



TO: Health and Human Services Commission
Executive Council

DATE: December 6, 2018

FROM: Kay Molina, Associate Commissioner of
Compliance and Quality Control, PCS

AGENDA ITEM: 2.p

SUBJECT: Bid Protest Rules

BACKGROUND: Federal Legislative Other: Program Initiative

Government Code Chapter 2155 requires each state agency to adopt rules concerning vendor protests. Specifically, §2155.076 requires each state agency to adopt by rule protest procedures for resolving vendor protests relating to purchasing issues. An agency's rules must be consistent with the rules of the Comptroller of Public Accounts (CPA). HHSC has current bid protest rules. However, the rules do not provide for an appeal process. The proposed amendments to §391.103, concerning Definitions, in Subchapter A; amendments to §§391.401, concerning Purpose, 391.405, concerning Filing of a Protest, and 391.409, concerning Contract Awards during Protest; and the repeal of and new §391.407, concerning Review and Disposition of Protests, in Subchapter D, Chapter 391, Part 15, Title 1 of the Texas Administrative Code, will clarify the current process and provide for an appeal process to the Executive Commissioner. The changes will ensure that HHSC's rules reflect the current agency procedures and that the rules are consistent with the rules of the CPA as required by statute.

ISSUES AND ALTERNATIVES:

HHSC is determined to move quickly on any rule changes to ensure that HHSC's procurement processes are in compliance with all statutory, regulatory, and best practice requirements.

STAKEHOLDER INVOLVEMENT:

The proposed rules were published in the October 19, 2018, issue of the *Texas Register*.

FISCAL IMPACT:

None

SERVICES IMPACT STATEMENT:

As these are administrative rules of the agency, there will be no impact to the agency's client population.

RULE DEVELOPMENT SCHEDULE:

October 19, 2018	Publish proposed rules in <i>Texas Register</i>
December 6, 2018	Present to HHSC Executive Council
December 2018	Publish adopted rules in <i>Texas Register</i>
January 2019	Effective date

PROPOSED PREAMBLE

The Texas Health and Human Services Commission (HHSC) proposes the amendment of §391.103, concerning Definitions, in Subchapter A; the amendment of §§391.401, concerning Purpose, 391.405, concerning Filing of a Protest, and 391.409, concerning Contract Awards during Protest, and the repeal of and new §391.407, concerning Review and Disposition of Protests, in Subchapter D, Chapter 391, Part 15, Title 1 of the Texas Administrative Code.

BACKGROUND AND PURPOSE

Government Code Chapter 2155 requires each state agency to adopt rules concerning vendor protests. Specifically, §2155.076 requires each state agency to adopt rule protest procedures for resolving vendor protests relating to purchasing issues. Section 2155.076 further requires an agency's rules to be consistent with the rules of the Comptroller of Public Accounts (CPA). HHSC has determined that changes to the bid protest rule procedures are needed to ensure that HHSC's rules reflect the current agency procedures and that the rules are consistent with the rules of the CPA, which are found in Title 34, Chapter 20, Subchapter F, Division 3 of the Texas Administrative Code.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §391.103, concerning Definitions, updates the definition of "Protestant" to align the definition with the CPA's rules.

The proposed amendment to §391.401, concerning Purpose, clarifies that the purpose of Subchapter D is to provide a formal protest procedure. Currently, §391.401 states that the purpose is to provide an internal protest procedure, and because the protest procedure is available to entities outside HHSC, "internal" is not an accurate term.

The proposed amendment to §391.405, concerning Filing of a Protest, clarifies the requirements necessary to file a protest with the agency. The subsections are relabeled to account for the addition of subsection (c). In addition, a new subsection (e) is added to define the term "interested parties" for purposes of Chapter 391, Subchapter D.

The proposed repeal of §391.407, concerning Review and Disposition of Protests, deletes the current section because it provides for only one level of administrative review. The new section sets out the process that the Deputy Executive Commissioner of Procurement and Contracting Services will follow

in determining the administrative action to be taken concerning the protest as well as providing the process for a second level appeal process, to be conducted by the Executive Commissioner of HHSC.

