

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
AGENDA ITEM REQUEST
for Proposed Rulemaking

AGENDA REQUESTED: March 26, 2014

DATE OF REQUEST: March 7, 2014

INDIVIDUAL TO CONTACT REGARDING CHANGES TO THIS REQUEST, IF NEEDED: Bruce McAnally, (512) 239-2141

CAPTION: Docket No. 2013-1913-RUL. Consideration for publication of, and hearing on, proposed amendments to Sections 11.102 30 TAC Chapter 11, Contracts; and Section 14.9 30 TAC Chapter 14, Grants.

The proposed rulemaking would implement House Bill (HB) 586, 83rd Legislature, 2013, Regular Session, to reflect the exemption of 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 or the Texas Government Code. The proposed rulemaking would also implement HB 1487, 83rd Legislature, 2013, Regular Session, 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.
(Greg Yturralde, Kenley Maddux) (Rule Project No. 2013-051-011-AS)


Deputy Director


Division Director


Agenda Coordinator

Copy to CCC Secretary? NO YES

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners

Date: March 07, 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 Proposed Rulemaking
Chapter 11, Contracts
Chapter 14, Grants
HBs 586 and 1487: Resolution of Contract Claims and Posting of Grants on
Public Website
Project No. 2013-051-011-AS

Background and reason(s) for the rulemaking:

The proposed rulemaking 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.

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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:

Section 11.102 is proposed to 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.

Section 14.9 is proposed to 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.

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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 rule public hearing will be held during the comment period on May 6, 2014.

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.

Key points in the proposal rulemaking schedule:

Anticipated proposal date: March 26, 2014

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

Anticipated public hearing date (if any): May 6, 2014

Anticipated public comment period: April 11, 2014 - May 12, 2014

Commissioners

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Re: Docket No. 2013-1913-RUL

Anticipated adoption date: August 13, 2014

Agency contacts:

Greg Yturralde, Rule Project Manager, (512) 239-1951, Financial Administration Division

LaTresa Stroud, Contract Team Leader, (512) 239-6641

Kenley Maddux, Staff Attorney, (512) 239-1636

Bruce McAnally, Texas Register Coordinator, (512) 239-2141

Attachments

House Bill 586

House Bill 1487

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

The Texas Commission on Environmental Quality (TCEQ, agency, commission) proposes to amend §11.102.

Background and Summary of the Factual Basis for the Proposed Rule

The commission is proposing this rulemaking to amend an existing rule pertaining to a sovereign immunity for state related breach of contract for engineering, architectural, or construction services or for material related to those professional services.

House Bill (HB) 586, 83rd Legislature, effective September 1, 2013, added Chapter 114 to the Texas Civil Practice and Remedies Code.

Texas Civil Practice and Remedies Code, §114.001 defines "adjudication," "contract subject to this chapter," and "state agency."

Texas Civil Practice and Remedies Code, §114.002 applies only to a claim for breach of a written contract for engineering, architectural, or construction services or for materials related to engineering, architectural, or construction services brought by a party to the written contract.

Texas Civil Practice and Remedies Code, §114.003 provides that a state agency that is authorized by statute or the constitution to enter into a contract and that enters into a

contract subject to Texas Civil Practice and Remedies Code, Chapter 114 waives sovereign immunity to suit for the purpose of adjudicating a claim for breach of an express provision of the contract, subject to the terms and conditions of Texas Civil Practice and Remedies Code, Chapter 114.

Texas Civil Practice and Remedies Code, §114.004 provides that the total amount of money awarded in an adjudication brought against a state agency for breach of an express provision of a contract subject to Texas Civil Practice and Remedies Code, Chapter 114 is limited to the following: 1) the balance due and owed by the state agency under the contract as it may have been amended, including any amount owed as compensation for the increased cost to perform the work as a direct result of owner-caused delays or acceleration if the contract expressly provides for that compensation; 2) the amount owed for written change orders or additional work required to carry out the contract; 3) reasonable and necessary attorney's fees based on an hourly rate that are equitable and just if the contract expressly provides for that recovery; and 4) interest at the rate specified by the contract or, if a rate is not specified, the rate for post judgment interest under Texas Finance Code, §304.003(c) (relating to providing that the post judgment interest rate is the prime rate as published by the Board of Governors of the Federal Reserve System on the date of computation or 5%, whichever is more, or 15% a year if the prime rate as published by the Board of Governors of the Federal Reserve System is more than 15%), but not to exceed 10%. This section also

