

The Texas Commission on Environmental Quality (TCEQ or commission) proposes amendments to §§11.1 – 11.3, and 11.200.

#### BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

Certain Texas Building and Procurement Commission (TBPC) rules require that agencies adopt them by reference. Since TBPC has amended some of its rules, the adoptions in the TCEQ rules are being updated. Also, the names of agencies referenced in the rules have changed; therefore, the names are being updated. Several clarifications are being made to better organize and more thoroughly explain the rules. Several typographical errors are being corrected.

Also, the 77th Legislature, 2001, passed House Bill (HB) 2812. The bill renumbered Chapter 2259 to Chapter 2261. This proposed rulemaking is necessary to update the reference to the chapter and sections of the statutes.

#### SECTION BY SECTION DISCUSSION

The commission is making administrative changes to §11.1 to change references to the Texas Natural Resource Conservation Commission to the Texas Commission on Environmental Quality and references to the Texas General Services Commission to the Texas Building and Procurement Commission. A reference to the issue date of a TBPC rule is also being updated to reference the most recent amendment of the rule.

The commission is clarifying in §11.2(a) who can file a protest by adding “proposer” to the list. Also, the phrase “or his designee (hereafter Manager)” is being moved for clarity. The commission is making subsection (e)(3) parallel to subsection (e)(2) by explaining that the Procurements and Contracts Manager will include in its letter the appropriate remedial action. A typographical error is being corrected in subsection (g) with the removal of the word “either.” Subsection (h) is being deleted and reinserted as subsection (i) and subsection (i) is being relettered as subsection (h) to improve the logical order of the subsections. In the new subsection (h) a phrase is being moved to improve clarity, “in writing by the executive director” and a phrase that does not coincide with the rest of the rule is being removed, “either by the commission.”

In §11.200, the commission is updating the reference to Texas Government Code, Chapter 2259, and a related statute, to Chapter 2261.

The commission is making administrative changes to §11.3 to change references to the Texas Natural Resource Conservation Commission to the Texas Commission on Environmental Quality in subsection (c) and a reference to the Texas General Services Commission to the Texas Building and Procurement Commission in subsection (a). Also in subsection (a), a reference to the issue date of a TBPC rule is being updated to reference the most recent amendment of the rule and the subject of the referenced rule is clarified.

**FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT**

Nina Chamness, Analyst, Strategic Planning and Assessment Section, has determined that, for the first five-year period the proposed rules are in effect, no fiscal implications are anticipated for the agency or other units of state or local governments as a result of administration or enforcement of the proposed rules.

The proposed rules would revise 30 Texas Administrative Code (TAC) Chapter 11 and adopt by reference legislative changes made during the 77th Legislative Session to the rules of the Texas Building and Procurement Commission into the rules of the Texas Commission of Environmental Quality. The proposed rules would also update references, provide for more logical organization of the chapter, and correct typographical errors as needed. The proposed changes are administrative in nature and will have no fiscal implication on local governments, individuals, or businesses.

#### PUBLIC BENEFITS AND COSTS

Ms. Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be that the rules are easier to understand and are more current in the implementation of state purchasing requirements.

There are no anticipated fiscal implications for large businesses or individuals as a result of the proposed rules.

#### SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules.

#### LOCAL EMPLOYMENT IMPACT STATEMENT

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

#### DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a “major environmental rule” as defined in the act. The intent of the rule is to update agency names and references to rules, provide for more logical sequencing of phrases and subsections in the rules, and to clarify who the rules apply to and the contents of a letter from the Manager of Procurements and Contracts. The changes are not expressly to protect the environment and reduce risks to human health and the environment. The commission invites public comment on the draft regulatory impact analysis determination.

#### TAKINGS IMPACT ASSESSMENT

The commission evaluated these proposed rules and performed an assessment of whether these proposed rules constitute a takings under Texas Government Code, Chapter 2007. The specific purpose of these proposed rules is to update agency names and references to rules, provide for more logical

sequencing of phrases and subsections in the rules, and to clarify who the rules apply to and the contents of a letter from the Manager of Procurements and Contracts. The proposed rules will substantially advance this stated purpose.

Promulgation and enforcement of these proposed rules would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject proposed regulations do 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.

There are no burdens imposed on private real property, and the benefits to society are greater clarification of the rule.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

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

#### SUBMITTAL OF COMMENTS

Comments may be submitted to Holly Vierk, MC 205, Texas Register Team, Office of Legal Services, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. Electronic comments may be submitted at <http://www5.tceq.state.tx.us/rules/ecomments/>. All comments should reference Rule Project Number 2006-042-011-AD. The comment period closes January 2, 2007. Copies of the proposed rulemaking can be obtained from the commission's Web site at [http://www.tceq.state.tx.us/nav/rules/propose\\_adopt.html](http://www.tceq.state.tx.us/nav/rules/propose_adopt.html). For further information, please contact Joe McGill, Procurements and Contracts Section, at (512) 239-1813.

