

Commissioners:

J. Winston Krause,
Chairman

Doug Lowe

Robert Rivera



TEXAS LOTTERY COMMISSION

Gary Grief, *Executive Director*

Michael P. Farrell, *Charitable Bingo Operations Director*

To: J. Winston Krause, Chairman
Doug Lowe, Commissioner
Robert Rivera, Commissioner

From: Lea Garey, Senior Contracts Attorney *JAG*

Date: April 11, 2019

Re: Consideration of and possible discussion and/or action, including proposal, on amendments to 16 TAC §401.101 (Lottery Procurement Procedures) and 16 TAC §401.105 (Major Procurement Approval Authority, Responsibilities and Reporting)

Attached are draft rules prepared for submission to the *Texas Register* to adopt amendments to 16 TAC §401.101 (Lottery Procurement Procedures) and 16 TAC §401.105 (Major Procurement Approval Authority, Responsibilities and Reporting) without changes to the proposed text as published in the February 22, 2019, issue of the *Texas Register* (44 TexReg 765) (also attached). The purpose of the amendments to 16 TAC §401.101 is to reflect updates made to the Texas Procurement and Contract Management Guide, and to reflect current agency procedure. The amendments to definitions and dollar amount thresholds within the section mirror those found in the Texas Procurement and Contract Management Guide. Also, grammatical corrections were made to the text to increase clarity.

The purpose of the amendments to 16 TAC §401.105 is to align the language in this section with current procurement procedures observed by the Commission, and with the definitions of like terms found in the Texas Procurement and Contract Management Guide.

The Commission received no written comments on the proposed amendments during the public comment period.

Recommendation: Staff recommends the Commission adopt the attached rule amendments to 16 TAC §401.101 (Lottery Procurement Procedures) and 16 TAC §401.105 (Major Procurement Approval Authority, Responsibilities and Reporting).

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1 The Texas Lottery Commission (Commission) adopts amendments to 16 TAC §§401.101
2 (Lottery Procurement Procedures) and 401.105 (Major Procurement Approval Authority,
3 Responsibilities and Reporting), without changes to the proposed text as published in the February
4 22, 2019, issue of the *Texas Register* (44 TexReg 765). The purpose of the amendments to 16
5 TAC §401.101 is to reflect updates made to the *Texas Procurement and Contract Management*
6 *Guide*, and to reflect current agency procedure. The amendments to definitions and dollar amount
7 thresholds within the section mirror those found in the *Texas Procurement and Contract*
8 *Management Guide*. Also, grammatical corrections were made to the text to increase clarity.

9 The purpose of the amendments to 16 TAC §401.105 is to align the language in this section
10 with current procurement procedures observed by the Commission, and with the definitions of like
11 terms found in the *Texas Procurement and Contract Management Guide*.

12 The Commission received no written comments on the proposed amendments during the
13 public comment period.

14 These amendments are adopted under Texas Government Code §466.015(c), which
15 authorizes the Commission to adopt rules governing the operation of the lottery; under
16 §466.1005(b), which requires the Commission to review and approve all major procurements as
17 provided by Commission rule and, by rule, to establish a procedure to determine what constitutes
18 a major procurement; under §466.101(a), which authorizes the Commission and executive director
19 to establish procedures for the procurement of goods and services necessary to carry out the
20 purposes of Chapter 466; and, under §467.102, which authorizes the Commission to adopt rules
21 for the enforcement and administration of the laws under the Commission's jurisdiction.

22 This adoption is intended to implement Texas Government Code Chapter 466.
23 §401.101. Lottery Procurement Procedures.

1 (a) Definitions. The following words and terms, when used in this subchapter, shall have the
2 following meanings, unless the context clearly indicates otherwise.

3 (1) Act--The State Lottery Act.

4 (2) Agency--For the purposes of this subchapter that deals with procurements for the
5 administration of the lottery, the term "agency" refers to the commission as defined in paragraph
6 (5) of this subsection.

7 (3) Best and Final Offer (BAFO)--A revised final bid or proposal submitted after all
8 clarifications, discussions, and negotiations with the agency.

9 (4) Executive director--The executive director of the Commission.

10 (5) Commission--The state agency established under Chapter 466 and Chapter 467,
11 Government Code. However, this subchapter applies only to the procurement of goods and
12 services for the administration of the lottery authorized by the State Lottery Act. For the sake of
13 clarity, this subchapter will refer to the commission as "agency" and to the appointed board as the
14 "Texas Lottery Commission".

15 (6) Cost--The price at which the agency can purchase goods and/or services.

16 (7) Electronic State Business Daily or Business Daily--An online directory administered
17 by the Comptroller of Public Accounts, or its successor, that publishes solicitations for the purpose
18 of informing vendors of procurement opportunities and provides public notice of contract awards.

19 (8) Emergency procurement--A situation requiring the state agency to make the
20 procurement more quickly to prevent a hazard to life, health, safety, welfare, or property or to
21 avoid undue additional cost to the state.

22 (9) Goods--Supplies, materials, and equipment.

23 (10) IFB--A written invitation for bids.

1 (11) Lottery--The procedures and operations of the agency under the State Lottery Act
2 through which prizes are awarded or distributed by chance among persons who have paid, or
3 unconditionally agreed to pay, for a chance or other opportunity to receive a prize.

4 (12) Nonresident bidder or proposer--A person whose principal place of business is not in
5 Texas, but does not include a bidder whose majority owner or parent company has its principal
6 place of business in Texas.

7 (13) Principal place of business--The state in which the head office of a business is located,
8 and generally, where the executive management is located and the business records are maintained.

