

**TO:** Board Members

**THROUGH:** Jeff Walker, Executive Administrator  
Les Trobman, General Counsel

**FROM:** Kaye Schultz, Assistant General Counsel  
David Carter, Manager, Contracting and Purchasing

**DATE:** August 26, 2016

**SUBJECT:** Publication of 31 Texas Administrative Code §353.140 for Contracts

## **ACTION REQUESTED**

Consider authorizing publication of 31 Texas Administrative Code (TAC) §353.140, proposing to incorporate into rule enhanced contract monitoring requirements established under Texas Government Code §2261.253.

## **BACKGROUND**

Texas Government Code §2261.253 requires that state agencies establish by rule a procedure to identify contracts that require enhanced contract or performance monitoring and submit information on those contracts to the agency's governing body, including immediate notification of any serious issue or risk identified with respect to a contract subject to enhanced monitoring.

This section of the Texas Government Code was newly established through Senate Bill 20 of the 84<sup>th</sup> Legislature, Regular Session (2015).

## **KEY ISSUES**

Section 3.6 of the TWDB Contracting Policies and Procedures has been updated in compliance with Senate Bill 20 to formalize the requirements of risk analysis and enhanced contract monitoring procedures as specified in the legislation. In addition, the procedures are posted on the TWDB website and can also be accessed through a web page link from the comptroller's website. The final step to comply with Senate Bill 20 involves incorporating the enhanced contract monitoring procedure into an administrative rule.

The proposed rule to be added to Chapter 353 is:

## **Subchapter J – Enhanced Contract Monitoring**

### **§353.140 - Enhanced Contract Monitoring Procedure**

The proposed rule outlines the risk analysis performed to determine whether enhanced contract or performance monitoring is necessary. The analysis involves assessing the impact and probability of 20 attributes, including contract duration, cost and complexity, vendor experience and performance, monitoring and data quality.

Any contract rated high risk based on this analysis will receive enhanced monitoring, which can include weekly or monthly progress reports, regular site visits, project team meetings and documentation of corrective actions. Contract and performance monitoring activities will be documented and reported to the board on a quarterly basis, with immediate notification to the board of any serious issue or risk identified with respect to a contract subject to enhanced monitoring.

### **RECOMMENDATION**

Authorize publication of proposed 31 TAC §353.140, related to enhanced contract monitoring.

Attachment:

Proposed 31 TAC §353.140 for publication in the Texas Register

The Texas Water Development Board (TWDB) proposes new Subchapter J, Enhanced Contract Monitoring, §353.140, relating to an enhanced contract and performance monitoring procedure. The proposed new rule would outline the procedure for identifying contracts that require enhanced monitoring and the process for enhanced monitoring and board notification.

## BACKGROUND AND SUMMARY OF THE FACTUAL ISSUES FOR THE PROPOSED RULE.

Texas Government Code §2261.253, amended by Senate Bill 20, 84<sup>th</sup> Legislature, requires agencies by rule to establish a procedure for identifying each contract that requires enhanced contract or performance monitoring and submitting information on the contract to the agency's governing body. The proposed rule details the factors used in the risk analysis performed to determine whether enhanced monitoring is necessary. The rule also describes the type of enhanced monitoring that will be applied to a contract identified as high risk and outlines the documentation and reporting activities for this type of contract.

## SECTION BY SECTION DISCUSSION OF THE PROPOSED RULE

### *Subchapter J. Enhanced Contract Monitoring*

#### *Section 353.140. Enhanced Contract Monitoring Procedure.*

The proposed rule outlines the risk analysis performed to determine whether enhanced contract or performance monitoring is necessary, and lists the factors used in the risk analysis.

The type of enhanced monitoring that will be applied to any contract identified as having a high risk is described.

Documentation and reporting of contract and performance monitoring activities are identified.

## FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENTS

Ms. Rebecca Treviño, Chief Financial Officer, has determined that there will be no fiscal implications for state or local governments as a result of the proposed rule. For the first five years this rule is in effect, there is no expected additional cost to state or local governments resulting from enforcement or administration.

The rule is not expected to result in reductions in costs to either state or local governments. The intent of the rulemaking is to establish a procedure for identifying contract risk factors and providing increased monitoring for contracts identified as high risk. There is no change in costs because there are no direct costs associated with the proposed rule. This rule is not expected to have any impact on state or local revenues. The rule does not require any increase in expenditures for state or local governments as a result of administering the rule. Additionally, there are no foreseeable implications relating to state or local governments' costs or revenue resulting from the rule.

## PUBLIC BENEFITS AND COSTS

Ms. Treviño has also determined that for each year of the first five years the proposed rulemaking is in effect, the anticipated public benefit will be a higher level of performance monitoring associated with board contracts that have a risk level identified as high.

