

AGENDA ITEM MEMO

BOARD MEETING DATE: January 19, 2023

TO: Board Members

THROUGH: Jeff Walker, Executive Administrator
Ashley Harden, General Counsel
As to certain fiscal elements: Rebecca Trevino, Chief Financial Officer

FROM: Kendal Kowal, Assistant General Counsel

SUBJECT: Proposed publication of notice of intent to review rules in 31 Texas Administrative Code Subchapters B through D and of proposed amendments to 31 Texas Administrative Code, Subchapter A.

ACTION REQUESTED

Consider authorizing the publication of a (1) notice of intent to review rules in 31 Texas Administrative Code (TAC) Chapter 380, Alternative Dispute Resolution, Subchapter B, Negotiation of Contract Disputes; Subchapter C, Mediation of Contract Disputes, and; Subchapter D, Assisted Negotiation Processes; and (2) proposed amendments to 31 TAC §§ 380.2 and 380.3.

BACKGROUND

On December 15, 2022, the TWDB adopted a schedule of review related to the Agency's rules in 31 TAC, Part 10. This action proposes to publish notice of the Agency's review of certain rules in 31 TAC Chapter 380 and amendments to others within the same Chapter of the code.

KEY ISSUES

The TWDB is required pursuant to Texas Government Code (Tex. Gov't Code) § 2001.039 to review all existing rules every four years. Pursuant to that review, it must either re-adopt, re-adopt with amendments, or repeal existing rules.

Our Mission

Leading the state's efforts in
ensuring a secure water future
for Texas and its citizens

Board Members

Brooke T. Paup, Chairwoman | George B. Peyton V, Board Member | L'Oreal Stepney, P.E., Board Member
Jeff Walker, Executive Administrator

The Office of General Counsel proposes the following actions to 31 TAC Chapter 380:

- Publication of notice of the TWDB's intent to review rules in 31 TAC Chapter 380, Subchapters B through D. This notice and the TWDB's subsequent review will be conducted in accordance with Tex. Gov't Code § 2001.039; and
- Publication of proposed amendments to 31 TAC §§ 380.2, Applicability, and 380.3 Definitions to correspond to statutory changes in Chapter 2260, Texas Government Code since the promulgation and adoption of the rules by TWDB in 2001.

RECOMMENDATION

The Executive Administrator recommends the publication of notice to review certain rules in 31 TAC Chapter 380 and the publication of proposed amendments to 31 TAC §§ 380.2 and 380.3.

Attachment:

Notice of Review of Rules and Rulemaking to be filed with the *Texas Register*.

The Texas Water Development Board (TWDB) proposes an amendment to 31 Texas Administrative Code (TAC) §§380.2, Applicability, and 380.3 Definitions.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED AMENDMENT.

The TWDB proposes amendments to 31 TAC Chapter 380, Alternative Dispute Resolution, Subchapter A, General Provisions. These amendments are proposed to make the rules consistent with statute in Chapter 2260, Texas Government Code.

SECTION BY SECTION DISCUSSION OF PROPOSED AMENDMENTS.

31 TAC §380.1, Scope of Rules

No changes are proposed to §380.1. They are not republished in this proposal.

31 TAC §380.2, Applicability

Section 380.2 Applicability, is revised to add new subsection (4). New subsection (4) allows a claim for breach of contract to which Chapter 114, Civil Practices and Remedies Code to proceed against the TWDB, consistent with applicable statute in Chapter 2260, Texas Government Code.

31 TAC §380.3, Definitions

Section 380.3 Definitions, is revised provide that certain attorneys fees may be recoverable in an action against the TWDB, consistent with applicable statute in Chapter 2260, Texas Government Code.

31 TAC §380.4, Prerequisites to Suit

No changes are proposed to §§380.4. They are not republished in this proposal.

31 TAC §380.5, Sovereign Immunity

No changes are proposed to §380.5. They are not republished in this proposal.

31 TAC §380.6, Computation of Time

No changes are proposed to §380.6. They are not republished in this proposal.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENTS (Texas Government Code §2001.024(a)(4))

Ms. Rebecca Trevino, Chief Financial Officer, has determined that there will be no fiscal implications for state or local governments as a result of the proposed rulemaking. For the first five years these rules are in effect, there is no expected additional cost to state or local governments resulting from their administration.

These rules are not expected to result in reductions in costs to either state or local governments and there will be no change in costs for either state or local governments as these changes are necessary to comply with the resolution of certain contract claims against the state in Chapter 2260 of the Texas Government Code. These rules are not expected to have any impact on state or local revenues. The rules do not require any increase in expenditures for state or local governments as a result of administering these rules. Additionally, there are no foreseeable implications relating to state or local governments' costs or revenue resulting from these rules.

Because these rules will not impose a cost on regulated persons, the requirement included in Texas Government Code, §2001.0045 to repeal a rule does not apply. Furthermore, the requirement in §2001.0045 does not apply because these rules are necessary to implement legislation.