9 (14) Produced in Texas--Those goods that are manufactured in Texas, excluding the sole
10 process of packaging or repackaging. Packaging or repackaging does not constitute being
11 manufactured in Texas.

12 (15) Proprietary purchase--A product or service that is unique to a single vendor or
13 manufacturer and is not available from other sources.

14 (16) Resident bidder or proposer--A person whose principal place of business is in this
15 state, including a contractor whose ultimate parent company or majority owner has its principal
16 place of business in this state.

17 (17) RFP--A written request for proposals.

18 (18) RFQ--A written request for qualifications.

19 (19) Services--The furnishing of skilled or unskilled labor or professional work.

20 (20) State or statewide contract--A contract for goods or services established and
21 administered by another state agency (e.g., Texas Comptroller of Public Accounts, Texas
22 Department of Information Resources) for use by all state agencies.

1 (21) Texas Lottery Commission--The appointive board or commission established in
2 Chapter 467, Government Code.

3 (b) Use and Effect. This subchapter is prescribed for the performance of the statutory powers and
4 functions vested in the agency. In no event shall they, or any of them, be construed as a limitation
5 or restriction upon the exercise of any discretion authorized to be exercised by the Texas Lottery
6 Commission.

7 (c) Procurement method.

8 (1) For the purchase or lease of goods and services not expected to exceed \$5,000, or for
9 the purchase or lease of goods and services available under a state contract, a competitive
10 solicitation, whether formal or informal, may be conducted, but is not required.

11 (2) For the purchase or lease of goods and services not expected to exceed \$25,000, the
12 agency, at a minimum, will conduct an informal competitive solicitation in an attempt to obtain at
13 least three competitive bids and will solicit at least two HUB vendors.

14 (3) For the purchase or lease of goods and services expected to exceed \$25,000, the agency
15 will conduct a formal competitive solicitation in an attempt to obtain at least three competitive
16 bids or proposals and will solicit at least two HUB vendors.

17 (4) Printing services. For the purchase of printing services over \$2,500, the agency will
18 submit print job specifications and bid requests to the State Print Shops. If no responsive bids are
19 received from a State Print Shop or, after the results of the bid evaluation, the agency determines
20 that best value would be achieved through a private sector vendor, the agency may perform a
21 competitive solicitation outlined in paragraph (2) or (3) of this subsection.

22 (5) Emergency procurement. Notwithstanding paragraphs (1) - (4) of this subsection, the
23 agency may make an emergency purchase or lease of goods or services. Prior to making an

1 emergency purchase or lease of goods or services, the existence of an emergency should be
2 documented. For emergency purchases in excess of \$5,000, the agency may conduct an informal
3 competitive solicitation in an attempt to obtain at least three competitive bids, whenever possible.
4 For emergency purchases in excess of \$25,000, the procurement will be posted on the Electronic
5 State Business Daily; however, the minimum posting requirements do not apply. Posting of the
6 advertisement and/or the award notice satisfies this requirement. In response to an emergency, the
7 agency may procure goods or services in the most expeditious manner deemed appropriate,
8 including from a sole source.

9 (6) Proprietary purchase. When the agency believes that a purchase of goods or services
10 over \$5,000 is proprietary to one vendor or one manufacturer, a written proprietary purchase
11 justification will be included in the procurement file. If the estimated purchase price exceeds
12 \$25,000, the procurement will be posted on the Electronic State Business Daily prior to a purchase
13 order or contract being issued.

14 (7) Notwithstanding paragraphs (1) - (4) of this subsection, the agency may make a
15 purchase or lease of goods or services under any other procedure not otherwise prohibited by law.

16 (d) Informal competitive solicitations.

17 (1) An informal competitive solicitation is a process conducted in an effort to receive at
18 least three competitive bids for a specifically identified good or service, without the advertisement
19 and issuance of an IFB or RFP. The bids may be solicited by letter, electronic mail, facsimile, or
20 telephone call. The following information will be recorded by the agency in the procurement file:

21 (A) the name and telephone number of each person or company to which the
22 solicitation was provided;

23 (B) the name and telephone number of the person or company submitting the bid;

- 1 (C) the date the bid was received;
- 2 (D) the amount of the bid;
- 3 (E) bidder's Historically Underutilized Business status; and
- 4 (F) the name and telephone number of the person receiving the bid for the agency.

5 (2) The agency will award a contract to the qualified bidder submitting the lowest and best
6 bid, except that the agency may reject all bids if it is determined to be in the best interest of the
7 state.

8 (3) The contract will be awarded by the issuance of a written purchase order.

9 (e) Formal competitive solicitations.

10 (1) A formal competitive solicitation is a process conducted in order to receive at least
11 three sealed competitive bids or proposals pursuant to the issuance of an IFB, RFP, RFQ, or
12 another statewide contract process, respectively.

13 (A) An IFB will be used when the agency is able to describe, by way of established
14 specifications, exactly what it wishes to procure, and wants bidders to offer such at a specific price.

15 (B) An RFP will be used when the agency knows generally what it wishes to procure in
16 order to accomplish a certain goal(s) or objective(s); requirements cannot be completely and
17 accurately described; requirements can be satisfied in a number of ways, all of which could be
18 acceptable; or, where oral or written communications with proposers may be necessary in order to
19 effectively communicate requirements and/or assess proposals, and the agency wants proposers to
20 offer a solution(s) to address such need(s) at a specific price(s). The RFP process allows for
21 negotiations between a proposer and the issuing agency.

22 (C) An RFQ will be used when the agency wants to procure professional services and
23 evaluate proposers solely on their qualifications.

