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PROPOSAL OF REPEAL OF
SUBCHAPTER A. PURCHASE CONTRACTS
43 TAC §§210.1 - 210.3

NEW
SUBCHAPTER A. GENERAL PROVISIONS
43 TAC §210.1 AND §210.2

NEW
SUBCHAPTER C. CONTRACT MANAGEMENT
43 TAC §§210.41 - 210.43

INTRODUCTION. The Texas Department of Motor Vehicles (department) proposes the repeal of 43 Texas Administrative Code (TAC) §§210.1, 210.2, and 210.3; and proposes new Subchapter A, General Provisions, §210.1 and §210.2, and new Subchapter C, Contract Management, §§210.41, 210.42, and 210.43. The proposed repeals and new sections are necessary as a part of the department’s rule review to organize the rules to begin with the generally applicable provisions, to organize subsequent subchapters by subject matter, to delete duplicative language, to add a delegation of signature authority, and to bring the department’s protest, claims and contract monitoring rules into alignment with statute, with the current rules of the Texas Comptroller of Public Accounts (Comptroller) in 34 TAC, Part 1, and with current department practices.

The proposed revisions to 43 TAC Chapter 210 would repeal all of Subchapter A, Purchase Contracts, concerning claims, protests and enhanced contract monitoring, to incorporate and reorganize the sections into proposed new Subchapters A and C. Proposed new Subchapter A, General Provisions, would provide definitions applicable to the entire chapter and contract signature authority applicable to

1 all contracts. Proposed new Subchapter C, Contract Management, would incorporate language currently
2 found in Subchapter A regarding claims, protests, and contract monitoring.

3 **EXPLANATION.** The department is conducting a review of its rules in Chapter 210 in compliance with
4 Government Code, §2001.039. Notice of the department’s intention to conduct this review is also
5 published in this issue of the *Texas Register*. As a part of the review, the department is proposing
6 necessary amendments, repeals, and new sections to update and streamline the rule text, bringing it into
7 compliance with statute and with current department procedure.

8 Chapter 210 is proposed to be retitled “Procurement and Contracting” to more accurately reflect
9 the scope of the chapter and to avoid any confusion with proposed new Subchapter C, Contract
10 Management.

11 Repeal of Subchapter A. Purchase Contracts

12 The proposed repeal of §§210.1, 210.2 and 210.3 would allow for the reorganization of the
13 chapter for clarity and ease of reference. Language from these sections is proposed to be incorporated
14 into proposed new Subchapter C, Contract Management, §§210.41 - 210.43.

15 New Subchapter A. General Provisions

16 Proposed new Subchapter A would be titled General Provisions, consistent with the organization
17 and naming conventions found in Chapters 215 and 221 of this title. It would include information that is
18 generally applicable to the remainder of the chapter.

19 Proposed new §210.1 would add definitions to be applicable to the entire chapter. Definitions in
20 Chapter 210 are currently set out for each section separately, creating confusion and inconsistency. The
21 chapter-wide definitions proposed in new §210.1 would improve clarity, consistency, and readability for
22 the entire chapter.

1 Proposed new §210.1(a) would add an interpretation provision and references to the State
2 General Services and Purchasing Act and the Code Construction Act. It would provide that terms found in
3 this chapter have the definitions set forth in those statutes unless otherwise specified or unless the
4 context clearly requires a different meaning. This would allow for consistency and clarity among the
5 department’s rules and other relevant sources of authority.

6 Proposed new §210.1(b) would list specific definitions for words and terms used in Chapter 210.
7 Proposed new §210.1(b)(1) would define “Act” as Government Code, Chapters 2151 - 2177, otherwise
8 known as the State Purchasing and General Services Act, which governs purchases made by state agencies.

9 Proposed new §210.1(b)(2) would add the same definition for “board” that currently appears in §210.2,
10 which is proposed for repeal. Proposed new §210.1(b)(3) would add a new definition for “contract,” which
11 is more expansive and inclusive of the various types of contracts the department uses. Proposed new
12 §210.1(b)(4) would similarly add a new definition for “contractor” to replace the definition of “vendor” in
13 current §210.1(b)(5) for clarity and consistency, and to align with current department contract
14 terminology. Proposed new §210.1(b)(5) would add a definition for “days” to clarify that throughout the
15 chapter, “days” means calendar days rather than business or working days, to be consistent with how
16 days are calculated in the Comptroller’s procurement rules in 34 TAC, Part 1. Proposed new §210.1(b)(6)
17 would define “department” for the whole chapter to create consistency and clarity. Proposed new
18 §210.1(b)(7) would add a definition for “executive director” to identify the individual responsible for
19 certain duties and authorities in this chapter. Proposed new §§210.1(b)(8), 210.1(b)(9), and 210.1(b)(10)
20 would add definitions for “historically underutilized business,” “interagency contract or agreement,” and
21 “interlocal contract or agreement” respectively, citing to the relevant defining statutes for clarity and
22 consistency. “Purchase,” is currently defined with slightly different wording in both §210.1(b)(4) and
23 §210.1(b)(7), which are both proposed for repeal; proposed new proposed new §210.1(b)(11) would

1 define “purchase” for the whole chapter to create consistency and clarity. Proposed new §210.1(b)(12)
2 would add a new definition for “respondent” to replace the current definition of “interested party” in
3 current §210.2(b)(6), because the proposed definition is more specific and in better alignment with
4 current procurement terminology and department contract language.

