TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

# AGENDA ITEM REQUEST

for Proposed Rulemaking

**AGENDA REQUESTED:** August 3, 2016

**DATE OF REQUEST:** July 15, 2016

**INDIVIDUAL TO CONTACT REGARDING CHANGES TO THIS REQUEST, IF NEEDED:** Derek Baxter, (512) 239-2613

**CAPTION: Docket No. 2015-0935-RUL.** Consideration for publication of, and hearing on, proposed new Section 11.202 of 30 TAC Chapter 11, Contracts, Subchapter E, Contract Monitoring Roles and Responsibilities.

The proposed rulemaking would implement Senate Bill 20, 84th Texas Legislature, 2015, Regular Session, that added Texas Government Code, Section 2261.235(c), which requires state agencies to establish by rule a procedure to identify each contract that requires enhanced contract or performance monitoring, and submit information to the agencies' governing bodies. Accordingly, the commission is proposing this rulemaking to add a new section regarding contracts. (LaTresa Stroud, Elizabeth West) (Rule Project No. 2015-030-011-AD)

John Racanelli
**Deputy Director**

Greg Yturralde
**Division Director**

Derek Baxter
**Agenda Coordinator**

**Copy to CCC Secretary? NO X YES**

# Texas Commission on Environmental Quality
## Interoffice Memorandum

**To:** Commissioners **Date:** July 15, 2016

**Thru:** Bridget C. Bohac, Chief Clerk
Richard A. Hyde, P.E., Executive Director

**From:** John Racanelli, Deputy Director
Office of Administrative Services

**Docket No.:** 2015-0935-RUL

**Subject:** Commission Approval for Proposed Rulemaking
Chapter 11, Contracts
SB 20: Enhanced Contract Monitoring
Rule Project No. 2015-030-011-AD

**Background and reason(s) for the rulemaking:**
Senate Bill (SB) 20 (84th Texas Legislature, 2015) added Texas Government Code, §2261.253(c), which requires state agencies to establish by rule procedures to identify each contract that requires enhanced contract or performance monitoring, and submit information to the agency's governing bodies. Accordingly, the Texas Commission on Environmental Quality (TCEQ, agency, or commission) is proposing this rulemaking to amend an existing rule regarding contracts.

**Scope of the rulemaking:**
Pursuant to Texas Government Code, §2261.253, the executive director or his designee shall establish a written procedure to identify each contract that requires enhanced contract or performance monitoring and submit information on contracts subject to enhanced contract or performance monitoring to the commission.

**A.) Summary of what the rulemaking will do:**
This rulemaking establishes by rule a procedure to identify each contract that requires enhanced contract or performance monitoring and submit information on the contract to the Commission.

**B.) Scope required by federal regulations or state statutes:**
This rulemaking establishes by rule a procedure to identify each contract that requires enhanced contract or performance monitoring, and submit information to the Commission.

**C.) Additional staff recommendations that are not required by federal rule or state statute:**
None.

**Statutory authority:**
Texas Government Code, §2261.253(c), as added by SB 20.

**Effect on the:**

**A.) Regulated community:** None.

**B.) Public:** None.

**C.) Agency programs:**
TCEQ has a Contract Management Handbook that outlines standard contract monitoring and identifies when enhanced monitoring may be required. Agency program areas may supplement with additional Standard Operating Procedures.

**Stakeholder meetings:**
There were no stakeholder meetings held related to this rulemaking. However, a rule public hearing is scheduled for this rulemaking during the comment period.

**Potential controversial concerns and legislative interest:**
None.

**Will this rulemaking affect any current policies or require development of new policies?**
TCEQ has a Contract Management Handbook that outlines standard contract monitoring and identifies when enhanced monitoring may be required.

**What are the consequences if this rulemaking does not go forward? Are there alternatives to rulemaking?**
Texas Government Code, §2261.253(c) requires all state agencies to create a rule regarding enhanced contract monitoring.

**Key points in the proposal rulemaking schedule:**
**Anticipated proposal date:** August 3, 2016
**Anticipated *Texas Register* publication date:** August 19, 2016
**Anticipated public hearing date (if any):** September 13, 2016
**Anticipated public comment period:** August 19 – September 19, 2016
**Anticipated adoption date:** November 16, 2016

**Agency contacts:**
LaTresa Stroud, Rule Project Manager, Financial Administration Division, (512) 239-5555
Beth West, Senior Attorney, General Law Division, (512) 239-0748
Derek Baxter, Texas Register Coordinator, (512) 239-2613

**Attachments**
Senate Bill 20

cc: Chief Clerk, 2 copies
Executive Director's Office
Marshall Coover
Erin Chancellor
Stephen Tatum
Jim Rizk
Office of General Counsel

Re: Docket No. 2015-0935-RUL

LaTresa Stroud
Beth West
Derek Baxter

AN ACT

relating to state agency contracting.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 321.013, Government Code, is amended by adding Subsections (k) and (l) to read as follows:

(k) In devising the audit plan under Subsection (c), the State Auditor shall consider the performance of audits on contracts entered into by the Health and Human Services Commission that exceed $100 million in annual value, including a contract between the commission and a managed care organization. The State Auditor shall collaborate with the financial managers in the Medicaid/CHIP Division of the commission in performing an audit described by this subsection. An audit described by this subsection:

(1) may be limited in scope to target an area of the contract that the State Auditor determines poses the highest financial risk to this state; and

(2) must determine whether the entity contracting with the commission has spent state money in accordance with the purposes authorized in the contract.

