

Chapter 800. GENERAL ADMINISTRATION

Subchapter K. CONTRACT NEGOTIATION, MEDIATION, AND OTHER ASSISTED NEGOTIATION OR MEDIATION PROCESSES

40 TAC §§800.451 - 800.456, 800.461 - 800.463, 800.471 - 800.473, 800.481, 800.482, 800.491, 800.492

The Texas Workforce Commission (Commission) proposes new Chapter 800, Subchapter K, §§800.451-800.456, 800.461-800.463, 800.471-800.473, 800.481, 800.482, 800.491 and 800.492 relating to Contracts Negotiation, Mediation, and Other Assisted Negotiation and Mediation Processes.

Background and Purpose: House Bill 826, 76th Legislature, Regular Session (1999), as codified at Texas Government Code, Chapter 2260, and particularly §2260.052(c), requires that the Commission adopt rules to establish negotiation and mediation provisions relating to certain claims. Texas Government Code Section 2260.052(c) also directed the Office of the Attorney General (OAG) and the State Office of Administrative Hearings (SOAH) to provide model rules for negotiation and mediation that units of state government with rulemaking authority may voluntarily adopt or modify as they deem appropriate and that units of state government without rulemaking authority may use as a practice guide. The OAG proposed model rules on March 31, 2000, relating to procedures for the negotiation and mediation of certain breach of contract claims asserted by contractors against the State of Texas. An interagency dispute resolution working group, co-sponsored by the OAG and the Center for Public Policy Dispute Resolution at the University of Texas at Austin School of Law and consisting of representatives of state agencies, legislative offices, institutions of higher education, and contractors and vendors who do business with the state, assisted the OAG and SOAH with the development of the model rules. In the rules, the term "Agency" refers to the daily operations of the Texas Workforce Commission under the direction of the executive director. The term "Commission" refers to the three-member body of governance composed of Governor-appointed members.

Staff of the Agency participated in the interagency dispute resolution working group. There are only a few modifications to the model rules that the Commission proposes.

Specifically, the Commission proposes new Subchapter K, relating to Contract Negotiation, Mediation, and Other Assisted Negotiation and Mediation Processes.

The proposed rules describe an approach that builds upon existing and recommended provisions contained in contracts entered into by the Agency.

Randy Townsend, Chief Financial Officer, has determined that for the first five years the rules are in effect, the following statements will apply:

- there are no additional estimated costs to the state and to local governments expected as a result of enforcing or administering the rules;
- there are no estimated reductions in costs to the state or to local governments expected as a result of enforcing or administering the rules;
- there are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rules;
- there are no foreseeable implications relating to costs or revenues to the state or to local governments as a result of enforcing or administering the rules; and
- there are no anticipated costs to persons who are required to comply with the rules as proposed.

Mr. Townsend has also determined that there will be an effect on small businesses and anticipated economic costs to persons who are required to comply with the proposed rules. The costs will depend on a number of factors, including the methods of negotiation, mediation or other assisted negotiation or mediation processes agreed upon by the parties.

The Commission estimates the cost of complying is approximately \$10.00-\$300.00 per hour of labor for the amount of time it would take to meet the requirements of the rule. The time may require from one hour to approximately 40 hours to resolve a dispute. The range is to accommodate the various degrees of expertise needed to facilitate the resolution of contract disputes. The costs may include the costs of mediators, negotiators, attorneys, experts, accountants, financial officers, engineers, and others that will vary depending on the nature of the dispute.

Additional factors will cause the estimates to vary, such as the resources available to the small business, the wage rate of the person performing the task, the complexities of the issues subject to dispute, and numerous other variables will bear upon the actual costs of compliance for a particular contractor. Incidental costs such as postage and telephone calls are not included because of their minimal nature.

For rules that do not add requirements on small businesses but merely detail how the small businesses should comply with the statute, there are no costs other than those required by the statute. Those costs are directly caused

by the statute and not by any additional cost to small businesses caused by the rules. The Commission anticipates that many provisions in the rules will present no costs other than those directly required by the statute.

The comparison between the costs estimated by the small and large businesses indicates that larger businesses may have staff to perform functions under the rules while small businesses may need to contract or hire persons to perform the functions on behalf of the small businesses. Thus, larger businesses may pay less due to economies of scale and due to the various resources available to larger businesses.

