

# **Outline of Texas Department of Transportation Claims Process**

**Dallas Bar Association  
Construction Law Section**

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## **I. Introduction**

This paper will briefly discuss the claims and dispute resolution procedures of the Texas Department of Transportation ("TXDOT") in connection with construction contracts.

TXDOT has adopted a two step process for the resolution of contract claims. These two procedures are the Contract Claim Procedure and the Contested Case Procedure. The Contract Claim Procedure must be completed before a claimant can begin Step 2, the Contested Case Procedure. 43 TEX. ADMIN. CODE § 9.2(b)(3).

## **II. Contract Claim Procedure (Step 1)**

As you might suspect, the Texas Transportation Commission prefers that, to every extent possible, disputes between a prime contractor and TXDOT be resolved during the course of the project. However, if an informal resolution is not possible, the contractor must proceed to the Contract Claim Committee in order to seek relief. 43 TEX. ADMIN. CODE § 9.2(b)(2).

- The Contract Claim Committee is made up of persons appointed by the Executive Director of TXDOT.
  - a. The contractor must file a detailed report and contract claim request with the department office director under whose administration the contract was or is being performed, the TXDOT Construction Division or directly with the Contract Claim Committee. 43 TEX. ADMIN. CODE § 9.2(b)(2).
  - b. The Contract Claim Committee (the "Committee") is required to obtain detailed reports and recommendations from the responsible department office. 43 TEX. ADMIN. CODE § 9.2(b)(4). Attached as an addendum to this paper is an organization chart setting forth the multiple TXDOT districts.
  - c. The Committee will then provide the contractor an opportunity to meet with the Committee to informally discuss the disputed matters and to provide the contractor an opportunity to present relevant information and respond to the information the committee has received from the applicable department office. 43 TEX. ADMIN. CODE § 9.2(b)(5).
- This is the contractor's opportunity to present its case for payment of damages, extension of contract time, etc.

d. The Committee chairman will give written notice of the committee's proposed disposition of the claim to the parties. If the decision of the committee is acceptable, the contractor shall advise the committee chairman in writing within 20 days of the date such notice is received, and the chairman will forward to the commission an agreed order involving, when required, payment to the contractor on the claim. If the contractor is dissatisfied with the proposal of the Committee, the contractor may petition the Executive Director for a formal administrative hearing to litigate the claim pursuant to the provisions of Section 1.21 *et seq.* of the TEXAS ADMINISTRATIVE CODE (relating to Contested Case Procedure). 43 TEX. ADMIN. CODE § 9.2(b)(6).

e. If the contractor does not petition the executive director within 20 days after notice of the Committee's recommendation is received, that recommendation will be forwarded to the Executive Director for adoption as a final order.

**Note:** All further litigation of claims on the project or under the contract by the contractor are barred unless the petition to the executive director is filed within the 20 day period. 43 TEX. ADMIN. CODE §9.2(b)(7).

f. Proceedings before TXDOT and the Committee are considered settlement discussions and are not admissible for any purpose in a formal administrative hearing under the Contested Case Procedure.

### **III. Contested Case Procedure (Step 2)**

#### **a. Filing of the Petition**

A contractor that is not satisfied with the Contract Claim Committee's recommendation may initiate a contested case by filing an original and one copy of a petition with the Executive Director of TXDOT at the department's headquarters in Austin, Texas. 43 TEX. ADMIN. CODE § 1.23.

#### **b. Contents of the Petition**

The petition must include the following:

1. the name of the petitioner;
2. the names of all other known persons with an interest in the outcome of the contested case;
3. a concise statement of the facts on which the petitioner relies, including as an attachment, if applicable, the

document issued by the department that notified the petitioner of the decision or action challenged by the petitioner;

4. a statement of the relief demanded by the petitioner;
5. any other matter required by statute;
6. the signature of the petitioner or the petitioner's authorized representative; and
7. a department reference number, if applicable. 43 TEX. ADMIN. CODE §1.24.

**Note:** The petition must include a copy of the detailed report and request filed under § 9.2(b)(2) (relating to Contract Claim Procedure) and must state the date on which the petitioner received written notice of the proposed disposition by the Committee. The petition and its attachments may not otherwise refer to the proposed disposition and may not include a copy of the written notice of the proposed disposition. 43 TEX. ADMIN. CODE §1.24.

**c. Pleading Defects**

It is the duty of the Executive Director to examine the petition and return it to the contractor if it fails to comply with the TEXAS ADMINISTRATIVE CODE and Chapter 2001 of the TEXAS GOVERNMENT CODE. The contractor will then have at least 10 days to file a corrected petition. 43 TEX. ADMIN. CODE § 1.25.

If a corrected petition is rejected again for formal defects, the Executive Director will return the corrected petition to the petitioner along with a statement of the reasons rejecting it. The petitioner will not be given an opportunity to file another corrected petition. 43 TEX. ADMIN CODE § 1.25.

