

**Department of State Health Services
Council Agenda Memo for State Health Services Council
January 22, 2010**

Agenda Item Title: Repeal of rules and new rules concerning the negotiation and mediation of certain contract claims against the Department of State Health Services

Agenda Number: 5f

Recommended Council Action:

For Discussion Only

For Discussion and Action by the Council

Background:

The Office of General Counsel (OGC) is located within the Chief Operating Officer Division. OGC provides legal services to all DSHS programs and facilities throughout the state, including issues concerning contract issues and policies. The OGC current biennium budget is approximately \$4,639,610. OGC's funding comes from legislative appropriations from general revenue.

Summary:

The purpose of the repeals and new rules is to provide rules that are located in one chapter designated for DSHS contracting rules instead of three different chapters with duplicate information. The rules are necessary to eliminate confusion for DSHS programs and their contractors by having rules accessible in one chapter in DSHS's rule base.

Government Code, Chapter 2260, (2260 rules) concern a state agency contractor's right of action against the agency when the contractor believes that the agency has breached the contract. When House Bill 2292, 78th Legislature, 2003, consolidated DSHS legacy agencies, the Texas Department of Health (TDH), the mental health division of the Texas Department of Mental Health and Mental Retardation (TDMHMR), and the Texas Commission on Alcohol and Drug Abuse (TCADA) the rules were transferred into three different chapters of DSHS's rule base. TDH, TDMHMR, and TCADA each had adopted 2260 rules before House Bill 2292 was enacted on September 1, 2004.

TDH's 2260 rules are located in Chapter 1; TDMHMR's are located in Chapter 417; and TCADA's are located in Chapter 441. After consolidation, it was no longer necessary to have three sets of 2260 rules. DSHS proposes to repeal the existing sections in Chapters 1, 417, and 441 and adopt the new rules in Chapter 4, DSHS Contracting Rules.

The review of the rules complies with the four-year review of agency rules required by Government Code, Section 2001.039.

The expected outcomes of the proposed repeals and new rules are to eliminate duplication and maintain clear, concise 2260 rules for DSHS programs and their contractors.

Summary of Input from Stakeholder Groups:

OGC obtained internal DSHS input from OGC contract attorneys. The input proposed minor, nonsubstantive changes to the rules. The rules also were presented to the DSHS Contract Oversight Services Team, composed of contract staff from all DSHS divisions. There were no unresolved issues concerning the rule changes.

OGC will seek external stakeholder input from publishing the proposed rules in the *Texas Register*.

Proposed Motion: Motion to recommend HHSC approval for publication of rules contained in agenda item #5f

Approved by Assistant Commissioner/Director: Dee Porter **Date:** 1/4/10

Presenter: Elizabeth Jones, Assistant General Counsel **Program:** Office of General Counsel **Phone No.:** 512/458-7111 ext. 6645

Approved by CPCPI: Carolyn Bivens **Date:** 12/22/09

Title 25. HEALTH SERVICES
Part 1. DEPARTMENT OF STATE HEALTH SERVICES
Chapter 1. Texas Board of Health
Subchapter V. Negotiation and Mediation of Certain Contract Disputes
Repeals §§1.431 – 1.447
Chapter 417. TDMHMR and Facility Responsibilities
Subchapter B. Contracts Management for TDMHMR Facilities and Central Office
Repeals §417.63
Subchapter S. Negotiation and Mediation of Certain Contract Claims Against TDMHMR
Division One. General
Repeals §§417.901 – 417.905
Division Two. Negotiation
Repeals §§417.906 – 417.915
Division Three. Mediation
Repeals §§417.916 – 417.925
Chapter 441. General Provisions
Subchapter B. Claims Against the Commission
Repeals §§441.201 – 441.205
Chapter 4. DSHS Contracting Rules
Subchapter B. Certain Contract Claims Against the Department
New §§4.11 – 4.24

Proposed Preamble

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), proposes the repeal of §§1.431 – 1.447, 417.63, 417.901 – 417.925, and 441.201 – 441.205 and new §§4.11 – 4.24, concerning the negotiation and mediation of certain contract claims against the department.

BACKGROUND AND PURPOSE

Government Code, Chapter 2260, was enacted to provide an administrative remedy for state agency contractors if the contractors believe the state has breached a contract with them. Each state agency is required to adopt its own 2260 rules.