Cindy Silberman, Director of Procurement and Support Services, has determined that the public benefit anticipated as a result of the rules as proposed will be to modify the contract negotiation and dispute resolution rules of the Commission and the procedures of the Agency to conform to the statutorily recommended negotiation and dispute resolution provisions.

Mark Hughes, Director of Labor Market Information, has determined that there is no foreseeable negative impact upon employment conditions in this state as a result of these proposed rules.

Comments on the proposed rules may be submitted to Cindy Silberman, Procurement and Support Services, Texas Workforce Commission, 101 East 15th Street, Room 316T, Austin, Texas 78778; Fax Number 512-305-9636; or E-mail to cindy.silberman@twc.state.tx.us. Comments must be received by the Commission no later than thirty (30) days from the date this proposal is published in the *Texas Register*.

The new sections are proposed under Texas Labor Code §§301.061 and 302.002, which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Commission services and activities.

The proposal affects the Texas Labor Code, Title 2 and Title 4.

§800.451. Purpose and Applicability.

(a) Purpose. The Commission intends these rules to govern negotiation, mediation, and other assisted negotiation or mediation processes regarding a claim of breach of contract asserted by a contractor against the Agency under Texas Government Code, Chapter 2260. The Commission recognizes that the model rules of the Office of the Attorney General are voluntary guidelines that are not binding on the Commission. The Commission also recognizes that the rules contained in this subchapter are not intended to replace procedures relating to breach of contract claims that are mandated by state or federal law. The parties to a contract are encouraged to resolve any disagreement concerning the contract in the ordinary course of contract administration under less formal procedures specified in the parties' contract.

(b) Applicability.

(1) This chapter does not apply to an action of the Agency for which a contractor is entitled to a specific remedy pursuant to state or federal constitution or statute.

(2) This chapter does not apply to a contract action proposed or taken by the Agency for which a contractor receiving Medicaid funds under that contract is entitled by state statute or rule to a hearing conducted in accordance with Texas Government Code, Chapter 2001.

(3) This chapter does not apply to contracts:

(A) between the Agency and the federal government or its agencies, another state or nation;

(B) between the Agency and one or more other units of state government;

(C) between the Agency and a local governmental body, or a political subdivision of another state;

(D) between a subcontractor and a contractor;

(E) subject to §201.112 of the Transportation Code;

(F) within the exclusive jurisdiction of state or local regulatory bodies;

(G) within the exclusive jurisdiction of federal courts or regulatory bodies; or

(H) that are solely and entirely funded by federal grant monies other than for a project defined in §800.452(10) of this Chapter.

(c) Remedies. The procedures contained in this subchapter are exclusive and required prerequisites to suit under the Civil Practice & Remedies Code, Chapter 107, and the Texas Government Code, Chapter 2260. This subchapter does not waive the Commission's or Agency's sovereign immunity to suit or liability.

§800.452. Definitions.

The following words and terms, when used in this chapter, shall have the following meaning, unless the context clearly indicates otherwise:

(1) Claim -- A demand for damages by the contractor based upon the Agency's alleged breach of the contract.

(2) Contract -- A written contract between the Agency and a contractor by the terms of which the contractor agrees either:

(A) to provide goods or services, by sale or lease, to or for the Agency; or

(B)

to perform a project as defined by Texas Government Code, §2166.001.

(3) Contractor -- Independent contractor who has entered into a contract directly with the Agency. The term does not include:

(A) The contractor's subcontractor, officer, employee, agent or other person furnishing goods or services to a contractor;

(B) An employee of the Agency; or

(C) A student at an institution of higher education.

(4) Counterclaim -- A demand by the Agency based upon the contractor's claim.

(5) Event -- An act or omission or a series of acts or omissions giving rise to a claim, including but not limited to the following:

(A) for goods or services:

(i) the failure of the Agency to timely pay for goods and services;

(ii) the failure to pay the balance due and owing on the contract price, including orders for additional work, after deducting any amount owed the Agency for work not performed under the contract or in substantial compliance with the contract terms;

(iii) the suspension, cancellation, or termination of the contract;

(iv) final rejection of the goods or services tendered by the contractor, in whole or in part;

(v) repudiation of the entire contract prior to or at the outset of performance by the contractor; or

(vi) withholding liquidated damages from final payment to the contractor.