5 Proposed new §210.2 would create a new delegation of signature authority. The department’s
6 board currently delegates contract approval and signature authority through action and a board
7 resolution that incorporates department contract procedures. Proposed new §210.2 would eliminate the
8 need for yearly board action on that item and reduce risk by providing a consistent standard that is
9 transparent and readily accessible. It would also satisfy the requirement found in Government Code,
10 §2261.254, that the governing body of a state agency must either sign or delegate signature authority for
11 those contracts exceeding \$1,000,000. The delegation would be applicable to all types of contracts and
12 agreements and would allow the executive director to delegate authority further, as authorized by
13 statute.

14 New Subchapter C. Contract Management.

15 Proposed new Subchapter C would incorporate and modify language from current §§210.1 -
16 210.3.

17 Proposed new §210.41 would incorporate language from current §210.1, concerning claims for
18 purchase contracts. Proposed new §210.41 would not incorporate the definitions in current §210.1,
19 because definitions are proposed to be reorganized into proposed new §210.1. Additionally, as compared
20 to the language in current §210.1, proposed new §§210.41-42 would replace the word “vendor” with
21 either “contractor” or “respondent” depending on which is appropriate under the new definitions of those
22 terms in proposed new §210.1(b), for consistency with agency contracting terminology. Proposed new
23 §210.42 would also change the term “interested parties” in current §210.1 to “respondent,” as defined in

1 proposed new §210.1(b), for consistency and clarity. Proposed new §210.41 would include other non-
2 substantive punctuation, grammatical, and organizational changes to the language in current §210.1. In
3 proposed new §210.41 the word “mediation” is assigned the meaning set forth in Civil Practice and
4 Remedies Code §152.023 and in §210.41(d)(3) the qualifications of the mediator are updated to be
5 consistent with the Attorney General’s model rule. Additionally, in proposed new §210.41(d)(4) additional
6 potential mediation costs are addressed to be consistent with the Attorney General’s model rules. In
7 proposed new §210.41(e)(2), which incorporates language from current §210.1(f)(2), the word “shall”
8 would be changed to “must” for clarity and consistency. Government Code, §311.016 defines the word
9 “must” as “creates or recognizes a condition precedent,” which is the intended meaning in proposed new
10 §210.41(e)(2). The definitions in Government Code, §311.016 apply to Chapter 210 according to
11 Government Code, §311.002(4).

12 Proposed new §210.42 would incorporate language concerning protests from current §210.2,
13 except for the definitions, which are proposed to be reorganized into proposed new §210.1. Proposed
14 new §210.42 would update language from current §210.2 to more accurately describe the department’s
15 procedures for protests of department purchases, and to make non-substantive punctuation, grammatical
16 and organizational improvements. Proposed new §210.42(a) incorporates language from current §210.2,
17 but updates the term “vendor” to “respondent” for clarity and consistency with the new definitions in
18 proposed new §210.1.

19 Proposed new §210.42(b) would update the department’s protest rules to be consistent with the
20 Comptroller’s current rules in 34 TAC Chapter 20, as Government Code, §2155.076 requires. Proposed
21 new §210.42(b)(1) would only authorize vendors who have submitted a response to a department
22 solicitation to file a protest. This aligns with the Comptroller’s rules in 34 TAC Chapter 20, and limits
23 protests to those who have proper standing. Proposed new §210.42(b) would describe the requirements

1 for a properly filed protest, which is consistent with the language used in the Comptroller’s rule, 34 TAC
2 §20.535 regarding filing requirements for a protest.

3 Proposed new §210.42(c) would add deadlines for a protest to be filed timely, which would vary
4 depending on the type of protest. This proposed language would replace current §210.2(c)(1), which has
5 the same filing deadline regardless of protest type. The proposed new deadlines would be easier to
6 determine and calculate accurately because they are based on the specific solicitation and award dates,
7 whereas current §210.2(c)(1) is based on when the protestor “knew or should have known” an action had
8 occurred. This change would align proposed new §210.42 with the Comptroller’s rule, 34 TAC §20.535,
9 and would provide certainty and transparency in the protest process.

