

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 §9.1 Claims for Purchase Contracts, and new §9.7, Protest of Contract Practices or Procedures, to be codified under Title 43, Texas Administrative Code, Part 1.

The preamble and the proposed amendments and new section, 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 §9.1 and new §9.7 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:


General Counsel

Recommended by:


Executive Director

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Minute Number Date Passed

1 Proposed Preamble

2 The Texas Department of Transportation (department) proposes
3 amendments to §9.1 and new §9.7, concerning contract claims and
4 protests. These rules are proposed concurrently with new
5 §§1.101-1.108 of this title, concerning alternative dispute
6 resolution.

7

8 EXPLANATION OF PROPOSED AMENDMENTS AND NEW SECTION

9 Title 43, Texas Administrative Code (TAC), §9.2, Contract Claim
10 Procedure, applies to contract claims described by the statutory
11 provisions listed in Transportation Code, §201.112 (generally,
12 aviation contracts, logo signs contracts, highway improvement
13 contracts, and professional or consulting services contracts).
14 Section 9.1, currently titled Claims for Purchase Contracts,
15 applies to contract claims that are subject to Government Code,
16 Chapter 2260; however, the wording of the section may be subject
17 to a more restrictive reading. Section 9.1 is amended to
18 clarify the application of that section, namely that the section
19 applies to the processing of all contract claims except those
20 processed under §9.2.

21

22 The procedure for protests of purchases by the department under
23 the State Purchasing and General Services Act (Government Code,
24 Chapters 2151-2177) is provided by §9.3. Additionally, §9.154
25 provides the exclusive procedures for protests related to the

1 procurement of design-build contracts, and §27.6 provides the
2 exclusive procedure for protests related to procurement of
3 comprehensive development agreements. However, protest
4 procedures for other types of contracts (for example, highway
5 improvement contracts, and engineering services contracts) are
6 not currently provided for by rule. New §9.7 provides a general
7 protest process.

8
9 Amendments to §9.1 change the section heading to indicate that
10 the section applies to contracts that are subject to Government
11 Code, Chapter 2260. To clarify the types of contracts to which
12 the section applies, the amendments substitute "contract" for
13 the references to "purchase contract" throughout the section and
14 provide a definition of "contract." "Contract" means a written
15 contract for goods or services, but does not include a contract
16 to which §9.2 applies. In the definition of "director of
17 contract services," the location of the Contract Services
18 Section is corrected to the department's General Services
19 Division. In the definition of "executive director," the
20 limitation that a person designated to perform the duties
21 assigned to the executive director under the section may not be
22 below the level of office director is removed. This change
23 allows the executive director more flexibility in designating a
24 department employee who has expertise in contract claims
25 negotiations. The definition of "purchase" is removed because

1 the term is not used in the amended section.

2

3 New §9.7, Protest of Contract Practices or Procedures, provides
4 a general protest process that is applicable to the award of a
5 contract for which the rules of the commission do not provide a
6 protest process. The provisions to which this section applies
7 include Chapter 9, Subchapter B, Highway Improvement Contracts,
8 Subchapter C, Contracting for Architectural, Engineering, and
9 Surveying Services, and Subchapter F, Contracts for Scientific,
10 Real Estate Appraisal, Right of Way Acquisition, and Landscape
11 Architectural Services.

12

13 New §9.7(b) provides that, for a protest to be valid, it must be
14 received by the executive director within six days after the
15 aggrieved person knows, or should have known, of the action for
16 which the protest is filed.

17

18 New §9.7(c) provides the items that must be included in the
19 protest.

20

21 New §9.7(d) expressly authorizes the executive director to refer
22 the protest for alternative dispute resolution under Title 43,
23 Chapter 1, Subchapter G, Alternative Dispute Resolution; that
24 subchapter is proposed concurrently with the addition of this
25 provision. If the resolution is successful, a written agreement

1 will be produced and any suspension of the award of the contract
2 will be lifted.

3

4 New §9.7(e) provides the solicitation or the award of a contract
5 will continue after a protest has been filed unless the
6 executive director or, if the commission is to decide the
7 protest, the commission, determines that the delay will not
8 substantially harm the interests of the department.

9

10 Under New §9.7(f) if the protest is not resolved by agreement,
11 the executive director will deliver to the commission a written
12 recommendation for a decision that includes the reasons for the
13 recommendation if the commission is to decide the protest or, if
14 the department decides the protest, the executive director will
15 issue a written decision on the protest that includes reasons
16 for the decision. The recommendation or decision will be that a
17 violation did not occur or that a violation has occurred, but
18 remedial action is unnecessary or remedial action is necessary.
19 Remedial action may include voiding the contract, reversing the
20 contract award, or re-advertising the contract using revised
21 specifications. The executive director will deliver a copy of
22 the recommendation or decision, as appropriate, to the
23 protesting party and interested parties identified in the
24 protest.