The proposed amendment of §391.409, concerning Contract Awards during Protest, changes the title to "Contract Awards During Protest" and makes it clear that the Executive Commissioner makes the determination whether to waive §391.409.

FISCAL NOTE

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that for each year of the first five years that the new and repealed rules are in effect, there is no anticipated impact to costs and revenues of state or local governments.

GOVERNMENT GROWTH IMPACT STATEMENT

HHSC has determined that during the first five years that the sections will be in effect:

- (1) the proposed rules will not create or eliminate a government program;
- (2) implementation of the proposed rules will not affect the number of employee positions;
- (3) implementation of the proposed rules will not require an increase or decrease in future legislative appropriations;
- (4) the proposed rules will not affect fees paid to the agency;
- (5) the proposed rules will not create a new rule under Government Code §2155.076;
- (6) the proposed rules will expand, limit, or repeal an existing rule;
- (7) the proposed rules will not change the number of individuals subject to the rule; and
- (8) the proposed rules will not affect the state's economy.

SMALL BUSINESS, MICRO-BUSINESS, AND RURAL COMMUNITY IMPACT ANALYSIS

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that the proposed rules will not have an adverse economic effect on small and micro-businesses; or rural communities. Consequently, an economic impact statement and regulatory flexibility analysis, pursuant to Government Code §2006.002, are not required.

ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

There are no anticipated economic costs to persons who are required to comply with the rules as proposed.

There is no anticipated negative impact on local employment.

COSTS TO REGULATED PERSONS

Government Code §2001.0045 does not apply to these rules because the rules do not impose a cost on regulated persons, including another state agency, a special district, or a local government.

PUBLIC BENEFIT

Katherine Molina, Associate Commissioner of the Office of Compliance and Quality Control, has determined that for each year of the first five years the rules are in effect, the public will benefit from clarifying the bid protest procedures.

TAKINGS IMPACT ASSESSMENT

HHSC has determined that the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Government Code §2007.043.

PUBLIC COMMENT

Questions concerning the proposed rules may be directed to Katherine Molina at (512) 406-2451.

Written comments on the proposed rules may be submitted to Katherine Molina, Associate Commissioner of Compliance and Quality Control, Procurement and Contracting Services, Texas Health and Human Services Commission, 1100 W. 49th Street, Mail Code 2020, Austin, Texas 78756; or e-mailed to Katherine.Molina@hhsc.state.tx.us.

Comments must be received no later than 30 days from the date of publication of the proposed rules in the *Texas Register*. The last day to submit comments falls on a Sunday; therefore, comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) e-mailed by midnight on the last day of the comment period. When e-

mailing comments, please indicate "Comments on Proposed Rule 18R073" in the subject line.

STATUTORY AUTHORITY

The amendments, repeal, and new rule are proposed under Government Code §531.0055(e) and §531.033, which provide the Executive Commissioner of HHSC with rulemaking authority, and under Government Code §2155.076, which requires state agencies to adopt protest procedures by rule.

The proposed rules affect Government Code §531.00553 and §2155.076.

This agency hereby certifies that this proposal has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

TITLE 1 ADMINISTRATION
PART 15 TEXAS HEALTH AND HUMAN SERVICES COMMISSION
CHAPTER 391 PURCHASE OF GOODS AND SERVICES BY THE TEXAS
 HEALTH AND HUMAN SERVICES COMMISSION
SUBCHAPTER A INTRODUCTION

§391.103. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

(1) "Benefit" means anything reasonably regarded as pecuniary gain or pecuniary advantage.

(2) "Best value" means the optimum combination of economy and quality that is the result of fair, efficient, and practical procurement decision-making and which achieves HHSC procurement objectives. Best value may consist of a combination of:

(A) purchase price;

(B) meeting required specifications;

(C) installation costs;

(D) life cycle costs;

(E) anticipated quality and reliability of the goods/services;

(F) delivery terms;

(G) respondent's performance under past contracts and ratings in the Comptroller's Vendor Performance Tracking System;

(H) cost of any required training for employees; and

(I) other relevant factors for that specific contract.

(3) "Competition" means a contract or purchasing action in which HHSC posts a solicitation, inviting proposals, offers, or bids from qualified vendors.

