

The Texas Workforce Commission (Commission) adopts new §800.81 regarding Performance, with changes as published in the August 10, 2001 issue of the Texas Register (26 TexReg 5990).

The purpose of Subchapter C is generally to set forth performance required by the Boards. The adopted rule emphasizes the relationship between the Commission and local workforce development boards (Boards) in assuring compliance with federal and state standards through a performance-based contract method. The purposes of the rule are to describe performance required by Boards and other subrecipients and to set forth Boards' responsibilities regarding performance.

Background: The 74th Texas Legislature enacted Texas' landmark legislation, 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 design and oversee the delivery of workforce development services that meet the needs of local employers and workers.

In order to determine the effectiveness of the delivery of workforce development services by the Boards, the Commission uses the standards set by federal and state law for the various services delivered by the Board to develop performance targets which are reflected in the contracts with the Boards. Progress towards of the achievement of these targets is reflected in the monthly performance measures available to the Boards in the Monthly Performance Reports and on a daily basis through the TWIST system.

The Commission sets policy regarding performance using federal and state performance standards. The Commission approves contract performance targets during the allocation process. In addition, the Commission sets policy regarding contracts to ensure that the performance targets are met and that contracts are performance-based. Performance-based contracts describe expectations in terms of specific outcomes, results, or final work products, as opposed to methods, processes, or designs. The Agency then incorporates performance targets in contracts with the Boards and other subrecipients of federal and state funds that are appropriated through the Commission.

The Commission ensures compliance with performance targets while providing options for the Boards to streamline processes and to exercise local flexibility. The Commission works with the Boards to ensure that contract performance targets are consistent with a Board's and state's strategic planning goals and objectives, and adjusted for local conditions including specific economic conditions and demographic characteristics to be served in the local workforce development area (workforce area) and other factors the Commission deems appropriate.

One of the goals of the Commission is to use, to the maximum extent practicable, performance-based contracting concepts and methods in its management of contracts with the Boards. Performance-based contracting concepts and methodologies that are generally applied to contracts with the Boards and other subrecipients are designed to: (1) describe performance targets in terms of results rather than methods of accomplishing the work; (2) use measurable (i.e., terms of quality, timeliness, quantity) standards and objectives and quality assurance plans; and (3) provide a basis for either performance incentive awards for achieving high performance or penalty imposition for low performance.

The Commission is charged with ensuring accountability of Boards and subrecipients of the Agency. Boards are charged with the oversight and management of the delivery of services. Subrecipients are charged with providing services consistent with the terms of the contracts.

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 activities, including 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.

Comments were received from the Southeast Texas Workforce Development Board. The commenter did not indicate whether it was for or against the rule, but conveyed observations and posed questions regarding the rule. The comment summaries and responses are as follows:

Comment: Regarding § 800.81(a), the commenter stated that WIA performance is not measured based upon contractor standards. The commenter also indicated that performance is measured in practice by the Monthly Performance Reports, which utilize the characteristics of the participants in the program at any given time. The commenter remarked that these measures fluctuate.

Response: The Commission agrees that a Board's performance is impacted by the characteristics of the participants served and required to be served at any given time. However, the Board contracts contain language that sets forth the methodology used by the Commission to calculate performance. The Monthly Performance Reports also provide a snap shot for the Boards of the Boards' estimated year-end WIA adjustment factors. A Board is able to generate a TWIST report to monitor the Board's estimated performance at any point in time. In addition, the Commission makes available Monthly Performance Reports that present adjusted contract targets for WIA measures. Those Monthly Performance Reports represent the official adjusted contracted targets. In response to the comment, the Commission agrees with clarifying the language in the rule. The Commission is committed to fostering an outcome-based system of evaluating the performance of Boards to assure accountability and ensure the effective and efficient provision of services funded by the Agency. The Commission has established the core indicators of performance and the Agency evaluates each Board's success in meeting the negotiated local levels of performance for each indicator. In a state with the size and diversity of Texas, there may be significant differences among local conditions in different workforce areas such as the characteristics of clients served and local economic conditions. The level of performance achieved by a Board may be affected by these differences. WIA performance targets for the individual Boards may be adjusted to take into consideration these differences among workforce areas. Conditions in a workforce area change during the course of a program year. The final measure of the differences among Boards in local conditions cannot be calculated until after the end of a program year. In order to evaluate performance under WIA during the course of the year and ensure continuous improvement, the Agency provides each Board with monthly-adjusted performance targets based on the most recent information on specific local conditions.

Comment: Regarding §800.81 (f) and (g), the commenter stated that subsection (g) appears to negate subsection (f) and questioned whether the Commission still has the authority to determine the necessary adjustments to performance instead of engaging in a good faith negotiation process between the Commission and the Boards.

Response: The Commission believes that there is no apparent conflict between (f) and (g) for the following reasons. Subsection (f) addresses a Board's ability to request an adjustment to the local performance targets, while subsection (g) provides for the Commission allowing the Agency to make adjustments in reaction to specific local events or circumstances such as natural disasters or major economic changes. For that reason, the Commission does not agree to change the language of the rule.

In addition to the changes made in response to comments and because the purpose of the rule is to apply the rule to performance relating to other subrecipients, as well as to the Boards, a technical change is made to the title of the section and references to subrecipients are added to the language.

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The new rule is adopted under Texas Labor Code §301.061 and §302.002, which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rule as it deems necessary for the effective administration of Agency services and activities.

The rule affects Texas Labor Code, Chapter 302, and Texas Human Resources Code, Chapters 31 and 44.

<new>§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 subrecipient shall comply with all Commission rules, Workforce Development (WD) Letters, the Grants and Contracts Manual, the Financial Manual 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) as otherwise provided for by 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 local workforce development 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.

(i) A Board shall comply with and remain subject to the provisions contained in Chapter 805 effective on July 1, 2001, relating to performance or any other matters addressed in Chapter 805 regarding any funds granted by the Secretary of Labor under the JTPA regulations or Act, including NRA and other funds.