25

1 New §9.7(g) applies only if the commission decides the protest.
2 The commission may consider, in addition to the executive
3 director's recommendation, oral presentations and written
4 documents presented by the department, protesting party, or
5 interested parties identified in the protest. The commission
6 will adopt its decision by minute order.

7
8 New §9.7(h) clarifies that for this section the commission
9 decides a protest if commission rules provide that the
10 commission awards the contract that is the subject of the
11 protest. For example, under current adopted rules the
12 commission awards highway improvement contracts, and so the
13 commission would make the decision on any protest concerning
14 such contracts. The executive director decides the protests on
15 other contracts. Finally, a decision of the commission or
16 executive director is final and the protest may not be the
17 subject of a contested case.

18

19 FISCAL NOTE

20 James Bass, Chief Financial Officer, has determined that for
21 each of the first five years in which the amendments and new
22 section as proposed are in effect, there will be no fiscal
23 implications for state or local governments as a result of
24 enforcing or administering the amendments and new section.

25

1 Jeff Graham, General Counsel, has certified that there will be
2 no significant impact on local economies or overall employment
3 as a result of enforcing or administering the amendments and new
4 section.

5

6 PUBLIC BENEFIT AND COST

7 Mr. Graham has also determined that for each year of the first
8 five years in which the sections are in effect, the public
9 benefit anticipated as a result of enforcing or administering
10 the amendments and new section will be to clarify the procedures
11 used for contract claims involving the department and for the
12 protest of the department's contract policies or procedures.
13 There are no anticipated economic costs for persons required to
14 comply with the sections as proposed. There will be no adverse
15 economic effect on small businesses.

16

17 SUBMITTAL OF COMMENTS

18 Written comments on the proposed amendments to §9.1 and new §9.7
19 may be submitted to Robin Carter, Office of General Counsel,
20 Texas Department of Transportation, 125 East 11th Street,
21 Austin, Texas 78701-2483 or through RuleComments@txdot.gov with
22 the subject line "§9.1 and §9.7." The deadline for receipt of
23 comments is 5:00 p.m. on September 10, 2012. In accordance with
24 Transportation Code, §201.811(a)(5), a person who submits
25 comments must disclose, in writing with the comments, whether

1 the person does business with the department, may benefit
2 monetarily from the proposed amendments and new section, or is
3 an employee of the department.

4

5 STATUTORY AUTHORITY

6 The amendments and new section are proposed under Transportation
7 Code, §201.101, which provides the Texas Transportation
8 Commission with the authority to establish rules for the conduct
9 of the work of the department, and more specifically, Government
10 Code, §2155.076, which requires each state agency to adopt rules
11 related to protest procedures for resolving vendor protests
12 relating to purchasing issues.

13

14 CROSS REFERENCE TO STATUTE

15 Government Code, Title 10, Subtitle D; Chapter 2254, Subchapter
16 A; and Chapter 2260. Transportation Code, Chapter 223,
17 Subchapters A-D.

SUBCHAPTER A. GENERAL

§9.1. Contract Claims under Government Code, Chapter 2260 [~~for~~
~~Purchase Contracts~~].

(a) Purpose. Government Code, Chapter 2260, provides a resolution process for certain contract claims against the state. [~~Chapter 2260 applies to purchase contracts of the Texas Department of Transportation entered into under the State Purchasing and General Services Act.~~] This section governs the filing, negotiation, and mediation of such a claim.

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

(1) Claim--A claim for breach of a [~~purchase~~] contract between a vendor and the department.

(2) Contract--A written contract, other than a contract specified in §9.2(a)(1) of this subchapter (relating to Contract Claim Procedure), between the department and a vendor for goods or services.

(3) [~~+2~~] Department--The Texas Department of Transportation.

(4) [~~+3~~] Director of contract services--The director of the Contract Services Section of the department's General Services Division [~~Office of General Counsel~~].

1 (5) [~~(4)~~] Executive director--The executive director of
2 the department or the director's designee [~~not below the level~~
3 ~~of office director~~].

4 ~~[(5) Purchase --A procurement action under Government~~
5 ~~Code, Title 10, Subtitle D, for commodities or non professional~~
6 ~~services.]~~

7 (6) Vendor--An individual, partnership, corporation, or
8 other [~~business~~] entity that is a party to a [~~written~~] contract
9 [~~for a purchase~~] with the department.

10 (c) Filing of claim. A vendor may file a notice of claim
11 with the director of contract services within 180 days after the
12 date of the event giving rise to the claim. The claim must
13 contain the:

14 (1) nature of the alleged breach;

15 (2) amount the vendor seeks as damages; and

16 (3) legal theory of recovery.

17 (d) Negotiation.

18 (1) The executive director will begin negotiations with
19 the vendor to resolve the claim. The negotiations will begin no
20 later than the 120th day after the date the claim is received.

