

## **NEW SUBCHAPTER C. BOARD CONTRACTING GUIDELINES**

**PROPOSED RULES WITH PREAMBLE TO BE SUBMITTED TO THE *TEXAS REGISTER*. THIS DOCUMENT WILL NOT HAVE ANY SUBSTANTIVE CHANGES BUT IS SUBJECT TO FORMATTING CHANGES AS REQUIRED BY THE *TEXAS REGISTER*.**

ON DECEMBER 23, 2003, THE TEXAS WORKFORCE COMMISSION PROPOSED THE BELOW RULE WITH PREAMBLE TO BE SUBMITTED TO THE *TEXAS REGISTER*.

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The Texas Workforce Commission (Commission) proposes new Subchapter C. Board Contracting Guidelines and new §§801.51 - 801.60 regarding Board Contracting Guidelines.

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## **PART I. PURPOSE, BACKGROUND, AND AUTHORITY**

**A. Purpose.** The purpose of the proposed new Subchapter C and rules is to set forth contracting guidelines that apply to Local Workforce Development Boards (Boards) and the Boards' contracted service providers of one-stop services as required by Texas Government Code §§2308.264 and 2308.267 (as amended by Senate Bill 280, 78th Texas Legislature, Regular Session (2003)).

Texas Government Code, Chapter 2308; Texas Labor Code, Title 4; and federal statutes and regulations have made Boards responsible for a number of duties related to the administration of Commission-funded employment and training activities, including:

- \*contracting with service providers;
- \*ensuring that training and eligibility determinations relating to employment and training services are delivered by contracted workforce service providers;
- \*maintaining adequate fiscal systems;
- \*complying with the uniform rules for administration of grants and agreements;
- \*meeting the contract performance targets; and
- \*complying with all applicable federal and state statutes and regulations.

**B. Background and Authority.** The 74th Texas Legislature enacted Texas' landmark law, which is codified in part in Texas Labor Code, Chapter 302, and Texas Government Code, Chapter 2308. This state law reformed both the welfare and workforce systems and moved Texas into a leadership position among reform-minded states. State law provided local elected officials

the opportunity to form Boards that oversee the delivery of workforce development services that meet the needs of local employers and workers. Rules relating to the Boards' roles and responsibilities are set forth in 40 T.A.C. Chapter 801.

The 78th Texas Legislature (Legislature) amended portions of the Texas Government Code regarding Boards' contracted providers of one-stop workforce services. Specifically, §2308.264 was amended to require that, in consultation with the Boards, the Commission by rule establish contracting guidelines for Boards applicable to Board contracted providers of one-stop workforce services. The law requires that the guidelines:

- (1) ensure that each independent contractor that contracts to provide one-stop workforce services under this section has sufficient insurance bonding and liability coverage for the overall financial security of one-stop workforce services funds and operations;
- (2) prevent potential conflicts of interest between Boards and entities that contract with Boards under this section; and
- (3) ensure that if a Board acts as a fiscal agent for an entity that contracts with the Boards to provide one-stop workforce services, the Board does not deliver the services or determine eligibility for the services.

The Legislature also amended §2308.267, Texas Government Code, to state that a Board's staff may not direct or control the staffing of any entity providing one-stop workforce services. This would include Boards' contracted workforce service providers that provide one-stop workforce services through the Texas Workforce Centers as set out in 40 T.A.C. §801.28. They are:

(a) **core services**, as defined in the Workforce Investment Act (WIA) §134(d)(2) (29 U.S.C.A. §2864 (d)(2)) and Texas Government Code, Chapter 2308, including:

- (1) outreach;
- (2) intake, which may include worker profiling and orientation to the information and services available through the One-Stop Service Delivery Network;
- (3) determinations of whether the individuals are eligible for programs funded through the Commission that are available through the One-Stop Service Delivery Network;
- (4) initial assessment of skill levels, aptitudes, abilities, and supportive service needs;
- (5) job search and placement assistance and, when appropriate, career counseling;
- (6) provision of performance information and program cost information on eligible providers of training services as described in §§841.31-841.47 of this chapter (relating to Training Provider Certification), provided by program, and eligible providers of youth activities described in WIA §123 (29 U.S.C.A. §2843), providers of adult education described in Title II of WIA, providers of post-secondary vocational education activities and vocational education activities available to school dropouts under the Carl D. Perkins Vocational and Applied Technology Education Act (20 U.S.C.A. §2301 et seq.), and providers of vocational rehabilitation program activities described in Title I of the Rehabilitation Act of 1973 (29 U.S.C.A. §720 et seq.);
- (7) provision of information regarding how the local workforce development area (workforce area) is performing on the local performance measures and any