(l) The State Auditor may contract with a private auditor to audit a contract under Subsection (k).

SECTION 2. Subchapter B, Chapter 403, Government Code, is amended by adding Section 403.03057 to read as follows:

Sec. 403.03057. CENTRALIZED STATE PURCHASING STUDY.

(a) The comptroller, in cooperation with the governor's budget and policy staff, shall conduct a study examining the feasibility and practicality of consolidating state purchasing functions into fewer state agencies or one state agency. The study must examine the cost savings to this state that may be achieved through:

(1) abolishing offices or departments of state agencies that have a dedicated office or department for purchasing; and

(2) consolidating or reducing the number of vendors authorized to contract with this state to allow this state to better leverage its purchasing power.

(b) The comptroller shall prepare and deliver to the governor, the lieutenant governor, and each member of the legislature a report on the findings of the study conducted under Subsection (a), including:

(1) a detailed projection of expected savings or costs to this state in consolidating state purchasing;

(2) a report on the process for the legislature or the executive branch to implement the consolidation of state purchasing;

(3) a list of state agencies, including dedicated offices or departments in those agencies, with purchasing responsibilities; and

(4) the total cost to this state of the purchasing responsibilities for each state agency, including the dedicated office or department in the agency with purchasing responsibility.

(c) The comptroller shall prepare, deliver, and post on the

comptroller's Internet website the report required by this section not later than December 31, 2016.

(d) The comptroller may contract with a public or private entity to conduct the study required by this section.

(e) This section expires January 1, 2018.

SECTION 3. Subchapter L, Chapter 441, Government Code, is amended by adding Section 441.1855 to read as follows:

Sec. 441.1855. RETENTION OF CONTRACT AND RELATED DOCUMENTS BY STATE AGENCIES. Notwithstanding Section 441.185 or 441.187, a state agency:

(1) shall retain in its records each contract entered into by the state agency and all contract solicitation documents related to the contract; and

(2) may destroy the contract and documents only after the seventh anniversary of the date:

(A) the contract is completed or expires; or

(B) all issues that arise from any litigation, claim, negotiation, audit, open records request, administrative review, or other action involving the contract or documents are resolved.

SECTION 4. Subchapter C, Chapter 572, Government Code, is amended by adding Section 572.069 to read as follows:

Sec. 572.069. CERTAIN EMPLOYMENT FOR FORMER STATE OFFICER OR EMPLOYEE RESTRICTED. A former state officer or employee of a state agency who during the period of state service or employment participated on behalf of a state agency in a procurement or contract negotiation involving a person may not accept employment

from that person before the second anniversary of the date the officer's or employee's service or employment with the state agency ceased.

SECTION 5. Subchapter C, Chapter 2054, Government Code, is amended by adding Section 2054.067 to read as follows:

Sec. 2054.067. POSTING OF CERTAIN DOCUMENTS RELATING TO CONTRACT SOLICITATIONS. (a) The department shall post all solicitation documents related to a contract of the department, including contracts under Chapter 2157, to the centralized accounting and payroll system authorized under Sections 2101.035 and 2101.036, or any successor system used to implement the enterprise resource planning component of the uniform statewide accounting project.

(b) The documents posted under Subsection (a) must include documents showing the criteria by which the department evaluated each vendor responding to the contract solicitation and, if applicable, an explanation of why the vendor was selected by the department under Section 2157.068(b).

SECTION 6. Section 2101.001(1), Government Code, is amended to read as follows:

(1) "Enterprise resource planning" includes the administration of a state agency's:

(A) general ledger;

(B) accounts payable;

(C) accounts receivable;

(D) budgeting;

(E) inventory;

(F) asset management;

(G) billing;

(H) payroll;

(I) projects;

(J) grants;

(K) human resources, including administration of performance measures, time spent on tasks, and other personnel and labor issues; and

(L) purchasing, including solicitations and contracting.

SECTION 7. Section 2101.035, Government Code, is amended by adding Subsection (i) to read as follows:

(i) State agencies shall report contract and purchasing information in the uniform manner required by the comptroller.

SECTION 8. Section 2101.036, Government Code, is amended by adding Subsection (e) to read as follows:

(e) Notwithstanding Subsection (d), a state agency in the legislative branch may elect to participate in the enterprise resource planning system developed under this section.

SECTION 9. Subchapter C, Chapter 2101, Government Code, is amended by adding Section 2101.041 to read as follows:

Sec. 2101.041. STATE AGENCY REPORTING OF CONTRACTING INFORMATION. (a) The comptroller by rule shall determine the contracting information that state agencies must report or provide using the centralized accounting and payroll system, or any successor system used to implement the enterprise resource planning component of the uniform statewide accounting project, developed

under Sections 2101.035 and 2101.036.

