

TITLE 34. PUBLIC FINANCE
PART 3. TEACHER RETIREMENT SYSTEM OF TEXAS
CHAPTER 51. GENERAL ADMINISTRATION

34 TAC §51.2

The Teacher Retirement System of Texas (TRS) proposes new §51.2 (relating to Vendor Protests and Appeals) of Chapter 51 in Part 3 of Title 34 of the Texas Administrative Code. This new rule is proposed in conjunction with the proposed repeal of current §51.2 (relating to Vendor Protests, Dispute Resolution, and Appeal) in Part 3 of Title 34 of the Texas Administrative Code as published elsewhere in this issue of the *Texas Register*.

BACKGROUND AND PURPOSE

TRS proposes one new rule relating to vendor protests and appeals of TRS' procurements. The proposed new rule is consistent with TRS' efforts to update, streamline, and clarify its vendor protest process. For the same purpose, TRS is also proposing to repeal current §51.2 elsewhere in this issue of the *Texas Register*. The proposed new rule removes obsolete requirements or makes other changes for the purpose of efficiency and clarity. The proposed new rule effectively incorporates many of the substantive requirements of the proposed repealed rule but makes formatting and stylistic changes to those provisions for readability purposes.

SECTION-BY-SECTION SUMMARY

Proposed New §51.2 revises the title of current rule §51.2 from Vendor Protests, Dispute Resolution, and Hearing to Vendor Protests and Appeals.

Proposed New §51.2 adds headings to each section to improve readability.

Proposed New §51.2(a) adds a definition section that is not included in current rule §51.2.

Proposed New §51.2(b) incorporates the existing provisions of current §51.2(a), regarding the purpose of the proposed new rule.

Proposed New §51.2(c) incorporates the existing provisions of current §51.2 regarding exceptions, separates its content into subsections to improve readability, and under §51.2(c)(1)(D), confirms that transactions in which TRS buys or sells securities are excluded from the vendor protest process as well as any other transactions not subject to state purchasing rules.

Proposed New §51.2(d) largely incorporates the existing provisions of current §51.2(j) and adds guidance regarding the process of submitting a stay request to TRS.

Proposed New §51.2(e) largely incorporates the existing provisions of current §51.2(b) regarding the filing of a protest. In addition, Proposed New §51.2 (e)(1) substitutes TRS Legal & Compliance for the chief officer of the TRS business unit for whom the procurement is being made, as the recipient of a vendor protest and clarifies the deadline for filing a protest. Under current §51.2(b), to be considered timely, a protesting party must file its protest "within 10 working days after the protestor knows or should have known, of the occurrence of the action which is protested." New §51.2(e)(2) provides that a protest contesting (1) the solicitation be filed by the end of posted

solicitation period or (2) the evaluation or award be filed within 10 calendar days after the notice of contract award is posted either to the ESBD, or the TRS website, which may be accessed at <https://www.trs.texas.gov> as applicable. In addition, proposed new §51.2(e)(3) revises the required content of a protest to also include the specific identification of the TRS regulatory policy or the TRS Procurement and Contract Guide section, or both, that TRS is alleged to have violated. Finally, under new §51.2(e)(3)(F) the protesting party must also provide a precise statement of the remedy requested.

Proposed New §51.2(f) largely restates current §51.2(d)&(e) regarding the chief officer's disposition of a protest. Proposed New §51.2(f)(1) adds that TRS L&C will be responsible for the management of the protest, in coordination with the appropriate TRS chief officer, with support provided by the TRS Director of Procurement and Contracting.

Proposed New §51.2(g) largely incorporates the existing provisions of current §51.2(f) regarding the filing of an appeal. Proposed New Rule §51.2(g)(1) revises current §51.2(b) by requiring that an appeal be filed in accordance with the instructions stated in the solicitation document or on the TRS website, which may be accessed at <https://www.trs.texas.gov/>, as applicable, rather than by submitting the appeal to the executive director or his designee.

FISCAL NOTE

Don Green, TRS Chief Financial Officer, has determined that for each year of the first five years the proposed new rule will be in effect, there will be no foreseeable fiscal implications for state or local governments as a result of administering the proposed new rule.

PUBLIC COST/BENEFIT

For each year of the first five years proposed new §51.2 will be in effect, Mr. Green also has determined that the public benefit anticipated as a result of adopting the proposed new rule and repealing current §51.2 will be to streamline and clarify provisions relating to the general administration of the TRS' procurement and contracting processes.

Mr. Green has also determined that the public will incur no new costs as a result of complying with the proposed new rule.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS

TRS has determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities as a result of the proposed new rules. Therefore, neither an economic impact statement nor a regulatory flexibility analysis is required under Government Code §2006.002.

LOCAL EMPLOYMENT IMPACT STATEMENT

TRS has determined that there will be no effect on local employment because of the proposed new rule. Therefore, no local employment impact statement is required under Government Code §2001.022.

