

# **Texas Commission on Environmental Quality**

## **Interoffice Memorandum**

**To:** Commissioners

**Date:** August 1, 2014

**Thru:** Bridget C. Bohac, Chief Clerk  
Richard A. Hyde, P.E., Executive Director

**From:** Dorca Zaragoza-Stone, Deputy Director  
Office of Administrative Services

**Docket No.:** 2013-1913-RUL

**Subject:** Commission Approval for Rulemaking Adoption  
Chapter 11, Contracts  
Chapter 14, Grants  
HBs 586 and 1487: Resolution of Contract Claims and Posting of Grants on  
Public Website  
Rule Project No. 2013-051-011-AS

### **Background and reason(s) for the rulemaking:**

The rulemaking adoption is part of the implementation of House Bills (HB) 586 and 1487 from the 83rd Legislature, 2013.

HB 586, authored by Representative Paul Workman, amends the Texas Civil Practice and Remedies Code to waive sovereign immunity for the state related to a breach of contract for engineering, architectural, or construction services or for materials related to those professional services. The statute applies only to claims that exceed \$250,000, excluding penalties, costs, expenses, prejudgment interest, and attorney fees, and it removes such claims from the dispute resolution process provided for in Texas Government Code, Chapter 2260.

HB 586 limits any potential damages or damage award to those available under Texas Government Code, Chapter 2260 including: the amount due and owed under the contract, amounts owed for change orders and additional work required to be done under the contract, attorney's fees if the contract allows, and interest as allowed by law. Suits for these claims may only be initiated in state court with venue in the county in which the claim arose or Travis County. Payments and judgments can only be paid from general revenue if specifically appropriated and state property is exempt from seizure associated with a claim under this chapter. State agencies are required to submit a cost of these claims to the legislature on January 1 of each even numbered year.

HB 1487, authored by Representative Linda Harper-Brown, requires state agencies to post notices of state-funded grant awards of \$25,000 or more on an agency's generally accessible Internet website. Agencies must also provide to the Texas Comptroller of Public Accounts (Comptroller) a link to the information to allow the Comptroller to maintain the information on the Comptroller's Internet website through a central Internet portal. HB 1487 adds Texas Government Code, §403.0245.

Commissioners

Page 2

August 1, 2014

Re: Docket No. 2013-1913-RUL

**Scope of the rulemaking:**

The proposed rulemaking amends 30TAC §11.102 and §14.9 to reflect the changes to the Texas Civil Practice and Remedies Code and the Texas Government Code, respectively.

**A.) Summary of what the rulemaking will do:**

Adopted §11.102 would be amended by adding subsection (b)(9) to reflect the exemption from sovereign immunity for state related breach of contract for engineering, architectural, or construction services or for material related to those professional services as authorized under Texas Civil Practice and Remedies Code, Chapter 114.

Adopted §14.9 would be amended by adding subsection (f) to reflect the new requirement to make grant awards in excess of \$25,000 available to the public on the agency's generally accessible Internet website, and to state the purpose for which the grant was awarded.

**B.) Scope required by federal regulations or state statutes:**

None.

**C.) Additional staff recommendations that are not required by federal rule or state statute:**

None.

**Statutory authority:**

This rulemaking implements HB 586 and HB 1487 from the 83rd Legislature, 2013.

Texas Water Code (TWC), §5.102 – General Powers

TWC, §5.103 – Rules

Texas Civil Practice and Remedies Code, Chapter 114 – Adjudication of Claims Arising Under Written Contracts with State Agencies

Texas Government Code, §403.0245 – Availability of Internet of Certain Information on State Grants

**Effect on the:**

**A.) Regulated community:**

HB 1487 provides the regulated community with additional notice of state-funded grant opportunities and the purpose of those awards.

**B.) Public:**

HB 586 provides entities contracting with the state for engineering, architectural, or construction services or materials related to those services with additional legal avenues by waiving sovereign immunity for certain claims for the purpose of adjudicating a claim for breach of contract.

Commissioners

Page 3

August 1, 2014

Re: Docket No. 2013-1913-RUL

HB 1487 provides the public with additional notice of state-funded grant opportunities and the purpose of those awards.

**C.) Agency programs:**

TCEQ has a small number of “engineering services” contracts affected by this statute, primarily in the Remediation and Air Quality Divisions. There is a low risk that more claims may be made because the process might be seen as more accessible to aggrieved contractors. Sound contract management practices should prevent most potential contract dispute claims.

**Stakeholder meetings:**

The commission did not hold any stakeholder meetings related to this rulemaking; however, a public hearing was held during the comment period on May 6, 2014.

**Public comment:**

The agency did not receive any comments related to this rulemaking.

**Significant changes from proposal:**

There are no changes from the original proposal made to Chapters 11 and 14.

**Potential controversial concerns and legislative interest:**

Previously, contractors, who believe a state agency has breached their mutual contract, could not sue the state agency in court, but were required to use the dispute resolution process found in Texas Government Code, Chapter 2260. The statute does not affect potential liability, but changes the setting in which those claims are disputed from the State Office of Administrative Hearings to a state district court. Very few Texas Government Code, Chapter 2260 claims have been filed against the TCEQ, thus, it is not possible to project how many additional claims TCEQ may face.

**Will this rulemaking affect any current policies or require development of new policies?**

No.

**What are the consequences if this rulemaking does not go forward? Are there alternatives to rulemaking?**

If this rulemaking does not go forward, then commission rules will not reference the current versions of Texas Civil Practice and Remedies Code, Chapter 114 or Texas Government Code, §403.0245. The commission rules would not reference the current contract dispute resolution policy of the state regarding a breach of contract for engineering, architectural, or construction services or for material related to those professional services. The commission rules would not reflect the requirement to make grant awards in excess of \$25,000 available to the public on the agency’s generally accessible Internet website.

Commissioners  
Page 4  
August 1, 2014

Re: Docket No. 2013-1913-RUL

**Key points in the proposal rulemaking schedule:**

***Texas Register* publication date:** April 11, 2014

**Anticipated Texas Register adoption date:** September 5, 2014

**Anticipated effective date:** September 11, 2014

**Six-month Texas Register filing deadline:** October 11, 2014

**Agency contacts:**

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**Attachments**

House Bill 586

House Bill 1487

cc: Chief Clerk, 2 copies  
Executive Director's Office  
Marshall Coover  
Tucker Royall  
Pattie Burnett  
Office of General Counsel  
Greg Yturralde  
Bruce McAnally