

TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

Page 1 of 1

ALL Districts

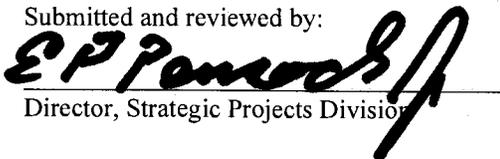
The Texas Transportation Commission (commission) finds it necessary to propose amendments to §9.2, Contract Claim Procedure, and §9.6, Contract Claim Procedure for Comprehensive Development Agreements and Certain Design-Build Contracts, to be codified under Title 43, Texas Administrative Code, Part 1.

The preamble and the proposed amendments, 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 the amendments to §9.2 and §9.6 are proposed for adoption and are authorized for publication in the *Texas Register* for the purpose of receiving public comments.

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

Submitted and reviewed by:


Director, Strategic Projects Division

Recommended by:


Executive Director

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Minute
Number

Date
Passed

1 Proposed Preamble

2 The Texas Department of Transportation (department) proposes
3 amendments to §9.2 and §9.6, concerning the contract claim
4 procedure for comprehensive development agreements and certain
5 design-build contracts.

6

7 EXPLANATION OF PROPOSED AMENDMENTS

8 Section 9.6 concerns contract claims under a comprehensive
9 development agreement (CDA). That section authorizes the
10 department and developer to use a dispute resolution board to
11 resolve disputes. The rule sets forth mandatory procedures that
12 must be in the CDA (if the parties elect to use a procedure
13 authorized by §9.6), and discretionary procedures that may be
14 used. Generally, the contract claim procedure provides for
15 resolution of disputes by a dispute resolution board. A
16 decision by a dispute resolution board may be overturned only if
17 there is a dispute resolution board error. In the CDA, the
18 parties may limit this to narrow issues, for example, whether
19 the decision was procured by fraud. Otherwise, the decision by
20 the dispute resolution board is final.

21

22 The amendments to §9.2 and §9.6 will allow the department to use
23 the contract claim procedure authorized in §9.6 to resolve
24 claims and disputes arising under a design-build contract
25 entered into under Transportation Code, Chapter 223, Subchapter

1 F, provided the highway project constructed, expanded, extended,
2 maintained, rehabilitated, altered, or repaired under the
3 design-build contract has estimated total project costs of \$500
4 million or more.

5
6 The ability of design-build contractors to effectively raise
7 construction financing will be aided by an administrative
8 process for dispute resolution under which the decision maker is
9 not a party to the design-build contract, and that produces
10 finality of decision within a reasonable time. The ability to
11 use this procedure will assist the department in attracting
12 meaningful proposals and in generating competition for design-
13 build projects.

14
15 Section 9.2 is amended to provide that a claim under a design-
16 build contract, as defined in §9.6 may be processed under that
17 section if the parties agree to do so in the CDA or design-build
18 contract, or if the design-build contract does not specify
19 otherwise. However, if the design-build contract specifies that
20 a claim procedure authorized by §9.6 applies, then any claim
21 arising under the design-build contract will be processed and
22 resolved in accordance with the claim procedure authorized by
23 §9.6 and not by that section.

24
25 Section 9.6 is amended to provide that the executive director of

1 the department may enter into a design-build contract containing
2 a claim procedure and provisions authorized by that section.
3 Section 9.6 defines a design-build contract as an agreement with
4 a design-build contractor for a highway project with estimated
5 total project costs of \$500 million or more.

6
7 If a design-build contract does not contain a claim procedure
8 authorized by §9.6, either by express reference to that section
9 or by inclusion of provisions required or permitted by that
10 section, then a claim under the agreement will be processed and
11 resolved under §9.2.

12

13 FISCAL NOTE

14 James Bass, Chief Financial Officer, has determined that for
15 each of the first five years in which the amendments as proposed
16 are in effect, there will be fiscal implications for state
17 government as a result of enforcing or administering the
18 amendments. The fiscal implications cannot be quantified as
19 those impacts are dependent on the number of design-build
20 contracts entered into by the department that use the dispute
21 resolution procedure authorized by §9.6, the number of claims
22 that need to be heard by a disputes board, if any, and the
23 length of time such hearings might last. There will be no
24 fiscal implications for local governments as a result of
25 enforcing or administering the amendments.