(4) "Contract" means a written agreement, including a purchase order, to purchase goods or services between HHSC and a vendor.

(5) "Contracting personnel" means all HHSC personnel involved in a procurement, contract administration, contract management, contract monitoring, and contract oversight.

(6) "Contractor" means an individual, firm, or entity that contracts with HHSC to provide goods or services.

(7) "Emergency purchase" means a purchase for which delay would create a hazard to life, health, safety, welfare, or property or would cause undue additional cost to the state.

(8) "Enrollment contract" means the contracting of vendors that meet qualifications or criteria for participation specified by HHSC and agree to provide the contracted goods or services in accordance with specific terms and conditions including for a standard rate or cost reimbursement.

(9) "HHSC" means the Texas Health and Human Services Commission or its designee.

(10) "Parceling" means the artificial division or intentional division of a purchase of same, like, or related goods, services, or construction into several purchases of smaller quantities, in order to circumvent competitive procurement.

(11) "Preferred supplier" means a provider of goods or services that state or federal law requires HHSC to provide a preference in the procurement of goods or services.

(12) "Procurement method" means the procedure employed by HHSC to acquire goods and services in accordance with this chapter.

(13) "Procurement file" means written documentation pertaining to the management of a procurement, including evidence of the decisions made by HHSC regarding the method, selection, and justification of a procurement.

(14) "Proprietary purchase" is the purchase of a product or service that is proprietary to one vendor and the proprietary nature of that good or service does not permit an equivalent good or service to be obtained.

(15) "Protestant" means any ~~[actual or potential]~~ respondent that files a protest in connection with a solicitation, evaluation or award of a contract, in accordance with Subchapter D of this Chapter (relating to Protests)~~[§391.403 of this subchapter (relating to Applicability)]~~.

(16) "Respondent" means a person or entity that submits a written or electronic response to a solicitation.

(17) "Sole source" means a type of proprietary purchase where the good or service is only available through a single vendor.

(18) "Solicitation" means the written invitation for bids, request for offers, request for proposals, or similar instrument that is posted on the HHSC Website and/or Electronic State Business Daily, seeking responses from qualified vendors for needed goods and services. This term includes "price requests" and "pricing requests" sent to Department of Information Resources vendors to get pricing, based on a specific scope of work, through a Cooperative Contract or DBITS contract.

(19) "Specifications" means the written statement or description and enumeration of particulars of goods to be purchased or services to be performed.

(20) "Vendor" means an individual or entity that is organized for the purpose of offering goods or services for sale, lease, lease-purchase, or contract.

TITLE 1 ADMINISTRATION
PART 15 TEXAS HEALTH AND HUMAN SERVICES COMMISSION
CHAPTER 391 PURCHASE OF GOODS AND SERVICES BY THE TEXAS
HEALTH AND HUMAN SERVICES COMMISSION
SUBCHAPTER D PROTESTS

§391.401. Purpose.

The purpose of this subchapter is to provide a formal ~~[an internal]~~ protest procedure to be used by any respondent who is allegedly aggrieved in connection with the solicitation, evaluation, or award of a contract by HHSC.

§391.405. Filing of a Protest.

(a) To be considered timely, the protest must be filed: [HHSC must receive a protest, in writing, no later than ten working days after the protestant knows, or should have known, of the occurrence of the act or omission by HHSC that is the basis for the protest.]

(1) no later than the date that responses to a solicitation are due, if the protest concerns the solicitation; or

(2) no later than 10 business days after the notice of award, if the protest concerns the evaluation or award.

(b) A protestant must file ~~[submit]~~ a protest with ~~[to]~~ the ~~[the]~~ Deputy Executive Commissioner of Procurement and Contracting Services, ~~[for Enterprise Contracting Operations;]~~ Texas Health and Human Services Commission, ~~[at]~~ Brown-Heatly Building, ~~[at]~~ 4900 N. Lamar Blvd., ~~[at]~~ Austin, TX 78751-2316.

(c) The protestant also must mail or deliver copies of the protest to other interested parties known to the protestant.

