

TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

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ALL Districts

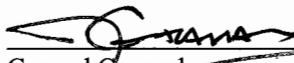
The Texas Transportation Commission (commission) finds it necessary to propose new §§1.101 - 1.108, relating to Alternative Dispute Resolution, to be codified under Title 43, Texas Administrative Code, Part 1.

The preamble and the proposed new sections, attached to this minute order as Exhibits A and B, are incorporated by reference as though set forth verbatim in this minute order, except that they are subject to technical corrections and revisions, approved by the General Counsel, necessary for compliance with state or federal law or for acceptance by the Secretary of State for filing and publication in the *Texas Register*.

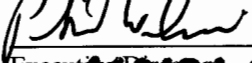
IT IS THEREFORE ORDERED by the commission that new §§1.101 - 1.108 are proposed for adoption and are authorized for publication in the *Texas Register* for the purpose of receiving public comments.

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:

  
General Counsel

Recommended by:

  
Executive Director

**113194 JUL 26 12**

Minute Number      Date Passed

1 Proposed Preamble

2 The Texas Department of Transportation (department) proposes new  
3 Subchapter G, Alternative Dispute Resolution, §§1.101-1.108.  
4 These rules are proposed concurrently with amendments to Title  
5 43, Texas Administrative Code (TAC), §9.1, and new §9.7,  
6 concerning contract claims and protests.

7

8 EXPLANATION OF PROPOSED NEW SECTIONS

9 Senate Bill 1420, 82nd Legislature, Regular Session, 2011, the  
10 department's sunset bill, added Transportation Code, §201.118,  
11 which in part contains the Sunset Commission's across-the-board  
12 provision that requires the Texas Transportation Commission  
13 (commission) to develop and implement a policy to encourage the  
14 use of appropriate alternative dispute resolution procedures  
15 under Government Code, Chapter 2009, to assist in the resolution  
16 of internal and external disputes under the department's  
17 jurisdiction. The statute requires the department's alternative  
18 dispute resolution procedures to conform as much as possible to  
19 model guidelines issued by the State Office of Administrative  
20 Hearings for the use of alternative dispute resolution by a  
21 state agency. Government Code, Chapter 2009, adopts some of the  
22 qualifications and requirements of Civil Practice and Remedies  
23 Code, Chapter 154, which relates to the alternative dispute  
24 resolution procedures used by the courts of this state.

25

1 New §1.101, Definitions, provides definitions used within the  
2 subchapter. The section contains a definition for "impartial  
3 third party" which is the individual who conducts an alternative  
4 dispute resolution process.

5  
6 New §1.102, Policy, states the policy for the subchapter which  
7 is to encourage the use, if appropriate, of an alternative  
8 dispute resolution process to resolve a dispute under the  
9 department's jurisdiction.

10  
11 New §1.103, Alternative Dispute Resolution Description, provides  
12 a general description of an alternative dispute resolution with  
13 a listing of the types of processes used.

14  
15 New §1.104, Impartial Third Party, provides the qualifications  
16 and standards for an impartial third party, as required by  
17 statute.

18  
19 New §1.105, Alternative Dispute Resolution Coordinator, requires  
20 the executive director of the department to designate an  
21 employee as the department's alternative dispute resolution  
22 coordinator. The section requires the coordinator to satisfy  
23 the statutory requirements for an impartial third party and,  
24 therefore, the coordinator is permitted to serve as an impartial  
25 third party in an alternative dispute resolution process in

1 which the department is a party if approved by all other parties  
2 to the process. Subsection (d) requires the alternative dispute  
3 resolution coordinator to develop the process to be used by the  
4 department for alternative dispute resolution, including the  
5 selection of an impartial third party. The process must  
6 conform, to the extent possible, to the model guidelines issued  
7 by the State Office of Administrative Hearings for the use of  
8 alternative dispute resolution by state agencies, as required by  
9 Transportation Code, §201.118(b). In accordance with  
10 Transportation Code, §201.118(c), subsection (e) requires the  
11 alternative dispute resolution coordinator to collect data on  
12 the effectiveness of the department's use of alternative dispute  
13 resolution and to report the results to the commission.