prohibits damages awarded in an adjudication brought against a state agency arising under a contract subject to Texas Civil Practice and Remedies Code, Chapter 114 from including consequential damages, exemplary damages, or damages for unabsorbed home office overhead.

Texas Civil Practice and Remedies Code, §114.005 provides that adjudication procedures, including requirements for serving notices or engaging in alternative dispute resolution proceedings before bringing a suit or an arbitration proceeding, that are stated in the contract subject to Texas Civil Practice and Remedies Code, Chapter 114 or that are established by the state agency and expressly incorporated into the contract are enforceable, except to the extent those procedures conflict with the terms of Texas Civil Practice and Remedies Code, Chapter 114.

Texas Civil Practice and Remedies Code, §114.006 provides that Texas Civil Practice and Remedies Code, Chapter 114 does not waive a defense or a limitation on damages available to a party to a contract, other than a bar against suit based on sovereign immunity.

Texas Civil Practice and Remedies Code, §114.007 provides that Texas Civil Practice and Remedies Code, Chapter 114 does not waive sovereign immunity to suit in federal court.

Texas Civil Practice and Remedies Code, §114.008 provides that Texas Civil Practice and Remedies Code, Chapter 114 does not waive sovereign immunity to a claim arising from a cause of action for negligence, fraud, tortious interference with a contract, or any other tort.

Texas Civil Practice and Remedies Code, §114.009 provides that Texas Civil Practice and Remedies Code, Chapter 114 does not apply to an employment contract between a state agency and an employee of that agency.

Texas Civil Practice and Remedies Code, §114.010 authorizes a suit under Texas Civil Practice and Remedies Code, Chapter 114 to be brought in a district court in a county in which the events or omissions giving rise to the claim occurred, or a county in which the principal office of the state agency is located.

Texas Civil Practice and Remedies Code, §114.011 prohibits satisfaction and payment of any judgment under Texas Civil Practice and Remedies Code, Chapter 114 from being paid from funds appropriated to the state agency from general revenue unless the funds are specifically appropriated for that purpose. It provides that property of the state or any agency, department, or office of the state is not subject to seizure, attachment, garnishment, or any other creditors' remedy to satisfy a judgment taken under Texas Civil Practice and Remedies Code, Chapter 114.

Texas Civil Practice and Remedies Code, §114.012 provides that the remedy provided by Texas Civil Practice and Remedies Code, Chapter 114 is an alternative to the remedy provided by Texas Government Code, Chapter 2260 (Resolution of Certain Contract Claims Against the State). It requires a party claiming breach of an express provision of the contract to elect to pursue the remedy provided by Texas Civil Practice and Remedies Code, Chapter 114 or the remedy provided by Texas Government Code, Chapter 2260. The election is binding and is prohibited from being revoked.

Texas Civil Practice and Remedies Code, §114.013 requires each state agency, before January 1, of each even-numbered year, to report to the governor, the comptroller of public accounts of the State of Texas, and each house of the legislature the cost of defense to the state agency and the office of the attorney general in an adjudication brought against the agency under a contract subject to Texas Civil Practice and Remedies Code, Chapter 114. The report must include the amount claimed in any adjudication pending on the date of the report.

HB 586, 83rd Legislature, effective September 1, 2013, amends Texas Government Code, §2260.002, by adding subsection (3), which exempts a claim for breach of contract to which Texas Civil Practice and Remedies Code, Chapter 114 applies from the remedy authorized under Texas Government Code, Chapter 2260.

In a corresponding rulemaking published in this issue of the *Texas Register*, the commission also proposes to amend 30 TAC Chapter 14, Grants.