- additional performance information with respect to the One-Stop Service Delivery Network in the local area;
- (8) provision of information regarding filing claims for unemployment compensation;
  - (9) provision of employment statistics information, including the provision of accurate information relating to local, regional, and national labor market areas, including job vacancy listings in such labor market areas, information on job skills necessary to obtain the jobs listed, and information related to local occupations in demand and the earnings and skill requirements for such occupations;
  - (10) provision of accurate information relating to the availability of supportive services, including child care and transportation, available in the workforce area, and referral to such services, as appropriate;
  - (11) assistance in establishing eligibility for Welfare-to-Work activities, Choices, Food Stamp Employment and Training, and programs of financial aid assistance for training and education that are available in the local area; and
  - (12) follow-up services, including counseling regarding the workplace, for participants in workforce investment activities authorized under Chapter 841 of this Title, relating to Workforce Investment Act, who are placed in unsubsidized employment, for not less than twelve months after the first day of employment, as appropriate.

(b) **intensive services**, as described in the Texas Government Code, Chapter 2308, and as described in the WIA §134(d)(3) (29 U.S.C.A. §2864(d)(3)), which may include the following:

- (1) comprehensive and specialized assessments of the skill levels and service needs of adults and dislocated workers, such as diagnostic testing and use of other assessment tools, in-depth interviewing, and evaluation to identify employment barriers and employment goals;
- (2) development of an individual employment plan and service strategy to identify the employment goals, appropriate achievement objectives, and appropriate combination of services for the participant to achieve employment goals and objectives;
- (3) group counseling;
- (4) individual counseling and career planning;
- (5) centralized and continuous case management; and
- (6) short-term pre-vocational services, including learning skills, communication skills, interviewing skills, punctuality, personal maintenance skills, and professional conduct to prepare individuals for unsubsidized employment or training.

(c) **training services** as described in WIA §134(d)(4) (29 U.S.C.A. §2864(d)(4)) and the Texas Government Code, Chapter 2308, which may include the following:

- (1) occupational skills training, including training for nontraditional employment;
- (2) on-the-job training;
- (3) programs that combine workplace training with related instruction;
- (4) training programs operated by the private sector;
- (5) skills upgrading and retraining;
- (6) entrepreneurial training;

- (7) job readiness training;
- (8) adult education and literacy activities in combination with services and with activities described in (1)-(7) of this section; and
- (9) customized training conducted with a commitment by an employer or group of employers to employ an individual upon successful completion of training.

(d) **other services** including

- (1) all other permissible local employment and training activities included in the local workforce development plan, which may include discretionary one-stop activities, supportive services, and needs-related payments as outlined in WIA §134(e) (29 U.S.C.A. §2864(e));
- (2) all programs and activities administered by the Texas Workforce Center Partners; and
- (3) the information described in the Wagner-Peyser Act, §15, and all job search, placement, recruitment and other labor exchange services authorized under the Wagner-Peyser Act (29 U.S.C.A. §49 et seq.).

**Workforce Service Providers.** The Commission encourages entities to become providers of workforce services. The Commission also assists providers in building the knowledge and skills necessary to deliver services effectively by:

\*providing quarterly, annual, and regional conferences/workshops among Boards and their service providers for sharing of information and building relationships to identify best practices and improve service delivery including, but not limited to, improvements of services for universal customers and integration of all workforce services;

\*sponsoring conferences that focus on service providers, such as the conference for faith-based organizations, that encourage entities to provide services and fulfill contracted service provider roles within the one-stop service delivery system and to leverage resources through the Boards to assist with the delivery of services; and

\*working with the Texas Association of Workforce Boards (TAWB) in researching the concept of developing a credentials program for one-stop professionals as well as workforce professionals in general.

