of this section, or from continuing or resuming negotiations after the contractor requests a contested case hearing before SOAH.

*The provisions of this §800.462 adopted to be effective August 23, 2000, as published in the Texas Register, August 18, 2000, 25 TexReg 8063.*

### **§800.463. Conduct of Negotiation.**

- (a) A negotiation under this subchapter may be conducted by any method, technique, or procedure authorized under the contract or agreed upon by the parties, including, without limitation, negotiation in person, by telephone, correspondence, video conference, or any other method that permits the parties to identify their respective positions, discuss their respective differences, confer with their respective advisers, exchange offers of settlement, and settle.
- (b) The parties may conduct negotiations with the assistance of one or more neutral third parties. If the parties choose to mediate their dispute, the mediation shall be conducted in accordance with §§800.471-800.473 of this subchapter. Parties may choose other assisted negotiation or mediation processes, including, without limitation, processes such as those described in §§800.481 and 800.482 of this subchapter.
- (c) To facilitate the meaningful evaluation and negotiation of the claim(s) and any counterclaim(s), the parties may exchange relevant documents that support their respective claims, defenses, counterclaims or positions.
- (d) Material submitted pursuant to this subsection and claimed to be confidential by the contractor shall be handled pursuant to the requirements of the Public Information Act.

*The provisions of this §800.463 adopted to be effective August 23, 2000, as published in the Texas Register, August 18, 2000, 25 TexReg 8063.*

### **§800.471. Mediation.**

- (a) Option to mediate. The parties may agree to mediate the dispute at any time before the 270th day after the Agency receives the contractor's notice of claim or before the expiration of any

extension agreed to by the parties pursuant to §800.462(f) of this subchapter. The mediation shall be governed by rules contained in this subchapter.

- (b) **Timetable.** A contractor and Agency may mediate the dispute even after the case has been referred to SOAH for a contested case. SOAH may also refer a contested case for mediation pursuant to its own rules and guidelines, whether or not the parties have previously attempted mediation.
- (c) **Request for Referral.** If mediation does not resolve all issues raised by the claim, the contractor may request that the claim be referred to SOAH by the Agency. Nothing in these rules prohibits the contractor and the Agency from mediating their dispute after the case has been referred for contested case hearing, subject to the rules of SOAH.
- (d) **Conduct of Mediation.**
  - (1) A mediator may not impose his or her own judgment on the issues for that of the parties. The mediator must be acceptable to both parties.
  - (2) The mediation is subject to the provisions of the Governmental Dispute Resolution Act, Texas Government Code, Chapter 2009. For purposes of this subchapter, "mediation" is assigned the meaning set forth in the Civil Practice and Remedies Code, §154.023.
  - (3) To facilitate a meaningful opportunity for settlement, the parties shall, to the extent possible, select representatives who are knowledgeable about the dispute, who are in a position to reach agreement, or who can credibly recommend approval of an agreement.

*The provisions of this §800.471 adopted to be effective August 23, 2000, as published in the Texas Register, August 18, 2000, 25 TexReg 8063.*

#### **§800.472. Agreement to Mediate.**

- (a) Parties may agree to use mediation as an option to resolve a breach of contract claim at the time they enter into the contract and include a contractual provision to do so. The parties may mediate a breach of contract claim even absent a contractual provision to do so if both parties agree.
- (b) Any agreement to mediate shall include consideration of the following factors:
  - (1) The source of the mediator. Potential sources of mediators include governmental officers or employees who are qualified as mediators under Civil Practice and Remedies Code, §154.052, private mediators, SOAH, the Center for Public Policy Dispute Resolution at The University of Texas at Austin School of Law, an alternative dispute resolution system created under Civil Practice and Remedies Code, Chapter 152, or another state or federal agency or through a pooling agreement with several state agencies. Before naming a mediator source in a contract, the parties should contact the mediator source to be sure that it is willing to serve in that capacity. In selecting a mediator, the parties should use the qualifications set forth in §800.473 of this Subchapter (relating to Qualifications and Immunity of the Mediator).
  - (2) The time period for the mediation. The parties should allow enough time in which to make arrangements with the mediator and attending parties to schedule the mediation, to attend and participate in the mediation, and to complete any settlement approval procedures necessary to achieve final settlement. While this time frame can vary according to the needs and schedules of the mediator and parties, it is important that the parties allow adequate time for the process.
  - (3) The location of the mediation.

- (4) Allocation of costs of the mediator.
- (5) The identification of representatives who will attend the mediation on behalf of the parties, if possible, by name or position within the Agency or contracting entity.
- (6) The settlement approval process in the event the parties reach agreement at the mediation.