14

15 New §1.106, Use of Alternative Dispute Resolution, provides that  
16 alternative dispute resolution may be used to resolve a dispute  
17 relating to the department unless a rule of the commission  
18 specifically provides otherwise. The procedure provided under  
19 new Subchapter G may not be used for employee disputes,  
20 disciplinary actions, grievances, and appeals, contract claims,  
21 protests in connection with the solicitation, evaluation, or  
22 award of a purchase of commodities or non-professional services  
23 under the State Purchasing and General Services Act (Government  
24 Code, Title 10, Subtitle D), or requests for the review of  
25 decisions that are final or not reviewable under Title 43 of the

1 Texas Administrative Code or for which Title 43 provides an  
2 exclusive appeals process. The procedures used for resolving  
3 some of those disputes may provide for the use of alternative  
4 dispute resolution, but Subchapter G does not apply to those  
5 disputes. For example, under the proposed rule a request for  
6 alternative dispute resolution could be made concerning bid  
7 protests related to a highway improvement contract, or related  
8 to a contract for architectural, engineering, or surveying  
9 services.

10

11 New §1.107, Assessment for the Use of Alternative Dispute  
12 Resolution, requires the alternative dispute resolution  
13 coordinator to assess whether an alternative dispute resolution  
14 process is appropriate for a dispute that is referred to the  
15 coordinator for the use of alternative dispute resolution. If  
16 appropriate, the coordinator determines the type of process to  
17 be used. While the use of alternative dispute resolution is  
18 encouraged, it is not appropriate for all disputes. The new  
19 section provides some examples of when the use of an alternative  
20 dispute resolution process is not appropriate.

21

22 New §1.108, Confidentiality of Certain Records and  
23 Communications, states that the confidentiality provisions of  
24 Civil Practice and Remedies Code, §154.073 apply for an  
25 alternative dispute resolution process.

1

2 FISCAL NOTE

3 James Bass, Chief Financial Officer, has determined that for  
4 each of the first five years in which the new sections as  
5 proposed are in effect, there will be no fiscal implications for  
6 state or local governments as a result of enforcing or  
7 administering the new sections.

8

9 Jeff Graham, General Counsel, has certified that there will be  
10 no significant impact on local economies or overall employment  
11 as a result of enforcing or administering the new sections.

12

13 PUBLIC BENEFIT AND COST

14 Mr. Graham has also determined that for each year of the first  
15 five years in which the sections are in effect, the public  
16 benefit anticipated as a result of enforcing or administering  
17 the new sections will be to encourage the use of appropriate  
18 alternative dispute resolution procedures by the department and  
19 to clarify the procedure used for contract claims involving the  
20 department. There are no anticipated economic costs for persons  
21 required to comply with the sections as proposed. There will be  
22 no adverse economic effect on small businesses.

23

24 SUBMITTAL OF COMMENTS

25 Written comments on the proposed new §§1.101-1.108 may be

1 submitted to Robin Carter, Office of General Counsel, Texas  
2 Department of Transportation, 125 East 11th Street, Austin,  
3 Texas 78701-2483 or through RuleComments@txdot.gov with the  
4 subject line "§§1.101-1.108.". The deadline for receipt of  
5 comments is 5:00 p.m. on September 10, 2012. In accordance with  
6 Transportation Code, §201.811(a)(5), a person who submits  
7 comments must disclose, in writing with the comments, whether  
8 the person does business with the department, may benefit  
9 monetarily from the proposed new sections, or is an employee of  
10 the department.

11

12 STATUTORY AUTHORITY

13 The new sections are proposed under Transportation Code,  
14 §201.101, which provides the commission with the authority to  
15 establish rules for the conduct of the work of the department,  
16 and more specifically, Transportation Code, §201.118, which in  
17 part requires the commission to develop and implement a policy  
18 to encourage the use of appropriate alternative dispute  
19 resolution procedures to assist in the resolution of internal  
20 and external disputes under the department's jurisdiction.

21

22 CROSS REFERENCE TO STATUTE

23 Transportation Code, §201.118.

1 SUBCHAPTER G. ALTERNATIVE DISPUTE RESOLUTION

2 §1.101. Definitions. The following words and terms, when used  
3 in this subchapter, have the following meanings, unless the  
4 context clearly indicates otherwise.

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

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

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

9  
10 §1.102. Policy. In accordance with Transportation Code,  
11 §201.118, the commission encourages the use of appropriate  
12 alternative dispute resolution processes to assist in the  
13 resolution of internal and external disputes under the  
14 department's jurisdiction.

15  
16 §1.103. Alternative Dispute Resolution Description.

17 Alternative dispute resolution uses a wide variety of processes  
18 that may be informal or formal and that are intended to achieve  
19 conflict resolution through agreement of the parties to the  
20 conflict. Those processes include non-binding arbitration,  
21 collaborative problem-solving, conciliation, consensus building,  
22 and mediation, and may consist of a combination of two or more  
23 of those or other dispute resolution processes. An alternative



1 dispute resolution process is conducted by an individual who is  
2 referred to as an impartial third party.