**C. Coordination Activities.** On September 30, 2003, the Commission considered the methods of developing the rules, including negotiated rulemaking. The Commission selected a method that would afford the greatest amount of flexibility for interchange and dialogue. The Commission directed staff to convene a workgroup comprised of Boards, Boards' contracted workforce service providers, and any interested persons to develop draft rules for consideration by the Commission. Two public meetings were held. On October 18, 2003, the workgroup discussed concepts and basic principles to be included in the rule language, and at the second workgroup meeting held on November 14, 2003, the workgroup discussed draft rule language. The workgroup was attended by a number of representatives from both public and private sector entities, including nonprofit and for-profit contractors. It was also attended by entities that represented various Board contracting structures. The participants provided written and verbal feedback in person and via teleconference. The public was also able to monitor the workgroup's development by viewing materials on the Commission Internet page. The page serves as a clearinghouse for information on the rules' development. The work sessions involved discussions of each of the individual provisions of the proposed rules discussed below.

## **PART II. EXPLANATION OF INDIVIDUAL PROVISIONS**

New Subchapter C is added as the location for rules that comprise the Board contracting guidelines.

Section 801.51 sets forth the purpose and general provisions for the Board contracting guideline rules. The scope of the rules covers all Board contracted workforce service providers of one-stop services, including those that provide services listed in §801.28 and under contract with the Boards. Service providers that are state agencies are not subject to the guidelines proposed in these rules. The rule also clarifies that the rules in the subchapter are separate and distinct from the monitoring rules contained in Chapter 800, Subchapters H and I.

Section 801.52 adds a provision to set forth definitions for use in the subchapter for Boards' contracted workforce service provider, the Commission, and one-stop workforce service.

Section 801.53 adds a provision to set forth general standards of conduct and conflicts of interest provisions. These provisions are based in part on the Texas Ethics Commission guidelines for determining conflicts of interest and state requirements placed on state employees to avoid conflicts of interest. The rules are also based in part on the proposed rules by the Texas Commission on Environmental Quality for governing contracts for financial advisors, and standard practices used by the Commission and Boards in the past to ensure compliance with federal and state statutory requirements. The statutory requirements placed on state employees are also used as a benchmark for Boards' staff, and Boards' contracted service providers conduct. The provisions contained in the Texas Government Code, Chapter 572, the Texas Penal Code, Chapters 36 and 39 and 29 C.F.R. 97.36(b)(3) are utilized for the benchmark for Board and Boards' contracted service provider conduct.

The conflict of interest provisions are intended to ensure that perceptions of conflict do not arise at the Board level. The guidelines seek to:

- \*avoid personal, employment, or business relationships that create conflicts of interest;
- \*not use non-public information gained through a relationship with the Commission or Boards to seek or obtain monetary gain; and
- \*require disclosure of conflicts of interests.

Section 801.54 sets out the fiscal integrity requirements based in part on the methods already used by the Commission and other state and federal grantees to protect state and federal funds that are contracted to subcontractors. The Commission uses a key control measures checklist for reviewing potential contractors before awarding contracts. The key control measures checklist used by the Commission is set out in the Texas Workforce Commission Financial Manual for Grants and Contracts, which is available to the Boards, and includes indicators of fiscal quality controls. The key control checklist system is a method used by other entities awarding contracts to check for indicators of fiscal stability.

Section 801.55 sets out elements relating to fiscal integrity provisions. This includes the requirement that Boards develop a key control certification system for verifying the financial integrity of Boards' contracted workforce service providers. The Boards shall verify that the Boards' contracted workforce service providers meet the Board's key control measures. The

specific schedule is designed to be consistent with standard risk assessment and varies based on the amount of funds under the control of the Boards' contracted workforce service provider. The assessment of risk is tied to the monetary amount that is covered by the contract and designed to apply in a manner that will be consistent with reasonable procurement requirements, standard grants and contracts management practices, and Board customized monitoring plans as required under 40 T.A.C. Subchapter I. The provisions in this section are modeled after the standard fiscal integrity provisions currently contained in the contracts between the Commission and the Boards and based on federal and state contract management principles and best practices. Flexibility is built into the rule to recognize that contracts may vary significantly in monetary amount, performance requirements, scope and breadth of customers to be served as well as other factors. For that reason, the Commission is requiring the Boards to tailor their key control system to meet the needs of employers and job seekers in the individual workforce areas. The intent of the Commission is to emphasize the importance of strong financial planning. In this context, Boards must ensure that funds are not over-expended by Boards' contracted workforce service providers.