1 (2) The agency will advertise formal competitive solicitations, whether by IFB, RFP, or
2 RFQ on the Electronic State Business Daily in accordance with the Comptroller of Public
3 Accounts posting time requirements. The agency may advertise such solicitations in other media
4 determined appropriate by the agency.

5 (3) For all formal competitive solicitations, the agency will award a contract to the most
6 qualified bidder or proposer as determined during the evaluation of the bids or proposals. The
7 agency may reject all bids or proposals if it is determined to be in the best interest of the agency.
8 At the time a purchase order is issued or a contract is executed, the agency will notify, in writing,
9 all other bidders or proposers of the contract award by facsimile, email or by certified mail. Any
10 information relating to the solicitation not made privileged from disclosure by law will be made
11 available for public disclosure, after award of a contract, pursuant to the Texas Public Information
12 Act.

13 (4) For those formal competitive solicitations where fewer than two bids or proposals are
14 received, the agency will document the reasons, if known, for the lack of two bids or proposals.
15 If fewer than two bids or proposals are received, the agency may cancel the solicitation and
16 conduct another solicitation, or it may award a contract if one acceptable bid or proposal is
17 received.

18 (5) For formal competitive solicitations where an IFB is used, the agency will award a
19 contract to the qualified bidder submitting the lowest cost responsible bid meeting all
20 specifications and providing the best value for the agency, as determined during the evaluation of
21 the bids. Negotiations are not authorized when utilizing an IFB procurement method; however, if
22 only one response is received, negotiations are allowed, provided, negotiations may not result in a
23 material change to the advertised specifications.

1 (f) RFP.

2 (1) Submission. When an RFP is used by the agency, the RFP will contain, at a minimum,
3 the following:

4 (A) a general description of the goods and/or services to be provided, and a specific
5 identification of the goals or objectives to be achieved;

6 (B) a description of the format proposals must follow and the elements they must
7 contain;

8 (C) the time and date proposals are due, and the location and person to whom they
9 are to be submitted;

10 (D) an identification of the process to be utilized in evaluating proposals; and

11 (E) a listing of the factors to be utilized in evaluating proposals and awarding a
12 contract. At a minimum, the factors should include:

13 (i) the proposer's price to provide the goods or services;

14 (ii) the probable quality of the offered goods or services;

15 (iii) the agency's evaluation of the likelihood of the proposal to produce the
16 desired outcome for the agency, considering, among other criteria:

17 (I) the quality of the proposer's past performance in contracting with
18 the agency, with other state entities, or with private sector entities;

19 (II) the qualifications of the proposer's personnel;

20 (III) the experience of the proposer in providing the requested goods
21 or services;

22 (IV) the financial status of the proposer; and

1 (iv) whether the proposer performed the good faith effort required by the
2 HUB subcontracting plan, when the agency has determined that subcontracting is probable.

3 (2) Evaluation Process. The agency will, prior to the deadline for receipt of proposals,
4 develop and establish comprehensive evaluation criteria to be utilized by an evaluation committee
5 in evaluating the proposals. All proposals that are responsive to the RFP will be reviewed by the
6 evaluation committee. Part of the initial evaluation process may include an inspection trip to the
7 proposer's facilities, and/or proposers may be requested to make an oral presentation to the
8 committee. The evaluation committee may seek advice from consultants. If consultants are
9 employed, they may be provided all information provided by the proposers. The evaluation
10 committee will evaluate and score all proposals in accordance with the evaluation criteria.

11 (3) Best and Final Offers (BAFO). The agency may select top proposers, which may each
12 be given an opportunity to discuss, clarify, and negotiate with the agency, and submit revisions to
13 their respective proposals to the agency through a BAFO process. During discussions between the
14 proposers and the agency, no information from a competing proposal may be revealed by the
15 agency to another competitor. Any type of auction practice or allowing the transfer of technical
16 information is specifically prohibited. At the conclusion of the discussions, BAFOs may be
17 formally requested from the proposers and a deadline will be set for submission. BAFOs will be
18 submitted by supplemental pages and not a complete resubmission of the proposal. All BAFOs
19 will be reviewed by the evaluation committee. The evaluation committee will evaluate and score
20 the BAFO response together with the original proposal in accordance with the evaluation criteria.

21 (4) Negotiation. If a BAFO process is not used, the agency will attempt to negotiate a
22 contract with the selected proposer. If a contract cannot be negotiated with the selected proposer
23 on terms the agency determines reasonable, negotiations with that proposer will be terminated, and

1 negotiations will be undertaken with the next highest scored proposer. This process will be
2 continued until a contract is executed by a proposer and the agency, or negotiations with all
3 qualified proposers are terminated. If no contract is executed, the agency may cancel the
4 solicitation.

5 (5) Multiple Award. The agency may award a contract to two or more vendors or
6 contractors using a single solicitation to furnish the same or similar supplies or services, where
7 more than one vendor or contractor is needed to meet the agency's requirements for quantity,
8 delivery, or service.

9 (g) RFQ.

10 (1) Submission. When an RFQ is used by the agency, the RFQ will contain, at a minimum,
11 the following:

12 (A) a general description of the professional services to be performed, and a specific
13 identification of the goals or objectives to be achieved;

14 (B) a description of the format proposals must follow and the elements they must
15 contain;

16 (C) the time and date proposals are due, and the location and person to whom they
17 are to be submitted;

18 (D) an identification of the process to be utilized in evaluating proposals and
19 awarding a contract; and

20 (E) a listing of the factors to be utilized in evaluating proposals and awarding a
21 contract. At a minimum, the factors should include:

22 (i) the demonstrated competence and qualifications to perform the services;

1 (ii) the quality of the proposer's past performance in contracting with the
2 agency, with other state entities, or with private sector entities;

3 (iii) the financial status of the proposer;

4 (iv) the qualifications of the proposer's personnel;

5 (v) the experience of the proposer in providing the requested services; and

6 (vi) whether the proposer performed the good faith effort required by the
7 HUB subcontracting plan, when the agency has determined that subcontracting is probable.

