

TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

Page 1 of 1

ALL Districts

The Texas Transportation Commission (commission) finds it necessary to propose the repeal of §9.2 and simultaneously propose new §9.2 and §9.6, relating to contract claims, to be codified under Title 43, Texas Administrative Code, Part 1.

The preamble and the proposed repeal and new sections, attached to this minute order as Exhibits A - C, are incorporated by reference as though set forth at length verbatim in this minute order.

IT IS THEREFORE ORDERED by the commission that the repeal of §9.2 and new §9.2 and §9.6 are proposed for adoption and are authorized for publication in the *Texas Register* for the purpose of receiving public comments.

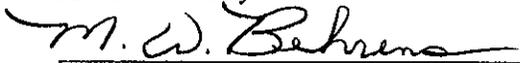
The executive director is directed to take the necessary steps to implement the actions as ordered in this minute order, pursuant to the requirements of the Administrative Procedure Act, Government Code, Chapter 2001.

Submitted and reviewed by:



Interim General Counsel

Recommended by:



Executive Director

110648 AUG 24 06

Minute Number Date Passed

1 Proposed Preamble

2 The Texas Department of Transportation (department) proposes the
3 repeal of §9.2, contract claim procedure, and new §9.2, contract
4 claim procedure and §9.6, contract claim procedure for
5 comprehensive development agreement.

6

7 EXPLANATION OF PROPOSED REPEAL AND NEW SECTIONS

8 The repeal of §9.2 and simultaneous adoption of new §9.2
9 implement Transportation Code, §201.112 concerning contract
10 claims. The new section is organized so that the procedures for
11 filing a contract claim are in chronological order. This is
12 intended to make the rule easier to use.

13

14 The section also includes several new provisions. Section
15 9.2(c) concerns contract claims under a comprehensive
16 development agreement (CDA). The new provision recognizes new
17 §9.6 and that the CDA may provide the procedure for resolving a
18 claim under the CDA. The explanation of new §9.6 later in this
19 preamble describes the new procedure authorized for a contract
20 claim under a CDA.

21

22 New §9.2(g)(2)(A) adds a provision concerning the deadline for
23 filing a claim. The repealed rule required that a claim be
24 filed no later than one year after the department issues
25 acceptance of the project that is the subject of the contract.

1 The new rule also specifies that a claim must be filed no later
2 than one year after the department issues notice to the
3 contractor that it is in default, or the department terminates
4 the contract. The department believes the addition of this
5 deadline is reasonable. A contractor will be able to determine
6 whether it has a claim within one year after the contractor's
7 work on the contract ends because of default or termination. A
8 contractor's opportunity to file a claim should not be extended
9 beyond one year simply because the contractor's surety or a
10 different contractor continues to work under the contract.

11

12 Section 9.2(g)(2)(C) and (D) adds a requirement that a prime
13 contractor certify the accuracy of a claim. The provisions are
14 modeled after federal contract dispute procedure found at 41 USC
15 §605(c) and 48 CFR §33.207. The purpose is to require the
16 person submitting a claim on behalf of a prime contractor to
17 review the claim and supporting documentation to ensure its
18 accuracy and veracity.

19

20 Section 9.2(g)(3)(D)(i) and (iii) changes the procedure related
21 to the contract claim committee's decision and the claimant's
22 acceptance of the decision or failure to respond. The new rule
23 does not require Texas Transportation Commission (commission)
24 approval of the settled claim. The department eliminated this
25 requirement because it is not required in Transportation Code,

1 §201.112. However, the executive director may request the
2 commission approve the settlement. The committee will continue
3 to give notice to the commission and executive director of a
4 settled claim.

5
6 Section 9.2(h) adds a provision that a claim against the
7 department shall be forfeited to the department by any person
8 who corruptly practices or attempts to practice any fraud
9 against the department. The provision is modeled after federal
10 law at 28 USC §2514. The purpose is to give the department an
11 appropriate remedy in its own contract claim rule should a
12 claimant present a fraudulent claim. The department does not
13 intend this new subsection to limit other remedies or actions
14 available in law.

15
16 Section 9.2(i) concerns the relation of a contract claim
17 proceeding and sanction proceeding concerning the same contract.
18 This new subsection supersedes §9.2(b)(3) in the repealed rule.
19 The new section continues to provide that a contract claim must
20 be considered by the committee before the claim is considered in
21 a contested case. However, §9.2(i) also provides that the
22 processing of a contract claim is a separate proceeding and
23 shall not affect the executive director's assessment of a
24 contract sanction under Subchapter G of this chapter (relating
25 to Contractor Sanctions). If a contested issue arises (e.g.

1 whether the department engineer properly defaulted the
2 contractor) that is common to the two proceedings then the issue
3 shall be resolved in the first proceeding referred for a
4 contested case hearing. The department intends that if there
5 are two simultaneous proceedings that they both proceed as
6 expeditiously as possible. But if there is a contested issue
7 that is litigated in a contested case hearing, the resolution of
8 the issue should be binding on all subsequent department
9 proceedings. In addition, if the contested issue relates to a
10 question submitted to the department engineer under the
11 contract, then the standard by which that decision will be
12 reviewed is that it shall be upheld unless it was based on
13 fraud, misconduct, or such gross mistake as would imply bad
14 faith or failure to exercise an honest judgment. This is the
15 standard by which a claim is judged pursuant to Texas Department
16 of Transportation v. Jones Brothers Dirt and Paving Contractors,
17 Inc., 92 S.W.3d 477 (Tex. 2002). The department believes the
18 new rule will ensure that the same standard of review applies
19 whether a contested issue is decided in a claim proceeding or
20 sanction proceeding. This will make the review of engineer's
21 decisions consistent, and not depend on which proceeding
22 happened to be referred first for a contested case hearing. New
23 §9.2(i) is also consistent with §9.102(d) of this chapter
24 (relating to Procedure) concerning sanctions, which provides
25 that the imposition of sanctions does not affect a contractor's

1 contractual obligations or limit the commission's contractual
2 remedies.

3

4 New §9.6 concerns contract claim procedure for a claim under a
5 CDA. A CDA is an agreement with a private entity that, at a
6 minimum, provides for the design and construction,
7 reconstruction, extension, expansion, or improvement of an
8 eligible project and may also provide for the financing,
9 acquisition, maintenance, or operation of an eligible project.
10 The authorization for the department entering into a CDA is
11 Transportation Code, Chapter 223, Subchapter E. Subchapter E
12 lists the eligible projects. Other provisions in Transportation
13 Code, §91.054 (rail facilities), and §227.023 (Trans-Texas
14 Corridor) also authorize the department to enter into a CDA.