Section 801.56 sets out the provisions relating to bonding, insurance and other methods of securing funds to cover possible contract losses. The provisions are based in part on the principles of local decisions and ensuring that the most cost effective methods are used by each Board. The current contracts between the Commission and the Boards require that bonds be in place to protect funds under the control of the Boards. In turn, Boards must determine the appropriate methods of protecting the funds under the control of the Board's contractors.

While the Commission recognizes that less than one-tenth of one percent of funds has been categorized as disallowed costs over the past eight years, including workforce areas that use individuals as the managing directors, the new provisions in Chapter 2308, Texas Government Code, must be effectuated. The successes of the Boards present the issue of whether it is cost effective for Boards to bond at the local level or require contractors to bond the funds under their control. The successes of the Boards are attributable to good local business practices in terms of contract management, monitoring practices and other efforts by the Boards to ensure financial safeguards. In light of these existing business practices and the history of Board management, the Commission finds that a minimum threshold of insurance or bonding should be set. The amount reviewed with the workgroup began at 100 percent and was revised to at least ten percent of the funds the Boards place under the control of the Boards' contracted workforce service providers. The ten percent threshold is a recognition of the Boards' strong history of financial successes. The Boards, however, may set a higher amount if they find it appropriate, either on a contract-by-contract basis or as a general rule.

Section 801.57 sets out provisions relating to contracting with former Commission, Board, or Boards' contracted workforce service provider employees. These provisions mirror the revolving door policies that already apply to many state employees.

Section 801.58 sets out provisions relating to restrictions on employing former employees of the Board, Commission or Boards' contracted workforce service providers. These provisions also mirror the revolving door policies that already apply to many state employees.

Section 801.59 sets out provisions relating the exemptions for requirements in the subchapter. The Commission may allow for exceptions where specific circumstances warrant.

Section 801.60 sets out provisions for enforcement of the requirements in the subchapter. The section explains consequences for failing to comply with the rules.

### **PART III. IMPACT STATEMENTS**

Randy Townsend, Chief Financial Officer, has determined that for each year of the first five years the rule will be in effect, the following statements will apply:

There are no additional estimated costs to the state and to local governments expected as a result of enforcing or administering the rule;

There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rule;

There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rule;

There are no foreseeable implications relating to costs or revenue of the state or local governments as a result of enforcing or administering the rule; and

There is no anticipated impact on small businesses because the Boards are provided local funds to implement the program locally and the reasonable and necessary costs of performing under a contract by a contracted workforce service provider would be paid through the contract.

Mark Hughes, Acting Director of Labor Market Information, has determined that there is no foreseeable negative impact upon employment conditions in this state as a result of the proposed rule amendments and new rules.

Joann Benton, Director of Contract Monitoring Services, has determined that for each year of the first five years the rules are in effect, the public benefit anticipated as a result of enforcing the sections will be a comprehensive process used by the Commission, its Boards, subrecipients, and contract service providers to help ensure the accountability of program funds and outcomes. The Commission anticipates that the rules will make contract management processes inclusive of a more comprehensive key control system. The financial safeguards will be locally designed and provide the Boards with the flexibility to make local decisions based on state policy.

The new rules are proposed in response to and under the authority of the following sections:

Comments on the proposed section may be submitted to John Moore, General Counsel, Texas Workforce Commission, 101 East 15th Street, Room 608, Austin, Texas 78778; Fax Number 512-463-2220; or e-mailed to john.moore@twc.state.tx.us. Comments must be received by the Agency no later than thirty (30) days from the date this proposal is published in the *Texas Register*.

Sections 2308.264 and 2308.267, Texas Government Code, as amended by §§4.01, 4.02 and 4.09 of SB 280, 78th Texas Legislature, Regular Session, 2003. These laws require the Commission

to adopt rules not later than March 1, 2004, regarding Board contracting guidelines and related provisions referenced in the legislation.

Additionally, §301.0015, Texas Labor Code, provides that the Commission has authority to adopt rules necessary to administer the Commission's policies, including rules necessary for the administration of Title 4, Texas Labor Code, relating to employment services and unemployment.

Section 302.002(d), Texas Labor Code, authorizes the Commission to adopt, amend, or repeal such rules in accordance with Chapter 2001, Texas Government Code, as necessary for the proper administration of the Workforce Development Division.