Section Discussion

§11.102, Applicability

The commission proposes to amend §11.102 by adding subsection (b)(9) to reflect the exemption of 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 or the Texas Government Code.

Fiscal Note: Costs to State and Local Government

Nina Chamness, Analyst in the Chief Financial Officer Division, has determined that, for the first five-year period the proposed rule is in effect, no fiscal implications are anticipated for the agency or other units of state or local government as a result of administration or enforcement of the proposed rule.

The proposed rule would update Chapter 11 as required by HB 586, 83rd Legislature.

The proposed rule would allow the agency to be sued for a breach of contract for engineering, architectural, construction services, or for materials related to these professional services if claims (exclusive of prejudgment interest, penalties, costs,

expenses, and attorney fees) are \$250,000 or more. The proposed rule would implement the requirements of HB 586 some of which include: definitions of terms; limitations on adjudicated awards; limitations on remedies; and reporting requirements.

The agency solicits contracts for engineering, architectural, and construction services, primarily related to remediation activities (such as Superfund and petroleum storage tank sites) and related site construction activities. In the past five years, contractors filed two claims for \$250,000 or more, but neither of these claims went to the administrative hearing phase. The agency follows state law and state purchasing guidelines when it enters into contracts. The agency also complies with state law and regulations when paying vendors and only withholds payment in accordance with the express contract terms. Therefore, the agency does not anticipate committing a breach of contract. For these reasons, the proposed rule is not expected to have a fiscal impact on the agency.

The proposed rule would not have a fiscal impact on a unit of local government since the proposed rule does not waive sovereign immunity for a local government and have no effects on agency contracts with governmental entities.

Public Benefits and Costs

Ms. Chamness also determined that for each year of the first five years the proposed rule

is in effect, the public benefit anticipated from the changes seen in the proposed rule will be compliance with state law.

The proposed rule would not have a significant fiscal impact on individuals or large businesses that are vendors of engineering, architectural, and construction services to the agency. The agency, since it complies with all state purchasing laws and regulations and all state payment laws and regulations, does not anticipate breaching any contract or losing a suit for breach of contract. In the event that individuals and businesses providing these services prevail in a breach of contract suit for claims of \$250,000 or more, those individuals and businesses could experience significant, beneficial fiscal impacts under the proposed rule.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses that are vendors of engineering, architectural, and construction services to the agency. The proposed rule would allow providers of these services to sue the agency if the agency commits a breach of contract and if claims total \$250,000 or more. The agency does not anticipate breaching any contract terms or losing a suit for breach of contract.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small

business regulatory flexibility analysis is not required because the proposed rule is required to comply with state law and does not adversely affect a small or micro-business in a material way for the first five years that the proposed rule is in effect.

Local Employment Impact Statement

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

Draft Regulatory Impact Analysis Determination

The commission reviewed the proposed amendment in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed amendment is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "major environmental rule." The intent of the proposed rulemaking is to make §11.102 conform to Texas Civil Practice and Remedies Code, Chapter 114. The changes are not expressly to protect the environment and reduce risks to human health and environment.

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submittal of Comments

section of this preamble.

Takings Impact Assessment

The commission evaluated the proposed amendment and assessed whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of this amendment is to make §11.102 conform to Texas Civil Practice and Remedies Code, Chapter 114. Promulgation and enforcement of this proposed amendment would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject proposed regulations do not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally); nor 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 regulations. Therefore, there are no burdens imposed on private real property.

Consistency with the Coastal Management Program

The commission reviewed the proposed rulemaking and found the proposal is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(4) relating to rules subject to the Coastal Management Program, and will, therefore, require that goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Advisory Committee and determined that the amendment is consistent with CMP goals and policies because the rulemaking is a fee rule, which is a procedural mechanism for paying for commission programs; will not have direct or significant adverse effect on any coastal natural resource areas; will not have a substantive effect on commission actions subject to the CMP; and promulgation and enforcement of the amendment will not violate (exceed) any standards identified in the applicable CMP goals and policies.