15

16 New §9.6 is authorized by Transportation Code, §201.112(a),
17 which specifies that the department may, by rule, establish
18 procedures for the informal resolution of a claim arising out of
19 a contract for a highway project. Transportation Code, Chapter
20 223, Subchapter E, specifies the procedure by which the
21 department may enter into a CDA and the department's authority
22 to agree on specific matters. Under Transportation Code,
23 §223.203(n) the department may prescribe the general form of a
24 CDA and may include any matter the department considers
25 advantageous to the department. Under Transportation Code,

1 §223.208(b) the department may include any provision that the
2 department considers appropriate.

3

4 The department's experience using CDAs shows the need for the
5 new rule. The department has already entered into several CDAs.
6 As the department has expanded the use of CDAs, the department
7 has also expanded their scope. This experience indicates that
8 the ability of developers under CDA's to effectively raise
9 equity and debt financing for CDA projects depends on an
10 administrative process for dispute resolution under which the
11 decision maker is not a party to the CDA, and that produces
12 finality of decision within a reasonable time.

13

14 The department believes it may be necessary that CDAs, and
15 especially those that include the developer operating and
16 financing the project, include a dispute resolution procedure
17 other than as contemplated in §9.2. New §9.6 is intended to
18 authorize the executive director to enter into a CDA with a
19 negotiated dispute resolution procedure. The procedure must
20 comply with Transportation Code, §201.112, and meet the
21 requirements of §9.6. Section 9.6 includes specific
22 requirements to ensure that a negotiated procedure complies with
23 Transportation Code, §201.112, and to ensure that the general
24 outline of the procedure is consistent for all CDAs.

25

1 Section 9.6(b) describes the applicability of the section to a
2 CDA. Under a specific CDA, all disputes shall be under the
3 dispute procedure in §9.2, or all shall be under §9.6, as
4 specified in the CDA. No CDA shall have some disputes resolved
5 under §9.2 and some under §9.6. If the CDA is silent on the
6 matter then all disputes shall be resolved under §9.2. The
7 purpose is to have one procedure apply to all disputes under a
8 CDA so the parties are sure of the applicable procedure.

9
10 Section 9.6(b) also specifies the matters that are, and are not,
11 controlled by a disputes board procedure. A disputes board
12 procedure can be applied to other agreements related to a CDA
13 provided they are specifically identified as being subject to
14 the disputes board procedure. A disputes board procedure does
15 not apply to the listed equitable matters over which courts have
16 jurisdiction, and to other matters identified in a CDA.

17
18 Section 9.6(d) specifies the mandatory provisions in a disputes
19 board procedure. There shall be a disputes board that shall
20 consider disputes and issue decisions. Before a dispute is
21 referred to a disputes board, a CDA shall require that a claim
22 be referred for informal dispute resolution, optional mediation,
23 or other alternative dispute resolution process. The party
24 making a claim shall file a certified claim.

25

1 Section 9.6(e) specifies that if a CDA includes a claim
2 procedure authorized by the section, the claim procedure may
3 include certain permissive provisions. The subsection
4 authorizes, but does not require, the provisions because the
5 parties may negotiate a different procedure that is acceptable
6 and consistent with Transportation Code, §201.112. When the
7 parties negotiate a CDA they may agree to use the permissive
8 provisions, or agree not to use them. They may even agree to
9 terms that are contrary to the permissive terms so long as the
10 claim procedure complies with the remainder of the section.

11
12 The permissive provisions include: a decision of the disputes
13 board is final, conclusive, binding upon, and enforceable
14 against the parties. However, a disputes board decision is
15 subject to review to determine if there was a disputes board
16 error. Whether there was disputes board error may be referred
17 for a contested case hearing. If there was a disputes board
18 error then the dispute shall be remanded back to a disputes
19 board. A disputes board is authorized to direct that an award
20 be paid from the proceeds of any trust or other pool of project
21 funds that the CDA provides shall be available for payment of
22 such claims. During the processing of a claim, the developer
23 and its subcontractors shall continue work under the CDA,
24 subject to certain specified exceptions.

25

1 The department believes subsections (d) and (e) are authorized
2 under Transportation Code, §201.112(a). The law authorizes the
3 department by rule to establish procedures for informal
4 resolution of a claim. New §9.6 labels the disputes board as a
5 "formal" dispute resolution procedure. But the department uses
6 this label only to distinguish the required "informal dispute
7 resolution," the optional mediation, and mandatory "formal
8 dispute resolution" required under §9.6(d)(2). The disputes
9 board is "formal" in the sense that it conducts proceedings on a
10 claim, and makes a decision that is binding on the parties,
11 absent disputes board error. But the disputes board is informal
12 in the sense that the parties can change the disputes board
13 procedure if they agree. Also, a disputes board exists only as
14 authorized in the CDA. It is not permanent and it is not a
15 governmental entity. The department believes Transportation
16 Code, §223.203(n) and §223.208(b) authorize the creation of a
17 disputes board procedure.

18
19 Section 9.6(f), Pass-through claims, specifies that a dispute
20 procedure may provide that a developer who is a party to a
21 comprehensive development agreement with the department may make
22 a claim on behalf of a subcontractor. However, the developer
23 must be liable to the subcontractor on the claim.

24
25 Section 9.6(g) sets additional mandatory requirements that apply

1 specifically to proceedings of a disputes board. The
2 requirements limit the authority of a disputes board, and set
3 conflict of interest parameters.

4

5 Section 9.6(i) sets additional permissive requirements that
6 apply specifically to proceedings of a disputes board.

7

8 Section 9.6(j) sets permissive requirements in the CDA
9 concerning a contested case hearing held under Transportation
10 Code, §201.112. The scope of a contested case hearing on a
11 dispute is limited solely to whether a disputes board error
12 occurred upon the disputes board processing the dispute. The
13 executive director's order remanding a dispute to a disputes
14 board, or the executive director's order implementing a disputes
15 board decision following a contested case hearing, are subject
16 to judicial review under Government Code, Chapter 2001, under
17 the substantial evidence rule. Review is limited to whether
18 disputes board error occurred.

19

20 Section 9.6(k) specifies that a disputes board agreement may
21 provide that the procedural rules for a contested case may
22 adopt, modify, or not follow the procedural rules in department
23 rules.

24

25 Section 9.6(l) clarifies that the section does not interfere

1 with a developer's rights to seek mandamus relief pursuant to
2 Government Code, §22.002(c).

3

4 Section 9.6(m) concerns whether information exchanged among the
5 parties during the dispute resolution procedure is confidential.

