

TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

Page 1 of 1

ALL Districts

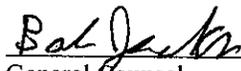
The Texas Transportation Commission (commission) finds it necessary to adopt the repeal of §9.2 and simultaneously adopt new §9.2 and §9.6, relating to contract claims, to be codified under Title 43, Texas Administrative Code, Part 1.

The preamble and the adopted 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 adopted and are authorized for filing with the Office of the Secretary of State.

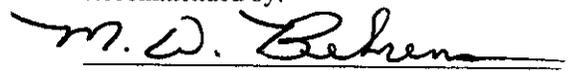
The executive director is directed to take the necessary steps to implement the actions as ordered in this minute order, pursuant to the requirements of the Administrative Procedure Act, Government Code, Chapter 2001.

Submitted and reviewed by:



General Counsel

Recommended by:



Executive Director

110751 NOV 16 06

Minute
Number

Date
Passed

1 Adoption Preamble

2 The Texas Department of Transportation (department) adopts the
3 repeal of §9.2, contract claim procedure, and simultaneously
4 adopts new §9.2, contract claim procedure and §9.6, contract
5 claim procedure for comprehensive development agreement. The
6 repeal of §9.2 and new §9.2 and §9.6 are adopted without changes
7 to the proposed text as published in the September 8, 2006 issue
8 of the *Texas Register* (31 TexReg 7300) and will not be
9 republished.

10

11 EXPLANATION OF ADOPTED REPEAL AND NEW SECTIONS

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

17

18 The section also includes several new provisions. Section
19 9.2(c) concerns contract claims under a comprehensive
20 development agreement (CDA). The new provision recognizes new
21 §9.6 and that the CDA may provide the procedure for resolving a
22 claim under the CDA. The explanation of new §9.6 later in this
23 preamble describes the new procedure authorized for a contract
24 claim under a CDA.

25

1 New §9.2(g)(2)(A) adds a provision concerning the deadline for
2 filing a claim. The repealed rule required that a claim be
3 filed no later than one year after the department issues
4 acceptance of the project that is the subject of the contract.
5 The new rule also specifies that a claim must be filed no later
6 than one year after the department issues notice to the
7 contractor that it is in default, or the department terminates
8 the contract. The department believes the addition of this
9 deadline is reasonable. A contractor will be able to determine
10 whether it has a claim within one year after the contractor's
11 work on the contract ends because of default or termination. A
12 contractor's opportunity to file a claim should not be extended
13 beyond one year simply because the contractor's surety or a
14 different contractor continues to work under the contract.

15
16 The department is concerned that upon the effective date of the
17 new rule, it will be unclear whether the new deadline to file a
18 claim will apply to a contract under which the deadline under
19 the old rule had not yet passed. The department intends that
20 the deadline to file a claim is the earlier of one year after
21 the effective date of the new rule, or one year after the
22 department issues final acceptance of the project that is the
23 subject of the contract.

24
25 Section 9.2(g)(2)(C) and (D) adds a requirement that a prime

1 contractor certify the accuracy of a claim. The provisions are
2 modeled after the federal contract dispute procedure found at 41
3 USC §605(c) and 48 CFR §33.207. The purpose is to require the
4 person submitting a claim on behalf of a prime contractor to
5 review the claim and supporting documentation to ensure its
6 accuracy and veracity.

7
8 Section 9.2(g)(3)(D)(i) and (iii) changes the procedure related
9 to the contract claim committee's (committee) decision and the
10 claimant's acceptance of the decision or failure to respond.
11 The new rule does not require Texas Transportation Commission
12 (commission) approval of the settled claim. The department
13 eliminated this requirement because it is not required in
14 Transportation Code, §201.112. However, the executive director
15 may request the commission approve the settlement. The
16 committee will continue to give notice to the commission and
17 executive director of a settled claim.

18
19 Section 9.2(h) adds a provision that a claim against the
20 department shall be forfeited to the department by any person
21 who corruptly practices or attempts to practice any fraud
22 against the department. The provision is modeled after federal
23 law at 28 USC §2514. The purpose is to give the department an
24 appropriate remedy in its own contract claim rule should a
25 claimant present a fraudulent claim. The department does not

1 intend this new subsection to limit other remedies or actions
2 available in law.