## **SUBCHAPTER A: HISTORICALLY UNDERUTILIZED BUSINESS PROGRAM**

### **§11.1**

#### **STATUTORY AUTHORITY**

The amendment is proposed under Texas Water Code (TWC), §5.103(a), which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state.

The proposed amendment implements TWC, §5.103(a), which provides that the commission has the authority to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state.

#### **§11.1. Historically Underutilized Business Program.**

The commission adopts by reference the rules of the Texas Building and Procurement Commission [Texas General Services Commission] in 1 TAC §§111.11 - 111.22 [111.23] and §§111.26 - 111.28 (relating to Historically Underutilized Business Program), as amended through the November 9, 2004, issue of the *Texas Register* (29 TexReg 10249). [June 9, 2000, issue of the *Texas Register* (25 TexReg 5621).]

## **SUBCHAPTER B: PROTEST PROCEDURES FOR VENDORS**

### **§11.2**

#### **STATUTORY AUTHORITY**

The amendment is proposed under Texas Water Code, §5.103(a), which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state.

The proposed amendment implements TWC, §5.103(a), which provides that the commission has the authority to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state.

#### **§11.2. Protest Procedures for Vendors.**

(a) Any actual or prospective bidder, offeror, proposer, or contractor who is aggrieved in connection with the solicitation, evaluation, or award of a contract may formally protest to the Procurements and Contracts Manager [or his designee (hereafter Manager)] of the commission or his designee (hereafter Manager). Such protests must be in writing and received in the Procurements and Contracts Section within ten working days after such aggrieved person knows, or should have known, of the occurrence of the action which is protested. Formal protests must conform to the requirements of this subsection and subsection (c) of this section, and shall be resolved in accordance with the procedure set forth in subsections (d) and (e) of this section. Copies of the protest must be mailed or

delivered by the protesting person to the project manager, if any, and other interested persons. For the purposes of this section, "interested persons" means all vendors who have submitted bids or proposals for the contract involved.

(b) - (d) (No change.)

(e) If the protest is not resolved by mutual agreement, the Manager will issue a written determination on the protest.

(1) - (2) (No change.)

(3) If the Manager determines that a violation of the rules or statutes has occurred in a case where a contract has been awarded, he or she shall inform the protesting person and other interested persons by letter which sets forth the reasons for the determination, and the appropriate remedial action, which may include ordering the contract void.

(f) (No change.)

(g) The executive director shall [either] issue a final determination on the protest within 15 days after receipt of the aggrieved person's request for reconsideration.

(h) A decision issued in writing by the executive director in response to a request for reconsideration shall be the final administrative action of the commission.

[ (h) Unless good cause for delay is shown or the Manager or executive director determines that a protest or appeal raises issues significant to procurement practices or procedures, a protest or appeal that is not filed timely will not be considered.]

(i) Unless good cause for delay is shown or the Manager or executive director determines that a protest or appeal raises issues significant to procurement practices or procedures, a protest or appeal that is not filed timely will not be considered.

[ (i) A decision issued in response to a request for reconsideration, either by the commission, or in writing by the executive director, shall be the final administrative action of the commission.]

(j) (No change.)

## SUBCHAPTER C: BID OPENING AND TABULATION

### §11.3

#### STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code, §5.103(a), which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state.

The proposed amendment implements TWC, §5.103(a), which provides that the commission has the authority to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state.

#### **§11.3. Bid Opening and Tabulation.**

(a) The commission adopts by reference the rules of the Texas Building and Procurement Commission [Texas General Services Commission] in 1 TAC §113.5(b) (relating to Bid Submission, Bid Opening, and Tabulation), as amended through the September 11, 2000, issue of the *Texas Register* (25 TexReg 8848) [effective April 20, 1993].

(b) (No change.)

(c) Copies of the rule are filed in the Texas Commission on Environmental Quality's (TCEQ) [Texas Natural Resource Conservation Commission's (TNRCC)] Library, located at 12100 Park 35 Circle, Building A, Austin, and at all TCEQ [TNRCC] regional offices.

**SUBCHAPTER E: CONTRACTS MONITORING ROLES AND RESPONSIBILITIES**

**§11.200**

**STATUTORY AUTHORITY**

The amendment is proposed under Texas Water Code, §5.103(a), which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state.

The proposed amendment implements TWC, §5.103(a), which provides that the commission has the authority to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state.

**§11.200. Applicability.**

This subchapter applies only to contracts for goods or services which have been procured by one of the procurement methods described in Texas Government Code, §2261.001 [Texas Government Code, §2259.001,] as being subject to the requirements of Texas Government Code, Chapter 2261 [Chapter 2259].