6

7 FISCAL NOTE

8 James Bass, Chief Financial Officer, has determined that for
9 each of the first five years the new sections as proposed are in
10 effect, there could be fiscal implications for state government
11 as a result of enforcing or administering the amendments.

12 However, the fiscal impact cannot be quantified because such
13 impact would be a function of the number of claims that need to
14 be heard by a disputes board, if any, and the length of time
15 such hearings might last. There is no history upon which to
16 base such an estimate.

17

18 New §9.2 is mostly a reorganized version of the repealed §9.2.
19 The provisions in new §9.2 that are not in the repealed §9.2
20 will not have fiscal implications. The new provision concerning
21 a simultaneous contract claim proceeding and sanction proceeding
22 may allow for more efficient litigation of disputes, but the
23 potential costs savings for the department are too unpredictable
24 to measure.

25

1 New §9.6 could have fiscal implications. The rule allows, but
2 does not require, the use of a disputes board for resolution of
3 a contract claim under a CDA. It is difficult to measure the
4 fiscal implications for the state because the department will
5 decide on a case by case basis whether to include a disputes
6 board procedure in a CDA. If the department agrees to use new
7 §9.6, it is not clear how many disputes will arise under the
8 CDA. Also, assuming a claim arises under a CDA, there would be
9 costs incurred by the department to process the matter, whether
10 processed under §9.2 or §9.6. If the department agrees to use a
11 disputes board, the department may incur half the fees and costs
12 of the disputes board, which could be significant. But this
13 also means the department would use less staff resources, namely
14 the efforts of department staff appointed to the contract claim
15 committee. And under §9.6 the department's costs to participate
16 in a contested case hearing also should be much lower. The
17 scope of the contested case hearing is limited to whether the
18 disputes board decision was affected by disputes board error.
19 The department anticipates being represented in contract claim
20 matters by the Office of the Attorney General, whether the
21 proceeding is under §9.2 or §9.6, and so those costs should be
22 the same.

23

24 There will be no loss or gain in revenue to the state. Assuming
25 a party makes a valid claim and is awarded a payment on the

1 claim, the payment should be attributed to the substantive
2 agreement in the CDA. The claim procedure itself, whether under
3 §9.2 or §9.6, is not the basis for the loss or gain of revenue.

4
5 Sections 9.2 and 9.6 would have no effect on local governments.
6 Only the department may enter into a CDA with a private
7 developer.

8
9 Bob Jackson, Interim General Counsel, has certified that there
10 will be no significant impact on local economies or overall
11 employment as a result of enforcing or administering the repeals
12 and new sections. There will be no adverse economic effect on
13 small businesses.

14
15 PUBLIC BENEFIT

16 Mr. Jackson has also determined that for each year of the first
17 five years the sections are in effect, the public benefit
18 anticipated as a result of enforcing or administering the repeal
19 and new sections is as follows. New §9.2 will make it easier
20 for the public to understand the department's contract claim
21 procedure. The benefits for contractors are the same as the
22 benefits for the department described above. The new rule may
23 allow for more efficient litigation of disputes. There will be
24 some additional costs incurred by contractors to satisfy the new
25 requirement that a contract claim shall be certified. The

1 department believes the added costs will be justified by the
2 public benefit to ensure the accuracy and veracity of claims
3 made.

4
5 New §9.6 will benefit the public because it will facilitate the
6 department's use of a CDA to construct transportation
7 facilities. The department may wish to construct a facility for
8 which current federal or state funding does not exist or is
9 inadequate. In those instances the department may seek to enter
10 into a CDA with a developer, for example, designing, building,
11 and financing the facility. The new rule will give the
12 department more options to negotiate the CDA. There will be no
13 cost impact on developers. The rule applies only if the
14 developer agrees to the use of a disputes board. If a contract
15 dispute arises, the developer would incur costs to participate
16 in the proceeding whether it is under §9.2 or §9.6.

17

18 PUBLIC HEARING

19 Pursuant to the Administrative Procedure Act, Government Code,
20 Chapter 2001, the Texas Department of Transportation will
21 conduct a public hearing to receive comments concerning the
22 proposed rules. The public hearing will be held at 9:00 a.m. on
23 October 4, 2006, in the first floor hearing room of the Dewitt
24 C. Greer State Highway Building, 125 East 11th Street, Austin,
25 Texas and will be conducted in accordance with the procedures

1 specified in 43 TAC §1.5. Those desiring to make comments or
2 presentations may register starting at 8:30 a.m. Any interested
3 persons may appear and offer comments, either orally or in
4 writing; however, questioning of those making presentations will
5 be reserved exclusively to the presiding officer as may be
6 necessary to ensure a complete record. While any person with
7 pertinent comments will be granted an opportunity to present
8 them during the course of the hearing, the presiding officer
9 reserves the right to restrict testimony in terms of time and
10 repetitive content. Organizations, associations, or groups are
11 encouraged to present their commonly held views and identical or
12 similar comments through a representative member when possible.
13 Comments on the proposed text should include appropriate
14 citations to sections, subsections, paragraphs, etc. for proper
15 reference. Any suggestions or requests for alternative language
16 or other revisions to the proposed text should be submitted in
17 written form. Presentations must remain pertinent to the issues
18 being discussed. A person may not assign a portion of his or
19 her time to another speaker. Persons with disabilities who plan
20 to attend this meeting and who may need auxiliary aids or
21 services such as interpreters for persons who are deaf or
22 hearing impaired, readers, large print or Braille, are requested
23 to contact Randall Dillard, Director, Public Information Office,
24 125 East 11th Street, Austin, Texas 78701-2483, 512/463-8588 at
25 least two working days prior to the hearing so that appropriate

1 services can be provided.

2

3 SUBMITTAL OF COMMENTS

4 Written comments on the proposed repeals and new sections may be
5 submitted to Bob Jackson, Interim General Counsel, Texas
6 Department of Transportation, 125 East 11th Street, Austin,
7 Texas 78701-2483. The deadline for receipt of comments is 5:00
8 p.m. on October 9, 2006.

9

10 STATUTORY AUTHORITY

11 The repeals and new sections are proposed under Transportation
12 Code, §201.101, which provides the Texas Transportation
13 Commission (commission) with the authority to establish rules
14 for the conduct of the work of the department, and more
15 specifically, under Government Code, §201.112, which allows the
16 commission by rule to establish procedures for the informal
17 resolution of a claim arising out of a contract under the
18 statutes set forth in that section. New §9.6 is also authorized
19 by Transportation Code, §223.203, which provides the department
20 may prescribe the general form of a CDA and may include any
21 matter the department considers advantageous to the department,
22 and Transportation Code, §223.208, which provides the department
23 may include in a CDA any provision that the department considers
24 appropriate.

