

The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts new §11.101, Definitions; §11.102, Applicability; §11.103, Other Rules and Statutes; §11.104, Filing Notice of Claim for Breach of Contract; Counterclaim; §11.105, Negotiation; §11.106, Settlement of Claim; §11.107, Mediation; and §11.108, Request for Hearing. The sections are adopted without changes to the proposed text as published in the May 5, 2000 issue of the *Texas Register* (25 TexReg 3911) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The purpose of Chapter 11, Subchapter D, Resolution of Contract Claims, is to implement Texas Government Code, Chapter 2260, Resolution of Certain Contract Claims Against the State, which was created by House Bill (HB) 826, 76th Legislature, 1999. The statute requires that each unit of state government must adopt rules to govern the negotiation and mediation of contractor claims for breach of contract. Chapter 2260 provides that this administrative claim procedure is a prerequisite to filing suit by the contractor. Chapter 2260 also requires the commission to define by rule the process for mediating and settling claims against the state arising under contracts for goods and services. The adopted rules have been drafted to be consistent with the intent and language of HB 826, and to specifically satisfy the rulemaking requirements required of the commission.

The adopted rules establish a procedure for the administrative processing of contractor claims for breach of written contracts with the commission.

SECTION BY SECTION DISCUSSION

No sections were changed from the proposed version.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

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

These are procedural rules governing the resolution of breach of contract claims. These rules do not set any environmental standards or affect the enforcement of environmental standards. There are no federal standards for these contracting issues. These rules are specifically required by state law, Texas Government Code, §2260.052(c). These rules are adopted under this specific state statute rather than the general powers of the commission. These rules do not exceed the requirements of state law. These rules do not relate to any delegation agreements or contracts between the state and federal government concerning state contracting procedures.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for these rules under Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of the rules is to implement legislation on procedures for handling contract disputes between the commission, and persons who enter into contracts with it. These are procedural rules governing the resolution of breach of contract claims. These rules do not set any environmental standards or affect the enforcement of

environmental standards. These rules do not regulate the use of private real property. Therefore, these rules will not constitute a takings under Texas Government Code, Chapter 2007.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has determined that the rulemaking does not relate to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 et seq.), and the commission's rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the CMP. These are procedural rules that do not set environmental standards or affect their enforcement.

HEARING AND COMMENTERS

A public hearing was held in Austin on June 1, 2000. No comments were received at the public hearing or during the public comment period which closed on June 5, 2000.

STATUTORY AUTHORITY

The new sections are adopted under HB 826, 76th Legislature, 1999, codified as Texas Government Code, Chapter 2260, which requires the commission to develop rules governing the negotiation and mediation of claims for breach of contract between the commission and a contractor.

SUBCHAPTER D: RESOLUTION OF CONTRACT CLAIMS

§§11.101 - 11.108

§11.101. Definitions.

The following words and terms, when used in this chapter, shall have the following meaning, unless the context clearly indicates otherwise:

(1) **Claim** - A demand for damages by the contractor based upon the agency's alleged breach of the contract.

(2) **Contract** - A written contract between the agency and a contractor (including contract documents, work orders, purchase order change notices, and other documents amending, modifying, or supplementing the contract) by the terms of which the contractor agrees either:

(A) to provide goods or services, by sale or lease, to or for the agency; or

(B) to perform a project as defined by Texas Government Code, §2166.001.

(3) **Contractor** - Independent contractor who has entered into a contract directly with a unit of state government. The term does not include:

(A) the contractor's subcontractor, officer, employee, agent, or other person furnishing goods or services to a contractor;

(B) an employee of a unit of state government; or

(C) a student at an institution of higher education.

(4) **Counterclaim** - A demand by the agency relating to the contractor's claim.

(5) **Deputy director of OLS** - the deputy director for the Office of Legal Services (OLS) or the director of a similar successor unit within the agency serving as legal counsel for the executive director and includes individuals designated to act for the deputy director of OLS or a similar unit.

§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.

(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.

§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 (regarding Document Filing) except §1.11(a).

§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 OLS no later than the day of filing.

(4) The executive director shall file any appropriate counterclaim with the chief clerk within 90 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) Upon receiving a notice of claim, the executive director shall provide the contractor a reasonable opportunity to meet and negotiate the 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.

§11.106. Settlement of Claim.

Any agreement to settle all or a portion of the contractor's claim filed under this subchapter must be:

- (1) in writing;
- (2) signed by the executive director and the contractor or authorized representative; and
- (3) filed with the chief clerk.

§11.107. Mediation.

The contractor and the executive director may agree to mediate a claim made under this subchapter. Mediation must be conducted under Chapter 40 of this title (relating to Alternative Dispute Resolution Procedure).

§11.108. Request for Hearing.

(a) A contractor may request a contested case hearing before the state 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 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) 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.