

1 **CHAPTER 800. GENERAL ADMINISTRATION**

2 **PROPOSED RULES WITH PREAMBLE TO BE SUBMITTED TO THE TEXAS**
3 **REGISTER. THIS DOCUMENT WILL HAVE NO SUBSTANTIVE CHANGES BUT IS**
4 **SUBJECT TO FORMATTING CHANGES AS REQUIRED BY THE TEXAS REGISTER.**

5 ON JULY 7, 2020, THE TEXAS WORKFORCE COMMISSION PROPOSED THE RULES
6 BELOW WITH PREAMBLE TO BE SUBMITTED TO THE TEXAS REGISTER.

7 Estimated Publication Date of the Proposal in the *Texas Register*: **July 24, 2020**
8 Estimated End of Comment Period: **August 24, 2020**

9 The Texas Workforce Commission (TWC) proposes the following new section to Chapter 800,
10 relating to General Administration:

11 Subchapter A. General Provisions, §800.10

12 TWC proposes amendments to the following section of Chapter 800, relating to General
13 Administration:

14 Subchapter A. General Provisions, §800.3

15 TWC proposes the following new subchapters to Chapter 800, relating to General
16 Administration:

17 Subchapter H. Vendor Protests, §800.300 and §800.301
18 Subchapter I. Enhanced Contract Monitoring, §§800.350 - 800.352
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- 21 PART I. PURPOSE, BACKGROUND, AND AUTHORITY
- 22 PART II. EXPLANATION OF INDIVIDUAL PROVISIONS
- 23 PART III. IMPACT STATEMENTS
- 24 PART IV. COORDINATION ACTIVITIES

25 **PART I. PURPOSE, BACKGROUND, AND AUTHORITY**

26 The purpose of the proposed Chapter 800 rule amendments is to align TWC rules with the
27 following sections of the Texas Government Code requiring state agencies to adopt rules
28 regarding contracting and purchasing:

- 29 --Section 2252.202 requires agencies to adopt rules to promote compliance with the requirement
- 30 that any iron or steel product produced through a manufacturing process and used in the project
- 31 be produced in the United States;
- 32 --Section 2155.076 requires agencies to establish, by rule, procedures for resolving vendor
- 33 protests relating to purchasing issues; and
- 34 --Section 2261.253 requires agencies to establish, by rule, a procedure to identify each contract
- 35 that requires enhanced contract performance monitoring.

1 Additionally, minor nonsubstantive revisions are required to correct the Texas Comptroller of
2 Public Accounts (Comptroller) rule citation and to remove the obsolete Comptroller division
3 reference related to the Historically Underutilized Business (HUB) program.

4 **PART II. EXPLANATION OF INDIVIDUAL PROVISIONS**

5 (Note: Minor editorial changes are made that do not change the meaning of the rules and,
6 therefore, are not discussed in the Explanation of Individual Provisions.)

7 **SUBCHAPTER A. GENERAL PROVISIONS**

8 **TWC proposes the following amendments to Subchapter A:**

9 **§800.3. Historically Underutilized Businesses**

10 Section 800.3 is amended to correct the Comptroller rule citation related to the HUB program
11 and to remove the obsolete Comptroller division reference.

12 **§800.10. Purchase of Certain Products**

13 New §800.10 is added to comply with Texas Government Code, Chapter 2252, Subchapter G,
14 §2252.202, requiring that governmental entities adopt rules to promote compliance with the
15 uniform general conditions for a project in which iron or steel products will be used must require
16 that the bid documents provided to all bidders and the contract include a requirement that any
17 iron or steel product produced through a manufacturing process and used in the project be
18 produced in the United States.

19 The rule language states that TWC complies with the statutory requirements of Texas
20 Government Code, Chapter 2252, Subchapter G.