25

- 1 Transportation Code, §201.112, §223.203, and §223.208.

SUBCHAPTER A. GENERAL

§9.2. Contract Claim Procedure.

(a) Applicability. A claim shall satisfy the requirements in paragraphs (1) - (3) of this subsection.

(1) The claim is under a contract entered into and administered by the department, acting in its own capacity or as an agent of a local government, under one of the following statutes:

(A) Transportation Code, §22.018 (concerning the designation of the department as agent in contracting and supervising for aviation projects);

(B) Transportation Code, §391.091 (concerning erection and maintenance of specific information logo, major area shopping guide, and major agricultural interest signs);

(C) Transportation Code, Chapter 223 (concerning bids and contracts for highway improvement projects), subject to the provisions of subsection (c) of this section; or

(D) Government Code, Chapter 2254, Subchapters A and B (concerning professional or consulting services).

(2) The claim is for compensation, or for a time extension, or any other remedy.

(3) The claim is brought by a prime contractor or by the department.

1 (b) Pass-through claim. A prime contractor may make a
2 claim on behalf of a subcontractor only if the prime contractor
3 is liable to the subcontractor on the claim.

4 (c) Claim concerning comprehensive development agreement.
5 A claim under a comprehensive development agreement (CDA)
6 entered into under Transportation Code, Chapter 223, Subchapter
7 E, may be processed under this section if the parties agree to
8 do so in the CDA, or if the CDA does not specify otherwise.
9 However, if the CDA specifies that a claim procedure authorized
10 by §9.6 of this chapter (relating to Contract Claim Procedure
11 for Comprehensive Development Agreement) applies, then any claim
12 arising under the CDA shall be processed and resolved in
13 accordance with the claim procedure authorized by §9.6 and not
14 by this section.

15 (d) Definitions. The following words and terms, when used
16 in this section, shall have the following meanings, unless the
17 context clearly indicates otherwise, except that when used in
18 subsection (c) of this section, the terms claim, comprehensive
19 development agreement and CDA shall have the meanings given such
20 terms stated in §9.6.

21 (1) Claim--A claim for compensation, or other dispute,
22 disagreement, or controversy concerning respective rights and
23 obligations under the contract including any alleged breach or

1 failure to perform and for remedies.

2 (2) Claimant--The department or prime contractor who
3 submits a contract claim under this section.

4 (3) Commission--The Texas Transportation Commission.

5 (4) Committee--The Contract Claim Committee.

6 (5) Department--The Texas Department of Transportation.

7 (6) Department office--The department district, division,
8 or office responsible for the administration of the contract.

9 (7) Department office director--The chief administrative
10 officer of the responsible department office; the officer shall
11 be a district engineer, division director, or office director.

12 (8) District--One of the 25 districts of the department.

13 (9) Executive director--The executive director of the
14 Texas Department of Transportation.

15 (10) Prime contractor--An individual, partnership,
16 corporation, or other business entity that is a party to a
17 written contract with the state of Texas which is entered into
18 and administered by the department under Transportation Code,
19 §22.018, §391.091, Chapter 223, or Government Code, Chapter
20 2254, Subchapters A and B.

21 (11) Project--The portion of a contract that can be
22 separated into a distinct facility or work unit from the other
23 work in the contract.

1 (e) Contract claim committee. The executive director shall
2 name the members and chairman of a committee or committees to
3 serve at the executive director's pleasure. The chairman may
4 add members to the committee, including one or more district
5 engineers who will be assigned to the committee on a rotating
6 basis, with a preference, if possible, for district engineers of
7 districts that do not have a current contractual relationship
8 with the prime contractor involved in a contract claim.

9 (f) Negotiated resolution. To every extent possible,
10 disputes between a prime contractor and the department's project
11 engineer should be resolved during the course of the contract.

12 (g) Procedure.

13 (1) Exclusive procedure. Except as provided in
14 subsection (c) of this section, a contract claim shall be filed
15 under the procedure in this subsection. A claim must be
16 considered first by the committee before the claim is considered
17 in a contested case hearing.

18 (2) Filing claim.

19 (A) The claimant shall file a contract claim after
20 completion of the contract or when required for orderly
21 performance of the contract. A claim shall be filed no later
22 than one year after the earlier of the following:

23 (i) the department issues notice to the contractor

1 that it is in default, or the department terminates the
2 contract; or

3 (ii) the department issues final acceptance of the
4 project that is the subject of the contract.

5 (B) The claimant shall file a contract claim request
6 and a detailed report with the department's construction
7 division, the department engineer under whose administration the
8 contract was or is being performed, or the committee.

9 (C) If filed by a prime contractor, the claim shall
10 include a certification as follows: I certify that the claim is
11 made in good faith; that the supporting data are accurate and
12 complete to the best of my knowledge and belief; that the amount
13 requested accurately reflects the contract adjustment for which
14 the contractor believes the department is liable; and that I am
15 duly authorized to certify the claim on behalf of the
16 contractor.

17 (D) A defective certification shall not deprive the
18 department of jurisdiction over the claim. Prior to the entry
19 by the department of a final decision on the claim the
20 department shall require a defective certification to be
21 corrected.

22 (E) The construction division or department engineer
23 shall forward the contract claim request and detailed report to

1 the committee.

2 (3) Evaluation of claim by the committee.

3 (A) The committee's responsibility is to gather
4 information, study the relevant issues, and meet informally with
5 the prime contractor if requested. The committee shall attempt
6 to resolve the claim.

7 (B) The committee shall secure detailed reports and
8 recommendations from the responsible department office, and may
9 confer with any other department office deemed appropriate by
10 the committee. If the department is the claimant, the committee
11 shall give the prime contractor the opportunity to submit a
12 responsive report and recommendation.

13 (C) The committee shall afford the prime contractor an
14 opportunity for a meeting to informally discuss the disputed
15 matters and to provide the prime contractor an opportunity to
16 present relevant information and respond to information the
17 committee has received from the department office. Proceedings
18 before the committee are an attempt to mutually resolve a
19 contract claim without litigation and are not admissible for any
20 purpose in a formal administrative hearing provided in
21 subparagraph (D)(ii) of this paragraph. All oral
22 communications, reports, or other written documentation prepared
23 by department staff in connection with the analysis of a

1 contract claim are part of the attempt to mutually resolve a
2 contract claim without litigation, and are also not admissible
3 for any purpose in a formal administrative hearing provided in
4 subparagraph (D)(ii) of this paragraph.