The proposed repeals and new rules are necessary to eliminate duplication and to bring the department's 2260 rules into line with the requirements of Acts 2003, 78th Legislature, Chapter 198, §1.09 (House Bill 2292). When House Bill 2292 consolidated the department's legacy agencies, the Texas Department of Health (TDH), the mental health division of the Texas Department of Mental Health and Mental Retardation (TDMHMR), and the Texas Commission on Alcohol and Drug Abuse (TCADA) into the department, 25 Texas Administrative Code (TAC), Part 1, was designated as the location for all department rules. Chapter 4 of Part 1 has been designated as the location for all department contracting rules. TDH, TDMHMR, and TCADA each had adopted 2260 rules before House Bill 2292 was enacted on September 1, 2004. TDH's 2260 rules are located in Chapter 1; TDMHMR's are located in Chapter 417; and

TCADA's are located in Chapter 441. After consolidation, it was no longer necessary to have three sets of 2260 rules. The department has reviewed each legacy agency's set of 2260 rules, culled out the duplicates for repeal, updated the remaining sections, and drafted one set using those remaining sections. The department is proposing to repeal the existing sections in Chapters 1, 417, and 441 and adopt the new rules in Chapter 4, DSHS Contracting Rules. The proposed repeals and new rules are necessary to provide a set of updated 2260 rules that are located in Chapter 4, the chapter designated for DSHS contracting rules. The new rules are similar to the 2260 rules adopted by the Health and Human Services Commission.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 1.431 - 1.447, 417.63, 417.901 - 417.925 and 441.201 - 441.205 have been reviewed and the department has determined that reasons for adopting the sections continue to exist because rules on this subject are needed.

SECTION-BY-SECTION SUMMARY

The repeal of §§1.431 - 1.447, 417.63, 417.901 – 417.925, and 441.201 – 441.205 is necessary to eliminate duplicate and inaccurate legacy agency rules and to combine the updated 2260 rules in 25 TAC, Chapter 4, DSHS Contracting Rules.

New §4.11 states the purpose of the 2260 rules. New §4.12 sets out their applicability. New §4.13 defines terms used in the 2260 rules. New §4.14 states that the 2260 rules are exclusive and required prerequisites to suit under Civil Practice and Remedies Code, Chapter 107 and Government Code, Chapter 2260. New §4.15 lists requirements for contractors to provide a notice to the department concerning a claim of breach of contract. New §4.16 provides requirements for the department to assert a counterclaim. New §4.17 allows the department and the contractor asserting the 2260 claim to request voluntary disclosure of additional information from each other and lists the types of information that may be requested. New §4.18 provides the timetable for negotiation and mediation, including authorizing the contractor to request a contested case hearing before the State Office of Administrative Hearings. New §4.19 sets out requirements for conduct of negotiation. New §4.20 states the settlement approval procedures for negotiation. New §4.21, concerning negotiated settlement agreement, provides parameters for negotiated settlement agreements. New §4.22 requires each party to be responsible for its own costs incurred in connection with a negotiation. New §4.23 states the requirements for the contractor to request a contested case hearing, if the contract claim is not resolved through negotiation. New §4.24 sets out the requirements for mediation, if the parties agree to mediation of the contract claim.

FISCAL NOTE

Linda Wiegman, Deputy General Counsel, has determined that for each year of the first five-year period that the sections are in effect, there will be no fiscal implications to state or local governments as a result of enforcing or administering the sections as proposed.

SMALL AND MICRO-BUSINESS ECONOMIC IMPACT ANALYSIS

Ms. Wiegman has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the sections as proposed. This was determined by interpretation of the rules that small businesses and micro-businesses will not be required to alter their business practices in order to comply with the sections.

ECONOMIC COST TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

In addition, Ms. Wiegman has determined that for each year of the first five years the sections are in effect, the public will benefit from the adoption of the sections. The public benefit anticipated as a result of the proposed repeals and new rules is compliance with House Bill 2292 and to eliminate confusion concerning the department's contract claims administration.

REGULATORY ANALYSIS

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The department has determined that the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted by mail to Elizabeth Jones, Assistant General Counsel, Office of General Counsel – Mail Code 1919, P.O. Box 149347, Austin, Texas, 78714-9347, or by email to elizabeth.jones@dshs.state.tx.us. When emailing comments, please indicate "Comments on Proposed 2260 Rules" in the email subject line. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the proposed rules have been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

STATUTORY AUTHORITY

The repeals and new sections are authorized by Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001; and Government Code, §2260.052, which requires each unit of state government with rulemaking authority to develop rules to govern the negotiation and mediation of contract claims under Chapter 2260. Review of these rules implements Government Code, §2001.039.