(b) In making the determination required by this section, the comptroller shall consider requiring a state agency to report or provide:

(1) a brief summary of each contract that is quickly and easily searchable, including the contract's purpose, timeline, and deliverables;

(2) contract planning and solicitation documents;

(3) the criteria used to determine the vendor awarded the contract;

(4) if the contract was awarded based on best value to the state:

(A) a list of the factors considered in determining best value with the weight given each factor; and

(B) a statement regarding how the vendor awarded the contract provides the best value to the state in relation to other vendors who bid or otherwise responded to the contract solicitation;

(5) any statements of work and work orders prepared for or under the contract;

(6) the proposed budget for the contract;

(7) any conflict of interest documents signed by state agency purchasing personnel participating in the planning, soliciting, or monitoring of the contract;

(8) criteria used or to be used by the state agency in monitoring the contract and vendor performance under the contract;

(9) a justification for each change order, contract

amendment, contract renewal or extension, or other proposed action that would result in an increase in the monetary value of a contract with an initial value exceeding $10 million; and

(10) additional supporting documentation and justification for a change order, contract amendment, contract renewal or extension, or other proposed action of a contract described by Subdivision (9) that would result in an increase in the contract's monetary value by more than 20 percent.

SECTION 10. Subchapter B, Chapter 2155, Government Code, is amended by adding Section 2155.0755 to read as follows:

Sec. 2155.0755. VERIFICATION OF USE OF BEST VALUE STANDARD. (a) The contract manager or procurement director of each state agency shall:

(1) approve each state agency contract for which the agency is required to purchase goods or services using the best value standard;

(2) ensure that, for each contract, the agency documents the best value standard used for the contract; and

(3) acknowledge in writing that the agency complied with the agency's and comptroller's contract management guide in the purchase.

(b) For each purchase of goods or services for which a state agency is required to use the best value standard, the comptroller shall ensure that the agency includes in the vendor performance tracking system established under Section 2262.055 information on whether the vendor satisfied that standard.

SECTION 11. Section 2155.077, Government Code, is amended

by amending Subsections (a) and (b) and adding Subsection (a-2) to read as follows:

(a) The commission may bar a vendor from participating in state contracts that are subject to this subtitle, including contracts for which purchasing authority is delegated to a state agency, for:

(1) substandard performance under a contract with the state or a state agency;

(2) material misrepresentations in a bid or proposal to the state or a state agency or during the course of performing a contract with the state or a state agency;

(3) fraud; [~~or~~]

(4) breaching a contract with the state or a state agency; or

(5) repeated unfavorable performance reviews under Section 2155.089 or repeated unfavorable classifications received by the vendor under Section 2262.055 after considering the following factors:

(A) the severity of the substandard performance by the vendor;

(B) the impact to the state of the substandard performance;

(C) any recommendations by a contracting state agency that provides an unfavorable performance review;

(D) whether debarment of the vendor is in the best interest of the state; and

(E) any other factor that the comptroller

considers relevant, as specified by comptroller rule.

(a-2) The comptroller may bar a vendor from participating in state contracts that are subject to this subtitle, including contracts for which purchasing authority is delegated to a state agency, if more than two contracts between the vendor and the state have been terminated by the state for unsatisfactory vendor performance during the preceding three years.

(b) Except as provided by Subsection (d), the commission shall bar a vendor from participating in state contracts under Subsection (a) or (a-2) for a period that is commensurate with the seriousness of the vendor's action and the damage to the state's interests.

SECTION 12. Section 2155.078, Government Code, is amended by amending Subsections (a) and (b) and adding Subsection (a-1) to read as follows:

(a) The commission shall establish and administer a system of training, continuing education, and certification for state agency purchasing personnel. The training and continuing education for state agency purchasing personnel must include ethics training. The commission may establish and offer appropriate training to vendors on a cost recovery basis. The commission may adopt rules to administer this section, including rules relating to monitoring a certified purchaser's compliance with the continuing education requirements of this section.

(a-1) The training, continuing education, and certification required under Subsection (a) must include:

(1) training on the selection of an appropriate

procurement method by project type; and

(2) training conducted by the Department of Information Resources on purchasing technologies.

(b) Notwithstanding [~~Except as provided by~~] Subsection (n), all state agency purchasing personnel, including agencies exempted from the purchasing authority of the commission, must receive the training and continuing education to the extent required by rule of the commission. The training and continuing education must include ethics training. A state agency employee who is required to receive the training may not participate in purchases by the employing agency unless the employee has received the required training or received equivalent training from a national association recognized by the commission. The equivalent training may count, as provided by Subsection (k), toward the continuing education requirements.

SECTION 13. Subchapter B, Chapter 2155, Government Code, is amended by adding Section 2155.089 to read as follows:

Sec. 2155.089. REPORTING VENDOR PERFORMANCE. (a) After a contract is completed or otherwise terminated, each state agency shall review the vendor's performance under the contract.

(b) The state agency shall report to the comptroller, using the tracking system established by Section 2262.055, on the results of the review regarding a vendor's performance under a contract.

(c) This section does not apply to:

(1) an enrollment contract described by 1 T.A.C. Section 391.183 as that section existed on September 1, 2015; or

(2) a contract of the Employees Retirement System of

Texas or the Teacher Retirement System of Texas except for a contract with a nongovernmental entity for claims administration of a group health benefit plan under Subtitle H, Title 8, Insurance Code.

SECTION 14. Section 2156.181(a), Government Code, is amended to read as follows:

(a) The commission may enter into one or more compacts, interagency agreements, or cooperative purchasing agreements directly with one or more state governments, agencies of other states, or other governmental entities or may participate in, sponsor, or administer a cooperative purchasing agreement through an entity that facilitates those agreements for the purchase of goods or services if the commission determines that the [~~entering into an~~] agreement would be in the best interest of the state.