- While I am unaware of this rule being utilized to prevent a contractor from pursuing a Contested Claim against TXDOT, please note the critical nature of presenting a proper petition.

While not specifically addressed in the statute, an Administrative Law Judge ("ALJ") is appointed to hear the case. The ALJ will typically conduct a scheduling conference to schedule deadlines and set the case for trial.

d. **Standard of Review**

The standard of review to be utilized by the ALJ is whether the agency's actions were based on fraud, misconduct, or such gross mistake as would imply bad faith or failure to exercise an honest judgment. 43 TEX. ADMIN. CODE §1.26(c)(2).

- This is a significant hurdle for the contractor to overcome. Proving fraud, misconduct or gross mistake is a much more onerous burden than proving that TXDOT did not act reasonably or simply breached the contract.

e. **Discovery**

Discovery in a Contested Case is governed by the rules of procedure of the State Office of Administrative Hearings ("SOAH"). The SOAH rules of procedure are set forth in Chapter 155 of the TEXAS ADMINISTRATIVE CODE. SOAH's rules provide for the customary discovery tools such as requests for production, requests for admissions, interrogatories, subpoenas, depositions, privilege assertions and motions for protective orders. However, the SOAH rules have some significant differences from the TEXAS RULES OF CIVIL PROCEDURE.

While the full extent of the differences with the SOAH procedural rules is beyond the scope of this paper, some significant differences in the SOAH discovery rules include the following:

1. Section 155.31(d)(1) of the SOAH Rules gives each party the right to serve two sets – of thirty interrogatories each – upon any party to the case, rather than only twenty-five interrogatories as provided by the TEXAS RULES OF CIVIL PROCEDURE.
2. Discovery responses are due twenty days from the date of the receipt of the discovery requests.
3. Objections to discovery requests must be filed within ten days after service of the discovery, in a separate pleading from the party's responses.
4. Motions to compel discovery responses must be filed within ten days of receiving the opposing party's discovery objections.

f. **Summary Disposition**

As with summary judgments in ordinary civil cases, the SOAH rules provide for a summary disposition of a case. The ALJ may issue a proposal for decision or final order resolving the case if there is no genuine issue as to any material fact and if a party is entitled to a decision in its favor as a matter of law. 1 TEX. ADMIN. CODE § 155.57.

A case may also be dismissed based upon a want of prosecution, lack of SOAH jurisdiction or authority to conduct the proceedings and/or mootness of the case. 1 TEX. ADMIN. CODE § 155.57.

g. **Hearing**

Unless otherwise required by law, the hearing shall be open to the public. The ALJ shall exercise reasonable control over the mode and order of presenting preliminary matters, pending motions, opening statements, witness testimony and other evidence, oral or written closing argument, and other processes in the hearing.

- A party may request to appear by telephone or to present the testimony of a witness by telephone if a timely motion is filed and granted by the ALJ.
- A record of all contested case proceedings will be made.

h. **Proposal for Decision**

The ALJ shall prepare a proposal for decision which contains findings of fact and conclusions of law based upon the evidence presented at the hearing. 1 TEX. ADMIN. CODE § 155.59.

1. **Exceptions to the Proposal for Decision**

A party may file exceptions to an ALJ's proposal for decision or an amended proposal for decision no more than 20 days after service of the proposal for decision. A reply to exceptions must be filed no more than 15 days after the filing of the exceptions. 43 TEX. ADMIN. CODE § 1.30.

Exceptions and replies to exceptions must be filed with the Executive Director at the department's headquarters building in Austin. A copy must be filed simultaneously with the ALJ. 43 TEX. ADMIN. CODE § 1.30.

Exceptions and replies must conform to the following standards:

1. Exceptions and replies must be typewritten or printed on paper 8-1/2 inches wide by 11 inches long with an inside margin at least one inch wide.
2. Exceptions and replies must contain:
  - (a) the names of all parties;
  - (b) a concise statement of the facts and law on which the submitting party relies;
  - (c) a statement of the relief desired;
  - (d) a certificate of service;
  - (e) the signature of the submitting party or the submitting party's authorized representative; and
  - (f) any other matter required by statute. 43 TEX. ADMIN. CODE § 1.31.

Each specific exception must be separately numbered, separately set forth, and concisely stated, and it must incorporate all facts and law relating to that specific exception.

## **2. Submission to the Executive Director**

The ALJ'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 ALJ or may vacate or modify an order issued by the ALJ. The Executive Director shall provide a written statement containing the reason and legal basis for a change to the proposal for decision. 43 TEX. ADMIN. CODE § 9.2(b)(9).

- Note the absolute power given to the Executive Director to modify the ALJ's findings. If a contractor is fortunate enough to receive a favorable proposal for decision from the ALJ that TXDOT has acted fraudulently or with gross error, the contractor must still contend with the Executive Director of TXDOT having the absolute authority to modify or completely vacate the ALJ's decision.

