

The Texas Commission on Environmental Quality (commission) adopts the amendments to §§11.103 - 11.05 and 11.108 *without changes* to the proposed text as published in the March 10, 2006, issue of the *Texas Register* (31 TexReg 1597), and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

House Bill (HB) 1940, 79th Legislature, 2005, amended Texas Government Code, §2260.051(d), Claim for Breach of Contract; Notice, and §2260.052(a), Negotiation, by reducing the amount of time by which units of state government must file a counterclaim against a contractor from 90 days to 60 days after receiving notice of the claim from the contractor, and modifying the time by which units of state government must enter into negotiations with the contractor to 120 days after the date the claim is received.

The purpose of the adoption is to amend Chapter 11 to implement HB 1940. Additionally, the commission adopts the amendments to §11.103 and §11.108 to conform to Texas Register requirements.

SECTION BY SECTION DISCUSSION

The adopted amendment to §11.103, Other Rules and Statutes, corrects the section title of a reference to conform to Texas Register requirements.

The adopted amendment to §11.104, Filing Notice of Claim for Breach of Contract; Counterclaim, changes the time in which the executive director must file a counterclaim from 90 days to 60 days after

receiving the notice of claim from the contractor. At the time of the adoption of the rule on August 20, 2000, a unit of state government had 90 days after receiving the notice of claim in which to file a counterclaim. The adopted amendment to §11.104 spells out the acronym “OLS” to conform to Texas Register requirements.

The adopted amendment to §11.105, Negotiation, deletes the language that states that the executive director, upon receiving the claim, shall provide the contractor a reasonable opportunity to meet and negotiate the claim. The adopted amendment to §11.105 also specifies that the executive director must begin negotiations within 120 days after receiving notice of the claim by the contractor.

The adopted amendment to §11.108, Request for Hearing, spells out the acronyms “SOAH” and “OLS” to conform to Texas Register requirements.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a “major environmental rule” as defined in §2001.0225. The intent of the adopted rulemaking is to reduce the time in which a unit of state government must file a counterclaim against a contractor and the time in which to enter negotiations.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received on the draft regulatory impact analysis.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the adopted rules and performed an assessment of whether the adopted rules constitute a takings under Texas Government Code, Chapter 2007. The specific purpose of the adopted rules is to provide the time frame in which units of government must file a counterclaim against a contractor and enter into negotiations to resolve certain contract claims. The adopted rules will substantially advance this stated purpose.

Promulgation and enforcement of the adopted rules would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject adopted 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. In other words, the adopted rules affect the time frame in which units of state government must file a counterclaim and enter into negotiations in order to resolve certain contract claims. There are no burdens imposed on private real property, and the benefits to society are the efficient resolution of contract claims against a unit of state government.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rules and found that they are neither identified in Coastal

Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the adopted rules are not subject to the Texas Coastal Management Program.

PUBLIC COMMENT

The close of comment deadline was April 10, 2006. No comments were received from the public.

SUBCHAPTER D: RESOLUTION OF CONTRACT CLAIMS

§§11.103 - 11.105, 11.108

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code, §5.103, Rules, which provides the commission the authority to adopt rules necessary to carry out its power and duties under the Texas Water Code and any other laws of the State of Texas, and Texas Government Code, §2260.052(c), Negotiation, which gives each unit of state government the authority to develop rules to govern the negotiation and mediation of a claim.

The adopted amendments implement Texas Government Code, §2260.051(d) and §2260.052(a).

§11.103. Other Rules and Statutes.

The requirements of the following statutes and rules also apply to claims filed under this subchapter:

(1) Texas Government Code, Chapter 2260, regarding contract claims, including without limitation the time limits for filing the notice of claim, counterclaim, and request for hearing; and

(2) Section 1.10 and §1.11 of this title (relating to Document Filing Procedures; and Service on Judge, Parties, and Interested Persons) except §1.11(a) of this title.

§11.104. Filing Notice of Claim for Breach of Contract; Counterclaim.

A contractor asserting a claim that the agency has breached a contract must file a notice of claim as follows.

(1) The notice of claim must fully describe the claim in writing on a form to be determined by the agency and must be signed by the contractor or an authorized representative.

(2) The notice of claim must be filed with the agency's chief clerk no later than 180 days after the event that the contractor asserts as the basis of the claim. The contractor must reference the docket number assigned by the chief clerk in any documents subsequently filed which pertain to the notice of claim.

(3) Copies of the written notice of claim and all other documents filed with the chief clerk must be served on the executive director and the deputy director of Office of Legal Services no later than the day of filing.

(4) The executive director shall file any appropriate counterclaim with the chief clerk within 60 days after the filing of the notice of claim and provide a copy to the contractor.

§11.105. Negotiation.

(a) The executive director is authorized to negotiate, mediate, and settle the claim, as appropriate, and may designate one or more employees of the agency to act.

(b) The executive director shall initiate negotiations with the contractor within 120 days after receiving the notice of claim.

(c) The executive director may also negotiate, mediate, or settle with a contractor concerning any assertion by a contractor which does not constitute either a notice or a claim under Texas Government Code, Chapter 2260. Such actions by the executive director do not constitute a waiver of statutory or regulatory requirements for a notice or a claim.

§11.108. Request for Hearing.

(a) A contractor may request a contested case hearing before the State Office of Administrative Hearings (SOAH) of any unsettled portion of the claim.

(b) A contractor must file the request for hearing with the chief clerk in writing on a form to be determined by the commission.

(c) A contractor may not file the request for hearing until the expiration of 270 days after the

contractor files the notice of claim. This period may be extended or reduced by written agreement of the contractor and the executive director. The agreement must be filed with the chief clerk.

(d) A contractor must serve copies of the request for hearing on the executive director and the deputy director of Office of Legal Services no later than the day of filing.

(e) After a contractor files the request for hearing, the chief clerk shall refer the entire file on the claim and counterclaim to SOAH for a contested case hearing under Texas Government Code, Chapter 2001, as to the issues raised in the request for hearing. Referral of a request for hearing to SOAH does not constitute waiver by the commission of statutory or regulatory requirements for the notice of claim, the claim or the request for hearing.

(f) Other chapters of this title regarding requests for, and conduct of, contested case hearings of applications do not apply to hearings of contract claims brought under this subchapter.

(g) Contested case hearings brought under this subchapter must be conducted in compliance with the rules of SOAH applicable to hearings on contract claims and where those rules are silent, under the Texas Rules of Civil Procedure and the Texas Rules of Evidence.