1

2 Ed Pensock, P.E., Director, Strategic Projects Division, has
3 certified that there will be no significant impact on local
4 economies or overall employment as a result of enforcing or
5 administering the amendments.

6

7 PUBLIC BENEFIT AND COST

8 Mr. Pensock has also determined that for each year of the first
9 five years in which the sections are in effect, the public
10 benefit anticipated as a result of enforcing or administering
11 the amendments will be to assist the department in attracting
12 meaningful proposals and in generating competition for design-
13 build projects. There are no anticipated economic costs for
14 persons required to comply with the sections as proposed. There
15 will be no cost impact on design-build contractors. The rule
16 applies only if the design-build contractor agrees to the use of
17 a disputes board. If a contract dispute arises, the design-
18 build contractor would incur costs to participate in the
19 proceeding whether it is under §9.2 or §9.6. There will be no
20 adverse economic effect on small businesses.

21

22 SUBMITTAL OF COMMENTS

23 Written comments on the proposed amendments to §9.2 and §9.6 may
24 be submitted to Ed Pensock, P.E., Director, Strategic Projects
25 Division, Texas Department of Transportation, 125 East 11th

1 Street, Austin, Texas 78701-2483. The deadline for receipt of
2 comments is 5:00 p.m. on August 13, 2012. In accordance with
3 Transportation Code, §201.811(a)(5), a person who submits
4 comments must disclose, in writing with the comments, whether
5 the person does business with the department, may benefit
6 monetarily from the proposed amendments, or is an employee of
7 the department.

8

9 STATUTORY AUTHORITY

10 The amendments are proposed under Transportation Code, §201.101,
11 which provides the Texas Transportation Commission with the
12 authority to establish rules for the conduct of the work of the
13 department, and more specifically, Transportation Code,
14 §201.112, which allows the commission by rule to establish
15 procedures for the informal resolution of a claim arising out of
16 a contract under the statutes set forth in that section.

17

18 CROSS REFERENCE TO STATUTE

19 Transportation Code, §201.112 and Transportation Code, Chapter
20 223, Subchapter F.

1 SUBCHAPTER A. GENERAL

2 §9.2. Contract Claim Procedure.

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

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

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

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

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

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

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

22 (3) The claim is brought by a prime contractor.

23 (b) Pass-through claim; claim and counter claim.

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

4 (2) Only a prime contractor may submit a claim to begin a
5 claim proceeding under this section. After a claim proceeding
6 has begun the department may make a counter claim.

7 (3) This section does not abrogate the department's
8 authority to file a claim in a court of competent jurisdiction.
9 The procedure for the department to file a claim in a court of
10 competent jurisdiction, including the deadline to file a claim,
11 is set by other law.

12 (c) Claim concerning comprehensive development agreement or
13 certain design-build contracts. A claim under a comprehensive
14 development agreement (CDA) entered into under Transportation
15 Code, Chapter 223, Subchapter E, or under a design-build
16 contract, as defined in §9.6 of this subchapter (relating to
17 Contract Claim Procedure for Comprehensive Development
18 Agreements and Certain Design-Build Contracts), may be processed
19 under this section if the parties agree to do so in the CDA or
20 design-build contract, or if the CDA or design-build contract
21 does not specify otherwise. However, if the CDA or design-build
22 contract specifies that a claim procedure authorized by §9.6 of
23 this subchapter [~~chapter (relating to Contract Claim Procedure~~

1 ~~for Comprehensive Development Agreement~~)] applies, then any
2 claim arising under the CDA or design-build contract shall be
3 processed and resolved in accordance with the claim procedure
4 authorized by §9.6 of this subchapter [~~chapter~~] and not by this
5 section.

6 (d) Definitions. The following words and terms, when used
7 in this section, shall have the following meanings, unless the
8 context clearly indicates otherwise, except that when used in
9 subsection (c) of this section, the terms claim, comprehensive
10 development agreement, [~~and~~] CDA, and design-build contract
11 shall have the meanings given such terms stated in §9.6 of this
12 subchapter [~~chapter~~].

13 (1) Claim--A claim for compensation, for a time
14 extension, or for any other remedy arising from a dispute,
15 disagreement, or controversy concerning respective rights and
16 obligations under the contract.

17 (2) Commission--The Texas Transportation Commission.

18 (3) Committee--The Contract Claim Committee.

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

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

22 (6) Department office director--The chief administrative
23 officer of the responsible department office; the officer shall

1 be a district engineer, division director, or office director.