Section 302.021, Texas Labor Code, which consolidated under the jurisdiction of the Commission job-training, employment, and employment-related educational programs and other functions listed in the section (including, but not limited to, the programs funded under the Workforce Investment Act of 1998 as amended (29 U.S.C. §2801 et seq.).

Texas Labor Code, Title 4, and primarily Chapters 301 and 302, and Chapter 2308, Texas Government Code, will be affected by the proposed new rules.

## **Chapter 801. Local Workforce Boards**

### **Subchapter C. Board Contracting Guidelines**

#### **§801.51. Purpose and General Provisions.**

- (a) The purpose of the rules contained in this subchapter is to implement Texas Government Code §§2308.264 and 2308.267, by setting out the Board contracting guidelines applicable to Boards' contracted workforce service providers, including those who provide one-stop workforce services.
- (b) The Board contracting guidelines shall be applied by the Boards to ensure that contracts with workforce service providers that deliver one-stop services are reviewed for financial safeguards through utilizing a locally designed key control system based on the provisions in this subchapter. Boards shall ensure compliance with this subchapter through development of local policies and procedures to oversee and manage the Boards' contracted workforce service providers. Notwithstanding the provisions in this subchapter, Boards and Boards' contracted workforce service providers shall ensure compliance with monitoring requirements set out in Subchapters H and I of Chapter 800 of this title.

#### **§801.52. Definitions.**

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

- (1) **Boards' Contracted Workforce Service Provider**--A business entity or person, except a state agency, who contracts with a Board to provide one-stop workforce services.

- (2) **Commission** -- The Texas Workforce Commission, which is the body of governance composed of three members appointed by the Governor and includes the unit of state government established under Texas Labor Code Chapter 301 presided over by the Commission and administered by the Executive Director to operate the integrated workforce development system.
- (3) **One-Stop Workforce Services** -- The workforce employment and training services as listed in 40 T.A.C. §801.28, which are made available through the Texas Workforce Centers.

### **§801.53. Standards of Conduct and Conflicts of Interest Provisions.**

- (a) Standards of Conduct. Boards shall ensure that Boards' staff and Boards' contracted workforce service providers:
  - (1) comply with federal and state statutes and regulations regarding standards of conduct and conflicts of interest provisions including, but not limited to, the following:
    - (A) Texas Government Code, Chapter 572;
    - (B) Texas Penal Code, Chapters 36 and 39, in the same manner as applicable to a state officer or employee;
    - (C) 29 C.F.R. §97.36(b)(3); and
    - (D) professional licensing requirements, when applicable;
  - (2) avoid personal, employment, or business relationships that create conflicts of interest or the appearance of conflicts of interest; and
  - (3) refrain from using non-public information gained through a relationship with the Commission or Board or Board staff to seek or obtain monetary gains (including gain to an individual, partnership, corporation or other business entity) that would be in conflict with the use of funds.
- (b) Conflicts of Interest.
  - (1) Boards shall ensure that Boards' contracted workforce service providers comply with:
    - (A) federal and state statutes and regulations; and
    - (B) Office of Management and Budget (OMB) circular requirements as applicable, which are available through the Commission and the Governor's Office in the Governor's Uniform Grant Management Standards (UGMS).
  - (2) Boards shall ensure that Boards' contracted workforce service providers do not give advice or provide services relating to a matter where a real, appearance of, or possible conflict of interest exists unless the applicable Board or Board's designee waives this prohibition in writing.
    - (A) A conflict of interest exists whenever a Board member or Board staff and contracted workforce service provider have a personal, private, commercial, or

business relationship that could reasonably be expected to diminish the independence of judgment of the Board or Board staff in the performance of their responsibilities.

- (B) An appearance of a conflict exists if:
  - (i) an action taken by the Board's contracted workforce service provider reasonably appears to be influenced by considerations of personal gain, gain to an entity or organization for which the person has an employment or other interest, whether direct or indirect (other than those consistent with the terms of the contract); or
  - (ii) an action is motivated by a design to gain an improper influence over the Commission or the Board.
  