SECTION 15. Section 2157.068, Government Code, is amended by adding Subsections (e-1) and (e-2) to read as follows:

(e-1) A state agency contracting to purchase a commodity item shall use the list maintained as required by Subsection (e) as follows:

(1) for a contract with a value of $50,000 or less, the agency may directly award the contract to a vendor included on the list without submission of a request for pricing to other vendors on the list;

(2) for a contract with a value of more than $50,000 but not more than $150,000, the agency must submit a request for pricing to at least three vendors included on the list in the category to which the contract relates; and

(3) for a contract with a value of more than $150,000 but not more than $1 million, the agency must submit a request for pricing to at least six vendors included on the list in the category to which the contract relates or all vendors on the schedule if the category has fewer than six vendors.

(e-2) A state agency may not enter into a contract to purchase a commodity item if the value of the contract exceeds $1 million.

SECTION 16. Subchapter B, Chapter 2157, Government Code, is amended by adding Section 2157.0685 to read as follows:

Sec. 2157.0685. CONTRACT REQUIREMENTS FOR CERTAIN SERVICES. (a) In this section, "statement of work" means a document that states the requirements for a contract, including deliverables, performance specifications, and other requirements, specific to the vendor under that contract that are not specified in a contract awarded by the department under Section 2157.068 for contracts more than $50,000.

(b) For a contract awarded by the department under Section 2157.068 that requires a state agency to develop and execute a statement of work to initiate services under the contract, the state agency must:

(1) consult with the department before submission of the statement of work to a vendor; and

(2) post each statement of work entered into by the agency on the agency's Internet website in the manner required by department rule.

(c) A statement of work executed by a state agency under a

contract awarded by the department under Section 2157.068 is not valid and money may not be paid to the vendor under the terms of the statement of work unless the department first signs the statement of work.

SECTION 17. Section 2261.001(a), Government Code, is amended to read as follows:

(a) This chapter, other than Subchapter F, applies only to each procurement of goods or services made by a state agency that is neither made by the comptroller nor made under purchasing authority delegated to the agency by or under Section 51.9335 or 73.115, Education Code, or Section 2155.131 or 2155.132.

SECTION 18. Chapter 2261, Government Code, is amended by adding Subchapter F to read as follows:

SUBCHAPTER F. ETHICS, REPORTING, AND APPROVAL REQUIREMENTS FOR CERTAIN CONTRACTS

Sec. 2261.251. APPLICABILITY OF SUBCHAPTER. (a) Notwithstanding Section 2261.001, this subchapter applies to the Texas Department of Transportation and to an institution of higher education acquiring goods or services under Section 51.9335 or 73.115, Education Code.

(b) This subchapter does not apply to a contract of the Employees Retirement System of Texas or the Teacher Retirement System of Texas except for a contract with a nongovernmental entity for claims administration of a group health benefit plan under Subtitle H, Title 8, Insurance Code.

Sec. 2261.252. DISCLOSURE OF POTENTIAL CONFLICTS OF INTEREST; CERTAIN CONTRACTS PROHIBITED. (a) Each state agency

employee or official who is involved in procurement or in contract management for a state agency shall disclose to the agency any potential conflict of interest specified by state law or agency policy that is known by the employee or official with respect to any contract with a private vendor or bid for the purchase of goods or services from a private vendor by the agency.

(b) A state agency may not enter into a contract for the purchase of goods or services with a private vendor with whom any of the following agency employees or officials have a financial interest:

(1) a member of the agency's governing body;

(2) the governing official, executive director, general counsel, chief procurement officer, or procurement director of the agency; or

(3) a family member related to an employee or official described by Subdivision (1) or (2) within the second degree by affinity or consanguinity.

(c) A state agency employee or official has a financial interest in a person if the employee or official:

(1) owns or controls, directly or indirectly, an ownership interest of at least one percent in the person, including the right to share in profits, proceeds, or capital gains; or

(2) could reasonably foresee that a contract with the person could result in a financial benefit to the employee or official.

(d) A financial interest prohibited by this section does not include a retirement plan, a blind trust, insurance coverage, or an

ownership interest of less than one percent in a corporation.

Sec. 2261.253. REQUIRED POSTING OF CERTAIN CONTRACTS; ENHANCED CONTRACT AND PERFORMANCE MONITORING. (a) For each contract for the purchase of goods or services from a private vendor, each state agency shall post on its Internet website:

(1) each contract the agency enters into, including contracts entered into without inviting, advertising for, or otherwise requiring competitive bidding before selection of the contractor, until the contract expires or is completed;

(2) the statutory or other authority under which a contract that is not competitively bid under Subdivision (1) is entered into without compliance with competitive bidding procedures; and

(3) the request for proposals related to a competitively bid contract included under Subdivision (1) until the contract expires or is completed.

(b) A state agency monthly may post contracts described by Subsection (a) that are valued at less than $15,000.

(c) Each state agency by rule shall establish a procedure to identify each contract that requires enhanced contract or performance monitoring and submit information on the contract to the agency's governing body or, if the agency is not governed by a multimember governing body, the officer who governs the agency. The agency's contract management office or procurement director shall immediately notify the agency's governing body or governing official, as appropriate, of any serious issue or risk that is identified with respect to a contract monitored under this

subsection.

