

**Department of State Health Services
Agenda Item for State Health Services Council
January 30-31, 2008**

Agenda Item Title: New Protest Procedures for Certain DSHS Purchases, 25 TAC §4.1, concerning contract protests.

Agenda Number: 4b

Recommended Council Action:

For Discussion Only

For Discussion and Action by the Council

Background:

State agencies are required to provide contract protest procedures in a rule. After the consolidation of the legacy agencies DSHS had multiple rules and policies addressing this topic. A single rule for DSHS is needed.

The Office of General Counsel (OGC) has taken responsibility to develop the rule due to its ongoing role in the protests of certain DSHS purchases, along with the Contract Oversight and Support Section (COS), which are both located within the Chief Operating Officer Division. COS is responsible for the receipt of any protest and forwarding the protest to the committee members who will resolve the dispute. OGC and COS provide direct administrative support for purchasing and contracting functions within the Department.

Summary:

This new rule closely follows current DSHS policy regarding protest procedures of certain DSHS purchases. The purpose of the rule is to provide easier access to the public of DSHS purchasing protest procedures and to give notice of which state laws and rules apply to DSHS purchasing and contracting functions. Potential contractors and DSHS programs involved in purchasing and contracting functions are affected by the rule.

Summary of Input from Stakeholder Groups:

Internal stakeholders were briefed on the new rule at the regularly scheduled meeting of the Contract Oversight and Support Team (COST). The COST consists of representatives from COS, the Client Services Contract Unit, the Contract Management Units, and OGC. The COST recognized the need for this rule and possibly some revisions to the current DSHS policy to bring it into alignment with this rule once it is adopted.

External stakeholder input was not obtained because this process, or a similar process, has been in continuous use throughout the existence of DSHS so that this is not a great change in the way the Department conducts business. Also external stakeholders would include an unidentified and unknowable group of potential contractors.

Proposed Motion: Motion to recommend HHSC approval for publication of rules contained in agenda item #4b.

Agenda Item Approved by Assistant Commissioner/Director: Dee Porter **Date:** 1/7/08

Person Presenting: Mary Ann Slavin **Program:** Office of General Counsel **Phone No:** 458.7111 ext. 6971

Final CAM Approved by Consumer Affairs: RMM **Date:** 01/07/08

Title 25. HEALTH SERVICES
Part 1. DEPARTMENT OF STATE HEALTH SERVICES
Chapter 4 – DSHS CONTRACTING RULES
Subchapter A – PROTEST PROCEDURES FOR CERTAIN DSHS PURCHASES
New Rule §4.1

Proposed Preamble

The Executive Commissioner of the Health and Human Services Commission on behalf of the Department of State Health Services (department) proposes new §4.1 concerning protest procedures for resolving bidder or applicant or potential bidder or applicant protests relating to purchasing issues.

BACKGROUND AND PURPOSE

The Texas Government Code §2155.076, Protest Procedures, requires each state agency by rule to develop and adopt protest procedures for resolving protests relating to purchasing issues. The department's Office of General Counsel (OGC) proposes new §4.1, concerning contract protest procedures. Currently, contract protest procedures reside in department policy number AA-5105, Bid Protest for Competitive Procurements and Grants. OGC proposes to place contract protest procedures in rule rather than leaving them in policy to prevent any confusion over the application of state law and rules applicable to the purchase of goods and services and to provide better public access to the protest procedures. The proposed rule is part of new Chapter 4, which will eventually contain all department contracting rules. This rule supersedes 25 Texas Administrative Code §417.60, Protest and Appeal Procedures, which is a legacy Texas Department of Mental Health and Mental Retardation rule earmarked for repeal at a later date.

SECTION-BY-SECTION SUMMARY

New §4.1 contains the process and procedure for bidder or applicant or potential bidder or applicant to protest awards or potential awards of contracts.