- (C) Boards shall ensure, through the oversight and management of Board policies, that the following persons do not directly deliver one-stop workforce services or determine eligibility for one-stop workforce services:
  - (i) Board members;
  - (ii) Board staff; and
  - (iii) the Board's fiscal agent, if the Board does not act as its fiscal agent consistent with Chapter 2308, Texas Government Code.

(c) Disclosures.

- (1) Boards shall ensure that Boards' contracted workforce service providers promptly disclose in writing to the Boards:
  - (A) any relationship the Boards' contracted workforce service providers have with any party to a transaction with the Commission or the Board other than a relationship necessary to the services performed for the Commission or the Board when a reasonable person may consider a conflict of interest to exist because of that relationship;
  - (B) all direct or indirect pecuniary interests the Boards' contracted workforce service providers have in any transaction with the Commission or the Board if the transaction is connected with any services and advice provided to the Commission or the Board;
  - (C) at least annually a statement disclosing each relationship and pecuniary interest described by subsections (b) and (c) of this section, or a statement that no such relationships or pecuniary interests existed during the disclosure period; and
  - (D) any other potential conflicts of interest, including any business or financial transaction with a member of the Commission or Board or staff of the Commission or Board that is greater than \$50 in value within ten days of the transaction. This obligation does not apply to a financial transaction performed in the course of a contract with the Commission or Board. An account or benefit that is provided to a member of the Commission or Board or staff of the

Commission or Board shall be under the same terms and conditions as are provided to members of the general public.

- (2) Boards shall ensure that the written disclosures submitted under this subchapter shall also contain actions proposed by the Boards' contract service providers to avoid conflicts of interest.
- (3) Boards shall ensure that Boards' contracted workforce service providers submit a revised statement as necessary for promptly updating disclosure information where there are changes in relationships or pecuniary interests.

**§801.54. Fiscal Integrity Provisions.**

- (a) Boards shall develop a Key Control Certification System (Key Control System) for periodically evaluating the financial integrity of contracted workforce service providers and certifying that the contractor has met the minimum requirements of the Board. Boards shall adopt the Key Control System in an open meeting and include Board-approved key control measures designed to evaluate the financial integrity of Boards' contracted workforce service providers.
- (b) Boards shall evaluate the Boards' contracted workforce service providers to ensure they meet the requirements of the Boards' key control measures based on the following schedule:
  - (1) for contracts under \$100,000, the key control measures must be verified prior to the award of the contract and at each renewal of the contract;
  - (2) for contracts between \$100,000 and \$500,000, the key control measures must be verified prior to the award of the contract, at each renewal of the contract, and not less than biennially; and
  - (3) for contracts over \$500,000, the key control measures must be verified prior to award of the contract, at each renewal of the contract, and not less than once annually.
- (c) Along with any Board requirements, the key control measures shall include the following provisions for ensuring that Boards' contracted workforce service providers are meeting performance measures in compliance with requirements contained in:
  - (1) federal and state statutes and regulations and directives of the Commission;
  - (2) OMB circulars applicable to the entity, such as OMB Circular A-21, A-87 or A-122, and as supplemented by the Rules promulgated by the Office of the Governor under the Uniform Grant Management Standards (UGMS);
  - (3) review and consideration of the contracted workforce service provider's history during the four-year period before the contract with the Board of adverse judgments or any adverse finding (such as administrative findings from an audit

or sanction by the Commission, a Board, or a court of law); and

- (4) any other safeguards chosen by the Boards that are designed to ensure, through oversight and management by the Board, the proper and effective use of funds placed under the control of the Boards' contracted workforce service providers.
- (d) The Boards' key control measures may include provisions such as those used by the Commission and located in the Texas Workforce Commission's Financial Manual for Grants and Contracts, as may be amended, such as the review of the Boards' contracted service provider's demonstrated capability to:
- (1) account for program income in accordance with Federal regulations;
  - (2) budget and appropriately allocate resources and revenues;
  - (3) use and monitor encumbrances;
  - (4) maintain proper cash management;
  - (5) properly record, credit, deposit or disburse in a timely manner cash and cash equivalents;
  - (6) maintain collateral agreements in place that are sufficient to protect balances in excess of Federal Deposit Insurance Corporation (FDIC) coverage;
  - (7) timely resolve questioned costs and the repayment of disallowed costs by the Boards' contracted workforce service providers;
  - (8) safeguard fixed assets;
  - (9) ensure that all purchases are reasonable and necessary;
  - (10) maintain separate duties as they relate to cash, fixed assets, property, and other Board and Board contracted workforce service provider resources;
  - (11) properly record fixed assets in the accounting system;
  - (12) properly authorize payroll expenditures, accurately recording payroll expenditures in a timely manner, and properly classifying those in the correct accounting period;
  - (13) properly manage, authorize and record travel expenditures that are reasonable and necessary;
  - (14) retain sufficient supporting documentation regarding authorization of all purchases;
  - (15) enter only authorized, accurate transactions in the accounting system;