8 (2) Evaluation Process. The agency will, prior to the deadline for receipt of proposals,
9 develop and establish comprehensive evaluation criteria to be utilized by an evaluation committee
10 in evaluating the proposals. All proposals that are responsive to the RFQ will be reviewed by the
11 evaluation committee. The evaluation committee will evaluate and score all proposals in
12 accordance with the evaluation criteria.

13 (3) Negotiation. The agency will then attempt to negotiate a contract, for a fair and
14 reasonable price, with the selected proposer; or, the agency may engage in simultaneous
15 negotiations with multiple proposers. If a contract cannot be negotiated with the selected proposer
16 on terms the agency determines reasonable, negotiations with that proposer will be terminated, and
17 negotiations will be undertaken with the next highest scored proposer. This process will continue
18 until a contract is executed by a proposer and the agency, or negotiations with all qualified
19 proposers are terminated. If no contract is executed, the agency may cancel the solicitation.

20 (h) Preferences.

21 (1) If, after application of the preferences required by Texas law, a tie continues, the
22 contract award will be made by the drawing of lots.

1 (2) A bidder or proposer entitled to a preference(s) under Texas law shall claim the
2 preference(s) in its bid or proposal.

3 (i) Contract terms. A contract for the purchase or lease of goods or services relating to the
4 implementation, operation, or administration of the lottery will provide that the executive director
5 may terminate the contract, without penalty, if an investigation made pursuant to the Act reveals
6 that the person to whom the contract was awarded would not be eligible to receive a sales agent
7 license under the State Lottery Act, Texas Government Code, §466.155. An IFB, RFP or RFQ
8 may require that bidders or proposers provide in their bids or proposals sufficient information to
9 allow the agency to determine whether the bidder or proposer meets the eligibility requirements
10 for a sales agent license.

11 §401.105. Major Procurement Approval Authority, Responsibilities and Reporting.

12 (a) Purpose. The purpose of this rule is to establish the approval authority, responsibilities and
13 reporting for all formal procurements.

14 (b) Applicability. This rule applies to all formal procurements made by the agency.

15 (c) Definitions. As used in this section, the following terms shall have the following meanings,
16 unless the context clearly indicates otherwise.

17 (1) Contract--A written agreement between the agency and a vendor for goods or services.

18 (2) Formal Procurement--A formal competitive solicitation, for the purchase or lease of
19 goods and/or services expected to exceed \$25,000, conducted in order to receive at least three
20 sealed competitive bids or proposals pursuant to the issuance of an IFB, RFP, RFQ, or another
21 statewide contract process, respectively.

1 (3) Major Procurement--Any formal procurement for goods or services that directly
2 supports the agency's core gaming business function and has a cumulative contract value equal to
3 or greater than ten (10) million dollars.

4 (4) Major Contract--Any contract resulting from a Major Procurement.

5 (5) Prime Contract--Any contract, other than those contracts designated as Major
6 Contracts, which has a cumulative contract value that exceeds one (1) million dollars.

7 (6) Value--The agency adopts by reference the determination of contract value set forth in
8 the Texas Procurement and Contract Management Guide published by the Comptroller of Public
9 Accounts. The determination of contract value shall be the estimated dollar amount that the agency
10 may be obligated to pay pursuant to the contract and all executed and proposed amendments,
11 extensions and renewals of the contract. The agency shall base its determination of the proposed
12 length of and compensation during the original term and the renewal periods of the contract on
13 best business practices, state fiscal standards and applicable law, procedures and regulations.

14 (d) Major Procurement and Major Contract Approval Authority, Responsibilities and Reporting.

15 (1) Texas Lottery Commission Approval. The executive director or his/her designee shall
16 present all major procurements to the Texas Lottery Commission for review and approval. After a
17 vendor is selected and a contract has been fully negotiated, the Texas Lottery Commission shall
18 provide final approval of the contract with the selected vendor.

19 (2) Amendments/Renewals/Extensions to Major Contracts. The executive director or
20 his/her designee shall provide the Texas Lottery Commission advance notice of any amendment,
21 renewal or extension to a major contract.

1 (3) Enhanced Contract Monitoring. The executive director or his/her designee shall
2 immediately notify the Texas Lottery Commission of any serious issue or risk that is identified
3 with respect to a major contract.

4 (e) Prime Contract Reporting. The executive director or his/her designee shall provide the Texas
5 Lottery Commission advance notice of any procurement, amendment, renewal or extension to a
6 prime contract.