21 **SUBCHAPTER H. VENDOR PROTESTS**

22 **TWC proposes new Subchapter H:**

23 According to Texas Government Code §2155.076, each state agency, by rule, "shall develop and
24 adopt protest procedures for resolving vendor protests relating to purchasing issues. An agency's
25 rules must be consistent with the [Comptroller's] rules." TWC has procedures in place, and staff
26 has ensured that its procedures are consistent with the Comptroller's rules in 34 Texas
27 Administrative Code §1.72. However, pursuant to §2155.076, these procedures must be in rule.
28 New Subchapter H language reflects TWC's current procedures regarding bid protest procedures.

29 New §800.300 provides the following definitions related to vendor protests:

30 --Interested Parties--respondents in connection with the solicitation, evaluation, or award that is
31 being protested.

32 --Protestant--A respondent vendor that submits a protest under TWC vendor protest procedures.

33 --Respondent--A vendor that submits an offer or proposal in response to a TWC solicitation.

34 --Solicitation--A document, such as an Invitation for Bids, Request for Offers, Request for
35 Proposals, or Request for Qualifications that contains a request for responses from vendors to
36 provide specified goods and services. The term also refers to the process of obtaining responses
37 from vendors to provide specified goods and services.

38 --Vendor--A potential provider of goods or services to TWC.

1 New §800.301 describes the vendor protest procedures. The procedures state that any bid
2 respondent who is allegedly aggrieved in connection with the solicitation, evaluation, or award
3 of a contract by TWC may formally protest, in writing, to the TWC's director of business
4 operations.

5 The protest must be received by the TWC's director of business operations within 10 working
6 days after the protestant knows, or should have known, of the occurrence of the action that is
7 protested.

8 The rules state that a protest that is not filed timely shall not be considered unless the director of
9 business operations determines that a protest raises issues that are significant to the TWC's
10 procurement practices or procedures.

11 The protest must be signed by an authorized representative for the protestant, and the signature
12 notarized and contain the following details:

- 13 --the identifying name and number of the solicitation being protested
- 14 --identification of the specific statute or regulation that the protestant alleges has been violated
- 15 --a specific description of each act or omission alleged to have violated the statutory or
16 regulatory provision identified above in paragraph (2)
- 17 --a precise statement of the relevant facts, including:
 - 18 --sufficient documentation to establish that the protest has been timely filed; and
 - 19 --a description of the resulting adverse impact to the protestant
- 20 --a statement of the argument and authorities that the protestant offers in support of the protest
- 21 --an explanation of the action the protestant is requesting from TWC
- 22 --a statement confirming that copies of the protest have been mailed or delivered to any other
23 interested party known to the protestant.

24 The protestant may appeal determination of a protest to TWC's deputy executive director. The
25 appeal must be in writing, addressed to TWC's deputy executive director, and the protest must be
26 received by the deputy executive director no later than 10 business days after the date of receipt
27 of the written determination issued by the director of business operations.

28 Finally, in order to protect the best interests of TWC or the state, the rules provide that TWC
29 may move forward with a solicitation or contract award without delay, in spite of a timely filed
30 protest.

31 **SUBCHAPTER I. ENHANCED CONTRACT MONITORING**

32 **TWC proposes new Subchapter I:**

33 Texas Government Code §2261.253(c) requires state agencies to establish, by rule, a procedure
34 to identify contracts, prior to award, that require enhanced contract or performance monitoring
35 and submit the information to the agency's governing body. In its Procurement and Contract
36 Management Guide, the Comptroller has indicated that this requirement applies to "high-dollar
37 and high-risk contracts." TWC has a procedure implementing the requirement; however,
38 pursuant to §2261.253(c), these procedures must be in rule. New Subchapter I language reflects
39 the current TWC procedures regarding enhanced contract monitoring.

1 New §800.350 describes the purpose and scope of the subchapter. The purpose of this subchapter
2 is to implement the requirements of Texas Government Code, §2261.253(c) requiring state
3 agencies to establish, by rule, a procedure to identify each contract that requires enhanced
4 contract or performance monitoring.

5 Pursuant to Texas Government Code, §2261.253(d), this subchapter does not apply to:

- 6 --memoranda of understanding;
- 7 --interagency contracts;
- 8 --interlocal agreements; or
- 9 --contracts for which there is not a cost.