3
4 Section 9.2(i) concerns the relation of a contract claim
5 proceeding and sanction proceeding concerning the same contract.
6 This new subsection supersedes §9.2(b)(3) in the repealed rule.
7 The new section continues to provide that a contract claim must
8 be considered by the committee before the claim is considered in
9 a contested case. However, §9.2(i) also provides that the
10 processing of a contract claim is a separate proceeding and
11 shall not affect the executive director's assessment of a
12 contract sanction under Subchapter G of this chapter (relating
13 to Contractor Sanctions). If a contested issue arises (e.g.
14 whether the department engineer properly defaulted the
15 contractor) that is common to the two proceedings then the issue
16 shall be resolved in the first proceeding referred for a
17 contested case hearing. The department intends that if there
18 are two simultaneous proceedings that they both proceed as
19 expeditiously as possible. But if there is a contested issue
20 that is litigated in a contested case hearing, the resolution of
21 the issue should be binding on all subsequent department
22 proceedings. In addition, if the contested issue relates to a
23 question submitted to the department engineer under the
24 contract, then the standard by which that decision will be
25 reviewed is that it shall be upheld unless it was based on

1 fraud, misconduct, or such gross mistake as would imply bad
2 faith or failure to exercise an honest judgment. This is the
3 standard by which a claim is judged pursuant to Texas Department
4 of Transportation v. Jones Brothers Dirt and Paving Contractors,
5 Inc., 92 S.W.3d 477 (Tex. 2002). The department believes the
6 new rule will ensure that the same standard of review applies
7 whether a contested issue is decided in a claim proceeding or
8 sanction proceeding. This will make the review of engineer's
9 decisions consistent, and not depend on which proceeding
10 happened to be referred first for a contested case hearing. New
11 §9.2(i) is also consistent with §9.102(d) of this chapter
12 (relating to Procedure) concerning sanctions, which provides
13 that the imposition of sanctions does not affect a contractor's
14 contractual obligations or limit the commission's contractual
15 remedies.

16
17 New §9.6 concerns contract claim procedure for a claim under a
18 CDA. A CDA is an agreement with a private entity that, at a
19 minimum, provides for the design and construction,
20 reconstruction, extension, expansion, or improvement of an
21 eligible project and may also provide for the financing,
22 acquisition, maintenance, or operation of an eligible project.
23 The authorization for the department entering into a CDA is
24 Transportation Code, Chapter 223, Subchapter E. Subchapter E
25 lists the eligible projects. Other provisions in Transportation

1 Code, §91.054 (rail facilities), and §227.023 (Trans-Texas
2 Corridor) also authorize the department to enter into a CDA.

3
4 New §9.6 is authorized by Transportation Code, §201.112(a),
5 which specifies that the department may, by rule, establish
6 procedures for the informal resolution of a claim arising out of
7 a contract for a highway project. Transportation Code, Chapter
8 223, Subchapter E, specifies the procedure by which the
9 department may enter into a CDA and the department's authority
10 to agree on specific matters. Under Transportation Code,
11 §223.203(n) the department may prescribe the general form of a
12 CDA and may include any matter the department considers
13 advantageous to the department. Under Transportation Code,
14 §223.208(b) the department may include any provision that the
15 department considers appropriate.

16
17 The department's experience using CDAs shows the need for the
18 new rule. The department has already entered into several CDAs.
19 As the department has expanded the use of CDAs, the department
20 has also expanded their scope. This experience indicates that
21 the ability of developers under CDA's to effectively raise
22 equity and debt financing for CDA projects depends on an
23 administrative process for dispute resolution under which the
24 decision maker is not a party to the CDA, and that produces
25 finality of decision within a reasonable time.

1
2 The department believes it may be necessary that CDAs, and
3 especially those that include the developer operating and
4 financing the project, include a dispute resolution procedure
5 other than as contemplated in §9.2. New §9.6 is intended to
6 authorize the executive director to enter into a CDA with a
7 negotiated dispute resolution procedure. The procedure must
8 comply with Transportation Code, §201.112, and meet the
9 requirements of §9.6. Section 9.6 includes specific
10 requirements to ensure that a negotiated procedure complies with
11 Transportation Code, §201.112, and to ensure that the general
12 outline of the procedure is consistent for all CDAs.

13
14 Section 9.6(b) describes the applicability of the section to a
15 CDA. Under a specific CDA, all disputes shall be under the
16 dispute procedure in §9.2, or all shall be under §9.6, as
17 specified in the CDA. No CDA shall have some disputes resolved
18 under §9.2 and some under §9.6. If the CDA is silent on the
19 matter then all disputes shall be resolved under §9.2. The
20 purpose is to have one procedure apply to all disputes under a
21 CDA so the parties are sure of the applicable procedure.