The TWDB invites public comment regarding this fiscal note. Written comments on the fiscal note may be submitted to the contact person at the address listed under the Submission of Comments section of this preamble.

PUBLIC BENEFITS AND COSTS (Texas Government Code §2001.024(a)(5))

Ms. Rebecca Trevino also has determined that for each year of the first five years the proposed rulemaking is in effect, the public will benefit from the rulemaking as it clarifies the resolution process between the TWDB and contractors regarding certain contract claims against the state. Ms. Rebecca Trevino also has determined that for each year of the first five years the proposed rulemaking is in effect, the rules will not impose an economic cost on persons required to comply with the rule as these requirements are imposed by statute in Chapter 2260 of the Texas Government Code.

ECONOMIC AND LOCAL EMPLOYMENT IMPACT STATEMENT (Texas Government Code §§2001.022, 2006.002); REGULATORY FLEXIBILITY ANALYSIS (Texas Government Code §2006.002)

The TWDB has 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 because it will impose no new requirements on local economies. The TWDB also has determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities as a result of enforcing this rulemaking. The TWDB also has determined that there is no anticipated economic cost to persons who are required to comply with the rulemaking as proposed. Therefore, no regulatory flexibility analysis is necessary.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION (Texas Government Code §2001.0225)

The TWDB reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code §2001.0225 and determined that the rulemaking is not subject to Texas Government Code §2001.0225, because it does not meet the definition of a "major environmental rule" as defined in the Administrative Procedure Act. A "major

environmental rule” is defined as a rule with the specific intent to protect the environment or reduce risks to human health from environmental exposure, a rule that may adversely affect in a material way the economy or a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The intent of the rulemaking is to clarify the resolution process between the TWDB and contractors regarding certain contract claims against the state.

Even if the proposed rule were a major environmental rule, Texas Government Code §2001.0225 still would not apply to this rulemaking because Texas Government Code §2001.0225 only applies to a major environmental rule, the result of which is to: (1) exceed a standard set by federal law, unless the rule is specifically required by state law; (2) exceed an express requirement of state law, unless the rule is specifically required by federal law; (3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or (4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability criteria because it: (1) does not exceed any federal law; (2) does not exceed an express requirement of state law; (3) does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; and (4) is not proposed solely under the general powers of the agency, but rather under Chapter 2260 of the Texas Government Code. Therefore, this proposed rule does not fall under any of the applicability criteria in Texas Government Code §2001.0225.

The TWDB invites public comment regarding this draft regulatory impact analysis determination. Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submission of Comments section of this preamble.

TAKINGS IMPACT ASSESSMENT (Texas Government Code §2007.043)

The TWDB evaluated this proposed rule and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of this rule is to clarify the resolution process between the TWDB and contractors regarding certain contract claims against the state. The proposed rule would substantially advance this stated purpose by aligning currently adopted TWDB rules with statutory changes regarding the kinds of contract claims subject to TWDB rule and the recovery of certain attorneys fees in the resolution of a contract dispute with the TWDB.

The TWDB’s analysis indicates that Texas Government Code, Chapter 2007 does not apply to this proposed rule because this is an action that is reasonably taken to fulfill an obligation [ex: mandated by state law, which is exempt under Texas Government Code §2007.003(b)(4)]. The TWDB is the agency primarily charged with the responsibility for water planning and for administering water financing for the state.

Nevertheless, the TWDB further evaluated this proposed rule and performed an assessment of whether it constitutes a taking under Texas Government Code Chapter 2007. Promulgation and

enforcement of this proposed rule would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject proposed regulation does not affect a landowner's rights in private real property because this rulemaking does not burden, 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 regulation. In other words, this rule requires compliance with existing state law related to the resolution of contract claims against the state by contractor in accordance with Texas Government Code, Chapter 2260. Therefore, the proposed rule does not constitute a taking under Texas Government Code, Chapter 2007.

GOVERNMENT GROWTH IMPACT STATEMENT (Texas Government Code §2001.0221)

The TWDB reviewed the proposed rulemaking in light of the government growth impact statement requirements of Texas Government Code §2001.0221 and has determined, for the first five years the proposed rule would be in effect, the proposed rule will not: (1) create or eliminate a government program; (2) require the creation of new employee positions or the elimination of existing employee positions; (3) require an increase or decrease in future legislative appropriations to the agency; (4) require an increase or decrease in fees paid to the agency; (5) create a new regulation; (6) expand, limit, or repeal an existing regulation; (7) increase or decrease the number of individuals subject to the rule's applicability; or (8) positively or adversely affect this state's economy.

AGENCY REVIEW OF EXISTING RULES (Texas Government Code §2001.039)

The TWDB reviewed the proposed rulemaking in light of the statutory requirement for the Agency to review existing rules in Texas Government Code §2001.039. It has determined that the proposed rulemaking to Subchapter A, General Provisions, specifically 31 TAC §§380.2 and 380.3 is necessary to comply with §6.101, which provides the TWDB with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and also specifically Chapter 2260, Texas Government Code, which requires the TWDB to follow certain procedures in the resolution of certain contract claims against the state.