10 Proposed new §§210.42(d), (f), and (g) would incorporate language from current §§210.2(d), (e),
11 and (f) but would only authorize the department’s executive director or procurement director to move
12 forward with a contract award or performance under a contract while a protest is pending, and would
13 only authorize the department’s procurement director to informally resolve a protest, or issue a written
14 determination on a protest. Current §§210.2(d), (e), and (f) authorize the department’s executive
15 director’s designee to take such actions. The procurement director is the department staff member with
16 the most visibility into the procurement process by virtue of supervising the department’s Purchasing
17 Section, and is therefore in the best position to make initial decisions on matters involving purchasing
18 decisions. Proposed new §§210.42(d), (f), and (g) would ensure that protest decisions are made by those
19 with the most knowledge of and authority over the matter.

20 Proposed new §210.42(e) would address the actions the department may take on a protest,
21 including the dismissal of an untimely protest or a protest that does not meet the filing requirements. This
22 would allow the department increased efficiency in disposing of improper protests, so that it could focus
23 its time and resources on resolving the protests that comply with the filing requirements.

1 Proposed new §210.42(g) would incorporate language from current §210.2(f), but would replace
2 the term “interested parties” with the word “respondents” to align with the new definitions in proposed
3 new §210.1 for clarity and consistency.

4 Proposed new §210.42(h) would update the department’s protest rule to be consistent with the
5 Comptroller’s current rule, 34 TAC §20.538, as Government Code, §2155.076 requires. Proposed new
6 §210.42(h) would require that appeals of a written determination be filed with the general counsel and
7 that the general counsel may either make the final determination or refer it to the executive director for
8 final determination. Additionally, proposed new §210.42(h) would replace the term “interested parties”
9 in current §210.2(g) with the word “respondent” and would delete the word “working” before the word
10 “days” to align with the new definitions proposed in new §210.1 for clarity and consistency.

11 Proposed new §210.43 would incorporate language from current §210.3 concerning enhanced
12 contract monitoring. Proposed new §210.43 would be titled “Enhanced Contract or Performance
13 Monitoring” to align with statutory language in Government Code, §2261.253. Proposed new §210.43
14 would replace the word “vendor” from current §210.3 with the word “contractor” throughout to align
15 with the new definitions in proposed new §210.1. Additionally, as compared to the current language of
16 §210.3, the language of proposed new §210.43(a) would add two additional factors to the risk assessment
17 to determine which contracts require enhanced contract or performance monitoring: proposed new
18 §210.43(a)(5) would add “special circumstances of the project,” and proposed new §210.43(a)(6) would
19 add “the scope of the goods, products or services provided under the contract.” These additions would
20 align with the current risk assessment tool used by the department’s Purchasing Section.

21 **FISCAL NOTE AND LOCAL EMPLOYMENT IMPACT STATEMENT.** Glenna Bowman, Chief Financial Officer,
22 has determined that for each year of the first five years the new sections and repeals will be in effect,
23 there will be no significant fiscal impact to state or local governments as a result of the enforcement or

1 administration of the proposal. Brad Payne, Director of the Purchasing Section, has determined that there
2 will be no significant impact on local employment or the local economy as a result of the proposal.

3 **PUBLIC BENEFIT AND COST NOTE.** Mr. Payne has also determined that, for each year of the first five years
4 new and repealed sections are in effect, there are several anticipated public benefits.

5 Anticipated Public Benefits. The public benefits anticipated as a result of the proposal include
6 increased transparency, readability and clarity surrounding agency contracting processes and procedures.

7 Anticipated Costs to Comply with The Proposal. Mr. Payne anticipates that there will be no costs
8 to comply with these rules.

9 **ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS.** As required by Government
10 Code, §2006.002, the department has determined that the proposed new sections and repeals will not
11 have an adverse economic effect on small businesses, micro-businesses, and rural communities because
12 they do not make any changes affecting such entities. Also, many of the changes the department proposes
13 in new §210.42 are required by Government Code, §2155.076, which requires state agencies to adopt
14 rules that are consistent with the Comptroller's rules regarding protest procedures for resolving a vendor
15 protest relating to purchasing issues. Therefore, the department is not required to prepare a regulatory
16 flexibility analysis under Government Code, §2006.002.

17 **TAKINGS IMPACT ASSESSMENT.** The department has determined that no private real property interests
18 are affected by this proposal and that this proposal does not restrict or limit an owner's right to property
19 that would otherwise exist in the absence of government action and, therefore, does not constitute a
20 taking or require a takings impact assessment under Government Code, §2007.043.

21 **GOVERNMENT GROWTH IMPACT STATEMENT.** The department has determined that each year of the
22 first five years the proposed new sections and repeals are in effect, no government program would be
23 created or eliminated. Implementation of the proposed new sections and repeals would not require the

1 creation of new employee positions or elimination of existing employee positions. Implementation would
2 not require an increase or decrease in future legislative appropriations to the department or an increase
3 or decrease of fees paid to the department. The proposed new sections §§210.1, 210.2, 210.41, 210.42,
4 and 210.43 create new regulations, and the proposed repealed provisions, §§210.1, 210.2, and 210.3
5 repeal regulations. The proposed new sections and repeals do not expand or limit an existing regulation.
6 Lastly, the proposed new sections and repeals do not affect the number of individuals subject to the
7 applicability of the rules and will not affect this state's economy.