22
23 Section 9.6(b) also specifies the matters that are, and are not,
24 controlled by a disputes board procedure. A disputes board
25 procedure can be applied to other agreements related to a CDA

1 provided they are specifically identified as being subject to
2 the disputes board procedure. A disputes board procedure does
3 not apply to the listed equitable matters over which courts have
4 jurisdiction, and to other matters identified in a CDA.

5
6 Section 9.6(d) specifies the mandatory provisions in a disputes
7 board procedure. There shall be a disputes board that shall
8 consider disputes and issue decisions. Before a dispute is
9 referred to a disputes board, a CDA shall require that a claim
10 be referred for informal dispute resolution, optional mediation,
11 or other alternative dispute resolution process. The party
12 making a claim shall file a certified claim.

13
14 Section 9.6(e) specifies that if a CDA includes a claim
15 procedure authorized by the section, the claim procedure may
16 include certain permissive provisions. The subsection
17 authorizes, but does not require, the provisions because the
18 parties may negotiate a different procedure that is acceptable
19 and consistent with Transportation Code, §201.112. When the
20 parties negotiate a CDA they may agree to use the permissive
21 provisions, or agree not to use them. They may even agree to
22 terms that are contrary to the permissive terms so long as the
23 claim procedure complies with the remainder of the section.

24
25 The permissive provisions include: a decision of the disputes

1 board is final, conclusive, binding upon, and enforceable
2 against the parties. However, a disputes board decision is
3 subject to review to determine if there was disputes board
4 error. Whether there was disputes board error may be referred
5 for a contested case hearing. If there was disputes board error
6 then the dispute shall be remanded back to a disputes board. A
7 disputes board is authorized to direct that an award be paid
8 from the proceeds of any trust or other pool of project funds
9 that the CDA provides shall be available for payment of such
10 claims. During the processing of a claim, the developer and its
11 subcontractors shall continue work under the CDA, subject to
12 certain specified exceptions.

13
14 The department believes subsections (d) and (e) are authorized
15 under Transportation Code, §201.112(a). The law authorizes the
16 department by rule to establish procedures for informal
17 resolution of a claim. New §9.6 labels the disputes board as a
18 "formal" dispute resolution procedure. But the department uses
19 this label only to distinguish the required "informal dispute
20 resolution," the optional mediation, and mandatory "formal
21 dispute resolution" required under §9.6(d)(2). The disputes
22 board is "formal" in the sense that it conducts proceedings on a
23 claim, and makes a decision that is binding on the parties,
24 absent disputes board error. But the disputes board is informal
25 in the sense that the parties can change the disputes board

1 procedure if they agree. Also, a disputes board exists only as
2 authorized in the CDA. It is not permanent and it is not a
3 governmental entity. The department believes Transportation
4 Code, §223.203(n) and §223.208(b) authorize the creation of a
5 disputes board procedure.

6
7 Section 9.6(f), Pass-through claims, specifies that a dispute
8 procedure may provide that a developer who is a party to a
9 comprehensive development agreement with the department may make
10 a claim on behalf of a subcontractor. However, the developer
11 must be liable to the subcontractor on the claim.

12
13 Section 9.6(g) sets additional mandatory requirements that apply
14 specifically to proceedings of a disputes board. The
15 requirements limit the authority of a disputes board, and set
16 conflict of interest parameters.

17
18 Section 9.6(i) sets additional permissive requirements that
19 apply specifically to proceedings of a disputes board.

20
21 Section 9.6(j) sets permissive requirements in the CDA
22 concerning a contested case hearing held under Transportation
23 Code, §201.112. The scope of a contested case hearing on a
24 dispute is limited solely to whether a disputes board error
25 occurred upon the disputes board processing the dispute. The

1 executive director's order remanding a dispute to a disputes
2 board, or the executive director's order implementing a disputes
3 board decision following a contested case hearing, are subject
4 to judicial review under Government Code, Chapter 2001, under
5 the substantial evidence rule. Review is limited to whether
6 disputes board error occurred.

7

8 Section 9.6(k) specifies that a disputes board agreement may
9 provide that the procedural rules for a contested case may
10 adopt, modify, or not follow the procedural rules in department
11 rules.

