

TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

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ALL Districts

The Texas Transportation Commission (commission) finds it necessary to propose amendments to §9.3, relating to Protest of Department Purchases under the State Purchasing and General Services Act, to be codified under Title 43, Texas Administrative Code, Part 1.

The preamble and the proposed amendments, attached to this minute order as Exhibits A and B, are incorporated by reference as though set forth verbatim in this minute order, except that they are subject to technical corrections and revisions, approved by the general counsel, necessary for compliance with state or federal law or for acceptance by the Secretary of State for filing and publication in the *Texas Register*.

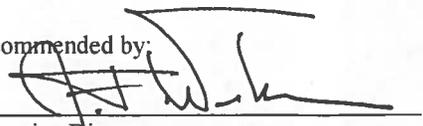
IT IS THEREFORE ORDERED by the commission that the amendments to §9.3 are proposed for adoption and are authorized for publication in the *Texas Register* for the purpose of receiving public comments.

The executive director is directed to take the necessary steps to implement the actions as ordered in this minute order, pursuant to the requirements of the Administrative Procedure Act, Government Code, Chapter 2001.

Submitted and reviewed by:


Statewide Procurement Director, Procurement Division

Recommended by:


Executive Director

114093 OCT 30 14

Minute Number Date Passed

1 Proposed Preamble

2 The Texas Department of Transportation (department) proposes
3 amendments to §9.3, concerning Protest of Department Purchases
4 under the State Purchasing and General Services Act.

5

6 EXPLANATION OF PROPOSED AMENDMENTS

7 Amendments to §9.3, Protest of Department Purchases under the
8 State Purchasing and General Services Act to accommodate the
9 change of title of the Chief Procurement and Deputy
10 Administrative Officer to Chief of Procurement & Field Support
11 Operations.

12

13 FISCAL NOTE

14 James Bass, Chief Financial Officer, has determined that for
15 each of the first five years in which the amendments as proposed
16 are in effect, there will be no fiscal implications for state or
17 local governments as a result of enforcing or administering the
18 amendments.

19

20 Glenn Hagler, Statewide Procurement Director, Procurement
21 Division, has certified that there will be no significant impact
22 on local economies or overall employment as a result of
23 enforcing or administering the amendments.

24

1 PUBLIC BENEFIT AND COST

2 Mr. Hagler has also determined that for each year of the first
3 five years in which the sections are in effect, the public
4 benefit anticipated as a result of enforcing or administering
5 the amendments response time will be improved for affected
6 parties. There are no anticipated economic costs for persons
7 required to comply with the sections as proposed. There will be
8 no adverse economic effect on small businesses.

9

10 SUBMITTAL OF COMMENTS

11 Written comments on the proposed amendments to §9.3 may be
12 submitted to Rule Comments, Office of General Counsel, Texas
13 Department of Transportation, 125 East 11th Street, Austin,
14 Texas 78701-2483 or to RuleComments@txdot.gov with the subject
15 line "Proposed Amendment Changes to Section 9.3." The deadline
16 for receipt of comments is 5:00 p.m. on December 15, 2014. In
17 accordance with Transportation Code, §201.811(a)(5), a person
18 who submits comments must disclose, in writing with the
19 comments, whether the person does business with the department,
20 may benefit monetarily from the proposed amendments, or is an
21 employee of the department.

22

23 STATUTORY AUTHORITY

24 The amendments are proposed under Transportation Code, §201.101,
25 which provides the Texas Transportation Commission with the

1 authority to establish rules for the conduct of the work of the
2 department, and more specifically, Government Code, §2155.076,
3 which requires each state agency to adopt rules that establish
4 protest procedures for resolving vendor protests relating to
5 purchasing issues.

6

7 CROSS REFERENCE TO STATUTE

8 Government Code, §2155.076.

SUBCHAPTER A. GENERAL

§9.3. Protest of Department Purchases under the State
Purchasing and General Services Act.

(a) Purpose. The purpose of this section is to provide a
procedure for vendors to protest purchases made by the
department. Purchases made by the Texas Procurement and Support
Services division of the Comptroller of Public Accounts office
on behalf of the department are addressed in 34 TAC Chapter 20.

(b) Definitions. The following words and terms, when used
in this section, shall have the following meanings, unless the
context clearly indicates otherwise.