3

4 §1.104. Impartial Third Party.

5 (a) A person may not act as an impartial third party unless  
6 the person has the qualifications specified in Civil Practice  
7 and Remedies Code, §154.052 and has no personal interest or  
8 stake in the outcome of the dispute.

9 (b) An impartial third party is subject to the standards  
10 and duties prescribed by Civil Practice and Remedies Code,  
11 §154.053.

12 (c) To serve as the impartial third party for an  
13 alternative dispute resolution process, a person must be  
14 approved by the parties to the process.

15

16 §1.105. Alternative Dispute Resolution Coordinator.

17 (a) The executive director shall designate a department  
18 employee as the department's alternative dispute resolution  
19 coordinator.

20 (b) The person designated as the alternative dispute  
21 resolution coordinator must have completed a minimum of 40  
22 classroom hours of training in dispute resolution techniques in  
23 a course conducted by an alternative dispute resolution system

1 established under Civil Practice and Remedies Code, Chapter 152,  
2 or another dispute resolution organization approved by a court  
3 of this state at the time of or as soon as practicable after the  
4 designation.

5 (c) The alternative dispute resolution coordinator may act  
6 as the impartial third party for an alternative dispute  
7 resolution process.

8 (d) The alternative dispute resolution coordinator shall  
9 develop the process to be used by the department for alternative  
10 dispute resolution. The process must conform, to the extent  
11 possible, to the model guidelines issued by the State Office of  
12 Administrative Hearings for the use of alternative dispute  
13 resolution by state agencies. The process should provide the  
14 method that will be used by the coordinator for the selection of  
15 impartial third parties.

16 (e) The alternative dispute resolution coordinator shall  
17 collect data on the effectiveness of the department's use of  
18 alternative dispute resolution and before December 31 of each  
19 year shall file with the commission a report interpreting the  
20 data collected for the preceding fiscal year.

21

22 §1.106. Use of Alternative Dispute Resolution.

23 (a) Alternative dispute resolution is available for a

1 dispute relating to the department unless a rule of the  
2 commission provides an exclusive procedure to address that type  
3 of dispute or specifically provides that alternative dispute  
4 resolution will not be used for that type of dispute.

5 (b) The alternative dispute resolution procedure provided  
6 under this subchapter is not applicable to:

7 (1) employee disputes, disciplinary actions, grievances,  
8 and appeals, all of which are subject to the department's Human  
9 Resources Manual;

10 (2) contract claims, which are subject to the procedures  
11 provided by §9.1 or §9.2 of this title (relating to Contract  
12 Claims under Government Code, Chapter 2260 or Contract Claim  
13 Procedure, respectively);

14 (3) protests in connection with the solicitation,  
15 evaluation, or award of a purchase of commodities or non-  
16 professional services under the State Purchasing and General  
17 Services Act (Government Code, Title 10, Subtitle D), which are  
18 subject to §9.3 (relating to Protest of Department Purchases  
19 under the State Purchasing and General Services Act); or

20 (4) appeals, regardless of how denominated, that request  
21 the review of decisions that are final or not reviewable under  
22 this title or for which this title provides an exclusive appeals  
23 process.

1

2 §1.107. Assessment of the Use of Alternative Dispute

3 Resolution.

4 (a) When the alternative dispute resolution coordinator  
5 receives a referral or request for the use of alternative  
6 dispute resolution, the coordinator will assess whether an  
7 alternative dispute resolution process is appropriate for the  
8 dispute and, if so, will determine the type of process that is  
9 most likely to result in an agreement.

10 (b) Reasons that the coordinator may determine that the use  
11 of an alternative dispute resolution process is not appropriate  
12 include:

13 (1) previous determinations concerning the matter in  
14 dispute provide a clearly established precedent for resolving  
15 the matter;

16 (2) the use of an alternative dispute resolution process  
17 is an inefficient use of the department's resources compared to  
18 other processes that may be used to resolve the dispute;

19 (3) the dispute involves significant unresolved legal  
20 issues that must be resolved before an alternative dispute  
21 resolution process is likely to be effective;

22 (4) the dispute significantly affects organizations or  
23 individuals who would not be participants in the process and

1 whose interests would not be adequately represented by  
2 participants; and

3 (5) the use of an alternative dispute resolution process  
4 cannot provide a public record of the proceeding, which is  
5 important or necessary for the particular type of dispute.

6

7 §1.108. Confidentiality of Certain Records and Communications.

8 The confidentiality of a communication or record relating to an  
9 alternative dispute resolution process is governed by Civil  
10 Practice and Remedies Code, §154.073.