- (16) separate the duties of authorizing source documents and the duties of entering records into the accounting system;
  - (17) retain records in accordance with the applicable rules and regulations; and
  - (18) conduct audits in accordance with applicable federal circulars and state policies.
- (e) Boards shall ensure that Boards' contracted service providers are
- (1) required to verify based on the schedule stated in 801.54(b)(1)-(3), or more often as determined appropriate by the Board, that the method of securing or protecting the funds under the control of the Boards' contracted service providers are in force. The appropriate verification processes may include such activities as follows:
    - (A) verifying that the insurance or bond policy is valid, premiums are paid to date, the company is authorized to provide the bonding or insurance, the company is not in receivership, bankruptcy or some other status that would jeopardize the ability to draw upon the policy,
    - (B) verifying that escrow account balances are at an appropriate level;
    - (C) the method of securing the funds has not been withdrawn, drawn upon, obligated for another purpose or no longer valid for use as the method of security, and
    - (D) other such protections as are applicable and relied upon by the Board are verified as in force;
  - (2) disclosing to Boards when a change in financial structure or circumstances alters the ability of the Board to rely upon the method of securing or protecting the funds. Examples include:
    - (A) failure or inability of the Boards' contracted service provider to pay premiums;
    - (B) the bonding or insurance company is going in receivership, bankruptcy, or insolvency; or
    - (C) escrow accounts, letters of credit, or other financial security methods being withdrawn, drawn upon, or otherwise used for other purposes or becoming invalid for use as the method of security.

**§801.55. Bonding, Insurance and Other Methods of Securing Funds to Cover Losses.**

- (a) Boards shall ensure that the funds subject to the control of the Boards' contracted workforce service providers are protected through bonds, insurance, escrow accounts, cash on deposit, or other methods to secure the funds consistent with this subchapter. Boards and Boards' contract service providers may, consistent with this section, utilize any method or combination of methods to meet this requirement. At the Board's discretion, the Boards may pay for the bonding, insurance or other protection method directly or require the Boards' contracted workforce service providers, to the extent allowable under state and federal law, to pay for such protections.
- (b) The Boards shall ensure that the method of securing funds is available to cover a loss of

at least ten percent of the funds placed under the control of the Boards' contracted workforce service providers. Funds subject to security include, but are not limited to, funds allocated, granted, distributed, awarded or otherwise provided to the Boards from the Commission and the value of any assets or placed under the control of the Boards' contracted workforce service provider. The Board may set a higher percentage to ensure security of the funds.

- (c) In setting the amount, the Board shall evaluate the cost of the bonding, insurance or other protection and the Boards' determination of the risk to be assigned to the Boards' contracted workforce service providers. Boards shall consider such factors as a reasonably prudent Board would consider to ensure the fiscal integrity of the funds placed under the control of the contractor including, but not limited to, the following:
  - (1) the contractor's history of disallowed costs;
  - (2) the experience, education, history, and other factors the Board determines are relevant to the evaluation of the principal person in control of the contractor, whether that is an individual sole proprietorship, principal partner in a partnership, chief operating officer of a corporation, or other principal in control of the funds placed under the control of the Boards' contracted workforce service provider; and
  - (3) any other factor determined appropriate by the Board.
- (d) Escrow of funds may also be utilized provided that:
  - (1) the funds placed in escrow require the signature of persons other than the person with signatory authority for the Boards' contracted workforce service provider;
  - (2) the funds do not lapse due to requirements for timely expenditure of funds; and
  - (3) this provision does not conflict with any provision in contract, rule or statute for timely expenditure of workforce funds.
- (e) If a bond is used, the Board shall ensure that the bond is executed by a corporate surety or sureties holding certificates of authority, authorized to do business in the State of Texas, and acceptable to the Commission.