The TWDB concurrently intends to review the rules in 31 TAC Chapter 380 and (publish notice of such in the *Texas Register*) in accordance with Texas Government Code §2001.039. The TWDB will consider whether the initial factual, legal, and policy reasons for adopting each rule in these chapters and subchapters continue to exist and whether these rules should be repealed, readopted, or readopted with amendments.

SUBMISSION OF COMMENTS (Texas Government Code §2001.024(a)(7))

Written comments on the proposed rulemaking may be submitted by mail to Office of General Counsel, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231, by email to rulescomments@twdb.texas.gov, or by fax to (512) 475-2053. Comments will be accepted until 5:00 p.m. of the 31st day following publication the Texas Register. Include Chapter 380, Subchapter A in the subject line of any comments submitted.

STATUTORY AUTHORITY (Texas Government Code §2001.024(a)(3))

The amendment is proposed under the authority of Texas Water Code §6.101, which provides the TWDB with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State, and also under the authority of Texas Government Code, Chapter 2260.

Cross-reference to statute: Texas Government Code, Chapter 2260.

<rule>

TITLE 31 NATURAL RESOURCES AND CONSERVATION

PART 10 TEXAS WATER DEVELOPMENT BOARD

CHAPTER 380 ALTERNATIVE DISPUTE RESOLUTION

SUBCHAPTER A GENERAL PROVISIONS

§380.2 Applicability

This chapter does not apply to:

- (1) claims for personal injury or wrongful death arising from a breach of contract;
- (2) an action of the board for which the contractor is entitled to a specific remedy pursuant to state or federal constitution or statute; [and]
- (3) contracts that are:
 - (A) between the board and:
 - (i) the federal government or its agencies, another state, or another nation;
 - (ii) a unit of state government; or
 - (iii) a local governmental body, or a political subdivision of another state;
 - (B) between a subcontractor and a contractor;
 - (C) within the exclusive jurisdiction of:
 - (i) a state or local regulatory body; or
 - (ii) a federal court or regulatory body; or
 - (D) solely and entirely funded by federal grant monies other than for a project defined in

§380.3(12) of this title (relating to Definitions)[.]; and

(4) a claim for breach of contract to which Chapter 114, Civil Practices and Remedies Code, applies.

§380.3 Definitions

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

(1) Board--Texas Water Development Board.

(2) Executive administrator--The executive administrator of the Texas Water Development Board.

(3) Claim--An assertion by a contractor that the board has breached a contract.

(4) Contract--A written agreement between the board and a contractor by the terms of which the contractor agrees either to:

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

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

(5) Contractor--An independent contractor who has entered into a contract directly with the board. The term does not include:

(A) the contractor's subcontractors, officers, employees, agents, or other persons furnishing goods or services to the contractor;

(B) an employee of the board; or

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

(6) Counterclaim--An assertion by the board that:

(A) a contractor has breached a contract; or

(B) justifies the actions taken by the board that are the subject of a contractor's claim.

(7) Damages--The total amount of money recoverable on a claim for breach of contract after deducting any amount owed the board for work not performed under the contract or not in substantial compliance with the contract's terms. Damages do not include:

(A) consequential or similar damages;

(B) exemplary damages;

(C) damages based on an unjust enrichment theory;

(D) attorney's fees except attorney's fees may be recoverable if

(i) the claim is for breach of a written contract for (I) engineering, architectural, or construction services, (II) material related to the services described in the preceding Paragraph (1); and

(ii) the amount in controversy is less than \$250,000, excluding penalties, costs, expenses, prejudgment interest, and attorney's fees; or

(E) home office overhead.

(8) Day--A calendar day.

(9) Event--An act or omission, or a series of acts or omissions, giving rise to a claim or counterclaim.

(10) Goods--Supplies, materials, or equipment.

(11) Parties--The board and the contractor who entered into the contract that is alleged to have been breached.

(12) Project--As defined in Texas Government Code, §2166.001, a building construction project that is financed wholly or partly by a specific appropriation, bond issue, or federal money, including the construction of:

(A) a building, structure, or appurtenant facility or utility, including the acquisition and installation of original equipment and original furnishing; and

(B) an addition to, or alteration, modification, rehabilitation, or repair of an existing building, structure, or appurtenant facility or utility.

(13) Services--The furnishing of skilled or unskilled labor or consulting or professional work, or a combination thereof, excluding the labor of an employee of the board.

(14) Unit of state government--The state or an agency, department, commission, bureau, board, office, council, court, or other entity that is in any branch of state government and that is created by the constitution or a statute of this state, including a university system or institution of higher education. The term does not include a county, municipality, court of a county or municipality, special purpose district, or other political subdivision of this state.