(B) for a project:

(i) the failure to timely pay the unpaid balance of the contract price following final acceptance of the project;

(ii) the failure to make timely progress payments required by the contract;

(iii) the failure to pay the balance due and owing on the contract price, including orders for additional work, after deducting any amount owed the Agency for work not performed under the contract or in substantial compliance with the contract terms;

(iv) the failure to grant time extensions to which the contractor is entitled under the terms of the contract;

(v) the failure to compensate the contractor for occurrences for which the contract provides a remedy;

(vi) suspension, cancellation or termination of the contract;

(vii) rejection by the Agency, in whole or in part, of the "work," as defined by the contract, tendered by the contractor;

(viii) repudiation of the entire contract prior to or at the outset of performance by the contractor;

(ix) withholding liquidated damages from final payment to the contractor; or

(x) refusal, in whole or in part, of a written request made by the contractor in strict accordance with the contract to adjust the contract price, the contract time, or the scope of work.

(6) Goods -- Supplies, materials or equipment.

(7) Mediation -- A consensual process in which an impartial third party, the mediator, facilitates communication between the parties to promote reconciliation, settlement, or understanding among them.

(8) Negotiation -- A consensual bargaining process in which the parties attempt to resolve a claim and counterclaim.

(9) Parties -- The contractor and the Agency that have entered into a contract in connection with which a claim of breach of contract has been filed under this chapter.

(10) Project -- As defined in Texas Government Code §2166.001, a building construction project that is financed wholly or partly by a specific appropriation, bond issue or federal money, including the construction of

(A) a building, structure, or appurtenant facility or utility, including the acquisition and installation of original equipment and original furnishing; and

(B) an addition to, or alteration, modification, rehabilitation, or repair of an existing building, structure, or appurtenant facility or utility

(11) Services -- The furnishing of skilled or unskilled labor or consulting or professional work, or a combination thereof, excluding the labor of an employee of the Agency.

§800.453. Contractor Claim.

(a) A contractor asserting a claim of breach of contract under the Texas Government Code, Chapter 2260, shall file notice of the claim as provided by this section that shall:

(1) be in writing and signed by the contractor or the contractor's authorized representative;

(2) be delivered by hand, certified mail return receipt requested, or other verifiable delivery service to the officer of the Agency designated in the contract to receive a notice of claim of breach of contract under the Texas Government Code, Chapter 2260; if no person is designated in the contract, the notice shall be delivered to the executive director;

and

(3) state in detail:

(A) the nature of the alleged breach of contract, including the date of the event that the contractor asserts as the basis of the claim and each contractual provision allegedly breached;

(B) a description of damages that resulted from the alleged breach, including the amount and method used to calculate those damages; and

(C) the legal theory of recovery, i.e., breach of contract, including the causal relationship between the alleged breach and the damages claimed.

(b) In addition to the mandatory contents of the notice of claim as required by subsection (a) of this section, the contractor may submit supporting documentation or other tangible evidence to facilitate the Agency's evaluation of the contractor's claim.

(c) The notice of claim shall be delivered no later than 180 days after the date of the event that the contractor asserts as the basis of the claim.

§800.454. Agency Counterclaim.

(a) The Agency asserting a counterclaim under the Texas Government Code, Chapter 2260, shall file notice of the counterclaim as provided by this section that shall:

(1) be in writing;

(2) be delivered by hand, certified mail return receipt requested, or other verifiable delivery service to the contractor or representative of the contractor who signed the notice of claim of breach of contract; and

(3) state in detail:

(A) the nature of the counterclaim;

(B) a description of damages or offsets sought, including the amount and method used to calculate those damages or offsets; and

(C) the legal theory supporting the counterclaim.

(b) In addition to the mandatory contents of the notice of counterclaim required by subsection (a) of this section, the Agency may submit supporting documentation or other tangible evidence to facilitate the contractor's evaluation of the unit's counterclaim.

(c) The notice of counterclaim shall be delivered to the contractor no later than 90 days after the Agency's receipt of the contractor's notice of claim.