(d) This section does not apply to a memorandum of understanding, interagency contract, interlocal agreement, or contract for which there is not a cost.

Sec. 2261.254. CONTRACTS WITH VALUE EXCEEDING $1 MILLION. (a) For each contract for the purchase of goods or services that has a value exceeding $1 million, a state agency shall develop and implement contract reporting requirements that provide information on:

(1) compliance with financial provisions and delivery schedules under the contract;

(2) corrective action plans required under the contract and the status of any active corrective action plan; and

(3) any liquidated damages assessed or collected under the contract.

(b) Each state agency shall verify:

(1) the accuracy of any information reported under Subsection (a) that is based on information provided by a contractor; and

(2) the delivery time of goods or services scheduled for delivery under the contract.

(c) Except as provided by Subsection (d), a state agency may enter into a contract for the purchase of goods or services that has a value exceeding $1 million only if:

(1) the governing body of the state agency approves the contract and the approved contract is signed by the presiding officer of the governing body; or

(2) for a state agency that is not governed by a multimember governing body, the officer who governs the agency approves and signs the contract.

(d) The governing body or governing official of a state agency, as appropriate, may delegate to the executive director of the agency the approval and signature authority under Subsection (c).

(e) A highway construction, engineering services, or maintenance contract that is in compliance with all applicable laws related to procuring engineering services or construction bidding and that is awarded by the Texas Department of Transportation under Subchapter A, Chapter 223, Transportation Code, is not required to be signed by a member of the Texas Transportation Commission or the executive director of the department. This exception does not apply to expedited highway improvement contracts under Subchapter C, Chapter 223, Transportation Code, a comprehensive development agreement entered into under Subchapter E, Chapter 223, Transportation Code, a design-build contract entered into under Subchapter F, Chapter 223, Transportation Code, or any other contract entered into by the Texas Department of Transportation.

Sec. 2261.255. CONTRACTS WITH VALUE EXCEEDING $5 MILLION. For each state agency contract for the purchase of goods or services that has a value exceeding $5 million, the contract management office or procurement director of the agency must:

(1) verify in writing that the solicitation and purchasing methods and contractor selection process comply with state law and agency policy; and

(2) submit to the governing body of the agency, or governing official of the agency if the agency is not governed by a multimember governing body, information on any potential issue that may arise in the solicitation, purchasing, or contractor selection process.

Sec. 2261.256. ACCOUNTABILITY AND RISK ANALYSIS PROCEDURE; CONTRACT MANAGEMENT HANDBOOK. (a) Each state agency shall develop and comply with a purchasing accountability and risk analysis procedure. The procedure must provide for:

(1) assessing the risk of fraud, abuse, or waste in the contractor selection process, contract provisions, and payment and reimbursement rates and methods for the different types of goods and services for which the agency contracts;

(2) identifying contracts that require enhanced contract monitoring or the immediate attention of contract management staff; and

(3) establishing clear levels of purchasing accountability and staff responsibilities related to purchasing.

(b) Each state agency shall publish a contract management handbook that establishes consistent contracting policies and practices to be followed by the agency and that is consistent with the comptroller's contract management guide. The agency's handbook may include standard contract provisions and formats for the agency to incorporate in contracts.

(c) Each state agency shall post on the agency's Internet website the procedures described by Subsections (a)(2) and (3) and submit to the comptroller a link to the web page that includes the

procedures. The comptroller shall post on the comptroller's Internet website the web page link submitted by each state agency.

Sec. 2261.257. CONTRACT DATABASE. (a) Each state agency that becomes a participant in the centralized accounting and payroll systems as authorized by Sections 2101.035 and 2101.036 shall use the system to identify and record each contract entered into by the agency as specified by the rules, policies, or procedures developed by the comptroller.

(b) The comptroller shall provide as necessary information and state agency contract data contained in the centralized accounting and payroll systems to other state agencies with oversight duties, including the Legislative Budget Board, the state auditor's office, and the Department of Information Resources.

SECTION 19. Section 2262.053(d), Government Code, is amended to read as follows:

(d) The comptroller shall administer training under this section and may assess a fee for the training in an amount sufficient to recover the comptroller's costs under this section.

SECTION 20. Section 2262.0535, Government Code, is amended by adding Subsection (c) to read as follows:

(c) The comptroller may assess a fee for the training provided under this section in an amount sufficient to recover the comptroller's costs under this section.

SECTION 21. Section 2262.055, Government Code, is amended by amending Subsections (a) and (b) and adding Subsections (d) and (e) to read as follows:

(a) The comptroller shall evaluate the vendor's performance

based on information reported by state agencies under Section 2155.089 and criteria established by the comptroller.

(b) The comptroller by rule shall establish an evaluation process that:

(1) rates vendors on an A through F scale, with A being the highest grade; and

(2) allows vendors who receive a grade lower than a C [~~an unfavorable performance review~~] to protest any classification given by the comptroller.

(d) A state agency shall use the vendor performance tracking system to determine whether to award a contract to a vendor reviewed in the tracking system. The comptroller by rule shall establish the manner in which the rating scale established under Subsection (b) affects a vendor's eligibility for state contracts and the grades on the scale that disqualify a vendor from state contracting.