The repeals and new sections affect the Health and Safety Code, Chapter 1001 and Government Code, Chapter 531.

Sections for repeal.

Subchapter V. Negotiation and Mediation of Certain Contract Disputes.

- §1.431. Purpose and Scope.
- §1.432. Definitions.
- §1.433. Prerequisites to Suit.
- §1.434. Sovereign Immunity.
- §1.435. Notice of Claim of Breach of Contract.
- §1.436. Department Counterclaim.
- §1.437. Duty to Negotiate.
- §1.438. Negotiation Timetable.
- §1.439. Conduct of Negotiation.
- §1.440. Settlement Approval Procedures.
- §1.441. Settlement Agreement.
- §1.442. Costs of Negotiation.
- §1.443. Request for Contested Case Hearing.
- §1.444. Mediation of Contract Claims.
- §1.445. Conduct of Mediation.
- §1.446. Costs of Mediation.
- §1.447. Settlement Agreement.

Subchapter B. Contracts Management for TDMHMR Facilities and Central Office.

§417.63. Negotiation and Mediation.

Subchapter S. Negotiation and Mediation of Certain Contract Claims Against TDMHMR.

Division 1. General.

- §417.901. Purpose.
- §417.902. Applicability.
- §417.903. Definitions.
- §417.904. Prerequisites to Suit.
- §417.905. Sovereign Immunity.

Division 2. Negotiation.

- §417.906. Notice of Claim of Breach of Contract.
- §417.907. Agency Counterclaim.
- §417.908. Request for Voluntary Disclosure of Additional Information.
- §417.909. Duty to Negotiate.
- §417.910. Timetable.
- §417.911. Conduct of Negotiation.
- §417.912. Settlement Approval Procedures.
- §417.913. Settlement Agreement.
- §417.914. Costs of Negotiation.
- §417.915. Request for Contested Case Hearing.

Division 3. Mediation.

- §417.916. Mediation Timetable.
- §417.917. Conduct of Mediation.
- §417.918. Agreement to Mediate.
- §417.919. Qualifications and Immunity of the Mediator.
- §417.920. Confidentiality of Mediation and Final Settlement Agreement.
- §417.921. Costs of Mediation.
- §417.922. Settlement Approval Procedures.
- §417.923. Initial Settlement Agreement.
- §417.924. Final Settlement Agreement.
- §417.925. Referral to the State Office of Administrative Hearings.

Subchapter B. Claims Against the Commission.

- §441.201. Notice of Claim.
- §441.202. Agency Counterclaim.
- §441.203. Timetable for Negotiations and Contested Case Hearings.
- §441.204. Conduct of Negotiations.
- §441.205. Mediation.

Proposed Repealed Language
~~Strikethrough=repealed text~~

~~§1.431. Purpose and Scope.~~

~~This subchapter governs the negotiation and mediation of a claim of breach of contract asserted by a contractor against the Texas Department of Health under the Government Code, Chapter 2260.~~

~~§1.432. Definitions.~~

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

- ~~–(1) Chief administrative officer—The executive officer responsible for the day to day operations of the department.~~
- ~~–(2) Claim—A demand for damages by the contractor based upon the department's alleged breach of contract.~~
- ~~–(3) Contractor—An independent contractor who has entered into a contract directly with the department. The term does not include:
 - ~~—(A) a contractor's subcontractor, officer, employee, agent, or other person furnishing goods or services to a contractor;~~
 - ~~—(B) an employee of the department; or~~
 - ~~—(C) a student at an institution of higher education.~~~~
- ~~–(4) Counterclaim—A demand by the unit of state government based upon the contractor's claim.~~
- ~~–(5) Department—The Texas Department of Health.~~
- ~~–(6) Day—A calendar day. If an act is required to occur on a date falling on a Saturday, Sunday, or holiday, the first working day following one of these days is the date to be counted as the required day for the act.~~
- ~~–(7) Event—An act or omission or a series of acts or omissions giving rise to a claim.~~
- ~~–(8) Mediation—Mediation is a consensual process in which an impartial third party, the mediator, facilitates communication between the parties to promote reconciliation, settlement, or understanding among them.~~
- ~~–(9) Negotiation—Negotiation is a consensual bargaining process in which the parties attempt to resolve a claim and counterclaim.~~
- ~~–(10) Parties—The department and the contractor that have entered into the contract that is the subject of the claim.~~