## LOCAL EMPLOYMENT IMPACT STATEMENT

The board has determined that a local employment impact statement is not required. The proposed rule does not adversely affect a local economy in a material way for the first five years that it is in effect because it will impose no new requirements on local economies. The board also has determined that there will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this rulemaking. The board also has determined that there is no anticipated economic cost to persons who are required to comply with the rulemaking as proposed. Therefore, no regulatory flexibility analysis is necessary.

## DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The board reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code §2001.0225 and determined that the rulemaking is not subject to Texas Government Code §2001.0225 because the proposed rulemaking does not meet the definition of a "major environmental rule" as defined in the Administrative Procedure Act. A "major environmental rule" is defined as a rule with the specific intent to protect the environment or reduce risks to human health from environmental exposure, a rule that may adversely affect in a material way the economy or a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The intent of this rulemaking is to outline the procedure for identifying high risk contracts and monitoring performance under those contracts.

Even if the rulemaking being proposed was a major environmental rule, Texas Government Code §2001.0225 still would not apply to this rulemaking because Texas Government Code §2001.0225 only applies to a major environmental rule the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability criteria because it: 1) does not exceed any standard set by a federal law; 2) does not exceed an express requirement of state law; 3) does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; and 4) is not proposed solely under the general powers of the agency, but rather is also proposed under authority of Texas Water Code §§6.104 and 6.109. Therefore, these proposed rule does not fall under any of the applicability criteria in Texas Government Code §2001.0225.

The board invites public comment regarding this draft regulatory impact analysis determination. Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submission of Comments section of this preamble.

## TAKINGS IMPACT ASSESSMENT

The board evaluated this proposed rulemaking and performed an analysis of whether it constitutes a taking under Texas Government Code Chapter 2007. The specific purpose of this rule is to outline the procedure for identifying high risk contracts and monitoring performance under those contracts.

The board's analysis indicates that Texas Government Code Chapter 2007 does not apply to the proposed rule because this rulemaking is an action that is reasonably taken to fulfill an obligation mandated by state law, which is exempt under Texas Government Code §2007.003(b)(4). Nevertheless, the board further evaluated the proposed rule and performed an assessment of whether it constitutes a taking under Texas Government Code Chapter 2007. Promulgation and enforcement of this proposed rule would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject proposed rule does not affect a landowner's rights in private real property because this rulemaking does not burden or restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulation. Therefore, the proposed rule does not constitute a taking under Texas Government Code Chapter 2007.

## SUBMISSION OF COMMENTS

Comments on the proposed rulemaking will be accepted until 30 days following publication in the *Texas Register* and may be submitted to Mr. Les Trobman, Office of General Counsel, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231 or [rulescomments@twdb.texas.gov](mailto:rulescomments@twdb.texas.gov) or by fax to (512) 475-2053.

## STATUTORY AUTHORITY

This rule is proposed under Texas Water Code §6.101, which gives the TWDB authority to adopt rules, and Texas Government Code §2261.253, which requires the TWDB to establish by rule a procedure to identify contracts that require enhanced monitoring.

Cross reference to statute: Texas Water Code §6.101, Texas Government Code §2261.253.

<rule>

## SUBCHAPTER J. ENHANCED CONTRACT MONITORING.

### §353.140. Enhanced Contract Monitoring Procedure.

(a) All contract managers, with the support of contract administration, will perform a risk analysis prior to the execution of a contract to determine whether enhanced contract or

performance monitoring is necessary.

(1) The impact and probability of the following attributes will be considered, as applicable:

(A) contract cost revisions;

(B) contract duration limitations;

(C) transaction and data volume;

(D) monitoring and quality assurance;

(E) vendor control activities and data quality;

(F) communication and customer service;

(G) complexity of vendor operations and processes;

(H) complexity of contract scope or deliverables;

(I) close out, including untimely delivery, outstanding invoices or unresolved matters creating delays;

(J) extent of government regulations;

(K) vendor cooperation with audits;

(L) potential for public disclosure;

(M) vendor experience and past performance;

(N) physical and system security;

(O) data security;

(P) business continuity/disaster recovery;

(Q) training;

(R) financial assurance and credit worthiness;

(S) fraud, waste and abuse; and/or

(T) any other factors that may impact the contract.

(b) Any contract rated high risk will receive enhanced contract monitoring to be performed by the contract manager.

(1) Enhanced contract monitoring may include the following actions, as applicable:

(A) weekly or monthly progress reports;

(B) documented controlled correspondence;

(C) regular site visits;

(D) project team meetings; and/or

(E) documentation of corrective actions.

(c) Contract and performance monitoring activities will be documented and reported to the board on a quarterly basis. Contract administration will immediately notify the board of any serious issue or risk that is identified with respect to a contract subject to enhanced monitoring.

(d) This process does not apply to an interagency agreement or contract, interlocal agreement, memorandum of understanding, or a contract for which there is not a cost.