

TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

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ALL Districts

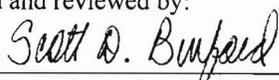
The Texas Transportation Commission (commission) finds it necessary to adopt amendments to §9.3 relating to Protest of Department Purchases under the State Purchasing and General Services Act to be codified under Title 43, Texas Administrative Code, Part 1.

The preamble and the adopted 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 adopted and are authorized for filing with the Office of the Secretary of State.

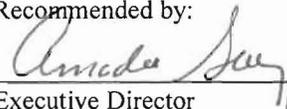
The executive director is directed to take the necessary steps to implement the actions as ordered in this minute order, pursuant to the requirements of the Administrative Procedure Act, Government Code, Chapter 2001.

Submitted and reviewed by:



Director, General Services Division

Recommended by:



Executive Director

112067 DEC 17 09

Minute
Number

Date
Passed

1 Adoption Preamble

2 The Texas Department of Transportation (department) adopts
3 amendments to §9.3, concerning Protest of Department Purchases
4 under the State Purchasing and General Services Act. The
5 amendments to §9.3 are adopted without changes to the proposed
6 text as published in the October 9, 2009 issue of the *Texas*
7 *Register* (34 TexReg 7058) and will not be republished.

8

9 EXPLANATION OF ADOPTED AMENDMENTS

10 The department previously adopted §9.3 to provide a procedure
11 for vendors to protest purchases made by the department. Under
12 the current rule, the protest is addressed to the district
13 engineer or the director of purchasing, depending on the
14 location of the purchase, but sent to the director of general
15 services. Revisions to this delegation authority are necessary
16 due to recent department organization changes. The delegation
17 authority afforded by this revision will also serve to
18 accommodate future organizational changes that may affect
19 personnel associated with the receipt and processing of
20 department purchases under the State Purchasing and General
21 Services Act.

22

23 Amendments to §9.3 update the delegation authority associated
24 with department personnel responsible for the receipt and
25 processing of protests related to the applicable purchases. All

1 references to district engineer are removed throughout the
2 section. The amendments also simplify the process prescribed
3 for vendor complainants filing protests with the department by
4 providing one point of contact within the department to whom
5 complainants will send their complaints. The department point
6 of contact will handle any further distribution of the complaint
7 to department personnel.

8

9 COMMENTS

10 No comments on the proposed amendments were received.

11

12 STATUTORY AUTHORITY

13 The amendments are adopted under Transportation Code, §201.101,
14 which provides the Texas Transportation Commission with the
15 authority to establish rules for the conduct of the work of the
16 department, and more specifically, Government Code, §2155.076,
17 which provides the department with the authority to develop
18 rules for protest procedures associated with the State
19 Purchasing and General Services Act.

20

21 CROSS REFERENCE TO STATUTE

22 Transportation Code, §201.101 and 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) Director of general services--The director of the general services division of the department.

(5) Director of purchasing--The director of purchasing in the general services division of the department, or other individual as designated by the director of general services.

~~[(6) District engineer--The chief administrative officer in charge of a district of the department.]~~

(6) ~~[(7)]~~ Division--An organizational unit in the

1 department's Austin headquarters.

2 (7) [~~(8)~~] Executive director--The executive director of
3 the department.

4 (8) [~~(9)~~] Interested party--A vendor that has submitted a
5 bid, proposal, or other expression of interest for the purchase
6 involved.

7 (9) [~~(10)~~] Purchase--A procurement action for commodities
8 or non-professional services under the Act.

9 (c) Filing of protest.

10 (1) An actual or prospective bidder or offeror who is
11 aggrieved in connection with the solicitation, evaluation, or
12 award of a purchase may file a written protest. The protest
13 must be [~~addressed to the attention of the district engineer in~~
14 ~~whose district the action is being or was processed, or to the~~
15 ~~director of purchasing for purchases made on behalf of a~~
16 ~~division, but sent to the office of the director of general~~
17 ~~services. The protest must be~~] received in the office of the
18 director of general services 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 Act that
22 the action is alleged to have violated;

23 (B) a specific description of the alleged violation;

1 (C) a precise statement of the relevant facts;
2 (D) the issue to be resolved;
3 (E) argument and authorities in support of the protest;
4 and

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

7 (d) Suspension of award. If a protest or appeal of a
8 protest has been filed, then the department will not proceed
9 with the solicitation or the award of the purchase until the
10 executive director or his or her designee, not below the level
11 of division director, consults with the director of general
12 services [~~and the appropriate district engineer or the director~~
13 ~~of purchasing,~~] and makes a written determination that the award
14 of the purchase should be made without delay to protect
15 substantial interests of the department.

16 (e) Informal resolution. The [~~district engineer or the~~
17 director of purchasing may informally resolve the dispute,
18 including:

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

21 (2) resolving the dispute by mutual agreement.

22 (f) Written determination. If the protest is not resolved
23 by agreement, the [~~district engineer or the~~] director of

1 purchasing will issue a written determination to the protesting
2 party and interested parties which sets forth the reason for
3 [~~of~~] the determination. The [~~district engineer or the~~] director
4 of purchasing may determine that:

5 (1) no violation has occurred; or

6 (2) a violation has occurred and it is necessary to take
7 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 to
14 the executive director. The written appeal must be received in
15 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 [~~determining district engineer or the~~]
20 director of purchasing and other interested parties with an
21 affidavit that such copies have been 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 director
13 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.