~~§1.433. Prerequisites to Suit.~~

~~The procedures contained within this subchapter are exclusive and required prerequisites to suit under the Civil Practice & Remedies Code, Chapter 107, and the Government Code, Chapter 2260.~~

~~§1.434. Sovereign Immunity.~~

~~This chapter does not waive the department's sovereign immunity to suit or liability.~~

~~§1.435. Notice of Claim of Breach of Contract.~~

~~(a) A contractor asserting a claim of breach of contract under the Government Code, Chapter 2260, shall file notice of the claim as provided in this section.~~

~~(b) The notice of the claim shall:~~

~~–(1) be in writing and signed by the contractor or the contractor's authorized representative; and
–(2) be delivered by hand, certified mail return receipt requested, or other verifiable delivery service, to the officer of the department designated in the contract to receive a notice of claim of breach of contract under the Government Code, Chapter 2260; if no person is designated in the contract the notices shall be delivered to the department's chief administrative officer.~~

~~(c) The notice shall state in detail:~~

~~–(1) 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;
–(2) a description of damages that resulted from the alleged breach, including the amount and method used to calculate those damages; and
–(3) the legal theory of recovery, including the relationship between the alleged breach and the damages claimed.~~

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

~~§1.436. Department Counterclaim.~~

~~a) The department may assert a counterclaim under the Government Code, Chapter 2260, as provided in this section:~~

~~–(1) be in writing; and~~

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

~~(b) The notice shall state in detail:~~

~~–(1) the nature of the counterclaim;~~

~~–(2) a description of damages or offsets sought, including the amount and method used to calculate those damages or offsets; and~~

~~–(3) the legal theory supporting the counterclaim.~~

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

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

~~§1.437. Duty to Negotiate.~~

~~The parties shall negotiate in accordance with the timetable set forth in §1.438 of this title (relating to Negotiation Timetable) to attempt to resolve all claims and counterclaims. No party is obligated to settle with the other party as a result of the negotiation.~~

~~§1.438. Negotiation Timetable.~~

~~(a) Following receipt of a contractor's notice of claim, the department's chief administrative officer or his designee, shall review the contractor's claim and the department's counterclaim, if any, and initiate negotiations with the contractor to attempt to resolve the claim and counterclaim.~~

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

~~–(1) the date of termination of the contract;~~

~~–(2) the completion date in the original contract; or~~

~~–(3) the date the department receives the contractor's notice of claim.~~

~~(c) The department may delay negotiations until after the 180th day from the date of the event giving rise to the claim of breach of contract by delivering written notice to the contractor that the commencement of negotiations will be delayed and notice of when the department will be ready to begin negotiations.~~

~~(d) The parties may conduct negotiations according to an agreed schedule as long as they complete the negotiations no later than 270 days after the department receives the contractor's notice of claim.~~

~~(e) The parties may agree in writing on or before the 270th day after the department receives the contractor's notice of claim to extend the time for negotiations. 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.~~

~~(f) The contractor may request a contested case hearing before the State Office of Administrative Hearings (SOAH) on or before the 270th day after the department receives the contractor's notice of claim, or the expiration of any extension agreed to by the parties.~~

~~(g) The parties may agree to mediate the dispute at any time before the 270th day after the department receives the contractor's notice of claim or before the expiration of any extension agreed to by the parties pursuant to subsection (e) of this section.~~

~~§1.439. Conduct of Negotiation.~~

~~(a) The negotiation may be conducted by any method, technique, or procedure authorized under the contract or agreed upon by the parties.~~

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

~~(c) Material submitted pursuant to this section and claimed to be confidential by the contractor shall be handled pursuant to the requirements of the Public Information Act, Government Code, Chapter 552.~~

~~§1.440. Settlement Approval Procedures.~~

~~The parties' settlement approval procedures shall be disclosed prior to, or at the beginning of, negotiations. To the extent possible, the parties shall select negotiators 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.~~

~~§1.441. Settlement Agreement.~~

~~(a) A settlement agreement may resolve an entire claim or any designated and severable portion of a claim.~~

~~(b) To be enforceable, a settlement agreement must be in writing and signed by representatives of the contractor and the department who have authority to bind each respective party.~~

~~(c) A partial settlement does not waive a party's rights under the Government Code, Chapter 2260, as to the parts of the claim or counterclaim that are not resolved.~~

~~§1.442. Costs of Negotiation.~~

Unless the parties agree otherwise, each party shall be responsible for its own costs incurred in connection with a negotiation, including, without limitation, the costs of attorney's fees, consultant's fees, and expert's fees.