TXDOT may change a finding of fact or conclusion of law made by the ALJ, or may vacate or modify an order issued by the ALJ, only if the agency determines:

1. that the ALJ did not properly apply or interpret applicable law, agency rules, written policies, or prior administrative decisions;
2. that a prior administrative decision on which the ALJ relied is incorrect or should be changed; or
3. that a technical error in a finding of fact should be changed.

TXDOT is required to state in writing the specific reason and legal basis for a change made under this subsection. TEX. GOV'T CODE ANN. § 2001.058(e).

- If the Executive Director of TXDOT modifies or vacates the ALJ's proposal for decision and the contractor is seeking to get the Executive Director's decision reversed on appeal, the Executive Director's failure to follow the requirements of this section will usually be the most likely way to get the final order reversed on appeal.<sup>1</sup>

#### i. **Appeal Process**

##### 1. **Motion for Rehearing**

A motion for rehearing is a prerequisite to an appeal in a contested case. TEX. GOV'T CODE ANN. § 2001.145.

A party must file a motion for rehearing no later than 20 days after the date on which the party is notified of TXDOT's final order. TEX. GOV'T CODE ANN. § 2001.146.

##### 2. **Judicial Review**

If the motion for rehearing is denied or overruled, a party is entitled to judicial review under Section 2001.171 of the TEXAS GOVERNMENT CODE.

A person initiates judicial review in a contested case by filing a petition not later than the 30<sup>th</sup> day after the date on which

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<sup>1</sup> For a good review of an agency's authority to modify the ALJ's proposal for decision, please see the following articles: "When Can an Agency Change the Findings or Conclusions of an Administrative Law Judge?" 50 BAYLOR L. REV. 65 (1998) and "When Can an Agency Change the Findings or Conclusions of an Administrative Law Judge?: Part Two" 51 BAYLOR L. REV. 63 (1999). Also see "Agencies, Follow Your Statutes: The Substantial Evidence Rule in Judicial Review of Administrative Decisions", 4 TEX. TECH J. TEX ADMIN. L. 137 (2003).

the decision is final and appealable. TEX. GOV'T CODE ANN. § 2001.174.

- A decision in a contested case is final:
  - (1) if a motion for rehearing is not filed on time, on the expiration of the period for filing a motion for rehearing; or
  - (2) if a motion for rehearing is filed on time, on the date:
    - (A) the order overruling the motion for rehearing is rendered; or
    - (B) the motion is overruled by operation of law.
- The petition must be filed in a Travis County District Court.
- A copy of the petition must be served on TXDOT and each party of record in the proceedings before the agency.
- Travis County has local rules for this judicial review.

### 3. **Reviewing Court's Authority**

The Travis County District Court Judge must review the decision under the Substantial Evidence Rule. Section 2001.174 describes the review under the Substantial Evidence Rule.

A court shall reverse or remand the case for further proceedings if substantial rights of the appellant have been prejudiced because the administrative findings are:

- (a) in violation of a constitutional or statutory authority;
- (b) in excess of the agency's statutory authority;
- (c) made through unlawful procedure;
- (d) affected by other error of law;

- (e) not reasonably supported by the substantial evidence considering the reliable and probative evidence in the record as a whole; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. TEX. GOV'T. CODE § 2001.174.

Texas Case Law Interpretation of the Substantial Evidence Rule

- Substantial evidence means that, upon the evidence as a whole, reasonable minds could have reached the same conclusion that the agency reached. *McKinley Iron Works, Inc. v. Texas Employment Com'n*, 917 S.W.2d 468 (Tex. App. – Fort Worth 1996).
- The court must uphold the administrative agency's decision if it is reasonable, even though the court might have reached a different conclusion based on the same evidence. *City of San Antonio v. Flores*, 619 S.W.2d 601 (Tex. App. – Houston [14th Dist.] 1981).
- On judicial review of an administrative decision, the true test is not whether the agency reached the correct conclusion, but whether some reasonable basis exists in the record for the action taken by the agency. *City of Allen v. Public Utility Comm'n of Texas*, 876 S.W.2d 346 (Tex. App. – Austin 1993).
- The issue is whether the agency acted arbitrarily and without regard to the facts based upon the record as a whole. *Texas Health Facilities Comm'n v. Baptist General Convention of Texas*, 573 S.W.2d 575 (Tex. App. – Tyler 1978).

The Travis County District Court will hold a non-evidentiary hearing and allow arguments from counsel based upon the record from the SOAH hearing and resulting TXDOT decision. Once the District Court rules on the Petition for Review, it is appealable to the Court of Appeals as any other case rendered by the District Court.

## ADDENDUM

## TxDOT Organization Chart

January 1, 2006