The commission determined that the proposed amendment will not affect any coastal natural resource areas because the rule only affects counties outside the CMP area and is, therefore, consistent with CMP goals and policies.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on May 6, 2014, at 10 a.m., in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by

interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802. Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Bruce McAnally, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: <http://www5.tceq.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2013-051-011-AS. The comment period closes May 12, 2013.

Copies of the proposed rulemaking can be obtained from the commission's Web site at http://www.tceq.texas.gov/nav/rules/propose_adopt.html. For further information, please contact Greg Yturralde, Revenue Operation Manager, at (512) 239-2446.

CONTRACTS

§11.102

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.103, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state.

The proposed amendment implements requirements in House Bill 586, 83rd Legislature, 2013.

§11.102. Applicability.

(a) This chapter does not apply to an action of the agency for which a contractor is entitled to a specific remedy pursuant to state or federal constitution or statute.

(b) This chapter does not apply to contracts:

(1) between the agency and the federal government or its agencies, another state, or another nation;

(2) between the agency and another unit of state government;

(3) between the agency and a local governmental body, or a political subdivision of another state;

(4) between a subcontractor and a contractor;

(5) subject to the Transportation Code, §201.112;

(6) within the exclusive jurisdiction of state or local regulatory bodies;

(7) within the exclusive jurisdiction of federal courts or regulatory bodies;

[or]

(8) for grants of funds from the agency to grantees or subgrantees; or [.]

(9) for engineering, architectural, or construction services or for materials related to engineering, architectural, or construction services brought by a party to the written contract, in which the amount in controversy is not less than \$250,000.

(c) This subchapter applies to claims for breach of contract against the agency asserted by a contractor under Texas Government Code, Chapter 2260 and to counterclaims of the agency. No employee or agent of the commission is authorized to waive the requirements of this subchapter nor the sovereign immunity of the agency, whether by means of acceptance of goods and services or otherwise.

The Texas Commission on Environmental Quality (TCEQ, agency, commission) proposes to amend §14.9.

Background and Summary of the Factual Basis for the Proposed Rule

The commission is proposing this rulemaking to amend an existing rule pertaining to a state funded grant opportunity notification.

House Bill (HB) 1487, 83rd Legislature, effective September 1, 2013, added §403.0245 to the Texas Government Code. Texas Government Code, §403.0245 requires the commission to post notices of state-funded grant opportunities of \$25,000 or more on the public website. It also requires the commission to provide a link to the Texas Comptroller of Public Accounts (Comptroller) website through a central Internet portal.

In a corresponding rulemaking published in this issue of the *Texas Register*, the commission also proposes to amend 30 TAC Chapter 11, Contracts.

Section Discussion

§14.9, Notices

The commission proposes to amend §14.9 by adding subsection (f) to the rule 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.

Fiscal Note: Costs to State and Local Government

Nina Chamness, Analyst in the Chief Financial Officer Division, has determined that, for the first five-year period the proposed rule is in effect, no significant fiscal implications are anticipated for the agency or other units of state or local government as a result of administration or enforcement of the proposed rule.

Per the requirements of HB 1487, 83rd Legislature, the proposed rule amends Chapter 14 to require the notification of grants of \$25,000 or more on the agency's generally accessible public website and provide a link to the Comptroller's website through a central internet portal, currently known as the Texas Marketplace.

The agency has used currently available resources to establish the required webpage and internet link, and the proposed rule has not had a significant fiscal impact on the agency.

The proposed rule is not expected to have a significant fiscal impact for local governments. However, it may result in easier access to information for grants of \$25,000 or more. The agency does not anticipate that there will be a significant increase in grant applications since information on grant opportunities (though not as

consolidated as per the proposed rule) is currently communicated via other means and funding is limited to predetermined amounts.

Public Benefits and Costs

Ms. Chamness also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the changes seen in the proposed rule will be compliance with state law and greater transparency and communication regarding grant information.