GOVERNMENT GROWTH IMPACT STATEMENT

TRS has determined that for the first five years the proposed new rule is in effect, the proposed new rule will not create or eliminate any TRS programs; will not require the creation or elimination of employee positions; will not require an increase or decrease in future legislative appropriations to TRS; will not eliminate any fees currently paid to TRS; will not expand, limit or repeal an existing regulation; will not increase or decrease the number of individuals subject to the rule's applicability; and will not affect the state's economy.

The proposed new rule will add one new rule for the reasons stated above in this preamble.

TAKINGS IMPACT ASSESSMENT

TRS has determined that there are no private real property interests affected by the proposed new rule, therefore, a takings impact assessment is not required under Government Code §2007.043.

COSTS TO REGULATED PERSONS

TRS has determined that Government Code §2001.0045 does not apply to the proposed new rule because the proposed new rule does not impose a cost on regulated persons.

COMMENTS

Comments may be submitted in writing to Brian Guthrie, TRS Executive Director, 1000 Red River Street, Austin, Texas 78701-2698. Written comments must be received by TRS no later than 30 days after publication of this notice in the *Texas Register*.

STATUTORY AUTHORITY

The new rule is proposed under the authority of Government Code §825.102, which authorizes the board of trustees to adopt rules for the transaction of the business of the board.

CROSS-REFERENCE TO STATUTE

The proposed new rule affects the following Government Code §825.103(d) relating to TRS' purchase of goods and services.

§51.2. Vendor Protests and Appeals

(a) Definitions. The following words and terms, when used in this rule, shall have the following meaning unless the context clearly indicates otherwise.

(1) Appeal: A written appeal of the Determination of the Chief Officer.

(2) Appealing Party: A party who files an Appeal to the Determination.

(3) Chief Officer: the head of any business unit of TRS.

(4) Determination: A determination issued by the Chief Officer in response to a Protest.

(5) Director of Procurement & Contracts (P&C Director): the head of the TRS division responsible for overseeing the procurement of goods and services.

(6) Executive Director: Appointed by the TRS Board of Trustees pursuant to Government Code §825.202.

(7) Final Decision: A decision issued by the Executive Director in response to an Appeal.

(8) Interested Parties: Vendors who submitted a bid, offer, or proposal, as applicable, in response to the subject procurement.

(9) Protest: A process initiated in accordance with this rule by a Vendor who believes they have been aggrieved in connection with a solicitation, evaluation, or award of a contract.

(10) Protesting Party: A party who files a Protest.

(11) Solicitation Documents: all documents (including Invitation for Bids, Request for Offers, Request for Proposals, and Request for Qualifications) requesting responses from Vendors to provide specified goods or services, or both. Solicitation Documents also include any addenda posted by TRS to the Electronic State Business Daily (ESBD) or the TRS website, which may be accessed at <https://www.trs.texas.gov/>, as applicable, for the subject procurement.

(12) TRS Legal Counsel: the TRS General Counsel or any attorney designated by TRS General Counsel.

(13) TRS Legal & Compliance (TRS L&C): The TRS legal and compliance division.

(14) Vendor: An individual, company, partnership, corporation, or other entity that has filed a response to a TRS solicitation.

(b) Purpose. The purpose of this rule is to provide a procedure for a Vendor to Protest or Appeal, if applicable, the process by which TRS purchases goods, services, or both.

(c) Exceptions

(1) This section does not apply to protests of purchases made by:

(A) the Texas Facilities Commission (Facilities Commission) on behalf of TRS, which are addressed in 1 Texas Administrative Code Chapter 111, Subchapter C (relating to Complaints and Dispute Resolution);

(B) the Department of Information Resources (DIR) on behalf of TRS, which are addressed in 1 Texas Administrative Code Chapter 201, §201.1 (relating to Procedures for Vendor Protests and the Negotiation and Mediation of Certain Contract Disputes and Bid Submission, Opening and Tabulation Procedures);

(C) the Comptroller of Public Accounts (Comptroller's Office) on behalf of TRS, which are addressed in 34 Texas Administrative Code Chapter 20, Subchapter F, Division 3 (relating to Protests and Appeals);

(D) TRS, for transactions in which TRS buys or sells securities (whether publicly traded or privately issued) under the authority of Government Code §825.302, as well as any other transactions not subject to state purchasing rules.

(2) The rules of the Facilities Commission, DIR, and the Comptroller's Office may be accessed through the website of the Office of the Secretary of State, Texas Register Division located at: www.sos.state.tx.us/tac/index.shtml.

(d) Stay of Protest or Appeal. If a timely Protest or Appeal is filed, the Protesting Party or the Appealing Party may request in writing that TRS not proceed further with the solicitation or with the award of the contract. In support of the request, the Protesting Party or Appealing Party is required to show why a stay is necessary and that harm to TRS will not result from the stay. If the Executive Director determines that it is in the interest of TRS not to proceed with the solicitation or contract award, the Executive Director may make such a decision in writing and partially or fully suspend procurement or contract activity. Any request for a stay must be submitted in accordance with the requirements stated in the Solicitation Document (relating to Vendor Protests and Appeals) or on the TRS website, may be accessed at <https://www.trs.texas.gov/>, as applicable.