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

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

5 (9) Prime contractor--An individual, partnership,
6 corporation, or other business entity that is a party to a
7 written contract with the state of Texas which is entered into
8 and administered by the department under Transportation Code,
9 §22.018, §391.091, Chapter 223, or Government Code, Chapter
10 2254, Subchapters A and B.

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

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

22 (f) Negotiated resolution. To every extent possible,
23 disputes between a prime contractor and the department's project

1 engineer should be resolved during the course of the contract.

2 (g) Procedure.

3 (1) Exclusive procedure. Except as provided in
4 subsection (c) of this section, a prime contractor shall file a
5 claim under the procedure in this subsection. A claim filed by
6 the prime contractor must be considered first by the committee
7 before the claim is considered in a contested case hearing.

8 (2) Filing claim.

9 (A) The prime contractor shall file a claim after
10 completion of the contract or when required for orderly
11 performance of the contract. For a claim resulting from the
12 enforcement of a warranty, a prime contractor shall file the
13 claim no later than one year after expiration of the warranty
14 period. For all other types of claims, a prime contractor shall
15 file the claim no later than one year after the earlier of the
16 following:

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

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

22 (B) To file a claim, a prime contractor shall file a
23 contract claim request and a detailed report that provides the

1 basis for the claim. The detailed report shall include relevant
2 facts of the claim, cost or other data supporting the claim, a
3 description of any additional compensation requested, and
4 documents supporting the claim. The prime contractor shall file
5 the claim with the department's construction division, the
6 department engineer under whose administration the contract was
7 or is being performed, or the committee.

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

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

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

1 (F) The deadline for the department to file a counter
2 claim is 45 days before the committee holds an informal meeting
3 under paragraph (3) of this subsection.

4 (3) Evaluation of claim by the committee.

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

9 (B) The committee shall secure detailed reports and
10 recommendations from the responsible department office, and may
11 confer with any other department office deemed appropriate by
12 the committee. The committee shall give the prime contractor
13 the opportunity to submit a responsive report and recommendation
14 concerning a counter claim filed by the department.

15 (C) The committee shall afford the prime contractor an
16 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. Proceedings
20 before the committee are an attempt to mutually resolve a claim
21 without litigation and are not admissible for any purpose in a
22 formal administrative hearing provided in subparagraph (D)(ii)
23 of this paragraph. All oral communications, reports, or other

1 written documentation prepared by department staff in connection
2 with the analysis of a claim are part of the attempt to mutually
3 resolve a claim without litigation, and are also not admissible
4 for any purpose in a formal administrative hearing provided in
5 subparagraph (D)(ii) of this paragraph.

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

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

1 decision, the executive director shall expend funds as specified
2 in the decision. If contemplated in the committee's decision,
3 the executive director shall order the prime contractor to make
4 payment to the department.

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

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

1 committee's decision, the executive director shall order the
2 prime contractor to make payment to the department.

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

12 (5) This section does not abrogate the department's
13 authority to enforce in a court of competent jurisdiction a
14 final department order issued under the section.

15 (h) Claim forfeiture. A claim against the department shall
16 be forfeited to the department by any person who corruptly
17 practices or attempts to practice any fraud against the
18 department in the proof, statement, establishment, or allowance
19 thereof. In such cases the department shall specifically find
20 such fraud or attempt and render judgment of forfeiture. This
21 subsection applies only if there is clear and convincing
22 evidence that a person knowingly presented a false claim for the
23 purpose of getting paid for the claim.

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

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

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

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

23

1 §9.6. Contract Claim Procedure for Comprehensive Development
2 Agreements and Certain Design-Build Contracts [~~Agreement~~].

3 (a) Purpose. This section concerns processing and
4 resolution of a claim under Transportation Code, §201.112 that
5 arises under a comprehensive development agreement (CDA) or
6 design-build contract.

7 (b) Applicability.

8 (1) The executive director may enter into a CDA or
9 design-build contract containing a claim procedure and
10 provisions authorized by this section. When a claim arises
11 under a CDA or design-build contract containing a claim
12 procedure authorized by this section, the requirements of this
13 section apply, §9.2 of this subchapter [~~chapter~~] (relating to
14 Contract Claim Procedure) does not apply, and the parties shall
15 follow the claim procedure contained in the CDA or design-build
16 contract and shall be bound by the outcome of the claim
17 procedure. If a CDA or design-build contract does not contain a
18 claim procedure authorized by this section [~~§9.6 of this~~
19 ~~chapter~~], either by express reference to this section or by
20 inclusion of provisions required or permitted by this section,
21 then a claim under the agreement shall be processed and resolved
22 under §9.2 of this subchapter [~~chapter~~].