The proposed rule would not have a significant direct fiscal impact on individuals or businesses, but eligible entities may apply for additional grant funds because information of state-funded grants of \$25,000 or more would be easier to find. The proposed rule requires the posting of state-funded grants of \$25,000 or more on the agency's generally accessible public website and the provision of a link to the Comptroller's website through a central internet portal.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses under the proposed rule. The proposed rule provides additional communication regarding state-funded grants of \$25,000 or more and may lead more small businesses to apply for state-funded grants.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rule does not adversely affect a small or micro-business in a material way for the first five years that the proposed rule is in effect.

Local Employment Impact Statement

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

Draft Regulatory Impact Analysis Determination

The commission reviewed the proposed amendment in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed amendment is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "major environmental rule". The intent of the proposed rulemaking is to make certain information easily available to the public. The changes are not expressly to protect the environment and reduce risks to human health and environment.

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

The commission evaluated the proposed amendment and assessed whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of this amendment is to make certain information easily available to the public. Promulgation and enforcement of this proposed amendment would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject proposed regulation does not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally); nor 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 regulations. Therefore, there are no burdens imposed on private real property.

Consistency with the Coastal Management Program

The commission reviewed the proposed rulemaking and found the proposal is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(4), relating to rules subject to the Coastal Management Program, and will, therefore, require that goals and policies of the Texas Coastal Management Program

(CMP) be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Advisory Committee and determined that the amendment is consistent with CMP goals and policies because the rulemaking is a fee rule, which is a procedural mechanism for paying for commission programs; will not have direct or significant adverse effect on any coastal natural resource areas; will not have a substantive effect on commission actions subject to the CMP; and promulgation and enforcement of the amendment will not violate (exceed) any standards identified in the applicable CMP goals and policies.

The commission determined that the amendment will not affect any coastal natural resource areas because the rule only affects counties outside the CMP area and is, therefore, consistent with CMP goals and policies.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on May 6, 2014, at

10 a.m., in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802. Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Bruce McAnally, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: <http://www5.tceq.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2013-051-011-AS. The comment period closes May 12, 2014. Copies of the proposed rulemaking can be obtained from the commission's Web site at http://www.tceq.texas.gov/nav/rules/propose_adopt.html. For further information, please contact Greg Yturralde, Revenue Operation Manager, at (512) 239-1951.

GRANTS

§14.9

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.103, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state.

The proposed amendment implements House Bill 1487, 83rd Legislature, 2013.

§14.9. Notices.

(a) The executive director shall publish on the state electronic business daily, commonly known as the Texas Marketplace, information regarding any solicitation related to a grant or series of grants, any of which is reasonably expected to exceed \$25,000, to be awarded under this chapter.

(b) The notice will indicate either that the executive director is seeking proposals or applications from potential grant recipients, or that one or more direct awards is anticipated, in accordance with §14.8 of this title (relating to Direct Award).

(c) If one or more direct awards is anticipated, the notice will identify the recipients selected to receive a direct award and will describe the objective and amount of each proposed award.

(d) Following recipient selection and final grant award, except in the case of a previously noted direct award, the executive director shall file a second notice in the state's electronic business daily identifying the successful recipients and indicating the amount of each awarded grant.

(e) In addition, the executive director may publish or broadcast information concerning a grant or grants in any publication, website, or other forum.

(f) The executive director shall make available to the public on the agency's generally accessible Internet website the purpose for which any grant with a value greater than \$25,000 was awarded.

1 AN ACT

2 relating to the waiver of sovereign immunity for certain design and
3 construction claims arising under written contracts with state
4 agencies.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

6 SECTION 1. Title 5, Civil Practice and Remedies Code, is
7 amended by adding Chapter 114 to read as follows:

8 CHAPTER 114. ADJUDICATION OF CLAIMS ARISING UNDER WRITTEN
9 CONTRACTS WITH STATE AGENCIES

10 Sec. 114.001. DEFINITIONS. In this chapter:

11 (1) "Adjudication" of a claim means the bringing of a
12 civil suit and prosecution to final judgment in county or state
13 court.

14 (2) "Contract subject to this chapter" means a written
15 contract stating the essential terms of the agreement for providing
16 goods or services to the state agency that is properly executed on
17 behalf of the state agency. The term does not include a contract
18 that is subject to Section 201.112, Transportation Code.

