

1 **Purchasing from People with Disabilities Program Temporary Suspension of 40 TAC**
2 **§806.41(f)(9) and THRC §122.013(c)(3), Direct Labor Hour Ratio, Due to COVID-19**
3 **Pandemic**

4
5 **Discussion Paper**

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7 **Background**

8 On March 13, 2020, President Trump declared a national emergency in response to the COVID-
9 19 public health emergency. Soon afterward, state government officials issued executive orders
10 directing all Texans to minimize gatherings and enforce federal social distancing guidelines for
11 COVID-19, including the March 13, 2020 Declaration of Emergency and March 19, 2020
12 Executive Order GA-8 issued by the Governor of Texas. Further guidelines followed restricting
13 the travel and gatherings of individuals not providing essential services.

14 On April 1, 2020, in light of the policies instituted by the federal, state and local governments,
15 the AbilityOne Commission, a federal commission overseeing the national program similar to
16 the Texas Purchasing from People with Disabilities (PPD) program, issued an exception to the
17 requirement that 75 percent of direct labor hours be performed by employees with documented
18 disabilities. The AbilityOne Commission noted that, because of the COVID-19 emergency
19 response needs, many federal agencies have stopped certain activities, and/or have increased
20 demands for products or activities that directly affect nonprofit agency contract performance and
21 direct labor hour (DLH) ratios.

22 On April 2, 2020, WorkQuest, the Central Non-profit Agency that administers Community
23 Rehabilitation Program (CRP) contracts in the PPD program, notified Texas Workforce
24 Commission (TWC) PPD management that, because of reduced availability of employees with
25 disabilities to provide direct labor hours due to the COVID-19 pandemic, PPD CRPs were also
26 experiencing challenges in maintaining the 75 percent DLH ratio required by PPD program rule
27 40 Texas Administrative Code (TAC) §806.41(f)(9).

28 The requirement that TWC, “establish a minimum percentage of disabled labor an organization
29 must employ to be considered a community rehabilitation program under this chapter,” is
30 contained in Texas Human Resources Code (THRC) §122.013(c)(3). The specific percentage
31 requirement is contained in 40TAC §806.41(f)(9) of PPD rule as follows: “Notarized statement
32 that the CRP agrees to maintain compliance with the requirement that at least 75 percent of the
33 CRP’s total hours of direct labor, for each contract, necessary to perform services or reform raw
34 materials, assemble components, manufacture, prepare, process and/or package products will be
35 performed by individuals with documented disabilities consistent with the definition set forth in
36 this chapter. If a CRP intends to seek a waiver from the 75 percent requirement of the CRP’s total
37 hours of direct labor for a contract, the waiver request must be submitted with the application for
38 approval”.

1 **Issue**

2 Texas state agencies that provide essential services are served by the products and services
3 offered by PPD CRPs. Because of the COVID-19 emergency, the increased demand by agencies
4 is resulting in additional production requirements on essential product and service contracts.
5 Additionally, CRPs are having difficulty finding enough employees with disabilities to fulfill
6 contract requirements. Because of the reduction in availability of employees with disabilities and
7 given the 75 percent DLH ratio requirement, CRP’s must currently use internal staff or other
8 individuals who do not have disabilities to successfully perform contract requirements.

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10 WorkQuest reported several factors that are causing these staffing challenges, and as a result,
11 making it difficult for CRPs to comply with the 75 percent DLH ratio as required by 40 TAC
12 §806.41(f)(9). For example, many CRP employees with disabilities live in group homes and are
13 subject to local government shelter-in-place or stay-at-home orders or similar COVID-19
14 mitigation orders. Other CRPs rely on individuals who are employed at or sourced from local
15 rehabilitation centers. Some of these facilities are closed and therefore, unable to provide
16 employment services for the individuals with disabilities. In addition, based on the Center for
17 Disease Control guidelines, many CRP employees who are disabled are in a high-risk category
18 for contracting COVID-19. This situation has contributed to the current labor shortage because
19 PPD CRPs do not want to put these individuals at risk or the individual has decided to self-
20 quarantine during the pandemic.

21 WorkQuest proposes a temporary suspension of the PPD requirement that at least 75 percent of
22 the CRP's total hours of direct labor for each contract be performed by individuals with
23 documented disabilities. Such a suspension would assist CRPs to continue to provide products
24 and perform services required by state agencies that perform important essential services and
25 would also assist the CRPs to maintain continuity of operations during and in the immediate
26 aftermath of the pandemic. The duration of the proposed suspension is March 1, 2020 through
27 August 31, 2020. Retroactive application of the suspension is proposed to provide support for
28 CRPs experiencing a drop in available labor shortly after the onset of the pandemic in Texas.
29 After May 30, all CRPs not meeting the 75 percent DLH ratio requirement and anticipating a
30 continuing shortage of employees with disabilities would be required to submit to WorkQuest a
31 justification and request for an adjusted DLH ratio percentage for the next 90 days, June 1 –
32 August 31.

33 As noted in the background section of this paper, the federal AbilityOne Commission has issued
34 an exception to their requirement of their 75 percent direct labor requirement. THRC Sec.
35 122.011 states that TWC “may adopt procedures, practices, and standards used for federal
36 programs similar to the state program established in this chapter.”

37 **Decision Points:**

38 As a result of the COVID-19 pandemic, staff seeks direction in addressing the current challenges
39 of CRPs in the PPD program in meeting the required minimum 75 percent DLH ratio performed
40 by individuals with disabilities. A request for suspension of a regulatory statute or rule hindering

1 action in coping with this disaster may be submitted to the Office of the Governor pursuant to
2 Texas Government Code §418.016. Staff proposes a request to the Office of the Governor that
3 both 40 TAC §806.41(f)(9) and THRC Sec. 122.013(c)(3) be temporarily suspended, as follows:

- 4 • Consistent with the AbilityOne Commission, establish a minimum 35 percent DLH ratio
5 for each CRP contract that must be performed by individuals with documented
6 disabilities beginning from March 1, 2020 through May 30, 2020. Retroactive
7 application of the temporary suspension is proposed to provide support for CRPs that
8 have had fewer available employees with disabilities shortly after the onset of the
9 pandemic in Texas.
- 10 • After May 30, all CRPs that do not meet the 75 percent DLH ratio requirement and
11 anticipate a continuing shortage of employees with disabilities would be required to
12 submit to WorkQuest a request, including a justification, for an adjusted DLH ratio
13 percentage for the next 90 days, June 1 – August 31, 2020. The justification must include
14 the following:
 - 15 1. the DLH ratio achieved by the CRP in each month of the previous quarter, March
16 - June 2020;
 - 17 2. the measures the CRP has taken to ensure the safety of its employees;
 - 18 3. the measures the CRP has taken to employ individuals with disabilities at the 75
19 percent DLH ratio;
 - 20 4. the reasons that the CRP anticipates it will be unable to meet the 75 percent DHL
21 in the June – August 2020 quarter; and
 - 22 5. the DLH ratio that the CRP anticipates it will be able to achieve June – August.
- 23 • WorkQuest will evaluate each request and seek clarification from the CRP if needed,
24 before making a recommendation to TWC that the request be approved, denied or
25 approved with conditions. TWC staff then will evaluate each request and approve, deny
26 or approve with conditions.

27 If approved, staff will seek direction from the Commission regarding continuation of this
28 suspension or other remedy should the need for COVID-19 containment measures extend
29 into fall 2020 and continue to adversely impact CRP compliance with the DLH ratio.