(e) The comptroller shall make the vendor performance tracking system accessible to the public on the comptroller's Internet website.

SECTION 22. Section 51.9335(d), Education Code, is amended to read as follows:

(d) Subject to Section 51.9337, Subtitle D, Title 10, Government Code, and Subchapter B, Chapter 2254, Government Code, do not apply to the acquisition of goods and services under this section, except that an institution of higher education must comply with any provision of those laws, or a rule adopted under a provision of those laws, relating to contracting with historically underutilized businesses or relating to the procurement of goods

and services from persons with disabilities. An institution of higher education may, but is not required to, acquire goods or services as provided by Subtitle D, Title 10, Government Code.

SECTION 23. Subchapter Z, Chapter 51, Education Code, is amended by adding Section 51.9337 to read as follows:

Sec. 51.9337. PURCHASING AUTHORITY CONDITIONAL; REQUIRED STANDARDS. (a) An institution of higher education may not exercise the acquisition authority granted by Section 51.9335 or 73.115 unless the institution complies with this section. An institution that is determined under Subsection (j) to not be in compliance with this section is subject to the laws governing acquisition of goods and services by state agencies, including Subtitle D, Title 10, Government Code, and Chapter 2254, Government Code.

(b) The board of regents of an institution of higher education by rule shall establish for each institution under the management and control of the board:

(1) a code of ethics for the institution's officers and employees, including provisions governing officers and employees authorized to execute contracts for the institution or to exercise discretion in awarding contracts, subject to Subsection (c);

(2) policies for the internal investigation of suspected defalcation, misappropriation, and other fiscal irregularities and an institutional or systemwide compliance program designed to promote ethical behavior and ensure compliance with all applicable policies, laws, and rules governing higher education, including research and health care to the extent

applicable;

(3) a contract management handbook that provides consistent contracting policies and practices and contract review procedures, including a risk analysis procedure, subject to Subsection (d);

(4) contracting delegation guidelines, subject to Subsections (e) and (f);

(5) training for officers and employees authorized to execute contracts for the institution or to exercise discretion in awarding contracts, including training in ethics, selection of appropriate procurement methods, and information resources purchasing technologies; and

(6) internal audit protocols, subject to Subsection (g).

(c) The code of ethics governing an institution of higher education must include:

(1) general standards of conduct and a statement that each officer or employee is expected to obey all federal, state, and local laws and is subject to disciplinary action for a violation of those laws;

(2) policies governing conflicts of interest, conflicts of commitment, and outside activities, ensuring that the primary responsibility of officers and employees is to accomplish the duties and responsibilities assigned to that position;

(3) a conflict of interest policy that prohibits employees from having a direct or indirect financial or other interest, engaging in a business transaction or professional

activity, or incurring any obligation that is in substantial conflict with the proper discharge of the employee's duties related to the public interest;

(4) a conflict of commitment policy that prohibits an employee's activities outside the institution from interfering with the employee's duties and responsibilities to the institution;

(5) a policy governing an officer's or employee's outside activities, including compensated employment and board service, that clearly delineates the nature and amount of permissible outside activities and that includes processes for disclosing the outside activities and for obtaining and documenting institutional approval to perform the activities;

(6) a policy that prohibits an officer or employee from acting as an agent for another person in the negotiation of the terms of an agreement relating to the provision of money, services, or property to the institution;

(7) a policy governing the use of institutional resources; and

(8) a policy providing for the regular training of officers and employees on the policies described by this subsection.

(d) An institution of higher education shall establish contract review procedures and a contract review checklist that must be reviewed and approved by the institution's legal counsel before implementation. The review procedures and checklist must include:

(1) a description of each step of the procedure that an

institution must use to evaluate and process contracts;

(2) a checklist that describes each process that must be completed before contract execution; and

(3) a value threshold that initiates the required review by the institution's legal counsel unless the contract is a standard contract previously approved by the counsel.

(e) An institution of higher education's policies governing contracting authority must clearly specify the types and values of contracts that must be approved by the board of regents and the types and values of contracts for which contracting authority is delegated by the board to the chief executive officer and by the chief executive officer to other officers and employees of the institution. An officer or employee may not execute a document for the board unless the officer or employee has authority to act for the board and the authority is exercised in compliance with applicable conditions and restrictions.

(f) An institution of higher education may not enter into a contract with a value of more than $1 million, including any amendment, extension, or renewal of the contract that increases the value of the original contract to more than $1 million, unless the institution's board of regents approves the contract, expressly delegates authority to exceed that amount, or expressly adopts an exception for that contract. The board must approve any amendment, extension, or renewal of a contract with a value that exceeds 25 percent of the value of the original contract approved by the board unless the authority to exceed the approved amount is expressly delegated by the board or an exception is expressly adopted by the

board for that contract.

(g) The board of regents of an institution of higher education shall adopt standards for internal audits conducted by the institution to provide a systematic, disciplined approach to evaluate and improve the effectiveness of the institution's risk management, control, and governance processes related to contracts and to require risk-based testing of contract administration. The internal auditor must have full and unrestricted access to all institutional property, personnel, and records. An internal auditor must report directly to the board of regents in accordance with Chapter 2102, Government Code.