19 (3) "State agency" means an agency, department,
20 commission, bureau, board, office, council, court, or other entity
21 that is in any branch of state government and that is created by the
22 constitution or a statute of this state, including a university
23 system or a system of higher education. The term does not include a
24 county, municipality, court of a county or municipality, special

1 purpose district, or other political subdivision of this state.

2 Sec. 114.002. APPLICABILITY. This chapter applies only to
3 a claim for breach of a written contract for engineering,
4 architectural, or construction services or for materials related to
5 engineering, architectural, or construction services brought by a
6 party to the written contract, in which the amount in controversy is
7 not less than \$250,000, excluding penalties, costs, expenses,
8 prejudgment interest, and attorney's fees.

9 Sec. 114.003. WAIVER OF IMMUNITY TO SUIT FOR CERTAIN
10 CLAIMS. A state agency that is authorized by statute or the
11 constitution to enter into a contract and that enters into a
12 contract subject to this chapter waives sovereign immunity to suit
13 for the purpose of adjudicating a claim for breach of an express
14 provision of the contract, subject to the terms and conditions of
15 this chapter.

16 Sec. 114.004. LIMITATIONS ON ADJUDICATION AWARDS. (a) The
17 total amount of money awarded in an adjudication brought against a
18 state agency for breach of an express provision of a contract
19 subject to this chapter is limited to the following:

20 (1) the balance due and owed by the state agency under
21 the contract as it may have been amended, including any amount owed
22 as compensation for the increased cost to perform the work as a
23 direct result of owner-caused delays or acceleration if the
24 contract expressly provides for that compensation;

25 (2) the amount owed for written change orders;

26 (3) reasonable and necessary attorney's fees based on
27 an hourly rate that are equitable and just if the contract expressly

1 provides that recovery of attorney's fees is available to all
2 parties to the contract; and

3 (4) interest at the rate specified by the contract or,
4 if a rate is not specified, the rate for postjudgment interest under
5 Section 304.003(c), Finance Code, but not to exceed 10 percent.

6 (b) Damages awarded in an adjudication brought against a
7 state agency arising under a contract subject to this chapter may
8 not include:

9 (1) consequential damages;

10 (2) exemplary damages; or

11 (3) damages for unabsorbed home office overhead.

12 Sec. 114.005. CONTRACTUAL ADJUDICATION PROCEDURES
13 ENFORCEABLE. Adjudication procedures, including requirements for
14 serving notices or engaging in alternative dispute resolution
15 proceedings before bringing a suit or an arbitration proceeding,
16 that are stated in the contract subject to this chapter or that are
17 established by the state agency and expressly incorporated into the
18 contract are enforceable, except to the extent those procedures
19 conflict with the terms of this chapter.

20 Sec. 114.006. NO WAIVER OF OTHER DEFENSES. This chapter
21 does not waive a defense or a limitation on damages available to a
22 party to a contract, other than a bar against suit based on
23 sovereign immunity.

24 Sec. 114.007. NO WAIVER OF IMMUNITY TO SUIT IN FEDERAL
25 COURT. This chapter does not waive sovereign immunity to suit in
26 federal court.

27 Sec. 114.008. NO WAIVER OF IMMUNITY TO SUIT FOR TORT

1 LIABILITY. This chapter does not waive sovereign immunity to a
2 claim arising from a cause of action for negligence, fraud,
3 tortious interference with a contract, or any other tort.

4 Sec. 114.009. EMPLOYMENT CONTRACTS EXEMPT. This chapter
5 does not apply to an employment contract between a state agency and
6 an employee of that agency.

7 Sec. 114.010. VENUE. A suit under this chapter may be
8 brought in a district court in:

9 (1) a county in which the events or omissions giving
10 rise to the claim occurred; or

11 (2) a county in which the principal office of the state
12 agency is located.

13 Sec. 114.011. LIMITATION ON REMEDIES. Satisfaction and
14 payment of any judgment under this chapter may not be paid from
15 funds appropriated to the state agency from general revenue unless
16 the funds are specifically appropriated for that purpose. Property
17 of the state or any agency, department, or office of the state is
18 not subject to seizure, attachment, garnishment, or any other
19 creditors' remedy to satisfy a judgment taken under this chapter.