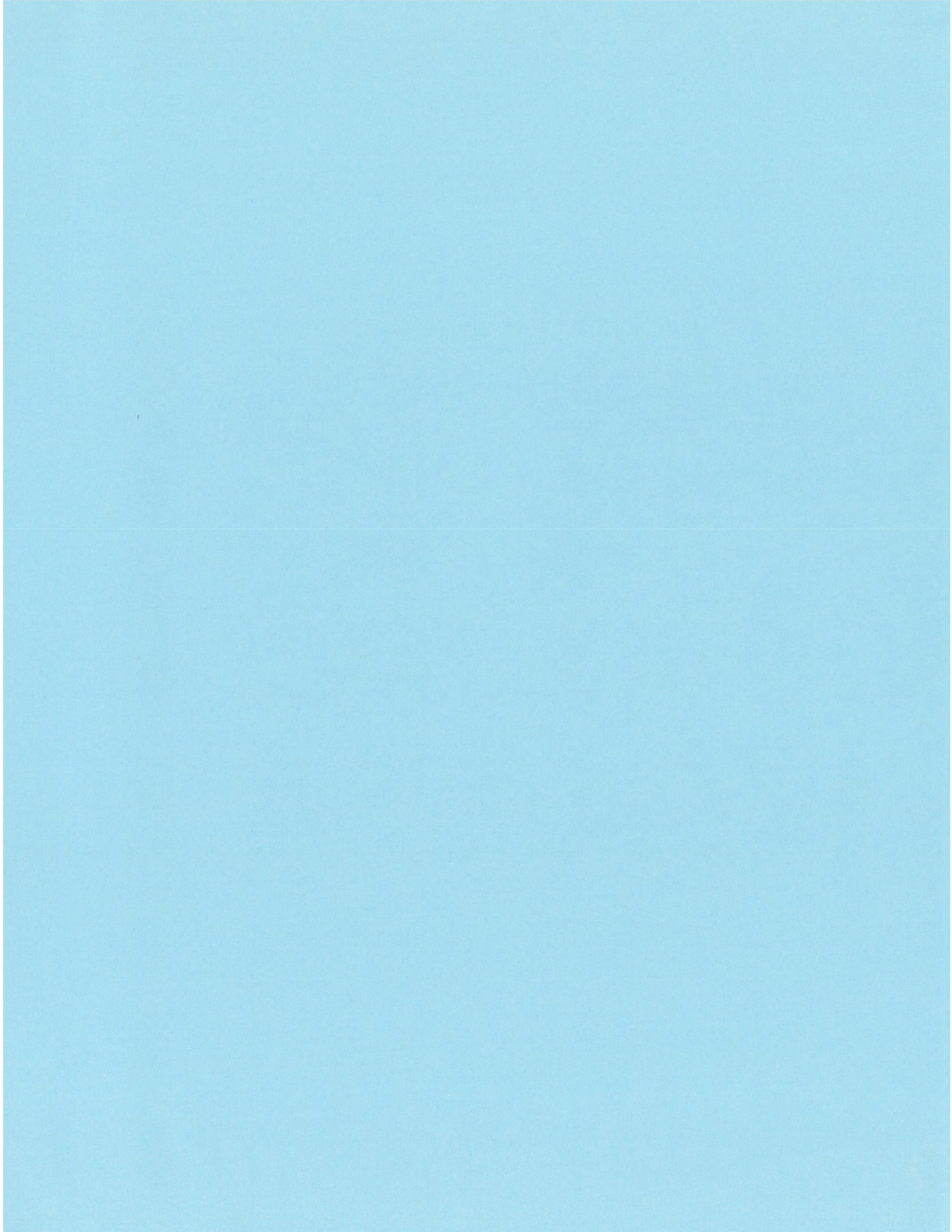
7 (f) Agency Approval. Except for a contract that by law requires the Commission's approval, the
8 Texas Lottery Commission delegates authority to the executive director (or his/her designee) to
9 approve all contracts and purchase orders not defined as major procurements in subsection (c) of
10 this section.

11 (g) Authority to Execute Contracts. The Texas Lottery Commission delegates authority to the
12 executive director to execute all contracts for the agency. This authority may be delegated by the
13 executive director.

14 (h) Contract Planning.

15 (1) The executive director or his/her designee will present the status of all major and
16 prime contracts to the Texas Lottery Commission annually for informational purposes. The report
17 will be presented at the beginning of each fiscal year.

18 (2) As deemed necessary by the executive director or his/her designee, updates to the status
19 of certain contracts may be provided to the Texas Lottery Commission periodically throughout the
20 fiscal year for informational purposes.



PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

Symbols in proposed rule text. Proposed new language is indicated by underlined text. ~~Square brackets and strikethrough~~ indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

TITLE 16. ECONOMIC REGULATION

PART 9. TEXAS LOTTERY COMMISSION

CHAPTER 401. ADMINISTRATION OF STATE LOTTERY ACT SUBCHAPTER A. PROCUREMENT

16 TAC §401.101, §401.105

The Texas Lottery Commission (Commission) proposes amendments to 16 TAC §401.101 (Lottery Procurement Procedures) and §401.105 (Major Procurement Approval Authority, Responsibilities and Reporting). The purpose of the proposed amendments to 16 TAC §401.101 is to reflect updates made to the *Texas Procurement and Contract Management Guide*, and to reflect current agency procedure. Proposed amendments to definitions and dollar amount thresholds within the section mirror those found in the *Texas Procurement and Contract Management Guide*. Also, grammatical corrections were made to the text to increase clarity.

The purpose of the proposed amendments to 16 TAC §401.105 is to align the language in this section with current procurement procedures observed by the Commission, and with the definitions of like terms found in the *Texas Procurement and Contract Management Guide*.

Kathy Pyka, Controller, has determined that for each year of the first five years the amendments will be in effect, there will be no significant fiscal impact for state or local governments as a result of the proposed amendments. There will be no adverse effect on small businesses or rural communities, micro businesses, or local or state employment. There will be no additional economic cost to persons required to comply with the amendments, as proposed. Furthermore, an Economic Impact Statement and Regulatory Flexibility Analysis is not required because the proposed amendments will not have an adverse economic effect on small businesses or rural communities as defined in Texas Government Code §2006.001(1-a) and (2).

Mike Fernandez, Administration Division Director, has determined that for each year of the first five years the proposed amendments will be in effect, the public benefit expected is improved clarity and transparency regarding the Commission's procurement procedures.

