

The Texas Commission on Environmental Quality (commission) proposes amendments to §§11.103 - 11.05 and 11.108.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED 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 proposed rulemaking is to amend Chapter 11 to implement HB 1940. Additionally, the commission proposes the amendments to §11.103 and §11.108 to conform to Texas Register requirements.

SECTION BY SECTION DISCUSSION

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

The proposed 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 proposed amendment to §11.104 would also spell out the acronym “OLS” to conform to Texas Register requirements.

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

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Walter Perry, Analyst, Strategic Planning and Assessment Section, determined that for the first five-year period the proposed amendments are in effect, no significant fiscal implications are anticipated for the commission or other units of state or local government.

The proposed rules implement HB 1940, which amended Texas Government Code, Chapter 2260. The bill addresses the resolution of certain contract claims against the state. The proposed rulemaking would reduce the time by which the commission must file a counterclaim from 90 days to 60 days after receiving notice of the claim from the contractor. The commission would also be required to enter into negotiations with a contractor within 120 days after receiving notice of the claim by the contractor. These proposed changes are not anticipated to have significant fiscal implications for the commission.

The proposed rules are specific to anyone who directly enters into a contract with the commission.

Units of local government who enter into a contract directly with a unit of state government would be subject to the proposed rules and as such may benefit from the reduced time frame to resolve claims, though cost savings, if any, are not expected to be significant.

PUBLIC BENEFITS AND COSTS

Mr. Perry also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be compliance with state law.

The proposed rulemaking would reduce the time by which the commission must file a counterclaim from 90 days to 60 days after receiving notice of the claim from the contractor. The commission would also be required to enter into negotiations with a contractor within 120 days after receiving notice of the claim by the contractor.

No significant fiscal implications are anticipated for businesses and individuals as a result of the proposed rules. The proposed rules would reduce the time frame for the resolution of claims against a unit of state government.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rulemaking. Small and micro-businesses would experience the same benefits as larger businesses.

LOCAL EMPLOYMENT IMPACT STATEMENT

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

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed rulemaking is not subject to §2001.0225 because it does not meet the definition of a “major environmental rule” as defined in the act. The intent of the proposed 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 invites public comment on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these proposed rules and performed an assessment of whether these proposed rules constitute a takings under Texas Government Code, Chapter 2007. The specific purpose of these proposed 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 proposed rules will substantially advance this stated purpose.

Promulgation and enforcement of these proposed rules 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. In other words, these proposed 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 proposed 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 proposed rules are not subject to the Texas Coastal Management Program.

SUBMITTAL OF COMMENTS

Comments may be submitted to Patricia Durón, MC 205, Texas Register Team, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-13087, or faxed to (512) 239-4808. All comments should reference Rule Project Number 2005-071-011-LS. Comments must be received by 5:00 p.m., April 10, 2006. For further information, please contact Evelyn Njuguna, General Law Division, (512) 239-0688.

SUBCHAPTER D: RESOLUTION OF CONTRACT CLAIMS

§§11.103 - 11.105, 11.108

STATUTORY AUTHORITY

The amendments are proposed under the Texas Water Code, §5.103, Rules, which provides the commission with 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 the Texas Government Code, §2260.052(c), Negotiation, which gives each unit of state government with rulemaking authority the authority to develop rules to govern the negotiation and mediation of a claim.

The proposed amendments implement Texas Government Code, §2260.051(d), Claim for Breach of Contract; Notice, and §2260.052(a), Negotiation.

§11.103. Other Rules and Statutes.

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

(1) (No change.)

(2) Section 1.10 and §1.11 of this title (relating to [regarding] 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) - (2) (No change.)

(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 [OLS] no later than the day of filing.

(4) The executive director shall file any appropriate counterclaim with the chief clerk within 60 [90] days after the filing of the notice of claim and provide a copy to the contractor.

§11.105. Negotiation.

(a) (No change.)

(b) The executive director shall initiate negotiations with the contractor within 120 days after receiving the notice of claim [Upon receiving a notice of claim, the executive director shall provide the contractor a reasonable opportunity to meet and negotiate the claim].

(c) (No change.)

§11.108. Request for Hearing.

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

(b) - (c) (No change.)

(d) A contractor must serve copies of the request for hearing on the executive director and the deputy director of Office of Legal Services [OLS] 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 [the] 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) - (g) (No change.)