5 (D) The committee chairman shall give written notice of
6 the committee's decision on the claim to the department and
7 prime contractor. The department and prime contractor are
8 presumed to receive the decision three days after it is sent by
9 United States mail.

10 (i) If the claimant does not object to the
11 committee's decision, the claimant shall file a written
12 statement with the committee's chairman stating that the
13 claimant does not object. The claimant shall file the statement
14 no later than 20 days after receipt of the committee's decision.
15 The chairman shall then prepare a document showing the
16 settlement of the claim including, when required, payment either
17 to the department or to the prime contractor, and the claimant's
18 release of all claims under the contract. The claimant shall
19 sign it. The executive director may approve the settlement, or
20 may request the commission to approve the settlement by issuance
21 of an order. The executive director shall then implement the
22 resolution of the claim, and if contemplated in the committee's
23 decision, expend funds as specified in the decision.

1 (ii) If the claimant objects to the committee's
2 decision the claimant shall file a petition with the executive
3 director no later than 20 days after receipt of the committee's
4 decision requesting an administrative hearing to litigate the
5 claim under the provisions of §§1.21 et seq. of this title
6 (relating to Procedures in Contested Cases).

7 (iii) If the claimant fails to file a written
8 petition under clause (ii) of this subparagraph within 20 days
9 of receipt of the committee's decision, the claimant waives his
10 right to a contested case hearing. All further litigation of
11 claims on the project or contract by the claimant shall be
12 barred by the doctrines of issue and claim preclusion. The
13 chairman shall then prepare an order implementing the resolution
14 of the claim under the committee's decision, and stating that
15 further litigation on the claim is prohibited. The executive
16 director shall then issue the order and implement the resolution
17 of the claim, and if contemplated in the committee's decision,
18 expend funds as specified in the decision.

19 (4) Decision after contested case hearing. This
20 paragraph applies if a contested case hearing has been held on a
21 claim. The administrative law judge's proposal for decision
22 shall be submitted to the executive director for adoption. The
23 executive director may change a finding of fact or conclusion of

1 law made by the administrative law judge or may vacate or modify
2 an order issued by the administrative law judge. The executive
3 director shall provide a written statement containing the reason
4 and legal basis for any change.

5 (h) Claim forfeiture. A claim against the department shall
6 be forfeited to the department by any person who corruptly
7 practices or attempts to practice any fraud against the
8 department in the proof, statement, establishment, or allowance
9 thereof. In such cases the department shall specifically find
10 such fraud or attempt and render judgment of forfeiture. This
11 subsection applies only if there is clear and convincing
12 evidence that a person knowingly presented a false claim for the
13 purpose of getting paid for the claim.

14 (i) Relation of contract claim proceeding and sanction
15 proceeding.

16 (1) Except as provided in paragraphs (2) and (3) of this
17 subsection, the processing of a contract claim under this
18 section is a separate proceeding and shall not affect the
19 executive director's assessment of a contract sanction under
20 Subchapter G of this chapter (relating to Contractor Sanctions).

21 (2) If a contested issue arises that is relevant both to
22 a contract claim proceeding and a sanction proceeding concerning
23 the same contract, the issue shall be resolved in the proceeding

1 that the executive director refers first for a contested case
2 hearing under Chapter 1, Subchapter E of this title (relating to
3 Procedures in Contested Cases). If the issue is decided in the
4 first proceeding that decision shall apply to and be binding in
5 all subsequent department proceedings.

6 (3) This paragraph applies to a contract under which the
7 parties agreed to submit questions which may arise to the
8 decision of a department engineer. If a dispute under the
9 contract leads to a contract claim proceeding or sanction
10 proceeding, the engineer's decision shall be upheld unless it
11 was based on fraud, misconduct, or such gross mistake as would
12 imply bad faith or failure to exercise an honest judgment.

13
14 §9.6. Contract Claim Procedure for Comprehensive Development
15 Agreement.

16 (a) Purpose. This section concerns processing and
17 resolution of a claim under Transportation Code, §201.112 that
18 arises under a comprehensive development agreement (CDA).

19 (b) Applicability.

20 (1) The executive director may enter into a CDA
21 containing a claim procedure and provisions authorized by this
22 section. When a claim arises under a CDA containing a claim
23 procedure authorized by this section, the requirements of this

1 section apply, §9.2 of this chapter (relating to Contract Claim
2 Procedure) does not apply, and the parties shall follow the
3 claim procedure contained in the CDA and shall be bound by the
4 outcome of the claim procedure. If a CDA does not contain a
5 claim procedure authorized by this §9.6, either by express
6 reference to this section or by inclusion of provisions required
7 or permitted by this section, then a claim under the agreement
8 shall be processed and resolved under §9.2 of this chapter.

9 (2) The claim procedure and provisions authorized by this
10 section may be applied to claims that arise under the CDA,
11 related agreements that collectively constitute a CDA, or other
12 agreements entered into with or for the benefit of the
13 department in connection with the CDA. A CDA shall identify the
14 related agreements and any other agreements to which the claim
15 procedure and provisions apply.

16 (3) This section and §9.2 do not affect or impede the
17 department's or the developer's rights to seek judicial relief
18 in connection with the following types of actions or
19 proceedings, and the claim procedures and provisions in this
20 section or in §9.2 do not apply to such actions:

21 (A) equitable relief that the department is permitted
22 to seek to the extent allowed by law;

23 (B) mandamus action that a developer is permitted to

1 bring against the department or the executive director under
2 Government Code, §22.002(c);

3 (C) mandamus relief sought by a developer under
4 Transportation Code, §223.208(e) (relating to termination
5 compensation and related security obligations); or

6 (D) other matters or disputes expressly excluded from
7 the dispute resolution procedures authorized by this section, as
8 specified in the CDA or other related agreement between the
9 department and the developer that is part of the CDA.

10 (c) Definitions. The following words and terms, when used
11 in this chapter, shall have the following meanings, unless the
12 context clearly indicates otherwise.

13 (1) Claim--A claim for compensation, or other dispute,
14 disagreement, or controversy concerning respective rights,
15 obligations, and remedies under the CDA, or under related
16 agreements that collectively constitute a CDA or other
17 agreements entered into with or for the benefit of the
18 department in connection with the CDA, including any alleged
19 breach or failure to perform.

20 (2) Comprehensive development agreement (CDA)--An
21 agreement with a developer that, at a minimum, provides for the
22 design and construction, reconstruction, extension, expansion,
23 or improvement of a project described in Transportation Code,

1 §223.201(a), and may also provide for the financing,
2 acquisition, maintenance, or operation of such a project. A CDA
3 is also authorized under Transportation Code, §91.054 (rail
4 facilities), and under Transportation Code, §227.023 (Trans-
5 Texas Corridor). A CDA includes related agreements that
6 collectively constitute a CDA or other agreements entered into
7 with or for the benefit of the department in connection with the
8 CDA.

