

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](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.