8 **REQUEST FOR PUBLIC COMMENT.** If you want to comment on the proposal, submit your written
9 comments by 5:00 p.m. CST on December 9, 2024. A request for a public hearing must be sent
10 separately from your written comments. Send written comments or hearing requests by email to
11 *rules@txdmv.gov* or by mail to Office of General Counsel, Texas Department of Motor Vehicles, 4000
12 Jackson Avenue, Austin, Texas 78731. If a hearing is held, the department will consider written
13 comments and public testimony presented at the hearing.

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SUBCHAPTER A. GENERAL PROVISIONS

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43 TAC §210.1 AND §210.2

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STATUTORY AUTHORITY. The department proposes new Subchapter A, §210.1 and §210.2 in Chapter
210 under Transportation Code, §1001.0411(b), which authorizes the executive director of the Texas
Department of Motor Vehicles (department) to delegate duties or responsibilities; Transportation Code,
§1002.001, which provides the board of the Texas Department of Motor Vehicles (board) with the
authority to adopt rules that are necessary and appropriate to implement the powers and the duties of
the department; Government Code, §2001.004, which requires state agencies to adopt rules of practice
stating the nature and requirements of all available formal and informal procedures; Government Code,

1 §2260.052(c), which requires state agencies to develop rules to govern negotiation and mediation of
2 contract claims; Government Code, §2161.003, which requires state agencies to adopt the Texas
3 Comptroller of Public Accounts' historically underutilized business rules as their own rules; Government
4 Code, §2261.254(d), which authorizes the board to delegate approval and signature authority for
5 contracts; and the statutory authority referenced throughout the preamble and in the rule text, which is
6 incorporated herein by reference.

7 **CROSS REFERENCE TO STATUTE.** The proposed new sections would implement Government Code, Title
8 10, Subtitle D, and Chapters 771 and 791; and Transportation Code, Chapters 1001 and 1002.

9
10 Text.

11 210.1. Definitions.

12 (a) As used throughout this chapter, the words and terms defined in the State Purchasing and
13 General Services Act, Government Code, Title 10, Subtitle D, and the Code Construction Act,
14 Government Code, Chapter 311 will have the same meaning defined therein, and each word or term
15 listed in this chapter will have the meaning set forth herein, unless:

16 (1) its use clearly requires a different meaning; or

17 (2) a different definition is prescribed in this section, or for a particular section of this
18 chapter or portion thereof.

19 (b) The following words and terms, when used in this chapter, will have the following meaning
20 unless the context clearly indicates otherwise:

21 (1) Act--Government Code, Chapters 2151-2177, the State Purchasing and General
22 Services Act.

23 (2) Board--The Board of the Texas Department of Motor Vehicles.

1 (3) Contract--A legally enforceable written agreement, including a purchase order,
2 between the department and a contractor for goods, products, or services.

3 (4) Contractor--An individual or business entity that has a contract to provide goods,
4 products, or services to the department.

5 (5) Days--Calendar days.

6 (6) Department--The Texas Department of Motor Vehicles.

7 (7) Executive director--The executive director of the department.

8 (8) Historically underutilized business (HUB)--A business as defined in Government
9 Code, §2161.001(2).

10 (9) Interagency contract or Interagency agreement--An agreement entered into under
11 the Interagency Cooperation Act, Government Code, Chapter 771.

12 (10) Interlocal contract or Interlocal agreement--An agreement entered into under the
13 Interlocal Cooperation Act, Government Code, Chapter 791.

14 (11) Purchase--Any form of acquisition for goods, products, or services, including by
15 lease or revenue contract, under the Act.

16 (12) Respondent--An individual or business entity that has submitted a bid, proposal, or
17 other expression of interest in response to a specific solicitation for goods, products, or services.

18

19 210.2. Delegation of Approval and Signature Authority.

20 (a) Purpose. The purpose of this section is to establish the approval authority and
21 responsibilities for executing contracts required by the department.

22 (b) Applicability. This section applies to all contracts, interagency contracts, interlocal contracts,
23 as well as informal letters of agreement, memoranda, and agreements.

1 (c) Board Delegation. The board delegates the following duties and authorities to the executive
2 director of the department:

3 (1) the duty and authority to execute contracts, to include approving and signing
4 contracts on behalf of the department;

5 (2) the authority to further delegate contract approval and signature authority to the
6 executive director’s designees for contracts with a dollar value up to and including \$1,000,000; and

7 (3) the authority to further delegate contract approval and signature authority to a
8 deputy executive director of the department for contracts with a dollar value exceeding \$1,000,000 as
9 allowed by Government Code, §2261.254.