#### **§801.56. Prohibition of Directly Delivering Services.**

- (a) Boards shall not provide direct services or determine eligibility for one-stop workforce services. The Commission shall review a Board's compliance through an examination of the Board's exercise of direction and control over the Board's contract service providers. The Commission may use the factors for testing the employment status as set out in §821.5 of this title. Notwithstanding the provisions contained in §821.5, the Commission shall review compliance on the totality of the circumstances as they exist. The Commission shall also consider any federal and statutory requirements for the performance of certain duties by the Boards and the Boards' contracted workforce service

providers.

- (b) Boards shall ensure that the Boards' contracted workforce service providers are not employees of the Boards. Boards' contracted workforce service providers must take appropriate steps to maintain the separation of the authority between the Boards and the Boards' contracted workforce service providers that is consistent with the terms of the applicable contract.

**§801.57. Restriction on Contracting with Former Employee.**

A Board shall not contract for one-stop workforce services with a former Board member, executive or employee of the Board, or with any person, as defined under Texas Government Code §311.005 (2), business entity, or nonprofit organization, who employs a former Board member, or executive or other employee of the Board, who at any time during the twelve months before the date of the contract was in a position that:

- (1) involved decision making regarding the contracting process including, but not limited to, the content of the statement of work, the development of the method of scoring the responses to the request for proposal or otherwise involved in the management of the contract development;
- (2) involved developing the substance of the recommendations of or implementation of policy established by the Board; or
- (3) creates an appearance of undue influence or conflict of interest.

**§801.58. Restrictions on Employing Former Employee of Board, Commission or Board Contracted Workforce Service Provider.**

- (a) Twelve-month prohibition. Unless otherwise authorized under this subchapter,
  - (1) a Board shall not employ any individual previously employed by the Commission or a Board's contracted workforce service provider for a period of twelve months following the individual's date of voluntary or involuntary separation from employment with the Commission or a Boards' contracted workforce service provider; and
  - (2) a Board's contracted workforce service provider shall not employ any individual previously employed by the Commission or a Board for a period of twelve months following the individual's date of voluntary or involuntary separation from employment with the Commission or a Board.
- (b) Permanent prohibition related to a particular matter. Any individual who has previously been employed by a Board or the Commission may not:
  - (1) represent any of the following in any matter before the Board or the Commission:
    - (A) a person, as defined under Texas Government Code §311.005(2),

- (B) a business entity, or
- (C) a nonprofit entity; or

- (2) receive compensation for services rendered on behalf of any person, business entity or nonprofit entity regarding a "particular matter" in which the individual participated during the period of employment with a Board, a Board's contracted workforce service provider, or the Commission either through personal involvement or because the case or proceeding was a matter within the individual's responsibility.

- (c) For purposes of subsection (b),

- (1) "participated" means to have taken action as a Board or Commission employee through decision, approval, disapproval, recommendation, giving advice, investigation, or similar action; and

- (2) "particular matter" means a specific investigation, application, request for a ruling or determination, rulemaking proceeding, administrative proceeding, contract, claim, or judicial proceeding or other proceeding.

- (d) Local policies. A Board shall ensure that the Boards' contracted service providers establish a personnel policy consistent with this section.

#### **§801.59. Exceptions.**

- (a) Notwithstanding the provisions in this subchapter, the Commission may provide for exceptions to this subchapter to the extent necessary to address one or more of the following:

- (1) requests from a Board or former employee of a Board or the Commission in order that a sufficient number of providers and qualified staff is available in the workforce area to provide workforce services;
- (2) requests from a Board due to emergency situations to resolve contracting for emergency services to ensure full and efficient utilization of Commission funds;
- (3) circumstances that were unforeseen or beyond the control of the Board or Board's contracted workforce service provider, such as flooding, natural disaster, or other weather-related breakdowns in services; or
- (4) any other act that the Commission determines may jeopardize the fiscal integrity of a Board or contracted workforce service provider.

- (b) Notwithstanding the provisions in this subchapter, the Commission may waive one or more of the provisions in this subchapter if the Commission determines that no conflict of interest exists.

#### **§801.60. Enforcement.**

The Commission may impose corrective actions, up to and including sanctions upon the Boards and the Boards' contracted workforce service providers, for failing to adhere to provisions of the contract or this subchapter.

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