10 New §800.351 describes the enhanced contract monitoring policy and procedures. The rules state
11 that:

12 TWC shall identify contracts requiring enhanced monitoring by evaluating the risk factors,
13 which include:

- 14 --the complexity of the goods and services to be provided;
- 15 --the contract amount;
- 16 --the length and scope of the project supported by the contract;
- 17 --whether the services are new or have changed significantly since the last procurement of the
18 same services;
- 19 --whether TWC has experience with the contractor;
- 20 --whether the project affects external stakeholders or is of particular interest to third parties;
- 21 --whether TWC data is accessed by the contractor; and
- 22 --any other factors TWC determines in a particular circumstance will create a level of risk to the
23 state or TWC such that enhanced monitoring is required.

24 The rule states that for contracts requiring enhanced monitoring, the contractor shall report to the
25 assigned TWC contract manager on progress toward goals or performance measure
26 achievements, and the status of deliverables, if any, and on issues of which the contractor is
27 aware that may create an impediment to meeting the project timeline or goals.

28 Enhanced monitoring may also include site visits, additional meetings with contractor staff, and
29 inspection of documentation required by TWC to assess progress toward achieving performance
30 requirements.

31 Projects deemed medium or high risk shall be monitored by the assigned contract manager and
32 may involve additional team members such as an assigned project manager and staff from the
33 Office of General Counsel or the Finance, Information Technology, or Regulatory Integrity
34 Divisions, if warranted.

35 Texas Government Code, §2261.253 requires TWC to submit information on each contract
36 identified for enhanced contract monitoring to TWC's three-member Commission (Commission).
37 New §800.352 describes the reporting requirements for enhanced contractor monitoring as
38 follows:

1 --The director of Procurement and Contract Services (PCS Director) shall immediately notify the
2 Commission of any serious issue or risk that is identified with respect to a contract identified for
3 enhanced contract monitoring.

4 --The contract manager shall report on the status of all contracts subject to enhanced monitoring
5 to the PCS director quarterly.

6 --If any serious issues or risks are identified about a contract subject to enhanced monitoring, the
7 PCS director will immediately notify the director of business operations and the executive
8 director.

9 **PART III. IMPACT STATEMENTS**

10 Chris Nelson, Chief Financial Officer, has determined that for each year of the first five years the
11 rules will be in effect, the following statements will apply:

12 There are no additional estimated costs to the state and to local governments expected as a result
13 of enforcing or administering the rules.

14 There are no estimated cost reductions to the state and to local governments as a result of
15 enforcing or administering the rules.

16 There are no estimated losses or increases in revenue to the state or to local governments as a
17 result of enforcing or administering the rules.

18 There are no foreseeable implications relating to costs or revenue of the state or local
19 governments as a result of enforcing or administering the rules.

20 There are no anticipated economic costs to individuals required to comply with the rules.

21 There is no anticipated adverse economic impact on small businesses, microbusinesses, or rural
22 communities as a result of enforcing or administering the rules.

23 Based on the analyses required by Texas Government Code §2001.024, TWC has determined
24 that the requirement to repeal or amend a rule, as required by Texas Government Code
25 §2001.0045, does not apply to this rulemaking.

26 Takings Impact Assessment

27 Under Texas Government Code, §2007.002(5), "taking" means a governmental action that
28 affects private real property, in whole or in part or temporarily or permanently, in a manner that
29 requires the governmental entity to compensate the private real property owner as provided by
30 the Fifth and Fourteenth Amendments to the United States Constitution or the Texas
31 Constitution, §17 or §19, Article I, or restricts or limits the owner's right to the property that
32 would otherwise exist in the absence of the governmental action, and is the producing cause of a
33 reduction of at least 25 percent in the market value of the affected private real property,
34 determined by comparing the market value of the property as if the governmental action is not in
35 effect and the market value of the property determined as if the governmental action is in
36 effect. The Commission completed a Takings Impact Analysis for the proposed rulemaking
37 action under Texas Government Code, §2007.043. The primary purpose of this proposed

1 rulemaking action, as discussed elsewhere in this preamble, is to align TWC rules with the Texas
2 Government Code requiring state agencies to adopt rules regarding contracting and purchasing.