*The provisions of this §800.472 adopted to be effective August 23, 2000, as published in the Texas Register, August 18, 2000, 25 TexReg 8063.*

### **§800.473. Qualifications and Immunity of the Mediator.**

- (a) The mediator shall possess the qualifications required under Civil Practice and Remedies Code, §154.052, be subject to the standards and duties prescribed by Civil Practice and Remedies Code, §154.053, and have the qualified immunity prescribed by Civil Practice and Remedies Code, §154.055, if applicable.
- (b) The parties should decide whether, and to what extent, knowledge of the subject matter and experience in mediation would be advisable for the mediator.
- (c) The parties should obtain from the prospective mediator the ethical standards that will govern the mediation.

*The provisions of this §800.473 adopted to be effective August 23, 2000, as published in the Texas Register, August 18, 2000, 25 TexReg 8063.*

### **§800.481. Other Assisted Negotiation and Mediation Processes.**

- (a) Parties to a contract dispute under Texas Government Code, Chapter 2260 may agree, either contractually or when a dispute arises, to use other assisted negotiation and mediation (alternative dispute resolution) processes in addition to negotiation and mediation to resolve their dispute.
- (b) Factors Supporting the Use of Other Assisted Negotiation or Mediation Processes. The following factors may help parties decide whether one or more of the other assisted negotiation and mediation processes could help resolve their dispute:
  - (1) The parties recognize the benefits of an agreed resolution of the dispute;
  - (2) The expense of proceeding to contested case hearing at SOAH is substantial and might outweigh any potential recovery;
  - (3) The parties want an expedited resolution;
  - (4) The ultimate outcome is uncertain;
  - (5) There exists factual or technical complexity or uncertainty which would benefit from expertise of a third-party expert for technical assistance or fact-finding;
  - (6) The parties are having substantial difficulty communicating effectively;
  - (7) A mediator third party could facilitate the parties' realistic evaluation of their respective cases;
  - (8) There is an on-going relationship that exists between parties;
  - (9) The parties want to retain control over the outcome;
  - (10) There is a need to develop creative alternatives to resolve the dispute;
  - (11) There is a need for flexibility in shaping relief;

- (12) The other side has an unrealistic view of the merits of their case; or
- (13) The parties (or aggrieved persons) need to hear an evaluation of the case from someone other than their lawyers.

*The provisions of this §800.481 adopted to be effective August 23, 2000, as published in the Texas Register, August 18, 2000, 25 TexReg 8063.*

**§800.482. Methods of Other Assisted Negotiation and Mediation Processes.**

- (a) **Methods.** The Agency may elect any of the following methods, or a combination of these methods, or any assisted negotiation process if agreed to by the parties, in seeking resolution of disputes or other controversy arising under Texas Government Code, Chapter 2260. If the parties agree to use another assisted negotiation or mediation procedure, the parties shall agree in writing to a detailed description of the process prior to engaging in the process that may include one or more of the following:
  - (1) Mediation as set forth in this subchapter;
  - (2) Early evaluation by a third-party neutral;
  - (3) Neutral fact-finding by an expert; or
  - (4) Mini-trial.
- (b) **Early evaluation by a third party.**
  - (1) This is a confidential conference where the parties and their counsel present the factual and legal bases of their claim and receive a non-binding assessment by an experienced neutral with subject-matter expertise or with significant experience in the substantive area of law involved in the dispute.
  - (2) After summary presentations, the third-party neutral identifies areas of agreement for possible stipulations, assesses the strengths and weaknesses of each party's position, and estimates, if possible, the likelihood of liability and the dollar range of damages that appear reasonable to him or her.
  - (3) This is a less complicated procedure than the mini-trial, described in subsection (d) of this section. It may be appropriate for only some issues in dispute, for example, where there are clear-cut differences over the appropriate amount of damages. This process may be particularly helpful when:
    - (A) The parties agree that the dispute can be settled;
    - (B) The dispute involves specific legal issues;
    - (C) The parties disagree on the amount of damages;
    - (D) The opposition has an unrealistic view of the dispute; or
    - (E) The neutral is a recognized expert in the subject area or area of law involved.
- (c) **Neutral fact-finding by an expert.**
  - (1) In this process, a neutral third-party expert studies a particular issue and reports findings on that issue. The process usually occurs after most discovery in the dispute has been completed and the significance of particular technical or scientific issues is apparent.
  - (2) The parties may agree in writing that the fact-finding will be binding on them in later proceedings (and entered into as a stipulation in the dispute if the matter proceeds to

contested case hearing), or that it will be advisory in nature, to be used only in further settlement discussions between representatives of the parties. This process may be particularly helpful when:

- (A) Factual issues requiring expert testimony may be dispositive of liability or damage issues;
  - (B) The use of a neutral is cost effective; or
  - (C) The neutral's findings could narrow factual issues for contested case hearing.
- (d) Mini-trial.
- (1) A mini-trial is generally a summary proceeding before a representative of upper management from each party, with authority to settle, and a third-party neutral selected by agreement of the parties. A mini-trial is usually divided into three phases: a limited information exchange phase, the actual hearing, and post-hearing settlement discussions. No written or oral statement made in the proceeding may be used as evidence or an admission in any other proceeding.
  - (2) The information exchange stage should be brief, but it must be sufficient for each party to understand and appreciate the key issues involved in the case. At a minimum, parties should exchange key exhibits, introductory statements, and a summary of witnesses' testimony.
  - (3) At the hearing, representatives of the parties present a summary of the anticipated evidence and any legal issues that must be decided before the case can be resolved. The third-party neutral presides over the presentation and may question witnesses and counsel, as well as comment on the arguments and evidence. Each party may agree to put on abbreviated direct and cross-examination testimony. The hearing generally takes no longer than 1-2 days.
  - (4) Settlement discussions, facilitated by the third-party neutral, take place after the hearing. The parties may ask the neutral to formally evaluate the evidence and arguments and give an advisory opinion as to the issues in the case. If the parties cannot reach an agreed resolution to the dispute, either side may declare the mini-trial terminated and proceed to resolve the dispute by other means.
  - (5) Mini-trials may be appropriate when:
    - (A) The dispute is at a stage where substantial costs can be saved by a resolution based on limited information gathering;
    - (B) The matter justifies the senior executive time required to complete the process;
    - (C) The issues involved include highly technical mixed questions of law and fact;
    - (D) The matter involves trade secrets or other confidential or proprietary information; or
    - (E) The parties seek to narrow the large number of issues in dispute.

*The provisions of this §800.482 adopted to be effective August 23, 2000, as published in the Texas Register, August 18, 2000, 25 TexReg 8063.*

### **§800.491. Settlement Agreement and Approval Procedures.**

- (a) Settlement Process. The parties' settlement approval procedures shall be disclosed by the parties prior to the negotiation, mediation, or other assisted negotiation and mediation process, unless the parties agree otherwise in writing. To the extent possible, the parties shall select negotiators or representatives who are knowledgeable about the subject matter of the dispute, who are in a position to reach agreement, and who can credibly recommend approval of an agreement.

- (b) Initial Settlement Agreement. Any settlement agreement reached during the mediation shall be signed by the representatives of the contractor and the Agency, and shall describe any procedures required to be followed by the parties in connection with final approval of the agreement.
- (c) Final Settlement Agreement.
  - (1) A final settlement agreement reached during, or as a result of negotiation, mediation, or other assisted negotiation or mediation process that resolves an entire claim or any designated and severable portion of a claim, shall be in writing and signed by representatives of the contractor and the Agency who have authority to bind each respective party.
  - (2) If the settlement agreement does not resolve all issues raised by the claim and counterclaim, the agreement shall identify the issues that are not resolved.
- (3) A partial settlement does not waive a contractor's rights under the Texas Government Code, Chapter 2260, as to the parts of the claim that are not resolved.
- (d) Confidentiality of Mediation and Final Settlement Agreement.
  - (1) A mediation conducted under this section is confidential in accordance with Texas Government Code, §2009.054.
  - (2) The confidentiality of a final settlement agreement to which the Agency is a signatory that is reached as a result of the mediation is governed by Texas Government Code, Chapter 552.

*The provisions of this §800.491 adopted to be effective August 23, 2000, as published in the Texas Register, August 18, 2000, 25 TexReg 8063.*

#### **§800.492. Request for Contested Case Hearing.**

- (a) If a claim for breach of contract is not resolved in its entirety through negotiation, mediation, or other assisted negotiation or mediation process, in accordance with this subchapter on or before the 270th day after the Agency receives the notice of claim, or after the expiration of any extension agreed to by the parties pursuant to this subchapter, the contractor may file a request with the Agency for a contested case hearing before SOAH.
- (b) A request for a contested case hearing shall state the legal and factual basis for the claim, and shall be delivered to the chief administrative officer of the Agency or other officer designated in the contract to receive notice within a reasonable time after the 270th day or the expiration of any written extension agreed to pursuant to this subchapter.
- (c) The Agency shall forward the contractor's request for contested case hearing to SOAH within a reasonable period of time, not to exceed thirty days, after receipt of the request.
- (d) The parties may agree to submit the case to SOAH before the 270th day after the notice of claim is received by the Agency if they have achieved a partial resolution of the claim or if an impasse has been reached in the negotiations and proceeding to a contested case hearing would serve the interests of justice.

*The provisions of this §800.492 adopted to be effective August 23, 2000, as published in the Texas Register, August 18, 2000, 25 TexReg 8063.*