Pursuant to Texas Government Code §2001.0221, the Commission provides the following Government Growth Impact Statement for the proposed amendments to 16 TAC §401.101 (Lottery Procurement Procedures) and §401.105 (Major Procurement Approval Authority, Responsibilities and Reporting). For

each year of the first five years the proposed amendments will be in effect, Kathy Pyka, Controller, has determined the following:

- (1) The proposed amendments do not create or eliminate a government program.
- (2) Implementation of the proposed amendments does not require the creation of new employee positions or the elimination of existing employee positions.
- (3) Implementation of the proposed amendments does not require an increase or decrease in future legislative appropriations to the Commission.
- (4) The proposed amendments do not require an increase or decrease in fees paid to the Commission.
- (5) The proposed amendments do not create a new regulation.
- (6) The proposed amendments do not expand or limit an existing regulation.
- (7) The proposed amendments do not increase or decrease the number of individuals subject to the rule's applicability.
- (8) The proposed amendments do not positively or adversely affect this state's economy.

The Commission requests comments on the proposed amendments from any interested person. Comments on the proposed amendments may be submitted to Lea Garey, Senior Contracts Attorney, by mail at Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630; by facsimile at (512) 344-5189; or by email at legal.input@lottery.state.tx.us. Comments must be received within 30 days after publication of this proposal in the *Texas Register* to be considered.

These amendments are proposed under Texas Government Code §466.015(c), which authorizes the Commission to adopt rules governing the operation of the lottery; under §466.1005(b), which requires the Commission to review and approve all major procurements as provided by Commission rule and, by rule, to establish a procedure to determine what constitutes a major procurement; under §466.101(a), which authorizes the Commission and executive director to establish procedures for the procurement of goods and services necessary to carry out the purposes of Chapter 466; and, under §467.102, which authorizes the Commission to adopt rules for the enforcement and administration of the laws under the Commission's jurisdiction.

This proposal is intended to implement Texas Government Code Chapter 466.

§401.101. *Lottery Procurement Procedures.*

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

- (1) Act--The State Lottery Act.
- (2) Agency--For the purposes of this subchapter that deals with procurements for the administration of the lottery, the term "agency" refers to the commission as defined in paragraph (5) of this subsection.
- (3) Best and Final Offer (BAFO)--A revised final bid or proposal submitted after all clarifications, discussions, and negotiations with the agency.
- (4) Executive director--The executive director of the Commission.
- (5) Commission--The state agency established under Chapter 466 and Chapter 467, Government Code. However, this subchapter applies only to the procurement of goods and services for the administration of the lottery authorized by the State Lottery Act. For the sake of clarity, this subchapter will refer to the commission as "agency" and to the appointed board as the "Texas Lottery Commission".
- (6) Cost--The price at which the agency can purchase goods and/or services.
- (7) Electronic State Business Daily or Business Daily--An online directory [The website] administered by the Comptroller of Public Accounts, or its successor, that publishes solicitations for the purpose of informing vendors of procurement opportunities and provides public notice of contract awards. [on which procurement opportunities exceeding \$25,000 are advertised in electronic format.]
- (8) Emergency procurement--A situation requiring the state agency to make the procurement more quickly to prevent a hazard to life, health, safety, welfare, or property or to avoid undue additional cost to the state.
- (9) Goods--Supplies, materials, and equipment.
- (10) IFB--A written invitation for bids.
- (11) Lottery--The procedures and operations of the agency under the State Lottery Act through which prizes are awarded or distributed by chance among persons who have paid, or unconditionally agreed to pay, for a chance or other opportunity to receive a prize.
- (12) Nonresident bidder or proposer--A person whose principal place of business is not in Texas, but does not include a bidder whose majority owner or parent company has its principal place of business in Texas.
- (13) Principal place of business--The state in which the head office of a business is located, and generally, where the executive management is located and the business records are maintained.
- (14) Produced in Texas--Those goods that are manufactured in Texas, excluding the sole process of packaging or repackaging. Packaging or repackaging does not constitute being manufactured in Texas.
- (15) Proprietary purchase--A product or service that is unique to a single vendor or manufacturer and is not available from other sources.
- (16) Resident bidder or proposer--A person whose principal place of business is in this state, including a contractor whose ultimate parent company or majority owner has its principal place of business in this state.
- (17) RFP--A written request for proposals.
- (18) RFQ--A written request for qualifications.

(19) Services--The furnishing of skilled or unskilled labor or professional work. [Fungible services, specialized services, or unique services, including, by way of example, but not limitation: facility services (i.e., the lease of real property, including utility and custodial service); telecommunications services; advertising services; consultant services; personal services and professional services.]

(20) State or statewide contract--A contract for goods or services established and administered by another state agency (e.g., Texas Comptroller of Public Accounts, Texas Department of Information Resources) for use by all state agencies.

(21) Texas Lottery Commission--The appointive board or commission established in Chapter 467, Government Code.

(b) (No change.)

(c) Procurement method.

(1) For the purchase or lease of goods and services not expected to exceed \$5,000, or for the purchase or lease of goods and services available under a state contract, a competitive solicitation, whether formal or informal, may be conducted, but is not required.

(2) For the purchase or lease of goods and services not expected to exceed \$25,000, the agency, at a minimum, will conduct an informal competitive solicitation in an attempt to obtain at least three competitive bids and will solicit at least two HUB vendors.

(3) For the purchase or lease of goods and services expected to exceed \$25,000, the agency will conduct a formal competitive solicitation in an attempt to obtain at least three competitive bids or proposals and will solicit at least two HUB vendors.