9 (3) Department--The Texas Department of Transportation.

10 (4) Developer--The private entity or entities that enter
11 into a CDA with the department.

12 (5) Disputes board--A group of one or more individuals
13 appointed under the terms of a CDA to fairly and impartially
14 consider and decide a claim between the department and a
15 developer.

16 (6) Disputes board error--One or more of the following
17 actions:

18 (A) a disputes board acted beyond the limits of its
19 authority established under subsection (b)(3) of this section;

20 (B) a disputes board failed, in any material respect,
21 to properly follow or apply the procedure for handling, hearing
22 and deciding a claim established under the CDA and the failure
23 prejudiced the rights of a party;

1 (C) a disputes board decision was procured by, or there
2 was evident partiality by a disputes board member due to a
3 conflict of interest (which may be defined in the CDA),
4 misconduct (which may be defined in the CDA), corruption, or
5 fraud; or

6 (D) any other error that the parties agree may be the
7 subject of a contested case hearing, as set out in the CDA.

8 (7) Executive director--The executive director of the
9 Texas Department of Transportation.

10 (8) Party--The department, or a developer who has entered
11 into a CDA with the department. The department and the
12 developer are together referred to as the "parties."

13 (9) SOAH--State Office of Administrative Hearings.

14 (d) Mandatory requirements. A CDA that authorizes the use
15 of a claim procedure authorized by this section shall include
16 (or incorporate by reference) provisions substantially
17 consistent with the provisions in this subsection, but such
18 provisions need not apply to claims excluded from the claim
19 procedure under subsection (b)(3) of this section.

20 (1) A claim under the CDA that is not resolved by the
21 informal dispute resolution process set forth in the CDA shall
22 be referred to a disputes board for rendering of a disputes
23 board decision on the claim.

1 (2) The processing of a claim shall include a mandatory
2 informal dispute resolution process, such as mediation, and a
3 mandatory dispute resolution procedure using a disputes board.

4 (3) The party making a claim shall include in its notice
5 of the claim a certification by an authorized or designated
6 representative to the effect that:

7 (A) the claim is made in good faith;

8 (B) to the current knowledge of the party, except as to
9 matters stated in the notice of claim as being unknown or
10 subject to discovery, the supporting data is reasonably believed
11 by the party to be accurate and complete, and the description of
12 the claim contained in the certification accurately reflects the
13 amount of money or other right, remedy, or relief to which the
14 party asserting the claim reasonably believes it is entitled;
15 and

16 (C) the representative is duly authorized to execute
17 and deliver the certificate on behalf of the party.

18 (4) The certification required under subsection (d)(3) of
19 this section, if defective, shall not deprive a disputes board
20 of jurisdiction over the claim. Prior to the entry by the
21 disputes board of a final decision on the claim, the disputes
22 board shall require a defective certification to be corrected.

23 (e) Permissive requirements. A CDA that provides for a

1 claim procedure authorized by this section may include (or
2 incorporate by reference) any or all of the provisions in this
3 subsection, or provisions substantially consistent with them,
4 and other terms and conditions regarding claim resolution that
5 are not contrary to the mandatory requirements of this section.

6 (1) The executive director shall adopt the decision of a
7 disputes board as a ministerial act, subject to a party's right
8 to request a contested case hearing in accordance with the terms
9 of the CDA as to whether disputes board error occurred.

10 (2) A decision by a disputes board, upon completion of
11 the procedure required in Transportation Code, §201.112, this
12 section, and in the CDA, is final, conclusive, binding upon, and
13 enforceable against the parties, subject to any appeals allowed
14 by the CDA or this section.

15 (3) A disputes board, upon issuing a decision on a claim,
16 is authorized to direct that an award be paid from the proceeds
17 of any trust or other pool of project funds that the CDA
18 provides shall be available for payment of such claims.

19 (4) The executive director's discretion or actions in
20 connection with the resolution of a claim are limited or may be
21 purely ministerial in certain circumstances, including:

22 (A) adoption of the disputes board's decision absent
23 disputes board error;

1 (B) referral of a disputes board decision to SOAH to
2 determine whether disputes board error occurred; and

3 (C) issuance of a final order based on the SOAH
4 administrative law judge's proposal for decision.

5 (5) Certain claims may be categorized and treated by the
6 parties as expedited claims, and informal resolution procedures
7 shall be expedited for such claims.

8 (6) Certain claims may be categorized and treated by the
9 parties as small claims, and informal resolution procedures
10 shall be expedited for such claims.

11 (7) The parties may execute a related disputes board
12 agreement, or similar agreement, which shall be part of the CDA
13 and which may govern all aspects of the creation of and
14 procedures to be followed by a disputes board.

15 (8) The evidence presented to a SOAH administrative law
16 judge in a hearing regarding a claim, and to the Travis County
17 District Court in any appeal, may include: the disputes board's
18 written findings of fact, conclusions of law, and decision; any
19 written dissenting findings, recommendation, or opinions of a
20 disputes board member; all submissions to the disputes board by
21 the parties; and an independent engineer's written evaluations,
22 opinions, findings, reports, recommendations, objections,
23 decisions, certifications, or other determinations, if any,

1 delivered to the parties pursuant to the CDA and related to the
2 claim under consideration.

3 (9) Certain decisions, orders, or determinations of the
4 executive director may be deemed to have been issued as of a
5 certain date, or after a prescribed number of days, and setting
6 out the parameters of the deemed decision, order, or
7 determination.

8 (10) The parties are authorized and required to comply
9 with all or certain categories of interim orders of the disputes
10 board, including discovery and procedural orders.

11 (11) Except as agreed to by the parties in writing, a
12 disputes board shall have no power to alter or modify any terms
13 or provisions of the CDA, or to render any award that, by its
14 terms or effects, would alter or modify any term or provision of
15 the CDA. Notwithstanding the prior sentence, a disputes board
16 decision that contains error in interpretation or application of
17 a term or provision of the CDA but does not otherwise purport to
18 alter or modify terms or provisions of the CDA may not be
19 appealed on grounds of such error; and such error does not
20 deprive the disputes board of power or authority over the claim.

21 (12) A developer's claim for termination compensation, or
22 to enforce the department's security obligations that secure
23 payment of termination compensation, is not to be resolved under

1 any dispute resolution procedure in the CDA. Rather, a
2 developer may exercise its rights under Transportation Code,
3 §223.208(e) (relating to Terms of Private Participation) by
4 seeking mandamus against the department.