10

11 ~~**[SUBCHAPTER A. PURCHASE CONTRACTS]**~~

12 **STATUTORY AUTHORITY.** The department proposes the repeal of Chapter 210, Subchapter A, Purchase
13 Contracts, under Transportation Code, §1002.001, which provides the board of the Texas Department of
14 Motor Vehicles (board) with the authority to adopt rules that are necessary and appropriate to
15 implement the powers and the duties of the department; Government Code, §2001.004, which requires
16 state agencies to adopt rules of practice stating the nature and requirements of all available formal and
17 informal procedures; Government Code, §2155.076, which requires state agencies, by rule, to develop
18 and adopt protest procedures for resolving vendor protests relating to purchasing issues; Government
19 Code, §2260.052(c), which requires state agencies to develop rules to govern negotiation and mediation
20 of contract claims; Government Code, §2261.253(c), which requires state agencies, by rule, to establish
21 a procedure to identify each contract that requires enhanced contract monitoring; and the statutory
22 authority referenced throughout the preamble, which is incorporated herein by reference.

1 **CROSS REFERENCE TO STATUTE.** The proposed repeals would implement Government Code, Title 10,
2 Subtitle D; and Transportation Code, Chapters 1001 and 1002.

3
4 Text.

5 [~~§210.1. Claims for Purchase Contracts.~~]

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

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

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

14 [(2) Department—Texas Department of Motor Vehicles.]

15 [(3) Executive director—The executive director of the department or the director's
16 designee not below the level of division director.]

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

19 [(5) Vendor—An individual, partnership, corporation, or other business entity that is a
20 party to a written contract for a purchase with the department.]

21 [(c) Filing of claim. A vendor may file a notice of claim with the executive director within 180
22 days after the date of the event giving rise to the claim. The claim must contain the:]

23 [(1) nature of the alleged breach;]

1 ~~[(2) amount the vendor seeks as damages; and]~~

2 ~~[(3) legal theory of recovery.]~~

3 ~~[(d) Negotiation.]~~

4 ~~[(1) The executive director will begin negotiations with the vendor to resolve the claim.~~

5 ~~The negotiations will begin no later than the 120th day after the date the claim is received.]~~

6 ~~[(2) The negotiation may be written or oral. The executive director may afford the~~
7 ~~vendor an opportunity for a meeting to informally discuss the disputed matters and provide the vendor~~
8 ~~an opportunity to present relevant information.]~~

9 ~~[(e) Mediation.]~~

10 ~~[(1) The department and the vendor may agree to nonbinding mediation. The~~
11 ~~department will agree to mediation if the executive director determines that the mediation may speed~~
12 ~~resolution of the claim or otherwise benefit the department.]~~

13 ~~[(2) The executive director will appoint a department employee as mediator. The~~
14 ~~employee must not have had any previous involvement or participation in the administration of the~~
15 ~~contract or the resolution of the claim.]~~

16 ~~[(3) If the vendor objects to the appointment of a department employee as mediator,~~
17 ~~the department will select and hire a private mediator from outside the department. The costs for the~~
18 ~~services of a private mediator will be apportioned equally between the department and the vendor.]~~

19 ~~[(4) The role of a mediator is limited to assisting the parties in attempting to reach an~~
20 ~~agreed resolution of the issues.]~~

21 ~~[(f) Final offer.]~~

22 ~~[(1) The executive director will make a final offer to the vendor within 90 days of~~
23 ~~beginning negotiations.]~~

1 ~~[(2) If the disposition is acceptable to the vendor, the vendor shall advise the executive~~
2 ~~director in writing within 20 days of the date of the final offer. The department will forward an agreed~~
3 ~~disposition involving payment to the vendor for a final and binding order on the claim.]~~

4 ~~[(g) Contested case hearing. If the vendor is dissatisfied with the final offer, or if the claim is not~~
5 ~~resolved before the 270th day after the claim is filed with the department, the vendor may petition the~~
6 ~~executive director for an administrative hearing before the State Office of Administrative Hearings to~~
7 ~~litigate the unresolved issues in the claim under the provisions of Government Code, Chapter 2260,~~
8 ~~Subchapter C.]~~

9
10 ~~[\$210.2. Protest of Department Purchases under the State Purchasing and General Services Act.]~~

11 ~~[(a) Purpose. The purpose of this section is to provide a procedure for vendors to protest~~
12 ~~purchases made by the department. Purchases made by the Texas Procurement and Support Services~~
13 ~~division of the Comptroller of Public Accounts office on behalf of the department are addressed in 34~~
14 ~~TAC Chapter 20.]~~

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

17 ~~[(1) Act – Government Code, Chapters 2151–2177, the State Purchasing and General~~
18 ~~Services Act.]~~

19 ~~[(2) Board – Board of the Texas Department of Motor Vehicles.]~~

20 ~~[(3) Department – Texas Department of Motor Vehicles.]~~

21 ~~[(4) Division – An organizational unit in the department.]~~

22 ~~[(5) Executive director – The executive director of the department.]~~

23 ~~[(6) Interested party – A vendor that has submitted a bid, proposal, or other expression~~

1 of interest for the purchase involved.]

