

Commissioners:

J. Winston Krause,
Chairman

Carmen Arrieta-Candelaria

Doug Lowe

Robert Rivera



TEXAS LOTTERY COMMISSION

Gary Grief, Executive Director

Michael P. Farrell, Charitable Bingo Operations Director

To: J. Winston Krause, Chairman
Carmen Arrieta-Candelaria, Commissioner
Doug Lowe, Commissioner
Robert Rivera, Commissioner

From: Lea Garey, Senior Contracts Attorney *LAG*

Date: February 7, 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)

Approved

Denied

Attached are draft rules prepared for submission to the *Texas Register* to propose amendments to 16 TAC §401.101 (Lottery Procurement Procedures) and 16 TAC §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*.

Recommendation: Staff recommends the Commission initiate the rulemaking process by publishing the attached proposal in the *Texas Register* to receive public comment for a period of 30 days.

1 The Texas Lottery Commission (Commission) proposes amendments to 16 TAC §§
2 401.101 (Lottery Procurement Procedures) and 401.105 (Major Procurement Approval Authority,
3 Responsibilities and Reporting). The purpose of the proposed amendments to 16 TAC §401.101
4 is to reflect updates made to the *Texas Procurement and Contract Management Guide*, and to
5 reflect current agency procedure. Proposed amendments to definitions and dollar amount
6 thresholds within the section mirror those found in the *Texas Procurement and Contract*
7 *Management Guide*. Also, grammatical corrections were made to the text to increase clarity.

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

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

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

22 Pursuant to Texas Government Code §2001.0221, the Commission provides the following
23 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

1 provided by Commission rule and, by rule, to establish a procedure to determine what constitutes
2 a major procurement; under §466.101(a), which authorizes the Commission and executive director
3 to establish procedures for the procurement of goods and services necessary to carry out the
4 purposes of Chapter 466; and, under §467.102, which authorizes the Commission to adopt rules
5 for the enforcement and administration of the laws under the Commission's jurisdiction.

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

7 §401.101. Lottery Procurement Procedures.

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

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

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

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

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

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

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

1 (7) Electronic State Business Daily or Business Daily—An online directory ~~The website~~
2 administered by the Comptroller of Public Accounts, or its successor, that publishes solicitations
3 for the purpose of informing vendors of procurement opportunities and provides public notice of
4 contract awards. ~~on which procurement opportunities exceeding \$25,000 are advertised in~~
5 ~~electronic format.~~

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

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

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

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

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

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

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

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

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

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

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

6 (19) Services—The furnishing of skilled or unskilled labor or professional work. ~~Fungible~~
7 ~~services, specialized services, or unique services, including, by way of example, but not limitation:~~
8 ~~facility services (i.e., the lease of real property, including utility and custodial service),~~
9 ~~telecommunications services, advertising services, consultant services, personal services and~~
10 ~~professional services.~~

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

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

16 (b) (No change.)

17 (c) Procurement method.

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

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

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

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

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

20 (6) Proprietary purchase. When the agency believes that a purchase of goods or services
21 over \$5,000 is proprietary to one vendor or one manufacturer, a written proprietary purchase
22 justification will be included in the procurement file. If the estimated purchase price exceeds

1 \$25,000, the procurement will be posted on the Electronic State Business Daily prior to a purchase
2 order or contract being issued.

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

5 (d) (No change.)

6 (e) Formal competitive solicitations.

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

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

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

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

21 (2) The agency ~~Where appropriate, the agency~~ will advertise formal competitive
22 solicitations, whether by IFB, RFP, or RFQ on the Electronic State Business Daily in accordance

1 with the Comptroller of Public Accounts posting time requirements. The agency may advertise
2 such solicitations in other media determined appropriate by the agency.

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

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

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

22 (f) RFP.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 continued until a contract is executed by a proposer and the agency, or negotiations with all
2 qualified proposers are terminated. If no contract is executed, the agency may cancel the
3 solicitation.

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

8 (g) – (i) (No change.)

1 §401.105 (Major Procurement Approval Authority, Responsibilities and Reporting)

2 (a) – (b) (No change.)