(e) Protest Procedures

(1) A Vendor who believes they have been aggrieved in connection with a solicitation, evaluation, or award of a contract may formally Protest to TRS. Such Protest must be in writing and timely received by TRS L&C in accordance with the instructions provided in the Solicitation Document or on the TRS website, which may be accessed at <https://www.trs.texas.gov/>, as applicable. Copies of the Protest must be concurrently mailed or delivered by the Protesting Party to all other Interested Parties.

(2) To be considered timely, the Protest must be filed:

(A) by the end of the posted solicitation period, if the Protest concerns the Solicitation Documents or actions associated with the publication of the Solicitation Documents; or

(B) no later than 10 calendar days after the notice of contract award is posted to either the ESBD, or the TRS website, which may be accessed at <https://www.trs.texas.gov/>, as applicable, if the Protest concerns the evaluation or award. Notice of Awards posted to the TRS website may be accessed at <https://www.trs.texas.gov/>.

(3) A formal Protest must be sworn and contain:

(A) a specific identification of the State of Texas statutory provision(s), TRS policy, or TRS Procurement and Contract Management Guide (Guide) requirement that the action complained of is alleged to have violated;

(B) a specific description of each act alleged to have violated a State of Texas statutory provision(s), TRS regulatory policy, or Guide requirement;

(C) a precise statement of the relevant facts;

(D) an identification of the issue or issues to be resolved;

(E) argument and authorities in support of the Protest;

(F) a precise statement of the remedy requested by the Protesting Party; and

(G) a statement that copies of the Protest have been mailed or delivered to all other Interested Parties. Upon request, TRS will provide the Protesting Party with a list of Interested Parties as reflected in TRS records.

(f) Review and Disposition of Protests.

(1) TRS L&C will be responsible for management of the Protest and will coordinate TRS' disposition of the Protest with the Chief Officer, with support provided by the P&C Director.

(2) The Chief Officer may:

(A) dismiss the Protest if the Chief Officer determines the Protest was not timely filed or does not meet the requirements of subsection (d) of this section; or

(B) settle and resolve a timely Protest by mutual agreement of TRS and the Protesting Party.

(3) If the Chief Officer does not dismiss or resolve the Protest, the Chief Officer may, in his or her sole discretion, solicit written responses to the Protest from other Interested Parties.

(4) If the Protest is not dismissed or resolved under subsection (f)(2) of this section, the Chief Officer will issue to the Protesting Party and other Interested Parties a written Determination as to whether a violation of State of Texas statutes, TRS regulatory policies, or Guide requirements has occurred.

(5) The Determination will set forth the reasons for the Determination, and any appropriate remedial action, if applicable. Such remedial action, if applicable, may include, but is not limited to, declaring the procurement void; reversing the award and awarding the contract to a different Interested Party; or re-advertising the procurement.

(g) Appeal of Protest

(1) The Protesting Party or an Interested Party may Appeal the Determination to the Executive Director. The written Appeal must be received in accordance with the requirements stated in the Solicitation Document or on the TRS website, which may be accessed at <https://www.trs.texas.gov>, as applicable, no later than ten working days after the date of the Determination. The Appeal is limited to a review of the Determination.

(2) The Appealing Party must concurrently mail or deliver copies of the Appeal to all other Interested Parties and must include an affidavit that such copies have been provided.

(3) TRS L&C shall review the Protest, the Determination, and the Appeal and prepare a written opinion with a recommendation to the Executive Director. The Executive Director may, in his or her discretion, refer the matter to the Board of Trustees at a regularly scheduled open meeting or issue in writing a Final Decision.

(4) When a Protest has been appealed to the Executive Director under subsection (g)(1) of this section and has been referred to the Board of Trustees by the Executive Director under subsection (g)(3) of this section, the following requirements shall apply:

(A) Copies of the Appeal, responses of Interested Parties, if any, and the TRS L&C recommendation shall be mailed to the Board members and Interested Parties. Copies of the TRS L&C recommendation and responses of Interested Parties shall be mailed to the Appealing Party.

(B) All Interested Parties who wish to make an oral presentation at the open meeting are requested to notify the TRS L&C in accordance with the requirements stated in the Solicitation Document or on the TRS website, which may be accessed at <https://www.trs.texas.gov/>, as applicable, at least 48 hours in advance of the open meeting.

(C) The Board of Trustees may consider oral presentations and written documents presented by staff, the Appealing Party, and Interested Parties. The chairman shall set the order and amount of time allowed for presentations.

(D) The Board of Trustees' determination of an Appeal shall be by duly adopted resolution reflected in the minutes of the open meeting and shall be final.

(5) A Final Decision issued either by the Board of Trustees in open meeting, or in writing by the Executive Director shall be the final administrative action of TRS.

CERTIFICATION

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.