(d) Nothing herein precludes the Agency from initiating a lawsuit for damages against the contractor in a court of competent jurisdiction.

§800.455. Request for Voluntary Disclosure of Additional Information.

(a) Upon the filing of a claim or counterclaim, parties may request to review and copy information in the possession or custody or subject to the control of the other party that pertains to the contract claimed to have been breached, including, without limitation:

(1) accounting records;

(2) correspondence, including, without limitation, correspondence between the Agency and outside consultants it utilized in preparing its bid solicitation or any part thereof or in administering the contract, and correspondence between the contractor and its subcontractors, materialmen, and vendors;

(3) schedules;

(4) the parties' internal memoranda; and

(5) documents created by the contractor in preparing its offer to the Agency and documents created by the Agency in analyzing the offers it received in response to a solicitation.

(b) Subsection (a) of this section applies to all information in the parties' possession regardless of the manner in which it is recorded, including, without limitation, paper and electronic media.

(c) The contractor and the Agency may seek additional information directly from third parties, including, without limitation, the Agency's third-party consultants and the contractor's subcontractors.

(d) Nothing in this section requires any party to disclose the requested information or any matter that is privileged under Texas law.

(e) Material submitted pursuant to this subsection and claimed to be confidential by the contractor shall be handled pursuant to the requirements of the Public Information Act.

§800.456. Costs.

Unless the contractor and the Agency agree otherwise, each party shall be responsible for its own costs incurred in connection with the negotiation, mediation, and other assisted negotiation or mediation processes, including costs of document reproduction for documents requested by such party, attorney's fees, and consultant or expert fees. The costs of the mediation process itself shall be divided equally between the parties.

§800.461. Duty to Negotiate.

The parties shall negotiate in accordance with the timetable set forth in §800.462 of this subchapter to attempt to resolve all claims and counterclaims. No party is obligated to settle with the other party as a result of the negotiation.
§800.462. Negotiation Timetable.

(a) Following receipt of a contractor's notice of claim, the executive director of the Agency or other designated representative shall review the contractor's claim(s) and the Agency's counterclaim(s), if any, and initiate negotiations with the contractor to attempt to resolve the claim(s) and counterclaim(s).

(b) Subject to subsection (c) of this section, the parties shall begin negotiations within a reasonable period of time, not to exceed 60 days following the later of:

(1) the date of termination of the contract;

(2) the completion date, or substantial completion date in the case of construction projects, in the original contract;
or

(3) the date the Agency receives the contractor's notice of claim.

(c) The Agency may delay negotiations until after the 180th day after the date of the event giving rise to the claim of breach of contract by:

(1) delivering written notice to the contractor that the commencement of negotiations will be delayed; and

(2) delivering written notice to the contractor when the Agency is ready to begin negotiations.

(d) The parties may conduct negotiations according to an agreed schedule as long as they begin negotiations no later than the deadlines set forth in subsections (b) or (c) of this section, whichever is applicable.

(e) Subject to subsection (f) of this section, the parties shall complete the negotiations that are required by this subchapter as a prerequisite to a contractor's request for contested case hearing no later than 270 days after the Agency receives the contractor's notice of claim.

(f) The parties may agree in writing to extend the time for negotiations on or before the 270th day after the Agency receives the contractor's notice of claim. The agreement shall be signed by representatives of the parties with authority to bind each respective party and shall provide for the extension of the statutory negotiation period until a date certain. The parties may enter into a series of written extension agreements that comply with the requirements of this section.

(g) The contractor may request a contested case hearing before the State Office of Administrative Hearings (SOAH) pursuant to §800.492 of this subchapter (relating to Request for Contested Case Hearing) after the 270th day after the Agency receives the contractor's notice of claim, or the expiration of any extension agreed to under subsection (f) of this section.

(h) The parties may agree to mediate the dispute at any time before the 270th day after the Agency receives the contractor's notice of claim or before the expiration of any extension agreed to by the parties pursuant to subsection (f) of this section. The mediation shall be governed by §§800.471-800.473 of this subchapter.

(i) Nothing in this section is intended to prevent the parties from agreeing to commence negotiations earlier than the deadlines established in subsections (b) and (c) of this section, or from continuing or resuming negotiations after the contractor requests a contested case hearing before SOAH.

