

The Texas Commission on Environmental Quality (TCEQ, agency, commission) adopts the amendment to §11.102 *without change* to the proposed text as published in the April 11, 2014, issue of the *Texas Register* (39 TexReg 2748), and will not be republished.

Background and Summary of the Factual Basis for the Proposed Rule

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.

Section Discussion

§11.102, Applicability

Adopted subsection (b)(9) to the rule 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.

Final Regulatory Impact Analysis

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the adopted 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 adopted 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.

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

Takings Impact Assessment

The commission evaluated the adopted rulemaking 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 adopted amendment 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. Therefore, there are no burdens imposed on private real property.

Consistency with the Coastal Management Program

The commission reviewed the adopted 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 contracting 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 adopted amendment will not affect any coastal natural resource areas because the rule only affects governmental contracting and is therefore, consistent with CMP goals and policies.

The commission invited public comment regarding the consistency with the CPM during the public comment period. No comments were received on the CMP.

Public Comment

The commission held a public hearing on May 6, 2014. The comment period closed on May 12, 2014. The commission did not receive any comments regarding this rule making.

SUBCHAPTER D: RESOLUTION OF CONTRACT CLAIMS

§11.102

Statutory Authority

The amendment is adopted 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 adopted 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;

(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.