

The Texas Natural Resource Conservation Commission (commission) adopts new §11.2 and §11.3, concerning Protest Procedures for Vendors and Bid Opening and Tabulation. Section §11.2 is adopted with changes to the proposed text as published in the August 14, 1998, issue of the *Texas Register* (23 TexReg 8358). Section §11.3 is adopted without changes and will not be republished.

EXPLANATION OF ADOPTED RULES

The adopted sections establish procedures for resolving vendor protests relating to purchasing issues and adopt by reference the rule of the 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 continues the review of 30 TAC Chapter 11, §11.1, concerning Historically Underutilized Business Program, in accordance with the General Appropriations Act, Article IX, §167, 75th Legislature, 1997, as proposed in the Rules Review Section of the August 14, 1998, issue of the *Texas Register* (23 TexReg 8507). This action is concurrently published in the Rules Review Section of this edition of the *Texas Register*.

These new sections 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 sets 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 Procurements and Contracts 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 Procurements and Contracts Manager (Manager) or his designee 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. Documents related to the solicitation, evaluation, and award of a contract must be retained by the commission for four years. In §11.2(a) and (f), the term "Purchasing Section" is amended to "Procurements and Contracts Section" to reflect a recent internal reorganization. The Purchasing Section was combined with the Contracts Section to form the Procurements and Contracts Section. Similarly, in §11.2(a), the term "Purchasing Manager" is also amended to "Procurements and Contracts Manager" to reflect this internal reorganization.

Section 11.2(g)(2), which provides for the executive director, in his own discretion, to refer the request for reconsideration to the commission, is deleted. Also §11.2(h), which provides for procedures for requests that have been referred to the commission, is deleted. The remaining subsections are renumbered to reflect these changes. With these revisions, the executive director maintains the authority to review and make a final determination on requests for reconsideration. The revisions incorporate the commission's unanimous vote for this change at the November 19, 1998, commission open meeting, and do not require republication because these changes affect no other subject or person than those previously given notice.

Section 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.

FINAL 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 procedures on 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.

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 rulemaking does not constitute a taking of private real property.

COASTAL MANAGEMENT PLAN

The commission has reviewed the rulemaking and found that it 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 Coastal Management Plan.

HEARING AND COMMENTERS

The comment period for the proposed rules closed on September 14, 1998. No comments were received regarding the proposed new sections.

STATUTORY AUTHORITY

The new sections are adopted 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 adopted 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 adoption is also consistent with the authority granted to the commission to enter into contracts under Texas Water Code, §5.229.

CHAPTER 11

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 Procurements and Contracts Manager or his designee (hereafter Manager) of the commission. 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, 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 either issue a final determination on the protest within 15 days after receipt of the aggrieved person's request for reconsideration.

(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) 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) 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.