2 ~~[(7) Purchase—A procurement action for commodities or non-professional services~~
3 ~~under the Act.]~~

4 ~~[(c) Filing of protest.]~~

5 ~~[(1) An actual, prospective bidder, or offeror who is aggrieved in connection with the~~
6 ~~solicitation, evaluation, or award of a purchase, may file a written protest. The protest must be~~
7 ~~addressed to the attention of the executive director. The protest must be received in the office of the~~
8 ~~executive director within 10 working days after such aggrieved person knows, or should have known, of~~
9 ~~the action.]~~

10 ~~[(2) The protest must be sworn and contain:]~~

11 ~~[(A) the provision of or rule adopted under the Act that the action is alleged to~~
12 ~~have violated;]~~

13 ~~[(B) a specific description of the alleged violation;]~~

14 ~~[(C) a precise statement of the relevant facts;]~~

15 ~~[(D) the issue to be resolved;]~~

16 ~~[(E) argument and authorities in support of the protest; and]~~

17 ~~[(F) a statement that copies of the protest have been mailed or delivered to~~
18 ~~other identifiable interested parties.]~~

19 ~~[(d) Suspension of award or performance. If a protest or appeal of a protest has been filed, then~~
20 ~~the department will not proceed with the solicitation or the award of the purchase unless the executive~~
21 ~~director's designee, not below the level of division director, makes a written determination that the~~
22 ~~award of the purchase should be made without delay to protect substantial interests of the department.~~
23 ~~If the purchase has already been awarded, then the department will not allow the vendor to continue~~

1 ~~performance under the contract unless the executive director makes a written determination that~~
2 ~~continued vendor performance is necessary to protect substantial interests of the department.]~~

3 ~~[(e) Informal resolution. The executive director's designee may informally resolve the dispute,~~
4 ~~including:]~~

5 ~~[(1) soliciting written responses to the protest from other interested parties; and]~~

6 ~~[(2) resolving the dispute by mutual agreement.]~~

7 ~~[(f) Written determination. If the protest is not resolved by agreement, the executive director's~~
8 ~~designee will issue a written determination to the protesting party and interested parties which sets~~
9 ~~forth the reason of the determination. The designee may determine that:]~~

10 ~~[(1) no violation has occurred; or]~~

11 ~~[(2) a violation has occurred and it is necessary to take remedial action as appropriate to~~
12 ~~the circumstances, which may include:]~~

13 ~~[(A) declaring the purchase void;]~~

14 ~~[(B) reversing the award; or]~~

15 ~~[(C) re-advertising the purchase using revised specifications.]~~

16 ~~[(g) Appeal.]~~

17 ~~[(1) An interested party may appeal the determination to the executive director. The~~
18 ~~written appeal must be received in the executive director's office no later than 10 working days after the~~
19 ~~date of the determination. The appeal is limited to a review of the determination.]~~

20 ~~[(2) The appealing party must mail or deliver copies of the appeal to the executive~~
21 ~~director's designee and other interested parties with an affidavit that such copies have been provided.]~~

22 ~~[(3) The general counsel of the department shall review the protest, the determination,~~
23 ~~the appeal, and prepare a written opinion with recommendation to the executive director.]~~

1 ~~[(4) The executive director may:]~~

2 ~~[(A) issue a final written determination; or]~~

3 ~~[(B) refer the matter to the board for its consideration at a regularly scheduled~~
4 ~~open meeting.]~~

5 ~~[(5) The board may consider oral presentations and written documents presented by the~~
6 ~~department and interested parties. The board chairman shall set the order and the amount of time~~
7 ~~allowed for presentation. The board's determination of the appeal shall be adopted by order and~~
8 ~~reflected in the minutes of the meeting.]~~

9 ~~[(6) The decision of the board or executive director shall be final.]~~

10 ~~[(h) Filing deadline. Unless the board determines that the appealing party has demonstrated~~
11 ~~good cause for delay or that a protest or appeal raises issues significant to procurement practices or~~
12 ~~procedures, a protest or appeal that is not filed timely will not be considered.]~~

13 ~~[(i) Document retention. The department shall maintain all documentation on the purchasing~~
14 ~~process that is the subject of a protest or appeal in accordance with the retention schedule of the~~
15 ~~department.]~~

16

17 ~~[\$210.3. Enhanced Contract Monitoring Program.]~~

18 ~~[(a) The department will apply risk assessment factors to agency contracts as defined in~~
19 ~~Government Code, §2261.253 to identify those contracts that require enhanced contract or~~
20 ~~performance monitoring. The risk assessment will consider the following factors:]~~