~~§1.443. Request for Contested Case Hearing.~~

- ~~(a) If a claim for breach of contract is not resolved in its entirety on or before the 270th day after the department receives the notice of claim, or after the expiration of any extension, the contractor may file a request with the department 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 department's chief administrative officer, his designee, or the person designated in the contract to receive notice, within 30 days after the 270th day or the expiration of any agreed extensions.~~
- ~~(c) The department shall forward the contractor's request for a contested case hearing to SOAH within 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 department 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.~~

~~§1.444. Mediation of Contract Claims.~~

~~The contractor and the department may agree to mediate the claim and counterclaim at any time.~~

~~§1.445. Conduct of Mediation.~~

- ~~(a) 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.~~
- ~~(b) The mediation is subject to the provisions of the Governmental Dispute Resolution Act, Government Code, Chapter 2009.~~
- ~~(c) 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.~~

~~§1.446. Costs of Mediation.~~

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

~~§1.447. Settlement Agreement.~~

- ~~(a) A settlement agreement reached during, or as a result of mediation, 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 department who have authority to bind each respective party.~~
- ~~(b) 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.~~
- ~~(c) A partial settlement does not waive a contractor's rights under the Government Code, Chapter 2260, as to the parts of the claim that are not resolved.~~

~~§417.63. Negotiation and Mediation.~~

~~TDMHMR and its contractors must comply with Chapter 417, Subchapter S of this title (relating to Negotiation and Mediation of Certain Contract Claims Against TDMHMR), as applicable.~~

~~§417.901. Purpose.~~

~~The purpose of this subchapter is to describe the provisions for negotiation and mediation of certain contract claims against the Texas Department of Mental Health and Mental Retardation (TDMHMR), pursuant to the Government Code, §2260.052(e).~~

~~§417.902. Applicability.~~

~~(a) This subchapter applies to the Texas Department of Mental Health and Mental Retardation (TDMHMR).~~

~~(b) This subchapter does not apply to an action of a unit of state government for which a contractor is entitled to a specific remedy pursuant to state or federal constitution or statute.~~

~~(c) This subchapter does not apply to a contract action proposed or taken by a unit of state government for which a contractor receiving Medicaid funds under that contract is entitled by state statute or rule to a hearing conducted in accordance with Government Code, Chapter 2001.~~

~~(d) This subchapter does not apply to contracts:~~

~~—(1) between a unit of state government and the federal government or its agencies, another state or another nation;~~

~~—(2) between two or more units of state government;~~

~~—(3) between a unit of state government and a local governmental body, or a political subdivision of another state;~~

~~—(4) between a subcontractor and a contractor;~~

~~—(5) subject to §201.112 of the Transportation Code;~~

~~—(6) within the exclusive jurisdiction of state or local regulatory bodies;~~

~~—(7) within the exclusive jurisdiction of federal courts or regulatory bodies; or~~

~~—(8) that are solely and entirely funded by federal grant monies other than for a project defined in §417.903.(10) of this title (relating to Definitions).~~

~~§417.903. Definitions.~~

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

~~—(1) Chief administrative officer—The commissioner, executive director, president or other executive officer responsible for the day to day operations of a unit of state government.~~

~~—(2) Claim—A demand for damages by the contractor based upon the unit of state government's alleged breach of the contract.~~

~~—(3) Contract—A written contract between a unit of state government 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 a unit of state government; or~~