21 (2) The negotiation may be written or oral. The
22 executive director may afford the vendor an opportunity for a
23 meeting to informally discuss the disputed matters and provide

1 the vendor an opportunity to present relevant information.

2 (e) Mediation.

3 (1) The department and the vendor may agree to nonbinding
4 mediation. The department will agree to mediation if the
5 executive director determines that the mediation may speed
6 resolution of the claim or otherwise benefit the department.

7 (2) The executive director will appoint a department
8 employee as mediator. The employee must not have had any
9 previous involvement or participation in the administration of
10 the contract or the resolution of the claim.

11 (3) If the vendor objects to the appointment of a
12 department employee as mediator, the department will select and
13 hire a private mediator from outside the department. The costs
14 for the services of a private mediator will be apportioned
15 equally between the department and the vendor.

16 (4) The role of a mediator is limited to assisting the
17 parties in attempting to reach an agreed resolution of the
18 issues.

19 (f) Final offer.

20 (1) The executive director will make a final offer to the
21 vendor within 90 days of beginning negotiations.

22 (2) If the disposition is acceptable to the vendor, the
23 vendor shall advise the director of contract services in writing

1 within 20 days of the date of the final offer. The department
2 will forward an agreed disposition involving payment to the
3 vendor for a final and binding order on the claim.

4 (g) Contested case hearing. If the vendor is dissatisfied
5 with the final offer, or if the claim is not resolved before the
6 90th day after negotiations begin, the vendor may petition the
7 executive director for an administrative hearing to litigate the
8 unresolved issues in the claim under the provisions of §1.21 et
9 seq. of this title (relating to Procedures in Contested Case
10 [~~Cases~~]).

11

12 §9.7. Protest of Contract Practices or Procedures.

13 (a) Application of section. This section provides a
14 general protest process for the award of a contract for which
15 the rules of the commission do not provide a protest process.
16 For the purpose of the application of this section, a rule that
17 merely provides that a protest, appeal, or other type of request
18 for review may be filed, without establishing any other steps
19 that must be satisfied, does not provide a protest process.

20 (b) Filing of protest. A person who is aggrieved in
21 connection with the solicitation, evaluation, or award of a
22 contract to which this section applies may file a written
23 protest. The protest must be received by the executive director

1 within six days after the aggrieved person knows, or should have
2 known, of the action. A protest that is not filed within the
3 six-day period will not be considered.

4 (c) Contents of protest. The protest must contain:

5 (1) the provision of the statute or rule that the action
6 is alleged to have violated;

7 (2) a specific description of the alleged violation;

8 (3) a precise statement of the relevant facts;

9 (4) the issue to be resolved;

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

11 and

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

14 (d) Informal resolution. The executive director may refer
15 the protest for alternative dispute resolution under Chapter 1,
16 Subchapter G of this title (relating to Alternative Dispute
17 Resolution). If the protest is resolved by agreement:

18 (1) the agreement will be reduced to writing; and

19 (2) if the solicitation or the award of the contract has
20 been suspended under subsection (e) of this section, the
21 solicitation or award will resume immediately after the
22 agreement is reached.

23 (e) Suspension of solicitation or award. If a protest has

1 been filed, the solicitation or the award of the contract will
2 proceed unless the executive director or, if the commission is
3 to decide the protest, the commission, determines that the delay
4 of the solicitation or award of the contract will not
5 substantially harm the interests of the department.

6 (f) Executive director's recommendation or decision. This
7 subsection applies if the protest is not resolved by agreement.
8 If the commission is to decide the protest, the executive
9 director will deliver to the commission, protesting party, and
10 interested parties identified in the protest a written
11 recommendation for a decision that includes the reasons for the
12 recommendation. If the department, rather than the commission,
13 decides the protest, the executive director will issue a written
14 decision to the protesting party and interested parties
15 identified in the protest that includes reasons for the
16 decision. The executive director may recommend to the
17 commission or may decide, as appropriate, that:

18 (1) no violation has occurred;

19 (2) a violation has occurred, but remedial action is
20 unnecessary; or

21 (3) a violation has occurred and it is necessary to take
22 remedial action that may include:

23 (A) declaring the contract void;

1 (B) reversing the award; or

2 (C) re-advertising the contract using revised

3 specifications.

4 (g) Commission's decision. If the commission is to decide
5 the protest, in addition to the executive director's
6 recommendation provided under subsection (f) of this section,
7 the commission may consider oral presentations and written
8 documents presented by the department, protesting party, or
9 interested parties. The chair shall set the order and the time
10 allowed for presentations. The commission's decision on the
11 protest will be adopted by order and may be made part of the
12 order awarding the contract that is the subject of the protest.

13 (h) Authority to make decision on protest. For the
14 purposes of this section, the commission decides a protest if
15 commission rules provide that the commission awards the contract
16 that is the subject of the protest. The executive director
17 decides the protests on other contracts. A decision of the
18 commission or executive director is final and the protest may
19 not be the subject of a contested case.