23 (2) The claim procedure and provisions authorized by this

1 section may be applied to claims that arise under the CDA or
2 design-build contract, related agreements that collectively
3 constitute a CDA or design-build contract, or other agreements
4 entered into with or for the benefit of the department in
5 connection with the CDA or design-build contract. A CDA or
6 design-build contract shall identify the related agreements and
7 any other agreements to which the claim procedure and provisions
8 apply.

9 (3) This section and §9.2 of this subchapter [~~chapter~~] do
10 not affect or impede the department's or the developer's or
11 design-build contractor's rights to seek judicial relief in
12 connection with the following types of actions or proceedings,
13 and the claim procedures and provisions in this section or in
14 §9.2 of this subchapter [~~chapter~~] do not apply to such actions:

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

17 (B) mandamus action that a developer or design-build
18 contractor is permitted to bring against the department or the
19 executive director under Government Code, §22.002(c);

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

23 (D) other matters or disputes expressly excluded from

1 the dispute resolution procedures authorized by this section, as
2 specified in the CDA or design-build contract or other related
3 agreement between the department and the developer or design-
4 build contractor that is part of the CDA or design-build
5 contract.

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

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

17 (2) Comprehensive development agreement (CDA)--An
18 agreement with a developer that, at a minimum, provides for the
19 design and construction, reconstruction, extension, expansion,
20 or improvement of a project described in Transportation Code,
21 §223.201(a), and may also provide for the financing,
22 acquisition, maintenance, or operation of such a project. A CDA
23 is also authorized under Transportation Code, §91.054 (rail

1 facilities). A CDA includes related agreements that collectively
2 constitute a CDA or other agreements entered into with or for
3 the benefit of the department in connection with the CDA.

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

5 (4) Design-build contract--An agreement with a design-
6 build contractor for a highway project with estimated total
7 project costs of \$500 million or more that includes both design
8 and construction services for the construction, expansion,
9 extension, related capital maintenance, rehabilitation,
10 alteration, or repair of the highway project.

11 (5) Design-build contractor--A partnership, corporation,
12 or other legal entity or team that enters into a design-build
13 contract with the department.

14 (6) [~~4~~] Developer--The private entity or entities that
15 enter into a CDA with the department.

16 (7) [~~5~~] Disputes board--A group of one or more
17 individuals appointed under the terms of a CDA or design-build
18 contract to fairly and impartially consider and decide a claim
19 between the department and a developer or design-build
20 contractor.

21 (8) [~~6~~] Disputes board error--One or more of the
22 following actions:

23 (A) a disputes board acted beyond the limits of its

1 authority established under subsection (b)(3) of this section;

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

6 (C) a disputes board decision was procured by, or there
7 was evident partiality by a disputes board member due to a
8 conflict of interest (which may be defined in the CDA or design-
9 build contract), misconduct (which may be defined in the CDA or
10 design-build contract), corruption, or fraud; or

11 (D) any other error that the parties agree may be the
12 subject of a contested case hearing, as set out in the CDA or
13 design-build contract.

14 (9) [~~+7~~] Executive director--The executive director of
15 the Texas Department of Transportation.

16 (10) [~~+8~~] Party--The department, or a developer or
17 design-build contractor who has entered into a CDA or design-
18 build contract with the department. The department and the
19 developer or design-build contractor are together referred to as
20 the "parties."

21 (11) [~~+9~~] SOAH--State Office of Administrative Hearings.

22 (d) Mandatory requirements. A CDA or design-build contract
23 that authorizes the use of a claim procedure authorized by this

1 section shall include (or incorporate by reference) provisions
2 substantially consistent with the provisions in this subsection,
3 but such provisions need not apply to claims excluded from the
4 claim procedure under subsection (b)(3) of this section.

5 (1) A claim under the CDA or design-build contract that
6 is not resolved by the informal dispute resolution process set
7 forth in the CDA or design-build contract shall be referred to a
8 disputes board for rendering of a disputes board decision on the
9 claim.

