

The Texas Natural Resource Conservation Commission (commission) proposes new §11.2 and §11.3, concerning Protest Procedures for Vendors and Bid Opening and Tabulation.

EXPLANATION OF PROPOSED RULES

These new sections establish procedures for resolving vendor protests relating to purchasing issues and adopt by reference the rule of Texas General Services Commission (GSC) in 1 TAC §113.5(b), concerning bid opening and tabulation. This rulemaking is required by Texas Government Code, §2155.076 and §2156.005, which require state agencies to establish protest procedures and adopt GSC rules regarding bid opening and tabulation. Concurrently, the commission proposes the review of Chapter 11, §11.1, concerning Historically Underutilized Business Program, in accordance with the General Appropriations Act, Article IX, §167, 75th Legislature, 1997, and is publishing the proposed notice of review in the Rules Review Section of the *Texas Register*.

The rules will establish a consistent procedure for vendors and the agency to follow in the event a vendor is aggrieved in connection with the solicitation, evaluation, or award of a contract. The rules also establish consistent bid opening and tabulation procedures for the agency to follow. The inclusion of both protest procedures and bid opening and tabulation requirements in commission rules will clarify the bid process for the public and agency staff to follow.

Specifically, §11.2 will set forth the procedure to be followed by a vendor who is aggrieved in connection with a solicitation, evaluation, or award of a contract. The aggrieved person will have ten days to file a protest with the Purchasing Section once he or she knows, or should have known, of the action which is

protested. Copies of the protest are to be sent to all interested persons. The protest will be reviewed by the Purchasing or Contracts Manager (Manager) and a determination will be made. The aggrieved person may, within ten days after receiving the Manager's determination, request reconsideration by the executive director or his designee. The executive director may issue a determination or refer the matter to the commission for its consideration at a regularly scheduled open meeting. Documents related to the solicitation, evaluation, and award of a contract must be retained by commission for four years.

Proposed §11.3 adopts the GSC rule regarding bid opening and tabulation. The rule states that bid openings conducted by the commission will be open to the public. Bid opening dates may be changed if bidders are properly notified in advance, and if a bid opening is canceled, all bids will be returned to bidders. Bid tabulation files are available for public inspection during regular working hours of the commission. Commission employees are not required to give bid tabulation information by telephone.

FISCAL NOTE

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five-year period the sections as proposed are in effect there are no significant fiscal implications anticipated for state or local governments as a result of enforcing or implementing the sections. Some minimal costs may arise from the receipt and consideration of bid protests and the delay of bid proceedings; however, these costs will be insignificant.

PUBLIC BENEFIT

Mr. Minick also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcement of and compliance with the sections will be a more equitable and efficient process for resolution of vendor protests and increased consistency of commission administrative procedures for protests, bid opening, and tabulation with the rules of the GSC. Some costs may be incurred by protestants following the protest procedures outlined in the proposed rules, but any costs associated with these procedures are not anticipated to be significant and may not exceed the costs of investigation and pursuit of bid protests in the absence of these provisions. The effects of these sections on small businesses will be similar to the effects on any business initiating a bid protest. Although any potential costs are anticipated to be minimal, costs to small businesses will depend on the number of protests and the specifics of the particular bid in question, and such costs will not vary directly as a function of size of the company, employment, or sales. There are no other economic costs anticipated for any person required to comply with these sections as proposed.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for these rules under Texas Government Code, §2007.043. The specific purpose of the rules is to adopt the GSC rules regarding bid opening and tabulation and to establish protest procedures which must be consistent with GSC rules. The adoption of these rules will not burden private real property. Therefore, this proposal does not constitute a taking of private real property.

DRAFT REGULATORY IMPACT ANALYSIS

The staff has reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code (the Code), §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a “major environmental rule” as defined by the Code. There is not a specific intent of the protest procedures and bid rules adopted by reference to protect the environment or reduce risks to human health from environmental exposure. The rules are related solely to state purchasing of goods and services, not the environment. Furthermore, these rules will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

COASTAL MANAGEMENT PLAN

The commission has reviewed the proposed rulemaking and found that the proposal is not a rulemaking governing air pollutant emissions, on-site sewage disposal systems, or underground storage tanks (Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2)), nor is it a rulemaking governing or authorizing actions listed in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the rulemaking is not subject to the Texas Coastal Management Program.