(1) Act--Government Code, Chapters 2151-2177, the
State Purchasing and General Services Act.

(2) Commission--The Texas Transportation Commission.

(3) Department--The Texas Department of
Transportation.

(4) Chief of Procurement and Field Support Operations
~~[Chief Procurement and Deputy Administrative Officer]~~--The Chief
of Procurement and Field Support Operations ~~[Chief Procurement~~
~~and Deputy Administrative Officer]~~ of the department.

(5) Statewide Procurement Director--The director of
statewide procurement in the procurement division of the
department, or other individual as designated by the Chief of

1 Procurement and Field Support Operations [~~Chief Procurement and~~
2 ~~Deputy Administrative Officer~~].

3 (6) Division--An organizational unit in the
4 department's Austin headquarters.

5 (7) Executive director--The executive director of the
6 department.

7 (8) Interested party--A vendor that has submitted a
8 bid, proposal, or other expression of interest for the purchase
9 involved.

10 (9) Purchase--A procurement action for commodities or
11 non-professional services under the Act.

12 (c) Filing of protest.

13 (1) An actual or prospective bidder or offeror who is
14 aggrieved in connection with the solicitation, evaluation, or
15 award of a purchase may file a written protest. The protest
16 must be received in the office of the Chief of Procurement and
17 Field Support Operations [~~Chief Procurement and Deputy~~
18 ~~Administrative Officer~~] within 10 working days after such
19 aggrieved person knows, or should have known, of the action.

20 (2) The protest must be sworn and contain:

21 (A) the provision of or rule adopted under the
22 Act that the action is alleged to have violated;

23 (B) a specific description of the alleged

1 violation;

2 (C) a precise statement of the relevant facts;

3 (D) the issue to be resolved;

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

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

9 (d) Suspension of award. If a protest or appeal of a
10 protest has been filed, then the department will not proceed
11 with the solicitation or the award of the purchase until the
12 executive director or his or her designee, not below the level
13 of division director, consults with the Chief of Procurement and
14 Field Support Operations [~~Chief Procurement and Deputy~~
15 ~~Administrative Officer~~] and makes a written determination that
16 the award of the purchase should be made without delay to
17 protect substantial interests of the department.

18 (e) Informal resolution. The Statewide Procurement
19 Director may informally resolve the dispute, including:

20 (1) soliciting written responses to the protest from
21 other interested parties; and

22 (2) resolving the dispute by mutual agreement.

23 (f) Written determination. If the protest is not resolved

1 by agreement, the Statewide Procurement Director will issue a
2 written determination to the protesting party and interested
3 parties which sets forth the reason for the determination. The
4 Statewide Procurement Director may determine that:

5 (1) no violation has occurred; or

6 (2) a violation has occurred and it is necessary to
7 take remedial action which may include:

8 (A) declaring the purchase void;

9 (B) reversing the award; and

10 (C) re-advertising the purchase using revised
11 specifications.

12 (g) Appeal.

13 (1) An interested party may appeal the determination
14 to the executive director. The written appeal must be received
15 in the executive director's office no later than 10 working days
16 after the date of the determination. The appeal is limited to a
17 review of the determination.

18 (2) The appealing party must mail or deliver copies of
19 the appeal to the Statewide Procurement Director and other
20 interested parties with an affidavit that such copies have been
21 provided.

22 (3) The general counsel shall review the protest, the
23 determination, and the appeal, and prepare a written opinion

1 with recommendation to the executive director.

2 (4) The executive director may:

3 (A) issue a final written determination; or

4 (B) refer the matter to the commission for its
5 consideration at a regularly scheduled open meeting.

6 (5) The commission may consider oral presentations and
7 written documents presented by the department and interested
8 parties. The chair shall set the order and the amount of time
9 allowed for presentation. The commission's determination of the
10 appeal shall be adopted by minute order and reflected in the
11 minutes of the meeting.

12 (6) The decision of the commission or executive
13 director shall be final.

14 (h) Filing deadline. Unless the commission determines that
15 the appealing party has demonstrated good cause for delay or
16 that a protest or appeal raises issues significant to
17 procurement practices or procedures, a protest or appeal that is
18 not filed timely will not be considered.

19 (i) Document retention. The department shall maintain all
20 documentation on the purchasing process that is the subject of a
21 protest or appeal in accordance with the retention schedule of
22 the department.