

PROJECT NO. 24803

RULEMAKING CONCERNING	§	PUBLIC UTILITY COMMISSION
PROTEST PROCEDURES FOR	§	OF TEXAS
RESOLVING VENDOR PROTESTS	§	
RELATING TO PURCHASING	§	
ISSUES AS REQUIRED BY TEXAS	§	
GOVERNMENT CODE §2155.076	§	

**ORDER ADOPTING §27.161 RELATING TO
PROCEDURES FOR RESOLVING VENDOR PROTESTS
AS APPROVED AT THE AUGUST 23, 2002 OPEN MEETING**

The Public Utility Commission of Texas (commission) adopts new §27.161, relating to Procedures for Resolving Vendor Protests, with no changes to the proposed text as published in the June 28, 2002 *Texas Register* (27 TexReg 5662). The rule provides procedures for resolving vendor protests relating to agency purchasing issues as required by Texas Government Code Annotated §2155.076. The new rule closely follows the rule on such protests promulgated by the Texas Building and Procurement Commission in Texas Administrative Code, Title 1, Part 5, Chapter 111, Subchapter A, §111.3. This new section was adopted under Project Number 24803.

The commission received no comments on the proposed new section.

This section is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §14.052 (Vernon 1998, Supplement 2002) (PURA) which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure; and specifically, Texas Government Code

Annotated §2155.076, which requires the commission to develop and adopt protest procedures for vendors' protests concerning purchases that are consistent with the Texas Building and Procurement Commission rules on the same subject.

§27.161. Procedures for Resolving Vendor Protests.

- (a) **Definitions.** The following words and terms, when used in this subchapter, shall have the following meaning unless the context clearly indicates otherwise.
- (1) **Commission** — The Public Utility Commission of Texas.
 - (2) **Purchasing officer** — A commission employee who has received certification as a Texas Public Purchaser and who is responsible for assisting with commission purchases, and who has been designated the purchasing officer for the purchase in question.
 - (3) **Interested parties** — All vendors who have submitted bids or proposals for the provision of goods or services pursuant to a solicitation for a contract with the commission.
- (b) **Protest procedures.** Any actual or prospective bidder, offerer, proposer or contractor who considers himself to have been aggrieved in connection with the commission's solicitation, evaluation, or award of a contract may formally protest to the purchasing officer. Such protests must be made in writing and received by the purchasing officer within ten working days after the protesting party knows, or should have known, of the occurrence of the action that is protested. Protests must conform to the requirements of this subsection and subsection (d) of this section, and shall be resolved through use of the procedures that are described in subsections (e) — (j) of this section. The protesting party shall mail or deliver copies of the protest to the purchasing officer and other interested parties.

- (c) **Stay of contract award.** In the event of a timely protest under this section, the commission shall not proceed further with the solicitation or award of the contract unless the executive director, after consultation with the purchasing officer and the general counsel, makes a written determination that the contract must be awarded without delay, to protect the best interests of the commission.
- (d) **Protest requirements.** A protest must be sworn and contain:
- (1) a specific identification of the statutory or regulatory provision that the protesting party alleges has been violated;
 - (2) a specific description of each action by the commission that the protesting party alleges to be a violation of the statutory or regulatory provision that the protesting party has identified pursuant to paragraph (1) of this subsection;
 - (3) a precise statement of the relevant facts;
 - (4) a statement of any issues of law or fact that the protesting party contends must be resolved;
 - (5) a statement of the argument and authorities that the protesting party offers in support of the protest; and
 - (6) a statement that copies of the protest have been mailed or delivered to the commission and all other identifiable interested parties.

- (e) **Purchasing officer's role and responsibilities.** The purchasing officer shall conduct a review of issues raised by the protesting parties and shall have the following role and responsibilities in resolving the protest issues among the parties:
- (1) The purchasing officer may settle and resolve the dispute over the solicitation or award of a contract at any time before the matter is submitted on appeal to the executive director.
 - (2) The purchasing officer may solicit written responses to the protest from other interested parties.
 - (3) If the protest is not resolved by mutual agreement, the purchasing officer will issue a written determination on the protest. The purchasing officer will consult with the general counsel in preparing a written determination.
 - (4) If the purchasing officer determines that no violation of statutory or regulatory provisions has occurred, then the purchasing officer shall inform the protesting party, the executive director, and other interested parties by letter that states the reasons for the determination.
 - (5) If the purchasing officer determines that a violation of any statutory or regulatory provisions may have occurred in a situation in which a contract has not been awarded, then the purchasing officer shall inform the protesting party, the executive director, and other interested parties of that determination by letter that states the reasons for the determination and the appropriate remedy.
 - (6) If the purchasing officer determines that a violation of any statutory or regulatory provisions may have occurred in a situation in which a contract has been awarded, then the purchasing officer shall inform the protesting party, the executive

director, and other interested parties of that determination by letter that states the reasons for the determination. This letter may include a declaration that the contract is void.

- (f) **Appeal from purchasing officer determination.** The protesting party may appeal a determination of a protest by the purchasing officer to the executive director of the commission. An appeal of the purchasing officer's determination must be in writing and received in the executive director's office no later than ten working days after the date on which the purchasing officer has sent written notice of his determination. The scope of the appeal shall be limited to a review of the purchasing officer's determination. The protesting party shall mail or deliver to the purchasing officer and all other interested parties a copy of the appeal, which must contain a certified statement that such copies have been provided.
- (g) **Executive director review or reference of appeal.** The executive director shall confer with general counsel in the review of the matter appealed. The executive director may consider any documents that the commission staff or interested parties may have submitted. At the discretion of the executive director, the matter may be referred to the commissioners for their consideration in a regularly scheduled open meeting or the executive director may issue a written decision on the protest.
- (h) **Appeals referred to commission.** The following requirements shall apply to a protest that the executive director has referred to the commissioners:

- (1) The executive director shall deliver copies of the appeal and any responses by interested parties to the commissioners.
 - (2) The commissioners may consider any documents that commission staff or interested parties have submitted.
 - (3) The commissioners may confer with general counsel in their review of the matter appealed.
 - (4) The commissioners' determination of the appeal shall be made on the record and reflected in the minutes of the open meeting, and shall be final.
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- (i) **Written determination of appeal.** A determination issued either by the commissioners in open meeting, or in writing by the executive director, shall be the final administrative action of the commission.
 - (j) **Protest/appeal not timely filed.** A protest or appeal that is not filed timely shall not be considered unless good cause for delay is shown or the executive director determines that an appeal raises issues that are significant to commission procurement practices or procedures in general.
 - (k) **Document retention.** The commission shall maintain all documentation on the purchasing process that is the subject of a protest or appeal in accordance with the commission's retention schedule.

This agency hereby certifies that the rule, as adopted, has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority. It is therefore ordered by the Public Utility Commission of Texas that §27.161 relating to Procedures for Resolving Vendor Protests is hereby adopted with no changes to the text as proposed.

ISSUED IN AUSTIN, TEXAS ON THE _____ DAY OF _____ 2002.

PUBLIC UTILITY COMMISSION OF TEXAS

Rebecca Klein, Chairman

Brett A. Perlman, Commissioner