21 ~~[(1) dollar amount of contract;]~~

22 ~~[(2) total contract duration;]~~

23 ~~[(3) vendor past performance;]~~

1 ~~[(4) risk of fraud, abuse or waste;]~~
2 ~~[(5) business process impact of failure or delay; and]~~
3 ~~[(6) board or executive director's request for enhanced contract or performance~~
4 ~~monitoring.]~~

5 ~~[(b) The department will notify the board of the results of the risk assessment and present~~
6 ~~information to the board resulting from the enhanced contract or performance monitoring.]~~

7 ~~[(c) The chief financial officer or procurement manager shall immediately notify the~~
8 ~~department's governing body of any serious issue or risk that is identified under this section.]~~

9

10 **SUBCHAPTER C. CONTRACT MANAGEMENT**

11 **43 TAC §§210.41, 210.42, AND 210.43**

12 **STATUTORY AUTHORITY.** The department proposes new §§210.41, 210.42, and 210.43 in Chapter 210
13 under Transportation Code, §1002.001, which provides the board of the Texas Department of Motor
14 Vehicles (board) with the authority to adopt rules that are necessary and appropriate to implement the
15 powers and the duties of the department; Government Code, §2001.004, which requires state agencies
16 to adopt rules of practice stating the nature and requirements of all available formal and informal
17 procedures; Government Code, §2155.076, which requires state agencies, by rule, to develop and adopt
18 protest procedures for resolving vendor protests relating to purchasing issues; Government Code,
19 §2260.052(c), which requires state agencies to develop rules to govern negotiation and mediation of
20 contract claims; Government Code, §2261.253(c), which requires state agencies, by rule, to establish a
21 procedure to identify each contract that requires enhanced contract monitoring; and the statutory
22 authority referenced throughout the preamble and in the rule text, which is incorporated herein by
23 reference.

1 **CROSS REFERENCE TO STATUTE.** The proposed new sections would implement Government Code, Title
2 10, Subtitle D; and Transportation Code, Chapters 1001 and 1002.

3
4 Text.

5 §210.41. Claims for Purchase Contracts.

6 (a) Purpose. Government Code, Chapter 2260, provides a resolution process for certain contract
7 claims against the state. Chapter 2260 applies to contracts of the department entered into under the
8 State Purchasing and General Services Act. This section governs the filing, negotiation, and mediation of
9 a claim. When used in this section, the terms “contract” and “contractor” are defined in Government
10 Code, §2260.001.

11 (b) Filing of claim. A contractor may file a notice of claim with the executive director within 180
12 days after the date of the event giving rise to the claim. The claim must contain:

- 13 (1) the nature of the alleged breach;
14 (2) any amount the contractor seeks as damages; and
15 (3) the legal theory supporting recovery.

16 (c) Negotiation.

17 (1) The executive director shall negotiate with the contractor to resolve the claim;
18 (2) Negotiations will begin no later than the 120th day after the date the claim is
19 received by the department;

20 (3) Negotiations may be written or oral; and

21 (4) The executive director may afford the contractor an opportunity for a meeting to
22 informally discuss the claim and provide the contractor with an opportunity to present relevant
23 information.

1 (d) Mediation. The parties may agree to mediate a claim through an impartial party. For the
2 purposes of this subchapter, “mediation” is assigned the meaning set forth in the Civil Practice and
3 Remedies Code, §154.023. The mediation is subject to the provisions of the Governmental Dispute
4 Resolution Act, Government Code, Chapter 2009. The parties may be assisted in the mediation by legal
5 counsel or other individual.

6 (1) The department and the contractor may agree to nonbinding mediation;

7 (2) The department will agree to mediation if the executive director determines that
8 mediation may speed resolution of the claim or otherwise benefit the department;

9 (3) The mediator shall possess the qualifications required under Civil Practice and
10 Remedies Code §154.022;

11
12 (4) Unless otherwise agreed in writing, each party shall be responsible for its own costs
13 incurred in connection with a mediation, including without limitation, costs of document reproduction,
14 attorney’s fees, consultant fees and expert fees, and the cost of the mediator shall be divided equally
15 between the parties.

16 (e) Final offer.

17 (1) The executive director will make a final offer to the contractor within 90 days of
18 beginning negotiations; and

19 (2) If the final offer is acceptable to the contractor, the contractor must advise the
20 executive director in writing within 20 days of the date of the final offer. The department will forward a
21 settlement agreement to the contractor for signature to resolve the claim.

22 (f) Contested case hearing. If the contractor is dissatisfied with the final offer, or if the claim is
23 not resolved before the 270th day after the claim is filed with the department, then, unless the parties

1 agree in writing to an extension of time, the contractor may file a request with the executive director for
2 an administrative hearing before the State Office of Administrative Hearings to resolve the unresolved
3 issues of the claim under the provisions of Government Code, Chapter 2260, Subchapter C.