§800.463. Conduct of Negotiation.

(a) A negotiation under this subchapter may be conducted by any method, technique, or procedure authorized under the contract or agreed upon by the parties, including, without limitation, negotiation in person, by telephone, correspondence, video conference, or any other method that permits the parties to identify their respective positions, discuss their respective differences, confer with their respective advisers, exchange offers of settlement, and settle.

(b) The parties may conduct negotiations with the assistance of one or more neutral third parties. If the parties choose to mediate their dispute, the mediation shall be conducted in accordance with §§800.471-800.473 of this subchapter. Parties may choose other assisted negotiation or mediation processes, including, without limitation, processes such as those described in §§800.481 and 800.482 of this subchapter.

(c) To facilitate the meaningful evaluation and negotiation of the claim(s) and any counterclaim(s), the parties may exchange relevant documents that support their respective claims, defenses, counterclaims or positions.

(d) Material submitted pursuant to this subsection and claimed to be confidential by the contractor shall be handled pursuant to the requirements of the Public Information Act.

§800.471. Mediation.

(a) Option to mediate. The parties may agree to mediate the dispute at any time before the 270th day after the Agency receives the contractor's notice of claim or before the expiration of any extension agreed to by the parties pursuant to §800.462(f) of this subchapter. The mediation shall be governed by rules contained in this subchapter.

(b) Timetable. A contractor and Agency may mediate the dispute even after the case has been referred to SOAH for a contested case. SOAH may also refer a contested case for mediation pursuant to its own rules and guidelines, whether or not the parties have previously attempted mediation.

(c) Request for Referral. If mediation does not resolve all issues raised by the claim, the contractor may request that the claim be referred to SOAH by the Agency. Nothing in these rules prohibits the contractor and the Agency from mediating their dispute after the case has been referred for contested case hearing, subject to the rules of SOAH.

(d) Conduct of Mediation.

(1) A mediator may not impose his or her own judgment on the issues for that of the parties. The mediator must be acceptable to both parties.

(2) The mediation is subject to the provisions of the Governmental Dispute Resolution Act, Texas Government Code, Chapter 2009. For purposes of this subchapter, "mediation" is assigned the meaning set forth in the Civil Practice and Remedies Code, §154.023.

(3) To facilitate a meaningful opportunity for settlement, the parties shall, to the extent possible, select representatives who are knowledgeable about the dispute, who are in a position to reach agreement, or who can credibly recommend approval of an agreement.

§800.472. Agreement to Mediate.

(a) Parties may agree to use mediation as an option to resolve a breach of contract claim at the time they enter into the contract and include a contractual provision to do so. The parties may mediate a breach of contract claim even absent a contractual provision to do so if both parties agree.

(b) Any agreement to mediate shall include consideration of the following factors:

(1) The source of the mediator. Potential sources of mediators include governmental officers or employees who are qualified as mediators under Civil Practice and Remedies Code, §154.052, private mediators, SOAH, the Center for Public Policy Dispute Resolution at The University of Texas at Austin School of Law, an alternative dispute resolution system created under Civil Practice and Remedies Code, Chapter 152, or another state or federal agency or through a pooling agreement with several state agencies. Before naming a mediator source in a contract, the parties should contact the mediator source to be sure that it is willing to serve in that capacity. In selecting a mediator, the parties should use the qualifications set forth in §800.473 of this Subchapter (relating to Qualifications and Immunity of the Mediator).

(2) The time period for the mediation. The parties should allow enough time in which to make arrangements with the mediator and attending parties to schedule the mediation, to attend and participate in the mediation, and to complete any settlement approval procedures necessary to achieve final settlement. While this time frame can vary according to the needs and schedules of the mediator and parties, it is important that the parties allow adequate time for the process.

(3) The location of the mediation.

(4) Allocation of costs of the mediator.

(5) The identification of representatives who will attend the mediation on behalf of the parties, if possible, by name or position within the Agency or contracting entity.

(6) The settlement approval process in the event the parties reach agreement at the mediation.

§800.473. Qualifications and Immunity of the Mediator.