3 The proposed rulemaking action will not create any additional burden on private real property.
4 The proposed rulemaking action will not affect private real property in a manner that would
5 require compensation to private real property owners under the United States Constitution or the
6 Texas Constitution. The proposal also will not affect private real property in a manner that
7 restricts or limits an owner's right to the property that would otherwise exist in the absence of the
8 governmental action. Therefore, the proposed rulemaking will not cause a taking under Texas
9 Government Code, Chapter 2007.

10 Government Growth Impact Statement

11 TWC has determined that during the first five years the proposed amendments will be in effect:

- 12 --the proposed amendments will not create or eliminate a government program;
- 13 --implementation of the proposed amendments will not require the creation or elimination of
- 14 employee positions;
- 15 --implementation of the proposed amendments will not require an increase or decrease in future
- 16 legislative appropriations to TWC;
- 17 --the proposed amendments will not require an increase or decrease in fees paid to TWC;
- 18 --the proposed amendments will not create a new regulation;
- 19 --the proposed amendments will not expand, limit, or eliminate an existing regulation;
- 20 --the proposed amendments will not change the number of individuals subject to the rules; and
- 21 --the proposed amendments will not positively or adversely affect the state's economy.

22 Economic Impact Statement and Regulatory Flexibility Analysis

23 TWC has determined that the proposed rules will not have an adverse economic impact on small
24 businesses or rural communities, as the proposed rules place no requirements on small businesses
25 or rural communities.

26 Mariana Vega, Director of Labor Market and Career Information, has determined that there is no
27 significant negative impact upon employment conditions in the state as a result of the rules.

28 Lowell A. Keig, Director, Business Operations Division, has determined that for each year of the
29 first five years the rules are in effect, the public benefit anticipated as a result of enforcing the
30 proposed rules will be to ensure compliance with statutory contracting and procurement
31 requirements.

32 TWC hereby certifies that the proposal has been reviewed by legal counsel and found to be
33 within TWC's legal authority to adopt.

34 **PART IV. COORDINATION ACTIVITIES**

35 In the development of these rules for publication and public comment, TWC sought the
36 involvement of Texas' 28 Local Workforce Development Boards (Boards). TWC provided the
37 concept paper regarding these rule amendments to the Boards for consideration and review on
38 December 10, 2019. TWC also conducted a conference call with Board executive directors and
39 Board staff on December 20, 2019, to discuss the concept paper. During the rulemaking process,

1 TWC considered all information gathered in order to develop rules that provide clear and concise
2 direction to all parties involved.

3 Comments on the proposed rules may be submitted to TWCPolicyComments@twc.state.tx.us.
4 Comments must be received or postmarked no later than 30 days from the date this proposal is
5 published in the *Texas Register*.

6 The rules are proposed under Texas Labor Code §301.0015 and §302.002(d), which provide
7 TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the
8 effective administration of TWC services and activities.

9 The proposed rules affect Title 4, Texas Labor Code, particularly Chapters 301 and 302.

10

1 (a) Any Respondent who is allegedly aggrieved in connection with the Solicitation,
2 evaluation, or award of a contract by the Agency may formally protest to the
3 Agency's director of business operations.

4 (1) Such protests must be made in writing and timely received by the Agency's
5 director of business operations.

6 (2) The protest must be received by the Agency's director of business operations
7 within 10 working days after the Protestant knows, or should have known, of
8 the occurrence of the action that is protested.

9 (3) The Protestant shall mail or deliver copies of the protest to: Director of
10 Business Operations, 101 E. 15th Street, Room 316T, Austin, Texas 78778.
11 The Protestant must also mail or deliver copies of the protest to Interested
12 Parties known to the Protestant.

13 (b) A protest that is not filed timely shall not be considered unless the director of
14 business operations determines that the protest raises issues that are significant to
15 the Agency's procurement practices or procedures.

