

The Texas Natural Resource Conservation Commission (TNRCC or commission) proposes 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.

#### BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The purpose of proposed Chapter 11, Subchapter D, Resolution of Certain Contract Claims Against the Texas Natural Resource Conservation Commission, 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 proposed 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 proposed rules establish a procedure for the administrative processing of contractor claims for breach of written contracts with the commission.

#### SECTION BY SECTION DISCUSSION

New proposed §11.101 defines terms used in this subchapter including "claim," "contract," "contractor," and "counterclaim."

New proposed §11.102 provides that these rules apply to the types of claims authorized or required under Texas Government Code, Chapter 2260, but do not apply to certain specified types of contracts. The list of exemptions is derived from the Texas Attorney General's HB 826, Model Rules. Section 11.102(b)(6) and (7) exclude contracts which are within the exclusive jurisdiction of local, state, and federal regulatory bodies and federal courts. An example would be a claim by a contractor who has filed for federal bankruptcy court protection.

New proposed §11.103 provides that the requirements of Texas Government Code, Chapter 2260 and those of commission rules 30 TAC §1.10 and §1.11 (except §1.11(a)) apply to claims under this subchapter. The rule informs the public that additional statutory requirements apply to contract claims but does not repeat or incorporate the wording of the statute.

New proposed §11.104 sets out the procedure for a contractor to file a claim with the commission. The statutory period of limitation for filing the claim (within 180 days of the event asserted as the basis of the claim) is repeated here to clarify that the statutory period is the same as the period for filing the claim with the chief clerk.

New proposed §11.105 sets out the procedure for negotiating a claim.

New proposed §11.106 provides that an agreement to settle a claim must be in writing, signed by both the executive director and the contractor and be filed with the chief clerk.

New proposed §11.107 provides that the parties may agree to mediate a claim. The mediation procedure is in 30 TAC Chapter 40.

New proposed §11.108 describes the process by which a contractor may request a contested case hearing on the claim if it has not been resolved. The rule clarifies that a hearing request may not be filed within 270 days after the original notice of claim in order to allow time for negotiation and possible resolution of the claim. The rule also recognizes that the period (when hearing requests are prohibited) may be extended or reduced by agreement. Such an agreement might occur when negotiations are either approaching a successful settlement or have clearly reached an impasse.

#### FISCAL NOTE

Jeff Grymkoski, Director, Strategic Planning and Appropriations Division, has determined for the first five-year period the rules as proposed are in effect, there will be no fiscal implications for state or local governments as a result of administration or enforcement of the proposed new rules. Enforcement of the rules will not result in an increase in workload for commission staff.

#### PUBLIC BENEFIT

Mr. Grymkoski has also determined for each year of the first five years the proposed new rules are in effect, the public benefit anticipated from enforcement of and compliance with the rules will be an

easier, more straightforward, less time-consuming, and less costly way to resolve contract disputes.

#### SMALL AND MICRO-BUSINESS IMPACT ANALYSES

The proposed rules are not anticipated to impose costs on persons, small businesses, or micro-businesses because they create a cost-effective dispute resolution method, mediation, as an alternative to lawsuits in court, for resolving breach of contract claims. They will save money for those affected persons.

#### DRAFT REGULATORY IMPACT ANALYSIS

The commission has reviewed the proposed 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 proposed under this specific state statute rather than the general powers of the commission. These rules do not exceed the requirements of state law. There are no 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 proposed 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 proposed 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 proposed 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.

Interested persons may submit comments on the consistency of the proposed rules with the CMP during the public comment period.

#### PUBLIC HEARING

A public hearing on this proposal will be held in Austin on June 1, 2000 at 2:00 p.m. in Building F, Room 3202A at the Texas Natural Resource Conservation Commission Complex, located at 12100 Park 35 Circle. Individuals may present oral statements when called upon in order of registration. Open

discussion will not occur during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes before the hearing and will answer questions before and after the hearing.

Persons with disabilities who have special communication or other accommodation needs, who are planning to attend the hearing, should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

#### SUBMITTAL OF COMMENTS

Written comments may be submitted to Angela Slupe, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 1999-081-011-AD. Comments must be received by 5:00 p.m., June 5, 2000. For further information, please contact Doug McArthur at (512) 239-6857.

#### STATUTORY AUTHORITY

The new sections are proposed 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.

The proposed new sections implement Texas Government Code, Chapter 2260.

**CHAPTER 11**  
**SUBCHAPTER D**  
**RESOLUTION OF CONTRACT CLAIMS**

**§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.