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

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

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

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

1 and

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

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

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

16 (1) The executive director shall adopt the decision of a
17 disputes board as a ministerial act, subject to a party's right
18 to request a contested case hearing in accordance with the terms
19 of the CDA or design-build contract as to whether disputes board
20 error occurred.

21 (2) A decision by a disputes board, upon completion of
22 the procedure required in Transportation Code, §201.112, this
23 section, and in the CDA or design-build contract, is final,

1 conclusive, binding upon, and enforceable against the parties,
2 subject to any appeals allowed by the CDA or design-build
3 contract or this section.

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

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

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

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

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

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

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

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

5 (8) The evidence presented to a SOAH administrative law
6 judge in a hearing regarding a claim, and to the Travis County
7 District Court in any appeal, may include: the disputes board's
8 written findings of fact, conclusions of law, and decision; any
9 written dissenting findings, recommendation, or opinions of a
10 disputes board member; all submissions to the disputes board by
11 the parties; and an independent engineer's written evaluations,
12 opinions, findings, reports, recommendations, objections,
13 decisions, certifications, or other determinations, if any,
14 delivered to the parties pursuant to the CDA or design-build
15 contract and related to the claim under consideration.

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

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

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

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

20 (13) At all times during the processing of a contract
21 claim, the developer or design-build contractor and its
22 subcontractors shall continue with the performance of the work
23 and their obligations, including any disputed work or

1 obligations, diligently and without delay, in accordance with
2 the CDA or design-build contract, except to the extent enjoined
3 by order of a court or otherwise ordered or approved by the
4 department in its sole discretion.

5 (f) Pass-through claim. A CDA or design-build contract may
6 provide that a developer or design-build contractor who is a
7 party to a CDA or design-build contract with the department may
8 make a claim on behalf of a subcontractor. In order to make such
9 a claim the developer or design-build contractor must be liable
10 to the subcontractor on the claim.

11 (g) Mandatory requirements concerning disputes board. A
12 CDA or design-build contract that authorizes the use of a
13 disputes board shall include (or incorporate by reference)
14 provisions substantially consistent with the provisions in this
15 subsection.

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

20 (2) A disputes board member shall not have a financial
21 interest in the CDA or design-build contract, in any contract or
22 the facility that is the subject of the CDA or design-build
23 contract, or in the outcome of any claim decided under the CDA

1 or design-build contract, except for payments to that member for
2 services on the disputes board. Any person appointed as a
3 disputes board member shall disclose to the parties any
4 circumstances likely to give rise to justifiable doubt as to
5 such disputes board member's impartiality or independence,
6 including any bias or any financial or personal interest in the
7 result of the dispute resolution or any past or present
8 relationship with the parties or their representatives, or
9 developer's subcontractors and affiliates.

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

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

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

22 (1) Each party shall endeavor to have a standing list of
23 candidates from which to select a disputes board member. The CDA

1 or design-build contract may specify the qualifications to be a
2 board member, the procedure by which a party nominates a person
3 to the list of candidates, and the method by which the other
4 party may review and object to a proposed candidate. All
5 disputes board members are chosen from the list of candidates of
6 the department or of the developer or design-build contractor.

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

14 (3) The parties may jointly modify the procedure
15 applicable to the disputes board's proceedings, under the
16 provisions of the CDA or design-build contract.

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

22 (5) Each party is responsible for paying one-half the
23 costs of all facilities, fees, support services costs, and other

1 expenses of a disputes board.

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

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

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

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

22 (3) The executive director's issuance of a final order
23 following a contested case hearing is a purely ministerial act,

1 and that if by inaction the executive director does not issue a
2 final order within the time frame established by the CDA or
3 design-build contract, then a final order in a form recommended
4 by the administrative law judge shall be deemed to be
5 automatically issued.

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

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

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

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

22 (2) In the event of any conflict or difference between
23 the procedures set out in this section or a CDA or design-build

1 contract, and in Chapter 1, Subchapter E, the procedures in this
2 section or the CDA or design-build contract shall govern with
3 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 or design-build contract shall apply to and govern the contested
18 case proceeding before SOAH, consistent with 1 TAC §155.39(a)
19 (relating to Stipulations).

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

1 ministerial acts set out in this section and included in the CDA
2 or design-build contract as a ministerial act, or any other act
3 specified in the CDA or design-build contract as a ministerial
4 act.

5 (m) Confidential information.

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

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