(a) The mediator shall possess the qualifications required under Civil Practice and Remedies Code, §154.052, be subject to the standards and duties prescribed by Civil Practice and Remedies Code, §154.053, and have the qualified immunity prescribed by Civil Practice and Remedies Code, §154.055, if applicable.

(b) The parties should decide whether, and to what extent, knowledge of the subject matter and experience in mediation would be advisable for the mediator.

(c) The parties should obtain from the prospective mediator the ethical standards that will govern the mediation.

§800.481. Other Assisted Negotiation and Mediation Processes.

(a) Parties to a contract dispute under Texas Government Code, Chapter 2260 may agree, either contractually or when a dispute arises, to use other assisted negotiation and mediation (alternative dispute resolution) processes in addition to negotiation and mediation to resolve their dispute.

(b) Factors Supporting the Use of Other Assisted Negotiation or Mediation Processes. The following factors may help parties decide whether one or more of the other assisted negotiation and mediation processes could help resolve their dispute:

(1) The parties recognize the benefits of an agreed resolution of the dispute;

(2) The expense of proceeding to contested case hearing at SOAH is substantial and might outweigh any potential recovery;

(3) The parties want an expedited resolution;

(4) The ultimate outcome is uncertain;

(5) There exists factual or technical complexity or uncertainty which would benefit from expertise of a third-party expert for technical assistance or fact-finding;

- (6) The parties are having substantial difficulty communicating effectively;
- (7) A mediator third party could facilitate the parties' realistic evaluation of their respective cases;
- (8) There is an ongoing relationship that exists between parties;
- (9) The parties want to retain control over the outcome;
- (10) There is a need to develop creative alternatives to resolve the dispute;
- (11) There is a need for flexibility in shaping relief;
- (12) The other side has an unrealistic view of the merits of their case; or
- (13) The parties (or aggrieved persons) need to hear an evaluation of the case from someone other than their lawyers.

§800.482. Methods of Other Assisted Negotiation and Mediation Processes.

(a) Methods. The Agency may elect any of the following methods, or a combination of these methods, or any assisted negotiation process if agreed to by the parties, in seeking resolution of disputes or other controversy arising under Texas Government Code, Chapter 2260. If the parties agree to use another assisted negotiation or mediation procedure, the parties shall agree in writing to a detailed description of the process prior to engaging in the process that may include one or more of the following:

- (1) Mediation as set forth in this subchapter;
- (2) Early evaluation by a third-party neutral;
- (3) Neutral fact-finding by an expert; or
- (4) Mini-trial.

(b) Early evaluation by a third party.

(1) This is a confidential conference where the parties and their counsel present the factual and legal bases of their claim and receive a non-binding assessment by an experienced neutral with subject-matter expertise or with significant experience in the substantive area of law involved in the dispute.

(2) After summary presentations, the third-party neutral identifies areas of agreement for possible stipulations, assesses the strengths and weaknesses of each party's position, and estimates, if possible, the likelihood of liability and the dollar range of damages that appear reasonable to him or her.

(3) This is a less complicated procedure than the mini-trial, described in subsection (d) of this section. It may be appropriate for only some issues in dispute, for example, where there are clear-cut differences over the appropriate amount of damages. This process may be particularly helpful when:

- (A) The parties agree that the dispute can be settled;
- (B) The dispute involves specific legal issues;
- (C) The parties disagree on the amount of damages;
- (D) The opposition has an unrealistic view of the dispute; or
- (E) The neutral is a recognized expert in the subject area or area of law involved.

(c) Neutral fact-finding by an expert.

(1) In this process, a neutral third-party expert studies a particular issue and reports findings on that issue. The process usually occurs after most discovery in the dispute has been completed and the significance of particular technical or scientific issues is apparent.

(2) The parties may agree in writing that the fact-finding will be binding on them in later proceedings (and entered into as a stipulation in the dispute if the matter proceeds to contested case hearing), or that it will be advisory in nature, to be used only in further settlement discussions between representatives of the parties. This process may be particularly helpful when:

- (A) Factual issues requiring expert testimony may be dispositive of liability or damage issues;
- (B) The use of a neutral is cost effective; or
- (C) The neutral's findings could narrow factual issues for contested case hearing.

(d) Mini-trial.