(h) The chief auditor of an institution of higher education shall annually assess whether the institution has adopted the rules and policies required by this section and shall submit a report of findings to the state auditor. In auditing the purchase of goods and services by the institution, the state auditor shall determine whether an institution has adopted the required rules and policies.

(i) If the state auditor determines that an institution of higher education has failed to adopt the required rules and policies, the auditor shall report that failure to the legislature and to the institution's board of regents and shall, in consultation with the institution, adopt a remediation plan to bring the institution into compliance. If the institution fails to comply within the time established by the state auditor, the auditor shall find the institution to be in noncompliance and report that finding to the legislature and comptroller.

(j) In accordance with a schedule adopted by the state

auditor in consultation with the comptroller, the authority of an institution of higher education to acquire goods and services as provided by Section 51.9335 or 73.115 is suspended if the institution fails to comply with the remediation plan under Subsection (i) within the time established by the state auditor. As a result of the suspension, the laws, including Subtitle D, Title 10, Government Code, and Chapter 2254, Government Code, governing acquisition of goods and services by state agencies from which the institution is otherwise exempt, shall apply to the institution's acquisition of goods and services.

SECTION 24. Subchapter Z, Chapter 51, Education Code, is amended by adding Section 51.954 to read as follows:

Sec. 51.954. DISCLOSURE OF SPONSORS OF CONTRACTED RESEARCH IN PUBLIC COMMUNICATIONS. (a) In any public communication the content of which is based on the results of sponsored research, a faculty member or other employee or appointee of an institution of higher education who conducted or participated in conducting the research shall conspicuously disclose the identity of each sponsor of the research.

(b) In this section:

(1) "Institution of higher education" has the meaning assigned by Section 61.003.

(2) "Public communication" means oral or written communication intended for public consumption or distribution, including:

(A) testimony in a public administrative, legislative, regulatory, or judicial proceeding;

(B) printed matter including a magazine, journal, newsletter, newspaper, pamphlet, or report; or

(C) posting of information on a website or similar Internet host for information.

(3) "Sponsor" means an entity that contracts for or provides money or materials for research.

(4) "Sponsored research" means research:

(A) that is conducted under a contract with, or that is conducted under a grant awarded by and pursuant to a written agreement with, an individual or entity other than the institution conducting the research; and

(B) in which payments received or the value of materials received under that contract or grant, or under a combination of more than one such contract or grant, constitutes at least 50 percent of the cost of conducting the research.

SECTION 25. Sections 73.115(e) and (f), Education Code, are amended to read as follows:

(e) To the extent of any conflict, this section prevails over any other law relating to the purchasing of goods and services other than Section 51.9337 and [~~except~~] a law relating to contracting with historically underutilized businesses.

(f) Except as otherwise provided by this section and Section 51.9337, Subtitle D, Title 10, Government Code, and Chapter 2254, Government Code, do not apply to purchases of goods and services made under this section.

SECTION 26. Section 2155.502(d), Government Code, is repealed.

SECTION 27. Section 572.069, Government Code, as added by this Act, applies only to a state officer or employee whose service or employment with a state agency ceases on or after the effective date of this Act.

SECTION 28. As soon as is practicable after the effective date of this Act, the comptroller of public accounts, and each affected state agency as necessary, shall adopt the rules, processes, and procedures and take the actions necessary to implement the changes in law made by this Act.

SECTION 29. Section 2262.055(d), Government Code, as added by this Act, applies only in relation to a contract for which the request for bids or proposals or other applicable expression of interest is made public on or after October 1, 2015.

SECTION 30. The changes in law made by this Act apply only to a contract entered into on or after the effective date of this Act. A contract entered into before that date is governed by the law in effect immediately before the effective date of this Act, and the former law is continued in effect for that purpose.

SECTION 31. This Act takes effect September 1, 2015.

President of the Senate

Speaker of the House

I hereby certify that S.B. No. 20 passed the Senate on March 31, 2015, by the following vote: Yeas 30, Nays 0; May 20, 2015, Senate refused to concur in House amendments and requested appointment of Conference Committee; May 24, 2015, House granted request of the Senate; May 30, 2015, Senate adopted Conference Committee Report by the following vote: Yeas 31, Nays 0.

Secretary of the Senate

I hereby certify that S.B. No. 20 passed the House, with amendments, on May 19, 2015, by the following vote: Yeas 143, Nays 0, one present not voting; May 24, 2015, House granted request of the Senate for appointment of Conference Committee; May 31, 2015, House adopted Conference Committee Report by the following vote: Yeas 140, Nays 2, two present not voting.

Chief Clerk of the House

Approved:

Date

Governor

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes new §11.202.

**Background and Summary of the Factual Basis for the Proposed Rule**

Senate Bill (SB) 20 (84th Texas Legislature, 2015) added Texas Government Code, §2261.253(c), which requires state agencies to establish by rule a procedure to identify each contract that requires enhanced contract or performance monitoring, and submit information to the agencies' governing bodies.

**Section Discussion**

The commission proposes new §11.202, Enhanced Contract Monitoring, to incorporate this reference now required by statute. The proposed new rule establishes a procedure to ensure that all TCEQ contracts are assessed to determine the level and type of contract monitoring required. The proposed new rule requires the executive director, or his designee, to use risk assessment criteria to identify certain contracts for enhanced contract and performance monitoring. TCEQ's Procurements and Contracts Section, Financial Administration Division, currently maintains internal agency operating procedures for the risk-based assessment of contracts as well as the agency's Contract Management Handbook. The proposed new rule also requires regular reporting to the executive director on contracts identified for enhanced monitoring. The executive director shall notify the commission of serious issues or risks with those contracts.