(4) Printing services. For the purchase of printing services over \$2,500, [\$1,000,] the agency will submit print job specifications and bid requests to the State Print Shops. If no responsive bids are received from a State Print Shop or, after the results of the bid evaluation, the agency determines that best value would be achieved through a private sector vendor, the agency may perform a competitive solicitation outlined in paragraph (2) or (3) of this subsection.

(5) Emergency procurement. Notwithstanding paragraphs (1) - (4) of this subsection, the agency may make an emergency purchase or lease of goods or services. Prior to making an emergency purchase or lease of goods or services, the existence of an emergency should be documented. For emergency purchases in excess of \$5,000, the agency may conduct an informal competitive solicitation in an attempt to obtain at least three competitive bids, whenever possible. For emergency purchases in excess of \$25,000, the procurement will be posted on the Electronic State Business Daily; however, the minimum posting requirements do not apply. Posting of the advertisement and/or the award notice satisfies this requirement. In response to an emergency, the agency may procure goods or services in the most expeditious manner deemed appropriate, including from a sole source. [Whenever possible, contacts will be made with multiple sources in order to receive as much competition as possible.]

(6) Proprietary purchase. When the agency believes that a purchase of goods or services over \$5,000 is proprietary to one vendor or one manufacturer, a written proprietary purchase justification will be included in the procurement file. If the estimated purchase price exceeds \$25,000, the procurement will be posted on the Electronic State Business Daily prior to a purchase order or contract being issued.

(7) Notwithstanding paragraphs (1) - (4) of this subsection, the agency may make a purchase or lease of goods or services under any other procedure not otherwise prohibited by law.

(d) (No change.)

(e) Formal competitive solicitations.

(1) A formal competitive solicitation is a process conducted in order to receive at least three sealed competitive bids or proposals pursuant to the issuance of an IFB, RFP, RFQ, or another statewide contract process, respectively.

(A) An IFB will be used when the agency is able to describe, by way of established specifications, exactly what it wishes to procure, and wants bidders to offer such at a specific price.

(B) An RFP will be used when the agency knows generally what it wishes to procure in order to accomplish a certain goal(s) or objective(s); requirements cannot be completely and accurately described; requirements can be satisfied in a number of ways, all of which could be acceptable; or, where oral or written communications with proposers may be necessary in order to effectively communicate requirements and/or assess proposals, and the agency wants proposers to offer a solution(s) to address such need(s) at a specific price(s). The RFP process allows for negotiations between a proposer and the issuing agency.

(C) An RFQ will be used when the agency wants to procure professional services and evaluate proposers solely on their qualifications.

(2) The agency [Where appropriate, the agency] will advertise formal competitive solicitations, whether by IFB, RFP, or RFQ on the Electronic State Business Daily in accordance with the Comptroller of Public Accounts posting time requirements. The agency may advertise such solicitations in other media determined appropriate by the agency.

(3) For all formal competitive solicitations, the agency will award a contract to the most qualified bidder or proposer as determined during the evaluation of the bids or proposals. The agency may reject all bids or proposals if it is determined to be in the best interest of the agency. At the time a purchase order is issued or a contract is executed, the agency will notify, in writing, all other bidders or proposers of the contract award by facsimile, email or by certified mail. Any information relating to the solicitation not made privileged from disclosure by law will be made available for public disclosure, after award of a contract, pursuant to the Texas Public Information Act.

(4) For those formal competitive solicitations where fewer [less] than two [three] bids or proposals are received, the agency will document the reasons, if known, for the lack of two [three] bids or proposals. If fewer [less] than two [three] bids or proposals are received, the agency may cancel the solicitation and conduct another solicitation, or it may award a contract if one acceptable bid or proposal is received.

(5) For formal competitive solicitations where an IFB is used, the agency will award a contract to the qualified bidder submitting the lowest cost responsible bid meeting all specifications and providing the best value for the agency, as determined during the evaluation of the bids. Negotiations are not authorized when utilizing an IFB procurement method; however, if only one response is received, negotiations are allowed, provided, negotiations may not result in a material change to the advertised specifications.

(f) RFP.

(1) Submission. When an RFP is used by the agency, the RFP will contain, at a minimum, the following:

(A) a general description of the goods and/or services to be provided, and a specific identification of the goals or objectives to be achieved;

(B) a description of the format proposals must follow and the elements they must contain;

(C) the time and date proposals are due, and the location and person to whom they are to be submitted;

(D) an identification of the process to be utilized in evaluating proposals; and

(E) a listing of the factors to be utilized in evaluating proposals and awarding a contract. At a minimum, the factors should include:

(i) the proposer's price to provide the goods or services;

(ii) the probable quality of the offered goods or services;

(iii) the agency's evaluation of the likelihood of the proposal to produce the desired outcome for the agency, considering, among other criteria:

(I) the quality of the proposer's past performance in contracting with the agency, with other state entities, or with private sector entities;

(II) the qualifications of the proposer's personnel;

(III) the experience of the proposer in providing the requested goods or services;

(IV) the financial status of the proposer; and

(iv) whether the proposer performed the good faith effort required by the HUB subcontracting plan, when the agency has determined that subcontracting is probable.

(2) Evaluation Process. The agency will, prior to the deadline for receipt of proposals, develop and establish comprehensive evaluation criteria to be utilized by an evaluation committee in evaluating the proposals. All proposals that are responsive to the RFP will be reviewed by the evaluation committee. Part [As part] of the initial evaluation process may include an inspection trip to the proposer's facilities, and/or [;] proposers may be requested to make an oral presentation to the committee[; which may include an inspection trip to the proposer's facilities;] The evaluation committee may seek advice from consultants. If consultants are employed, they may be provided all information provided by the proposers. The evaluation committee will evaluate and score all proposals in accordance with the evaluation criteria.