5 (13) At all times during the processing of a contract
6 claim, the developer and its subcontractors shall continue with
7 the performance of the work and their obligations, including any
8 disputed work or obligations, diligently and without delay, in
9 accordance with the CDA, except to the extent enjoined by order
10 of a court or otherwise ordered or approved by the department in
11 its sole discretion.

12 (f) Pass-through claim. A CDA may provide that a developer
13 who is a party to a CDA with the department may make a claim on
14 behalf of a subcontractor. In order to make such a claim the
15 developer must be liable to the subcontractor on the claim.

16 (g) Mandatory requirements concerning disputes board. A
17 CDA that authorizes the use of a disputes board shall include
18 (or incorporate by reference) provisions substantially
19 consistent with the provisions in this subsection.

20 (1) A disputes board is not a supervisory, advisory, or
21 facilitating body and has no role other than as expressly
22 described in the CDA, including, if applicable, any disputes
23 board agreement.

1 (2) A disputes board member shall not have a financial
2 interest in the CDA, in any contract or the facility that is the
3 subject of the CDA, or in the outcome of any claim decided under
4 the CDA, except for payments to that member for services on the
5 disputes board. Any person appointed as a disputes board member
6 shall disclose to the parties any circumstances likely to give
7 rise to justifiable doubt as to such disputes board member's
8 impartiality or independence, including any bias or any
9 financial or personal interest in the result of the dispute
10 resolution or any past or present relationship with the parties
11 or their representatives, or developer's subcontractors and
12 affiliates.

13 (3) The scope of a SOAH contested case hearing on an
14 appeal of a disputes board decision is limited solely to whether
15 disputes board error occurred.

16 (h) Punitive damages. A disputes board shall have no power
17 or jurisdiction to award punitive damages.

18 (i) Permissive requirements concerning disputes board. A
19 CDA that authorizes the use of a disputes board may include (or
20 incorporate by reference) any or all of the provisions in this
21 subsection, or provisions substantially consistent with them,
22 and other terms and conditions regarding the disputes board that
23 are not contrary to the specific requirements of this section.

1 (1) Each party shall endeavor to have a standing list of
2 candidates from which to select a disputes board member. The
3 CDA may specify the qualifications to be a board member, the
4 procedure by which a party nominates a person to the list of
5 candidates, and the method by which the other party may review
6 and object to a proposed candidate. All disputes board members
7 are chosen from the list of candidates of the department or of
8 the developer.

9 (2) A disputes board conducts its proceedings in
10 accordance with procedural rules specified in the CDA. The
11 disputes board may allow for discovery similar to that allowed
12 under the Texas Rules of Civil Procedure, and the admission of
13 evidence conforming to the Texas Rules of Evidence, but may
14 allow for exceptions to or deviations from such requirements and
15 rules.

16 (3) The parties may jointly modify the procedure
17 applicable to the disputes board's proceedings, under the
18 provisions of the CDA.

19 (4) During the period that a disputes board member is
20 serving on a disputes board, neither party may communicate ex
21 parte with that member. A party may not communicate ex parte
22 with a person on its list of candidates to be a disputes board
23 member regarding the substance of a dispute.

1 (5) Each party is responsible for paying one-half the
2 costs of all facilities, fees, support services costs, and other
3 expenses of a disputes board.

4 (6) A disputes board does not have the authority to order
5 that one party compensate the other party for attorney's fees
6 and expenses.

7 (j) Permissive requirements on a contested case hearing. A
8 CDA that authorizes the use of a contract claim procedure
9 authorized by this section may include (or incorporate by
10 reference) any or all of the provisions in this subsection, or
11 provisions substantially consistent with them, and other terms
12 and conditions regarding a contested case hearing that are not
13 contrary to the specific requirements of this section.

14 (1) The executive director's referral of a developer's
15 request to SOAH for a contested case hearing as to whether a
16 decision by a disputes board was affected by disputes board
17 error is a purely ministerial act.

18 (2) If a determination is made after a contested case
19 hearing that disputes board error occurred, the dispute shall be
20 remanded to a disputes board for further consideration, except
21 that if the error is lack of authority to hear the claim, the
22 decision of the disputes board shall be vacated.

23 (3) The executive director's issuance of a final order

1 following a contested case hearing is a purely ministerial act,
2 and that if by inaction the executive director does not issue a
3 final order within the time frame established by the CDA, then a
4 final order in a form recommended by the administrative law
5 judge shall be deemed to be automatically issued.

6 (4) As allowed by Government Code, §2001.144 and
7 §2001.145, an order issued by the executive director after a
8 contested case hearing is final on the date issued and no motion
9 for rehearing is required to appeal the final order.

10 (5) An executive director's order remanding a dispute to
11 a disputes board, or an executive director's order implementing
12 a disputes board decision following a contested case hearing
13 before SOAH, are subject to judicial review under Government
14 Code, Chapter 2001, under the substantial evidence rule. Review
15 is limited to whether disputes board error occurred.

16 (k) Other department rules on a contested case hearing.

17 (1) The parties may agree in the CDA to adopt, modify or
18 not follow procedural provisions, deadlines, evidentiary rules,
19 and any other matters set out in Chapter 1, Subchapter E of this
20 title (relating to Procedures in Contested Cases).

21 (2) In the event of any conflict or difference between
22 the procedures set out in this section or a CDA, and in Chapter
23 1, Subchapter E, the procedures in this section or the CDA shall

1 govern with respect to any proceeding before SOAH.

2 (3) In the event of an appeal to SOAH of a disputes board
3 decision:

4 (A) the department shall present a copy of this section
5 to SOAH as a written statement of applicable rules or policies,
6 under Government Code, §2001.058(c); and

7 (B) the parties shall request that the administrative
8 law judge modify and supplement SOAH contested case procedures
9 as necessary or appropriate, and consider this section,
10 consistent with 1 TAC §155.3 (relating to Application and
11 Construction of this Chapter).

12 (C) the parties shall provide the administrative law
13 judge with a stipulation that the substantive provisions, scope
14 of review, and procedural provisions of this section and the CDA
15 shall apply to and govern the contested case proceeding before
16 SOAH, consistent with 1 TAC §155.39(a) (relating to
17 Stipulations).

18 (1) Mandamus relief. Nothing in this section shall
19 restrict a developer's rights to seek mandamus relief pursuant
20 to Government Code, §22.002(c) if the executive director fails
21 to perform one or more of the ministerial acts set out in this
22 section and included in the CDA as a ministerial act, or any
23 other act specified in the CDA as a ministerial act.

1 (m) Confidential information.

