

The Texas Commission on Environmental Quality (commission) adopts the amendments to §§11.1 - 11.3, and 11.200. Sections 11.1 and 11.3 are adopted with *non-substantive changes* to the proposed text as published in the December 1, 2006, issue of the *Texas Register* (31 TexReg 9681). Sections 11.2 and 11.200 are adopted *without changes* and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED 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 Texas Government Code, Chapter 2259 to Chapter 2261. This adoption of the rules is necessary to update the reference to the chapter and sections of the statutes.

SECTION BY SECTION DISCUSSION

The adopted amendment makes 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 updated to reference the most recent amendment of the rule.

In §11.2(a), the adopted amendment clarifies who can file a protest by adding “proposer” to the list. Also, the phrase “or his designee (hereafter Manager)” is moved for clarity. The adoption makes 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 corrected in subsection (g) with the removal of the word “either.” Subsection (h) is deleted and reinserted as subsection (i) and subsection (i) is relettered as subsection (h) to improve the logical order of the subsections. In the new subsection (h) a phrase is moved to improve clarity, “in writing by the executive director” and a phrase that does not coincide with the rest of the rule is removed, “either by the commission.”

In §11.200, the adopted amendment updates the reference to Texas Government Code, Chapter 2259, and a related statute, to Chapter 2261.

The adopted amendment makes an administrative change to §11.3, changing 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 updated to reference the most recent amendment of the rule and the subject of the referenced rule is clarified.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted 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 §2001.0225. The intent of the adopted rulemaking 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 commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received on the draft regulatory impact analysis.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the adopted rules and performed an assessment of whether the adopted rules constitute a taking under Texas Government Code, Chapter 2007. The specific purpose of the adopted rules is to update agency names and references to rules, provide a 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 adopted rules will substantially advance this stated purpose.

Promulgation and enforcement of the adopted rules would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject adopted 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 adopted 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 adopted rules are not subject to the Texas Coastal Management Program.

PUBLIC COMMENT

The close of comment deadline was January 2, 2007. No comments were received from the public.

SUBCHAPTER A: HISTORICALLY UNDERUTILIZED BUSINESS PROGRAM

§11.1

STATUTORY AUTHORITY

The amendment is adopted 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 adopted 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 in 1 TAC §§111.11 - 111.22 and §§111.26 - 111.28 (relating to Historically Underutilized Business Program), as amended through the November 5, 2004, issue of the *Texas Register* (29 TexReg 10249).

SUBCHAPTER B: PROTEST PROCEDURES FOR VENDORS

§11.2

STATUTORY AUTHORITY

The amendment is adopted 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 adopted 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 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) 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, and the appropriate remedial action, 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 Procurements and Contracts 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 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.

(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) 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.

SUBCHAPTER C: BID OPENING AND TABULATION

§11.3

STATUTORY AUTHORITY

The amendment is adopted 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 adopted 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 in 1 TAC §113.5(b) (relating to Bid Submission, Bid Opening, and Tabulation), as amended through the September 8, 2000, issue of the *Texas Register* (25 TexReg 8848).

(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 Commission on Environmental Quality's (TCEQ) Library, located at 12100 Park 35 Circle, Building A, Austin, and at all TCEQ regional offices.

SUBCHAPTER E: CONTRACTS MONITORING ROLES AND RESPONSIBILITIES

§11.200

STATUTORY AUTHORITY

The amendment is adopted 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 adopted 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 as being subject to the requirements of Texas Government Code, Chapter 2261.