FISCAL NOTE

Lisa Hernandez, General Counsel, has determined that for each year of the first five-year period that the section will be in effect, there will be no fiscal implications to state or local governments as a result of enforcing and administering the section as proposed.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Ms. Hernandez has also determined that there will be no effect on small businesses or micro-businesses required to comply with the section as proposed. This was determined by interpretation of the rule that small businesses and micro-businesses will not be required to alter their business practices in order to comply with the section. There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

In addition, Ms. Hernandez has also determined that for each year of the first five years the section is in effect, the public will benefit from adoption of the section. The public benefit anticipated as a result of enforcing or administering the section is to prevent confusion over the application of state law and rules applicable to the purchase of goods and services and to provide better public access to the protest procedures.

REGULATORY ANALYSIS

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The department has determined that the proposed new section 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, do not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Mary Ann Slavin, Assistant General Counsel, Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756, 512/458-7111, extension 6971, or by email to maryann.slavin@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the proposed rule has been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

STATUTORY AUTHORITY

The proposed new section is authorized by Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The proposed new section affects the Health and Safety Code, Chapter 1001 and Government Code, Chapter 531.

Legend: (Proposed New Rule)
Regular Print = Proposed new language

§4.1. Contract Protests.

(a) A potential contractor may protest a purchase award under the following circumstances:

(1) the purchase award was made under a competitive procurement method and the protestant submitted a bid or proposal that was not selected for the award; or

(2) the purchase or award was a sole source or emergency procurement and the protestant was not awarded the sole source or emergency procurement.

(b) This rule does not apply to:

(1) goods or services purchased pursuant to the Interagency Cooperation Act, Government Code, Chapter 771 or the Interlocal Cooperation Act, Government Code, Chapter 791;

(2) the lease, purchase, or lease-purchase of real property;

(3) provider enrollment agreements;

(4) interstate or international agreement executed in accordance with applicable law;

(5) a service of a public utility; or

(6) goods or services purchased under contracts or processes administered by other state agencies.

(c) The protest must meet the following requirements:

(1) be in writing and received by the Department of State Health Services (DSHS) Contract Oversight and Support Section (COS) within seven calendar days of posting of the award on the Electronic State Business Daily (ESBD);

(2) be limited to matters relating to the protestant's qualifications, the suitability of the goods or services offered by the protestant, or alleged irregularities in the procurement process; and

(3) be signed by the protestant or the protestant's authorized representative and delivered by hand, certified mail return receipt requested, facsimile or other verifiable delivery service.

(d) The protest must contain:

- (1) the potential contractor's name and the specific award, including the Request for Proposal number from the ESB, that is being protested;
- (2) the legal and factual basis for the protest with specific supporting information;
- (3) when applicable, how the potential contractor alleges the award violated state or federal laws or regulations regarding procurement;
- (4) an explanation of the facts in disagreement; and
- (5) the subsequent action the protestant is requesting.

(e) DSHS will conduct a protest review as follows:

(1) The protest must be received by the COS within the requisite time frame as stated subsection (c)(1) of this section. If the protest is not timely received or if it does not contain the required elements, it will not be considered and the protestant will be notified in writing.

(2) The COS will forward the protest to the DSHS Protest Review Committee (PRC) with a copy to the DSHS division that conducted the procurement.

(3) The PRC may, at its sole discretion, request supplemental oral or written information from the protestant or the DSHS division if such information is necessary to evaluate the protest.

(4) The PRC will issue a written determination within 15 working days of receipt of the protest. The determination of the PRC is final.

(f) DSHS will not execute a contract for a purchase that is subject to a protest filed in accordance with this rule until DSHS provides a final written disposition of the protest. The Commissioner of DSHS or his designee may waive this requirement in the case of an award that is required by state or federal law to be completed by a particular date or in the case of a bona fide emergency as determined by the Commissioner or his designee.

(g) This section supersedes §417.60 of this title (relating to Protest and Appeal Procedures).