16 (c) The protest must be in writing and contain:

17 (1) the identifying name and number of the Solicitation being protested;

18 (2) identification of the specific statute or regulation that the Protestant alleges
19 has been violated;

20 (3) a specific description of each act or omission alleged to have violated the
21 statutory or regulatory provision identified above in paragraph (2) of this
22 section;

23 (4) a precise statement of the relevant facts including:

24 (A) sufficient documentation to establish that the protest has been timely
25 filed; and

26 (B) a description of the resulting adverse impact to the Protestant;

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

29 (6) an explanation of the action the Protestant is requesting from the Agency; and,

30 (7) a statement confirming that copies of the protest have been mailed or
31 delivered to any other Interested Party known to the Protestant.

32 (d) The protest must be signed by an authorized representative for the Protestant and
33 the signature notarized.

1 (e) The Protestant may appeal determination of a protest to the Agency's deputy
2 executive director.

3 (1) The appeal filed under these procedures must be in writing, addressed to the
4 Agency's deputy executive director; and

5 (2) The protest must be received by the deputy executive director no later than
6 10 business days after the date of receipt of the written determination issued
7 by the director of business operations.

8 (f) The Agency may move forward with a Solicitation or contract award without
9 delay, in spite of a timely filed protest, to protect the best interests of the Agency
10 or the state.

11

12 **SUBCHAPTER I. ENHANCED CONTRACT MONITORING**

13 **§800.350. Purpose and Scope.**

14 (a) Purpose. The purpose of this subchapter is to implement the requirements of Texas
15 Government Code, §2261.253(c), requiring state agencies to establish, by rule, a
16 procedure to identify each contract that requires enhanced contract or performance
17 monitoring.

18 (b) Scope. Pursuant to Texas Government Code, §2261.253(d) and (g), this subchapter
19 does not apply to:

20 (1) memoranda of understanding;

21 (2) interagency contracts;

22 (3) interlocal agreements; or

23 (4) contracts for which there is not a cost.

24 **§800.351. Enhanced Contract Monitoring Policy.**

25 (a) The Agency shall identify which contracts for goods and services require enhanced
26 monitoring by evaluating the risk factors, which include:

27 (1) the complexity of the goods and services to be provided;

28 (2) the contract amount;

29 (3) the length and scope of the project supported by the contract;

30 (4) whether the services are new or have changed significantly since the last
31 procurement of the same services;

1 (5) whether the Agency has experience with the contractor;

2 (6) whether the project affects external stakeholders or is of particular interest to
3 third parties;

4 (7) whether Agency data is accessed by the contractor; and

5 (8) any other factors the Agency determines in a particular circumstance will
6 create a level of risk to the state or Agency such that enhanced monitoring is
7 required.

8 (b) For contracts requiring enhanced monitoring, the contractor shall report to the
9 assigned Agency contract manager on progress toward goals or performance
10 measure achievements, and the status of deliverables, if any, and on any issues of
11 which the contractor is aware that may create an impediment to meeting the project
12 timeline or goals.

13 (c) Enhanced monitoring may also include site visits, additional meetings with
14 contractor staff, and inspection of documentation required by the Agency to assess
15 progress toward achievement of performance requirements.

16 (d) Projects deemed medium or high risk shall be monitored by the assigned contract
17 manager and may involve additional team members such as an assigned project
18 manager and staff from the Office of General Counsel or the Finance, Information
19 Technology, or Regulatory Integrity Divisions, if warranted.

20 **§800.352. Reporting of Enhanced Contract Monitoring.**

21 (a) Pursuant to the Texas Government Code, §2261.253, the Agency shall submit
22 information on each contract identified for enhanced contract monitoring to the
23 Commission.

24 (b) The director of Procurement and Contract Services (PCS director) shall
25 immediately notify the Commission of any serious issue or risk that is identified
26 with respect to a contract identified for enhanced contract monitoring.

27 (c) The contract manager shall report on the status of all contracts subject to enhanced
28 monitoring to the PCS director quarterly.

29 (d) If any serious issues or risks are identified about a contract subject to enhanced
30 monitoring, the PCS director will immediately notify the director of business
31 operations and the executive director.