12

13 Section 9.6(l) clarifies that the section does not interfere
14 with a developer's rights to seek mandamus relief pursuant to
15 Government Code, §22.002(c).

16

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

19

20 COMMENTS

21 No comments on the proposed repeal and new sections were
22 received.

23

24 STATUTORY AUTHORITY

25 The repeal and new sections are adopted under Transportation

1 Code, §201.101, which provides the commission with the authority
2 to establish rules for the conduct of the work of the
3 department, and more specifically, under Government Code,
4 §201.112, which allows the commission by rule to establish
5 procedures for the informal resolution of a claim arising out of
6 a contract under the statutes set forth in that section. New
7 §9.6 is also authorized by Transportation Code, §223.203, which
8 provides the department may prescribe the general form of a CDA
9 and may include any matter the department considers advantageous
10 to the department, and Transportation Code, §223.208, which
11 provides the department may include in a CDA any provision that
12 the department considers appropriate.

13

14 CROSS REFERENCE TO STATUTE

15 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 of this
14 chapter and not 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 of this chapter.

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 of this chapter, either
6 by express reference to this section or by inclusion of
7 provisions required or permitted by this section, then a claim
8 under the agreement shall be processed and resolved under §9.2
9 of this chapter.

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

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

23 (A) equitable relief that the department is permitted

1 to seek to the extent allowed by law;

2 (B) mandamus action that a developer is permitted to
3 bring against the department or the executive director under
4 Government Code, §22.002(c);

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

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

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

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

22 (2) Comprehensive development agreement (CDA)--An
23 agreement with a developer that, at a minimum, provides for the

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

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

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

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

18 (6) Disputes board error--One or more of the following
19 actions:

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

22 (B) a disputes board failed, in any material respect,
23 to properly follow or apply the procedure for handling, hearing

1 and deciding a claim established under the CDA and the failure
2 prejudiced the rights of a party;

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

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

10 (7) Executive director--The executive director of the
11 Texas Department of Transportation.

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

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

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

22 (1) A claim under the CDA that is not resolved by the
23 informal dispute resolution process set forth in the CDA shall

1 be referred to a disputes board for rendering of a disputes
2 board decision on the claim.

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

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

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

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

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

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

1 board shall require a defective certification to be corrected.

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

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

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

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

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

1 (A) adoption of the disputes board's decision absent
2 disputes board error;

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

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

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

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

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

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

1 opinions, findings, reports, recommendations, objections,
2 decisions, certifications, or other determinations, if any,
3 delivered to the parties pursuant to the CDA and related to the
4 claim under consideration.

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

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

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

23 (12) A developer's claim for termination compensation, or

1 to enforce the department's security obligations that secure
2 payment of termination compensation, is not to be resolved under
3 any dispute resolution procedure in the CDA. Rather, a
4 developer may exercise its rights under Transportation Code,
5 §223.208(e) (relating to Terms of Private Participation) by
6 seeking mandamus against the department.

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

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

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

22 (1) A disputes board is not a supervisory, advisory, or
23 facilitating body and has no role other than as expressly

1 described in the CDA, including, if applicable, any disputes
2 board agreement.

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

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

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

20 (i) Permissive requirements concerning disputes board. A
21 CDA that authorizes the use of a disputes board may include (or
22 incorporate by reference) any or all of the provisions in this
23 subsection, or provisions substantially consistent with them,

1 and other terms and conditions regarding the disputes board that
2 are not contrary to the specific requirements of this section.

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

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

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

21 (4) During the period that a disputes board member is
22 serving on a disputes board, neither party may communicate ex
23 parte with that member. A party may not communicate ex parte

1 with a person on its list of candidates to be a disputes board
2 member regarding the substance of a dispute.

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

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

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

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

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

1 decision of the disputes board shall be vacated.

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

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

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

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

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

23 (2) In the event of any conflict or difference between

1 the procedures set out in this section or a CDA, and in Chapter
2 1, Subchapter E, the procedures in this section or the CDA shall
3 govern with respect to any proceeding before SOAH.

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

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

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

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

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

1 section and included in the CDA as a ministerial act, or any
2 other act specified in the CDA as a ministerial act.

3 (m) Confidential information.

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

12 (2) The parties may agree that with respect to a
13 proceeding before the disputes board, an administrative hearing
14 before an administrative law judge, or a judicial proceeding in
15 court, either or both parties may request a protective order to
16 prohibit disclosure to third persons of information that the
17 party believes is a trade secret, proprietary, or otherwise
18 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.