(d) ~~[e)]~~ A protest must be sworn and must contain:

(1) a specific identification of the statutory or regulatory provision that the protestant alleges has been violated;

(2) a specific description of each act alleged to have violated the statutory or regulatory provision identified in the protest;

(3) a precise statement of the relevant facts, including sufficient documentation that the protest has been timely filed and a description of the resulting adverse impact to the protestant;

(4) a statement of any issues of law or fact that the protestant contends must be resolved;

(5) a statement of the argument and authorities that the protestant offers in support of the protest; and

(6) a statement that copies of the protest have been mailed or delivered to any other interested party known to the protestant.

(e) For the purpose of this subchapter, "interested parties" means respondents in connection to the solicitation, response evaluation, or contract award that is being protested.

§391.407. Review and Disposition of Protests.

(a) Upon receipt of a protest, the Deputy Executive Commissioner of Procurement and Contracting Services may:

(1) dismiss the protest if:

(A) it is not timely; or

(B) it does not meet the requirements of §391.405 of this subchapter (relating to Filing of a Protest);

(2) solicit written responses to the protest from other interested parties;
or

(3) attempt to resolve the protest by mutual agreement.

(b) If the protest is not dismissed or resolved by mutual agreement, the Deputy Executive Commissioner of Procurement and Contracting Services will issue a written determination on the protest.

(1) If the Deputy Executive Commissioner of Procurement and Contracting Services determines that no violation of the specific statutory or regulatory provision cited by the protestant has occurred, he or she shall so inform the protestant and other interested parties by letter that sets forth the reasons for the determination.

(2) If the Deputy Executive Commissioner of Procurement and Contracting Services determines that HHSC violated the specific statutory or regulatory provision cited by the protestant in a case where HHSC has not awarded a contract, he or she shall so inform the protestant and other interested parties by letter that sets forth the reasons for the determination and any appropriate remedial action.

(3) If the Deputy Executive Commissioner of Procurement and Contracting Services determines that HHSC violated the specific statutory or regulatory provision cited by the protestant in a case where HHSC awarded a contract, he or she shall so inform the protestant and other interested parties by letter that sets forth the reasons for the determination, which may include ordering the contract void.

(4) The Deputy Executive Commissioner of Procurement and Contracting Services' written determination is the final administrative action by HHSC on a protest filed under this subchapter unless the protestant files an appeal of the determination under subsection (c) of this section.

(c) The protestant may appeal the Deputy Executive Commissioner of Procurement and Contracting Services' determination on a protest to the Executive Commissioner. The appeal must be in writing and received in the Executive Commissioner's office no later than 10 business days after the date of the Deputy Executive Commissioner of Procurement and Contracting Services' determination. The appeal shall be limited to review of the Deputy Executive Commissioner of Procurement and Contracting Services' determination. The protestant must mail or deliver copies of the appeal to other interested parties, and each copy must contain a certified statement that such copies have been provided.

(1) A protest or appeal that is not timely filed shall not be considered unless good cause for delay is shown or the Executive Commissioner determines that an appeal raises issues that are significant to HHSC's procurement practices or procedures in general.

(2) The Executive Commissioner may confer with the HHSC Chief Counsel in his or her review of the appeal.

(3) The Executive Commissioner will review the appeal of the Deputy Executive Commissioner of Procurement and Contracting Services' determination and render a final decision on the protest issues.

(4) A decision issued in writing by the Executive Commissioner shall be the final administrative action of HHSC on a protest determination that is appealed under this subchapter.

~~§391.407. Review and Disposition of Protests.~~

~~[The Deputy Executive Commissioner for Enterprise Contracting Operations will review the protest, examine the procurement file and supporting information, and render a final decision on the protest issues.]~~

§391.409. Contract Awards During ~~[during]~~ Protest.

HHSC will not award a contract that is subject to a properly filed protest until HHSC provides a final written disposition of the protest in accordance with §391.407 of this subchapter (relating to Review and Disposition of Protests). The Executive Commissioner may waive this requirement if the Executive Commissioner determines ~~[it is determined]~~ that HHSC must award a contract ~~[must be awarded]~~, without delay, to protect the best interests of the state.