2 (1) The parties may agree that, with respect to the
3 mandatory informal dispute resolution process required under
4 subsection (d)(2) of this section, communications between the
5 parties to resolve a dispute, and all documents and other
6 written materials furnished to a party or exchanged between the
7 parties during any such informal resolution procedure, shall be
8 considered confidential and not subject to disclosure by either
9 party.

10 (2) The parties may agree that with respect to a
11 proceeding before the disputes board, an administrative hearing
12 before an administrative law judge, or a judicial proceeding in
13 court, either or both parties may request a protective order to
14 prohibit disclosure to third persons of information that the
15 party believes is a trade secret, proprietary, or otherwise
16 entitled to confidentiality under applicable law.

1 SUBCHAPTER A. GENERAL

2 §9.2. Contract Claim Procedure.

3 (a) Definitions. The following words and terms, when used
4 in this section, shall have the following meanings, unless the
5 context clearly indicates otherwise.

6 (1) Commission--The Texas Transportation Commission.

7 (2) Committee--The Contract Claim Committee.

8 (3) Contract claim--A claim for additional compensation,
9 time extension, or any other reason, arising out of a contract
10 between the State of Texas, acting in its own capacity or as an
11 agent of a local government, and a prime contractor, which is
12 entered into and administered by the Texas Department of
13 Transportation pursuant to Transportation Code, Section 22.018
14 (concerning the designation of the department as agent in
15 contracting and supervising for aviation projects), Section
16 391.091 (concerning erection and maintenance of specific
17 information logo, major area shopping guide, and major
18 agricultural interest signs), Chapter 223 (concerning bids and
19 contracts for highway improvement projects, Chapter 361
20 (concerning state highway turnpike projects, or Government Code,
21 Chapter 2254, Subchapters A and B (concerning professional or
22 consulting services). The claim may be brought by the
23 department or a prime contractor:

1 (A) based on privity of contract; or

2 (B) on a prime contractor's continuing liability to a
3 subcontractor for alleged damages sustained by the subcontractor
4 arising from the contract, but not if the subcontractor releases
5 the prime contractor from liability for damages caused by the
6 prime contractor.

7 (4) Department--The Texas Department of Transportation.

8 (5) Department office--The department district, division,
9 or office responsible for the administration of the contract.

10 (6) Department office director--The chief administrative
11 officer of the responsible department office, such officer to be
12 a district engineer, division director, or office director.

13 (7) District--One of the 25 districts of the department.

14 (8) Executive director--The executive director of the
15 Texas Department of Transportation.

16 (9) Prime contractor--An individual, partnership,
17 corporation, or other business entity that is a party to a
18 written contract with the State of Texas which is entered into
19 and administered by the Texas Department of Transportation
20 pursuant to Transportation Code, Section 22.018, Section
21 391.091, Chapter 223, Chapter 361, or Government Code, Chapter
22 2254, Subchapters A and B.

23 (10) Project--The portion of a contract that can be

1 separated into a distinct facility or work unit from the other
2 work in the contract.

3 (b) Contract claim committee.

4 (1) The executive director will name the members and
5 chairman of a contract claim committee or committees to serve at
6 the executive director's pleasure. The chairman may add members
7 to the committee, including one or more district engineers who
8 will be assigned to the committee on a rotating basis, with a
9 preference, if possible, for district engineers of districts
10 that do not have a current contractual relationship with the
11 prime contractor involved in the contract claim. It will be the
12 responsibility of a committee to gather information, study, and
13 meet informally with prime contractors, if requested, to resolve
14 any disputes relating to the department's project engineer's
15 final decision and the prime contractor, and which result in one
16 or more contract claims.

17 (2) The commission stresses that, to every extent
18 possible, disputes between a prime contractor and the
19 department's project engineer should be resolved during the
20 course of the contract. If, however, after completion of a
21 contract, or when required for orderly performance prior to
22 completion, resolution of a contract claim is not reached by the
23 parties, either party may file a detailed report and contract

1 claim request with the department office director under whose
2 administration the contract was or is being performed, the
3 department's Construction Division, or the committee. The claim
4 must be filed within one year after the date of the acceptance
5 of the project. Documents filed with the office director or the
6 Construction Division will be transmitted to the committee.

7 (3) A contract claim, even when related to a direct
8 appeal to the State Office of Administrative Hearings (SOAH) of
9 a contract sanction, cannot be appealed to SOAH before the
10 Contract Claim Committee procedure is completed.

11 (4) The committee will secure detailed reports and
12 recommendations from the responsible department office, and may
13 confer with any other department office deemed appropriate by
14 the committee.

15 (5) The committee will then afford the prime contractor
16 an opportunity for a meeting to informally discuss the disputed
17 matters and to provide the prime contractor an opportunity to
18 present relevant information and respond to information the
19 committee has received from the department office.

20 (6) The committee chairman will give written notice of
21 the committee's proposed disposition of the claim to the
22 parties. If that disposition is acceptable, the claimant shall
23 advise the committee chairman in writing within 20 days of the

1 date such notice is received, and the chairman will forward to
2 the commission an agreed order involving, when required, payment
3 either to the department or the prime contractor on the claim.
4 If the claimant is dissatisfied with the proposal of the
5 committee, the claimant may petition the executive director for
6 a formal administrative hearing to litigate the claim pursuant
7 to the provisions of §§1.21 et seq. of this title (relating to
8 Contested Case Procedure).

9 (7) If the claimant fails to petition the executive
10 director within 20 days after notice of the committee's
11 recommendation is received, that recommendation will be
12 forwarded to the executive director for adoption as a final
13 order, and all further litigation of claims on the project or
14 contract by the claimant shall be barred by the doctrines of
15 issue and claim preclusion.

16 (8) Proceedings before the department office director or
17 the committee are in the nature of an attempt to mutually
18 resolve a contract claim without litigation and are not
19 admissible for any purpose in a formal administrative hearing
20 provided in paragraph (6) of this subsection. All oral
21 communications, reports, or other written documentation prepared
22 by department staff in connection with the analysis of a
23 contract claim are part of the attempt to mutually resolve a

1 contract claim without litigation, and are also not admissible
2 for any purpose in a formal administrative hearing provided in
3 paragraph (6) of this subsection.

4 (9) The administrative law judge's proposal for decision
5 in a formal administrative hearing provided in paragraph (6) of
6 this subsection shall be submitted to the executive director for
7 adoption. The executive director may change a finding of fact
8 or conclusion of law made by the administrative law judge or may
9 vacate or modify an order issued by the administrative law
10 judge. The executive director shall provide a written statement
11 containing the reason and legal basis for any change.