SUBMITTAL OF COMMENTS

Comments may be submitted to Lisa Martin, Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Tracking Log Number 97161-011-AD. Comments must be received by 5:00 p.m., September 14, 1998. For further information, please contact Kathy Robbins, Financial Administration Division, (512) 239-0392.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the agency at (512) 239-4900. Requests should be made as far in advance as possible.

STATUTORY AUTHORITY

The new sections are proposed under Texas Government Code, §2155.076, which requires state agencies to adopt protest procedures for resolving vendor protests relating to purchasing issues, and Texas Government Code, §2156.005, which requires state agencies making purchases to adopt GSC rules related to bid opening and tabulation. In addition, the new rules are proposed under Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission. The proposal is also consistent with the authority granted to the commission to enter into contracts under Texas Water Code, §5.229.

The proposed new sections implement Texas Government Code, §2155.076 and §2156.005.

CONTRACTS

§11.2, §11.3

§11.2. Protest Procedures for Vendors.

(a) Any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation, evaluation, or award of a contract may formally protest to the Purchasing Manager or his designee (hereafter Manager) of the commission. Such protests must be in writing and received in the Purchasing 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) In the event of a timely protest or appeal under this section, the state shall not proceed further with the solicitation or with the award of the contract unless the Manager makes a written determination that the award of a contract without delay is necessary to protect substantial interests of the state.

(c) A formal protest must be sworn and notarized and contain:

(1) a specific identification of the statutory or regulatory provision(s) that the action complained of is alleged to have violated;

(2) a specific description of each act alleged to have violated the statutory or regulatory provision(s) identified in paragraph (1) of this subsection;

(3) a precise statement of the relevant facts;

(4) an identification of the issue or issues to be resolved;

(5) argument and authorities in support of the protest; and

(6) a statement that copies of the protest have been mailed or delivered to other identifiable interested persons.

(d) The Manager may settle and resolve the dispute concerning the solicitation or award of a contract by mutual agreement with the protesting person. The Manager may solicit written responses to the protest from other interested persons.

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

(1) If the Manager determines that no violation of rules or statutes has occurred, he or she shall inform the protesting person and other interested persons by letter which sets forth the reasons for the determination.

(2) If the Manager determines that a violation of the rules or statutes has occurred in a case where a contract has not been awarded, he or she shall inform the protesting person and other interested persons by letter that sets forth the reasons for the determination and the appropriate remedial action.

(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, which may include ordering the contract void.

(f) After the Manager's determination has been made, the aggrieved person or interested persons may request reconsideration of the Manager's determination to be made by the executive director or his designee. Such request must be in writing and must be received in the Purchasing Section no later than ten working days after the date of the Manager's determination, which shall be calculated from the date the Manager's letter is hand-delivered, delivered by a nationally recognized courier service, or mailed by certified or registered mail. The request shall be limited to review of the Manager's determination. Copies of the request must be mailed or delivered by the aggrieved person to other interested persons. The request must contain an affidavit that such copies have been provided.

(g) The executive director shall either:

(1) issue a final determination on the protest within 15 days after receipt of the aggrieved person's request for reconsideration; or

(2) in his discretion, refer the matter to the commission for its consideration at a regularly scheduled open meeting.

(h) When a request for reconsideration has been received by the executive director under subsection (f) of this section and has been referred to the commission by the executive director under subsection (g) of this section, the following requirements shall apply.

(1) The request for reconsideration and responses of interested persons, if any, shall be filed with the chief clerk by the executive director.

(2) Copies of all documents filed with the chief clerk shall be mailed to the executive director, the appealing party, and all other interested persons, no later than the day of filing.

(3) All interested persons who wish to make an oral presentation at the open meeting shall complete a public participation form and deliver it to the chief clerk's representative at the meeting.

(4) The commission may consider oral presentations and written documents presented by staff and interested persons.

(5) The commission's determination of the appeal shall be by commission order.

(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.

(j) 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.

(k) In the event of a protest, all documents collected by the commission as part of a solicitation, evaluation, and/or award of a contract shall be retained by the commission for a period of four years to include the current fiscal year and three additional fiscal years.

§11.3. Bid Opening and Tabulation.

(a) The commission adopts by reference the rules of the Texas General Services Commission in 1 TAC §113.5(b) (relating to Bid Submission, Bid Opening, and Tabulation) effective April 20, 1993.

(b) The adoption of this rule is required by Texas Government Code, §2156.005(d), 75th Legislature, 1997.

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