

EXHIBIT M

DISPUTE RESOLUTION PROCESS

43 Texas Administrative Code Section 9.2 applies to Disputes subject to Section 22 of the Agreement. 43 Texas Administrative Code Section 9.6 is included in this Exhibit M for reference, but does not apply to Disputes arising under the Agreement. If agreed by the parties to a Facility Agreement, Section 9.6 may be included in the dispute resolution process for the Facility Agreement.

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.

(b) Pass-through claim. A prime contractor may make a claim on behalf of a

subcontractor only if the prime contractor is liable to the subcontractor on the claim.

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

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

(1) Claim—A claim for compensation, or other dispute, disagreement, or controversy concerning respective rights and obligations under the contract including any alleged breach or failure to perform and for remedies.

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

(3) Commission--The Texas Transportation Commission.

(4) Committee--The Contract Claim Committee.

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

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

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

office director.

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

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

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

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

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

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

(g) Procedure.

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

(2) Filing claim.

(A) The claimant shall file a contract claim after completion of the contract

or when required for orderly performance of the contract. A claim shall be filed no later than one year after the earlier of the following:

(i) the department issues notice to the contractor that it is in default, or the department terminates the contract; or

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

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

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

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

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

(3) Evaluation of claim by the committee.

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

(B) The committee shall secure detailed reports and recommendations from the responsible department office, and may confer with any other department office

deemed appropriate by the committee. If the department is the claimant, the committee shall give the prime contractor the opportunity to submit a responsive report and recommendation.

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

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

(i) If the claimant does not object to the committee's decision, the claimant shall file a written statement with the committee's chairman stating that the claimant does not object. The claimant shall file the statement no later than 20 days after receipt of the committee's decision. The chairman shall then prepare a document showing the settlement of the claim including, when required, payment either to the department or to the prime contractor, and the claimant's release of all claims under the contract. The claimant shall sign it. The executive director may approve the settlement, or may request the commission to approve the settlement by issuance of an order. The

executive director shall then implement the resolution of the claim, and if contemplated in the committee's decision, expend funds as specified in the decision.

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

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

(4) Decision after contested case hearing. This paragraph applies if a contested case hearing has been held on a claim. The administrative law judge's proposal for decision shall be submitted to the executive director for adoption. The executive director may change a finding of fact or conclusion of law made by the administrative law judge or may vacate or modify an order issued by the administrative law judge. The executive director shall provide a written statement containing the reason and legal basis for any change.

(h) Claim forfeiture. A claim against the department shall be forfeited to the department by any person who corruptly practices or attempts to practice any fraud against the department in the proof, statement, establishment, or allowance thereof. In such cases the department shall specifically find such fraud or attempt and render

judgment of forfeiture. This subsection applies only if there is clear and convincing evidence that a person knowingly presented a false claim for the purpose of getting paid for the claim.

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

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

(2) If a contested issue arises that is relevant both to a contract claim proceeding and a sanction proceeding concerning the same contract, the issue shall be resolved in the proceeding that the executive director refers first for a contested case hearing under Chapter 1, Subchapter E of this title (relating to Procedures in Contested Cases). If the issue is decided in the first proceeding that decision shall apply to and be binding in all subsequent department proceedings.

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

SUBCHAPTER A. GENERAL

§9.6. Contract Claim Procedure for Comprehensive Development Agreement.

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

(b) Applicability.

(1) The executive director may enter into a CDA containing a claim procedure and provisions authorized by this section. When a claim arises under a CDA containing a claim procedure authorized by this section, the requirements of this section apply, §9.2 of this chapter (relating to Contract Claim Procedure) does not apply, and the parties shall follow the claim procedure contained in the CDA and shall be bound by the outcome of the claim procedure. If a CDA does not contain a claim procedure authorized by this §9.6 of this chapter, either by express reference to this section or by inclusion of provisions required or permitted by this section, then a claim under the agreement shall be processed and resolved under §9.2 of this chapter.

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

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

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

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

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

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

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

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

(2) Comprehensive development agreement (CDA)--An agreement with a developer that, at a minimum, provides for the design and construction, reconstruction, extension, expansion, or improvement of a project described in Transportation Code, §223.201(a), and may also provide for the financing, acquisition, maintenance, or operation of such a project. A CDA is also authorized under Transportation Code, §91.054 (rail facilities), and under Transportation Code, §227.023 (Trans-Texas Corridor). A CDA includes related agreements that collectively constitute a CDA or other agreements entered into with or for the benefit of the department in connection with the CDA.

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

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

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

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

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

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

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

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

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

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

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

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

(1) A claim under the CDA that is not resolved by the informal dispute

resolution process set forth in the CDA shall be referred to a disputes board for rendering of a disputes board decision on the claim.

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

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

(A) the claim is made in good faith;

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

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

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

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

(1) The executive director shall adopt the decision of a disputes board as a

ministerial act, subject to a party's right to request a contested case hearing in accordance with the terms of the CDA as to whether disputes board error occurred.

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

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

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

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

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

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

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

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

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

(8) The evidence presented to a SOAH administrative law judge in a hearing regarding a claim, and to the Travis County District Court in any appeal, may include:

the disputes board's written findings of fact, conclusions of law, and decision; any written dissenting findings, recommendation, or opinions of a disputes board member; all submissions to the disputes board by the parties; and an independent engineer's written evaluations, opinions, findings, reports, recommendations, objections, decisions, certifications, or other determinations, if any, delivered to the parties pursuant to the CDA and related to the claim under consideration.

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

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

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

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

(13) At all times during the processing of a contract claim, the developer and

its subcontractors shall continue with the performance of the work and their obligations, including any disputed work or obligations, diligently and without delay, in accordance with the CDA, except to the extent enjoined by order of a court or otherwise ordered or approved by the department in its sole discretion.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) In the event of any conflict or difference between the procedures set out in this section or a CDA, and in Chapter 1, Subchapter E, the procedures in this section or the CDA shall govern with respect to any proceeding before SOAH.

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

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

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

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

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

(m) Confidential information.

(1) The parties may agree that, with respect to the mandatory informal dispute resolution process required under subsection (d)(2) of this section, communications

between the parties to resolve a dispute, and all documents and other written materials furnished to a party or exchanged between the parties during any such informal resolution procedure, shall be considered confidential and not subject to disclosure by either party.

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