(3) Best and Final Offers (BAFO). The agency may select top proposers, which may each be given an opportunity to discuss, clarify, and negotiate with the agency, and submit revisions to their respective proposals to the agency through a BAFO process. During discussions between the proposers and the agency, no information from a competing proposal may be revealed by the agency to another competitor. Any type of auction practice or allowing the transfer of technical information is specifically prohibited. At the conclusion of the discussions, BAFOs may be formally requested from the proposers and a deadline will be set for submission. BAFOs will be submitted by supplemental pages and not a complete resubmission of the proposal. All BAFOs will be reviewed by the evaluation committee. The evaluation committee will evaluate and score the BAFO response together with the original proposal in accordance with the evaluation criteria.

(4) Negotiation. If a BAFO process is not used, the agency will attempt to negotiate a contract with the selected proposer. If a contract cannot be negotiated with the selected proposer on terms the agency determines reasonable, negotiations with that proposer will be

terminated, and negotiations will be undertaken with the next highest scored proposer. This process will be continued until a contract is executed by a proposer and the agency, or negotiations with all qualified proposers are terminated. If no contract is executed, the agency may cancel the solicitation.

(5) Multiple Award. The agency may award a contract to two or more vendors or contractors using a single solicitation to furnish the same or similar supplies or services, where more than one vendor or contractor is needed to meet the agency's requirements for quantity, delivery, or service.

(g) - (i) (No change.)

§401.105. *Major Procurement Approval Authority, Responsibilities and Reporting.*

(a) - (b) (No change.)

(c) Definitions. As used in this section, the following terms shall have the following meanings, unless the context clearly indicates otherwise.

(1) Contract--A written agreement between the agency and a vendor for goods or services. [As used in this section, "contract" includes letters of agreement, interagency agreements with other government entities, and other documents in which state funds allocated to the agency are exchanged for the delivery of goods or services.]

(2) Formal Procurement--A formal competitive solicitation, for the purchase or lease of goods and/or services expected to exceed \$25,000, conducted in order to receive at least three sealed competitive bids or proposals pursuant to the issuance of an IFB, RFP, RFQ, or another statewide contract process, respectively.

(3) Major Procurement--Any formal procurement for goods or services that directly supports the agency's core gaming business function and has a cumulative contract value equal to or greater than ten (10) million dollars.

(4) Major Contract--Any contract resulting from a Major Procurement.

(5) Prime Contract--Any contract, other than those contracts designated as Major Contracts, which has a cumulative contract value that exceeds one (1) million dollars.

(6) Value--The agency adopts by reference the determination of contract value set forth in the Texas Procurement and [State of Texas] Contract Management Guide published by the Comptroller of Public Accounts. The determination of contract value shall be the estimated dollar amount that the agency may be obligated to pay pursuant to the contract and all executed and proposed amendments, extensions and renewals of the contract. [~~based on the original term of the contract, including any renewal periods.~~] The agency shall base its determination of the proposed length of and compensation during the original term and the renewal periods of the contract on best business practices, state fiscal standards and applicable law, procedures and regulations.

(d) - (g) (No change.)

(h) Contract Planning.

(1) The executive director or his/her designee will present the status of all major and prime contracts to the Texas Lottery Commission annually for informational purposes. The report will be presented at the beginning of each fiscal year.

(2) As deemed necessary by the executive director or his/her designee, updates to the status of certain contracts may be provided to the Texas Lottery Commission periodically throughout the fiscal year for informational purposes.

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

Filed with the Office of the Secretary of State on February 8, 2019.

TRD-201900402

Bob Biard

General Counsel

Texas Lottery Commission

Earliest possible date of adoption: March 24, 2019

For further information, please call: (512) 344-5012



TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 66. STATE ADOPTION AND DISTRIBUTION OF INSTRUCTIONAL MATERIALS

SUBCHAPTER DD. INSTRUCTIONAL MATERIALS PORTAL

19 TAC §§66.1401, 66.1403, 66.1405, 66.1407

The Texas Education Agency (TEA) proposes new §§66.1401, 66.1403, 66.1405, and 66.1407, concerning the instructional materials web portal. The new sections would implement House Bill (HB) 3526 and Senate Bill (SB) 810, 85th Texas Legislature, Regular Session, 2017, by specifying procedures by which publishers submit instructional materials for inclusion in the instructional materials web portal.

BACKGROUND INFORMATION AND JUSTIFICATION: HB 3526 and SB 810, 85th Texas Legislature, Regular Session, 2017, added Texas Education Code (TEC), §31.081, to require the commissioner to develop and maintain an instructional materials web portal to assist school districts and open-enrollment charter schools in selecting instructional materials. HB 3526 and SB 810 also added TEC, §31.082, which requires an analysis of instructional materials submitted by publishers for inclusion in the web portal, and TEC, §31.083, which requires that the web portal include a repository of open educational resources that school districts and open-enrollment charter schools can access at no cost.

The proposed new rules would implement HB 3526 and SB 810 by establishing the instructional materials portal, which is designed to promulgate the use of high-quality materials by providing school districts and open-enrollment charter schools access to free, transparent, and user-friendly information. A pilot phase will take place during the spring of 2019, involving a select number of Texas school districts and publishers who have volunteered to participate. The information about instructional materials generated during the pilot will be distributed only to pilot participants.

Proposed new §66.1401, Definitions, would define terms having meanings specific to proposed new Chapter 66, Subchapter DD.

Proposed new §66.1403, Instructional Materials to be Included in the Instructional Materials Portal, would describe the instruc-