(1) A mini-trial is generally a summary proceeding before a representative of upper management from each party, with authority to settle, and a third-party neutral selected by agreement of the parties. A mini-trial is usually divided into three phases: a limited information exchange phase, the actual hearing, and post-hearing settlement discussions. No written or oral statement made in the proceeding may be used as evidence or an admission in any other proceeding.

(2) The information exchange stage should be brief, but it must be sufficient for each party to understand and appreciate the key issues involved in the case. At a minimum, parties should exchange key exhibits, introductory statements, and a summary of witnesses' testimony.

(3) At the hearing, representatives of the parties present a summary of the anticipated evidence and any legal issues that must be decided before the case can be resolved. The third-party neutral presides over the presentation and may

question witnesses and counsel, as well as comment on the arguments and evidence. Each party may agree to put on abbreviated direct and cross-examination testimony. The hearing generally takes no longer than 1-2 days.

(4) Settlement discussions, facilitated by the third-party neutral, take place after the hearing. The parties may ask the neutral to formally evaluate the evidence and arguments and give an advisory opinion as to the issues in the case. If the parties cannot reach an agreed resolution to the dispute, either side may declare the mini-trial terminated and proceed to resolve the dispute by other means.

(5) Mini-trials may be appropriate when:

(A) The dispute is at a stage where substantial costs can be saved by a resolution based on limited information gathering;

(B) The matter justifies the senior executive time required to complete the process;

(C) The issues involved include highly technical mixed questions of law and fact;

(D) The matter involves trade secrets or other confidential or proprietary information; or

(E) The parties seek to narrow the large number of issues in dispute.

§800.491. Settlement Agreement and Approval Procedures.

(a) Settlement Process. The parties' settlement approval procedures shall be disclosed by the parties prior to the negotiation, mediation, or other assisted negotiation and mediation process, unless the parties agree otherwise in writing. To the extent possible, the parties shall select negotiators or representatives who are knowledgeable about the subject matter of the dispute, who are in a position to reach agreement, and who can credibly recommend approval of an agreement.

(b) Initial Settlement Agreement. Any settlement agreement reached during the mediation shall be signed by the representatives of the contractor and the Agency, and shall describe any procedures required to be followed by the parties in connection with final approval of the agreement.

(c) Final Settlement Agreement.

(1) A final settlement agreement reached during, or as a result of negotiation, mediation, or other assisted negotiation or mediation process that resolves an entire claim or any designated and severable portion of a claim, shall be in writing and signed by representatives of the contractor and the Agency who have authority to bind each respective party.

(2) If the settlement agreement does not resolve all issues raised by the claim and counterclaim, the agreement shall identify the issues that are not resolved.

(3) A partial settlement does not waive a contractor's rights under the Texas Government Code, Chapter 2260, as to the parts of the claim that are not resolved.

(d) Confidentiality of Mediation and Final Settlement Agreement.

(1) A mediation conducted under this section is confidential in accordance with Texas Government Code, §2009.054.

(2) The confidentiality of a final settlement agreement to which the Agency is a signatory that is reached as a result of the mediation is governed by Texas Government Code, Chapter 552.

§800.492. Request for Contested Case Hearing.

(a) If a claim for breach of contract is not resolved in its entirety through negotiation, mediation, or other assisted negotiation or mediation process, in accordance with this subchapter on or before the 270th day after the Agency receives the notice of claim, or after the expiration of any extension agreed to by the parties pursuant to this subchapter, the contractor may file a request with the Agency for a contested case hearing before SOAH.

(b) A request for a contested case hearing shall state the legal and factual basis for the claim, and shall be delivered to the chief administrative officer of the Agency or other officer designated in the contract to receive notice within a reasonable time after the 270th day or the expiration of any written extension agreed to pursuant to this subchapter.

(c) The Agency shall forward the contractor's request for contested case hearing to SOAH within a reasonable period of time, not to exceed thirty days, after receipt of the request.

(d) The parties may agree to submit the case to SOAH before the 270th day after the notice of claim is received by the Agency if they have achieved a partial resolution of the claim or if an impasse has been reached in the negotiations and proceeding to a contested case hearing would serve the interests of justice.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on June 2, 2000.

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J. Randel (Jerry) Hill

General Counsel

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For further information, please call: (512) 463-8812