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

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

6 ~~As used in this section, "contract" includes letters of agreement, interagency agreements with other~~
7 ~~government entities, and other documents in which state funds allocated to the agency are~~
8 ~~exchanged for the delivery of goods or services.~~

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

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

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

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

19 (6) Value--The agency adopts by reference the determination of contract value set forth in
20 the Texas Procurement and State of Texas Contract Management Guide published by the
21 Comptroller of Public Accounts. The determination of contract value shall be the estimated dollar
22 amount that the agency may be obligated to pay pursuant to the contract and all executed and
23 proposed amendments, extensions and renewals of the contract. ~~based on the original term of the~~

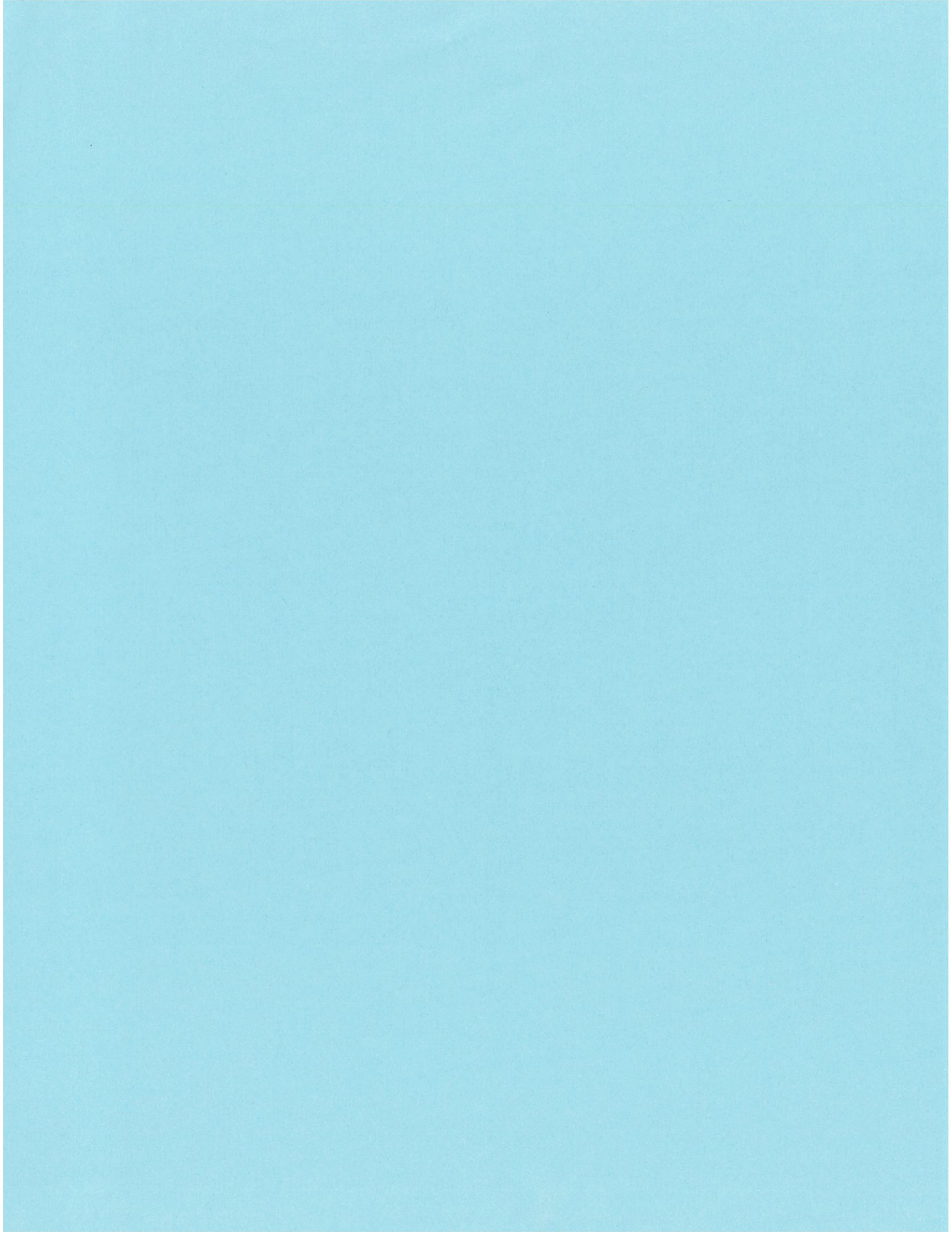
1 ~~contract, including any renewal periods.~~ The agency shall base its determination of the proposed
2 length of and compensation during the original term and the renewal periods of the contract on
3 best business practices, state fiscal standards and applicable law, procedures and regulations.

4 (d) –(g) (No change.)

5 (h) Contract Planning.

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

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



1 §401.105 (Major Procurement Approval Authority, Responsibilities and Reporting)

2 (a) – (b) (No change.)

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20 the Texas Procurement and State of Texas Contract Management Guide published by the
21 Comptroller of Public Accounts. The determination of contract value shall be the estimated dollar
22 amount that the agency may be obligated to pay pursuant to the contract and all executed and
23 proposed amendments, extensions and renewals of the contract. ~~based on the original term of the~~

1 ~~contract, including any renewal periods.~~ The agency shall base its determination of the proposed
2 length of and compensation during the original term and the renewal periods of the contract on
3 best business practices, state fiscal standards and applicable law, procedures and regulations.

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