**Fiscal Note: Costs to State and Local Government**

Jeffrey Horvath, Analyst in the Chief Financial Officer's Division, determined that for the first five-year period the proposed rule is in effect, no fiscal implications are anticipated for the agency or for other units of state or local government as a result of the administration or enforcement of the proposed rule.

The proposed rule implements SB 20, which requires state agencies to establish by rule a procedure to identify each contract that requires enhanced or performance monitoring and to submit information related to these contracts to the agencies' governing bodies.

TCEQ's Procurements and Contracts Section, Financial Administration Division, currently maintains internal agency operating procedures for the monitoring of contracts that complies with the proposed rule. TCEQ has a Contract Management Handbook that outlines standard contract monitoring and identifies when enhanced monitoring is required. Agency Program Areas also maintain more detailed Standard Operating Procedures. No fiscal implications are anticipated for the agency or for any other unit of state or local government as a result of the implementation of the proposed rule.

**Public Benefits and Costs**

Mr. Horvath also determined that for each year of the first five years the proposed new rule is in effect, the public benefit anticipated from the changes seen in the proposed rule will

be compliance with state law and to ensure that agencies have established and consistent procedures for their contracts.

No fiscal implications are anticipated for businesses or individuals as a result of the implementation or administration of the proposed rule. TCEQ's Procurements and Contracts Section within the Financial Administration Division currently maintains internal agency operating procedures for the monitoring of contracts in accordance with the new statute. No changes are anticipated from current agency policies and procedures.

**Small Business and Micro-Business Assessment**

No adverse fiscal implications are anticipated for small or micro-businesses due to the implementation or administration of the proposed rule for the first five-year period the proposed rule is in effect. The proposed rule is not anticipated to result in fiscal implications for any large or small business. The proposed rule is not expected to result in any changes from current agency policies and procedures.

**Small Business Regulatory Flexibility Analysis**

The commission reviewed this proposed rulemaking and determined that a Small Business Regulatory Flexibility Analysis is not required because the proposed rule is required by state law and does not adversely affect a small or micro-business in a material way for the first five years the proposed rule is in effect.

**Local Employment Impact Statement**

The commission reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

**Draft Regulatory Impact Analysis Determination**

The commission reviewed the proposed new rule in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed new rule is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "major environmental rule." The intent of the proposed rulemaking is to conform to Texas Government Code, §2261.253(c). The changes are not expressly to protect the environment and reduce risks to human health and environment.

Written comments on the Draft Regulatory Impact Analysis Determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

**Takings Impact Assessment**

The commission evaluated the proposed new rule and assessed whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of proposed new §11.202 is to conform to Texas Government Code, §2261.253(c).

Promulgation and enforcement of this proposed new rule would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject proposed regulation does not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally); nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. Therefore, there are no burdens imposed on private real property.

**Consistency with the Coastal Management Program**

The commission reviewed the proposed rule and found that it is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rule is not subject to the Texas Coastal Management Program.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

**Announcement of Hearing**

The commission will hold a public hearing on this proposal in Austin on September 13, 2016, at 2:00 p.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written

comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802 or 1-800-RELAY-TX (TDD). Requests should be made as far in advance as possible.

**Submittal of Comments**

Written comments may be submitted to Derek Baxter, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www1.tceq.texas.gov/rules/ecomments/*. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2015-030-011-AD. The comment period closes on September 19, 2016. Copies of the proposed rulemaking can be obtained from the commission's website at *http://www.tceq.texas.gov/rules/propose_adopt.html*. For further information, please contact LaTresa Stroud, Procurements and Contracts Section, Financial Administration Division, (512) 239-5555.

## SUBCHAPTER E: CONTRACTS MONITORING ROLES AND RESPONSIBILITIES

## §11.202

**Statutory Authority**

The new rule is proposed under Texas Water Code (TWC), TWC, §5.103, concerning Rules, which provides the commission with the authority to adopt rules necessary to carry out its power and duties under the TWC and any other laws of the State of Texas.

The proposed new rule implements Texas Government Code, §2261.253(c), as added by Senate Bill 20.

**§11.202. Enhanced Contract Monitoring.**

(a) Pursuant to Texas Government Code, §2261.253, the commission shall assess each contract to determine appropriate contract and performance monitoring requirements.

(b) The executive director or his designee shall ensure that risk assessment factors are used to determine when enhanced contract or performance monitoring is required for a contract. The criteria for evaluating risk include:

(1) the total contract amount;

(2) the funding source(s);

(3) the scope and complexity of the goods or services;

(4) the risk of fraud, waste, or abuse; and

(5) the importance of the work to the agency's mission or infrastructure.

(c) Contracts shall be monitored in accordance with the agency's policies and Contract Management Handbook.

(d) The executive director will receive regular reports on contracts identified for enhanced monitoring, and where serious issues or risks are identified, the executive director shall notify the commission.

(e) This section does not apply to a memorandum of understanding, memorandum of agreement, interagency contract, inter-local agreement, intergovernmental contract or contract for which there is not a cost.