4
5 §210.42. Protest of Department Purchases under the State Purchasing and General Services Act.

6 (a) Purpose. The purpose of this section is to provide a procedure for respondents to protest
7 purchases made by the department. Purchases made by the Texas Procurement and Support Services
8 division of the Texas Comptroller of Public Accounts' office on behalf of the department are addressed
9 in 34 TAC, Part 1, Chapter 20.

10 (b) Filing of protest.

11 (1) A respondent who has submitted a written response to a department solicitation
12 may file a written protest.

13 (2) The protest must contain:

14 (A) the specific statutory or regulatory provision the protestant alleges the
15 solicitation, contract award or tentative award violated;

16 (B) a specific description of each action by the department that the protestant
17 alleges violated the identified statutory or regulatory provision;

18 (C) a precise statement of the relevant facts, including:

19 (i) sufficient documentation to establish that the protest has been
20 timely filed; and

21 (ii) a description of the resulting adverse impact to the protestant,
22 department and the state;

1 (D) a statement of any issues of law or fact that the protestant contends must
2 be resolved;

3 (E) a statement of the protestant’s argument and authorities that the protestant
4 offers in support of the protest;

5 (F) an explanation of the subsequent action the protestant is requesting; and

6 (G) a statement that copies of the protest have been mailed or delivered to
7 other identifiable respondents.

8 (3) The protest must be signed by an authorized representative of the protestant and
9 the signature to the protest must be notarized.

10 (4) The protest must be filed in the time period specified in this section.

11 (5) The protest must be mailed or delivered to the department, to the attention of the
12 procurement director.

13 (c) Timeliness. To be considered timely, the protest must be filed:

14 (1) by the end of the posted solicitation period, if the protest concerns the solicitation
15 documents or actions associated with the publication of solicitation documents;

16 (2) by the day of the award of a contract resulting from the solicitation, if the protest
17 concerns the evaluation or method of evaluation for a response to the solicitation; or

18 (3) no later than 10 days after the notice of award, if the protest concerns the award.

19 (d) Suspension of contract award or performance. If a protest or appeal of a protest has been
20 filed, then the department will not proceed with the contract award or performance under the contract
21 resulting from the solicitation unless the executive director or procurement director makes a written
22 determination that the contract award should be made or performance under the contract should
23 proceed without delay to protect the best interests of the state and department.

1 (e) Action by department. Upon receipt of a protest, the department may:

2 (1) dismiss the protest if:

3 (A) it is not timely; or

4 (B) it does not meet the requirements of subsection (b) of this section;

5 or

6 (2) consider the protest under the procedures in this section.

7 (f) Informal resolution. The procurement director may solicit written responses to the protest

8 from other affected vendors and attempt to settle and resolve the protest by mutual agreement.

9 (g) Written determination. If the protest is not resolved by agreement, the procurement director

10 will issue a written determination to the protesting party and other respondents, setting forth the

11 reason for the determination. The procurement director may determine that:

12 (1) no violation has occurred; or

13 (2) a violation has occurred and it is necessary to take remedial action as appropriate to

14 the circumstances, which may include:

15 (A) declare the purchase void;

16 (B) reverse the contract award; or

17 (C) re-advertise the purchase using revised specifications.

18 (h) Appeal.

19 (1) A protestant may appeal the determination of a protest, to the general counsel. An

20 appeal must be in writing and received in the office of general counsel not later than 10 days after the

21 date the procurement director sent written notice of their determination. The scope of the appeal shall

22 be limited to review of the procurement director's determination.

23 (2) The general counsel may:

1 (A) refer the matter to the executive director for consideration and a final
2 written decision that resolves the protest; or

3 (B) may issue a written decision that resolves the protest.

4 (3) An appeal that is not filed in a timely manner may not be considered unless good
5 cause for delay is shown or the executive director determines that an appeal raises issues that are
6 significant to agency procurement practices or procedures in general.

7 (4) A written decision of the executive director or general counsel shall be the final
8 administrative action of the department.

9
10 §210.43. Enhanced Contract and Performance Monitoring.

11 (a) The department will apply risk assessment factors to its contracts as defined in Government
12 Code, §2261.253 to identify those contracts that require enhanced contract or performance monitoring.

13 The risk assessment may consider the following factors:

14 (1) dollar amount of the contract;

15 (2) total contract duration;

16 (3) contractor past performance;

17 (4) risk of fraud, abuse or waste;

18 (5) special circumstances of the project;

19 (6) the scope of the goods, products, or services provided under the contract;

20 (7) business process impact of failure or delay; and

21 (8) the board or executive director's request for enhanced contract or performance
22 monitoring.

1 (b) The department’s contract management office or procurement director will notify the board
2 of the results of the risk assessment and present information to the board resulting from the enhanced
3 contract or performance monitoring.

4 (c) The department’s contract management office or procurement director must immediately
5 notify the board of any serious issue or risk that is identified under this section.

6