20 Sec. 114.012. EXCLUSIVE REMEDY. A claim to which this
21 chapter applies may not be brought under Chapter 2260, Government
22 Code, against the state or a unit of state government as defined by
23 Section 2260.001, Government Code.

24 Sec. 114.013. REPORT. Before January 1 of each
25 even-numbered year, each state agency shall report to the governor,
26 the comptroller, and each house of the legislature the cost of
27 defense to the state agency and the office of the attorney general

1 in an adjudication brought against the agency under a contract
2 subject to this chapter. Included in the report shall be the amount
3 claimed in any adjudication pending on the date of the report.

4 SECTION 2. Section 2260.002, Government Code, is amended to
5 read as follows:

6 Sec. 2260.002. APPLICABILITY. This chapter does not apply
7 to:

8 (1) a claim for personal injury or wrongful death
9 arising from the breach of a contract; ~~or~~

10 (2) a contract executed or awarded on or before August
11 30, 1999; or

12 (3) a claim for breach of contract to which Chapter
13 114, Civil Practice and Remedies Code, applies.

14 SECTION 3. (a) Chapter 114, Civil Practice and Remedies
15 Code, as added by this Act, applies only to a claim arising under a
16 contract executed on or after September 1, 2013. A claim that
17 arises under a contract executed before September 1, 2013, is
18 governed by the law applicable to the claim immediately before the
19 effective date of this Act, and that law is continued in effect for
20 that purpose.

21 (b) Nothing in this Act is intended to create, rescind,
22 expand, or limit any waiver of sovereign immunity to suit
23 applicable to any contract executed before September 1, 2013.

24 SECTION 4. This Act takes effect September 1, 2013.

President of the Senate

Speaker of the House

I certify that H.B. No. 586 was passed by the House on May 10, 2013, by the following vote: Yeas 132, Nays 5, 2 present, not voting; that the House refused to concur in Senate amendments to H.B. No. 586 on May 24, 2013, and requested the appointment of a conference committee to consider the differences between the two houses; and that the House adopted the conference committee report on H.B. No. 586 on May 26, 2013, by the following vote: Yeas 145, Nays 0, 2 present, not voting.

Chief Clerk of the House

H.B. No. 586

I certify that H.B. No. 586 was passed by the Senate, with amendments, on May 22, 2013, by the following vote: Yeas 29, Nays 2; at the request of the House, the Senate appointed a conference committee to consider the differences between the two houses; and that the Senate adopted the conference committee report on H.B. No. 586 on May 26, 2013, by the following vote: Yeas 29, Nays 2.

Secretary of the Senate

APPROVED: _____

Date

Governor

AN ACT

relating to the Internet posting of certain information regarding state grants.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subchapter B, Chapter 403, Government Code, is amended by adding Section 403.0245 to read as follows:

Sec. 403.0245. AVAILABILITY ON INTERNET OF CERTAIN INFORMATION ON STATE GRANTS. (a) In this section, "state agency" has the meaning assigned by Section 403.013.

(b) A state agency that awards a state grant in an amount greater than \$25,000 shall make available to the public on the agency's generally accessible Internet website the purposes for which the grant was awarded. The agency shall provide to the comptroller a link to the information in order for the comptroller to maintain the information on the comptroller's Internet website through a central Internet portal.

SECTION 2. This Act takes effect September 1, 2013.

President of the Senate

Speaker of the House

I certify that H.B. No. 1487 was passed by the House on April 25, 2013, by the following vote: Yeas 136, Nays 0, 2 present, not voting; and that the House concurred in Senate amendments to H.B. No. 1487 on May 23, 2013, by the following vote: Yeas 140, Nays 0, 2 present, not voting.

Chief Clerk of the House

I certify that H.B. No. 1487 was passed by the Senate, with amendments, on May 17, 2013, by the following vote: Yeas 30, Nays 0.

Secretary of the Senate

APPROVED: _____

Date

Governor