~~—(B) to perform a project as defined by Government Code, §2166.001.~~

~~—(4) Contractor—Independent contractor who has entered into a contract directly with a unit of state government. 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 a unit of state government; or~~
- ~~—(C) A student at an institution of higher education.~~
- ~~—(5) Counterclaim—A demand by the unit of state government based upon the contractor's claim.~~
- ~~—(6) Day—A calendar day. If an act is required to occur on a day falling on a Saturday, Sunday, or holiday, the first working day which is not one of these days should be counted as the required day for purpose of this act.~~
- ~~—(7) Event—An act or omission or a series of acts or omissions giving rise to a claim.~~
- ~~—(8) Goods—Supplies, materials or equipment.~~
- ~~—(9) Parties—The contractor and unit of state government that have entered into a contract in connection with which a claim of breach of contract has been filed under this subchapter.~~
- ~~—(10) Project—As defined in 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 a unit of state government.~~
- ~~—(12) Unit of state government or unit—The state or an agency, department, commission, bureau, board, office, council, court, or other entity that is in any branch of state government and that is created by the Constitution or statute of this state, including a university system or institution of higher education. The term does not include a county, municipality, court of a county or municipality, special purpose district, or other political subdivision of this state.~~

~~§417.904. Prerequisites to Suit.~~

~~The procedures contained in this subchapter are exclusive and required prerequisites to suit under the Civil Practice and Remedies Code, Chapter 107, and the Government Code, Chapter 2260.~~

~~§417.905. Sovereign Immunity.~~

~~This subchapter does not waive a unit of state government's sovereign immunity to suit or liability.~~

~~§417.906. Notice of Claim of Breach of Contract.~~

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

~~(b) The notice of claim 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 unit of state government designated in the contract to receive a notice of claim of breach of contract under the Government Code, Chapter 2260; if no person is designated in the contract, the notice shall be delivered to the unit's chief administrative officer, 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.~~
- ~~(c) In addition to the mandatory contents of the notice of claim as required by subsection (b) of this section, the contractor may submit supporting documentation or other tangible evidence to facilitate the unit's evaluation of the contractor's claim.~~
- ~~(d) 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.~~

~~§417.907. Agency Counterclaim.~~

- ~~(a) A unit of state government asserting a counterclaim under the Government Code, Chapter 2260, shall file notice of the counterclaim as provided by this section.~~
- ~~(b) The notice of counterclaim 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.~~~~~~
- ~~(c) In addition to the mandatory contents of the notice of counterclaim required by subsection (b) of this section, the unit may submit supporting documentation or other tangible evidence to facilitate the contractor's evaluation of the unit's counterclaim.~~
- ~~(d) The notice of counterclaim shall be delivered to the contractor no later than 90 days after the unit of state government's receipt of the contractor's notice of claim.~~
- ~~(e) Nothing herein precludes the unit of state government from initiating a lawsuit for damages against the contractor in a court of competent jurisdiction.~~

~~§417.908. 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 unit and outside consultants it utilized in preparing its 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 unit and documents created by the unit 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 unit of state government may seek additional information directly from third parties, including, without limitation, the unit'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 section and claimed to be confidential by the contractor shall be handled pursuant to the requirements of the Public Information Act.~~

~~§417.909. Duty to Negotiate.~~

~~The parties shall negotiate in accordance with the timetable set forth in §417.910 of this title (relating to Timetable) to attempt to resolve all claims and counterclaims. No party is obligated to settle with the other party as a result of the negotiation.~~

~~§417.910. Timetable.~~

~~(a) Following receipt of a contractor's notice of claim, the chief administrative officer of the unit of state government or other designated representative shall review the contractor's claim(s) and the unit'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 unit of state government receives the contractor's notice of claim.~~

~~(c) The unit of state government 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 unit 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 unit of state government 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 unit of state government 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 §417.915 of this title (relating to Request for Contested Case~~

Hearing) after the 270th day after the unit 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 unit of state government 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 Division 3 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.

~~§417.911. Conduct of Negotiation.~~

(a) ~~Negotiation is a consensual bargaining process in which the parties attempt to resolve a claim and counterclaim. A negotiation under this division 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, by correspondence, by video conference, or by 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 Division 3 of this subchapter. Parties may choose an assisted negotiation process other than mediation.~~

(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 section and claimed to be confidential by the contractor shall be handled pursuant to the requirements of the Public Information Act.~~

~~§417.912. Settlement Approval Procedures.~~

~~The parties' settlement approval procedures shall be disclosed prior to, or at the beginning of, negotiations. To the extent possible, the parties shall select negotiators 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.~~

~~§417.913. Settlement Agreement.~~

(a) ~~A settlement agreement may resolve an entire claim or any designated and severable portion of a claim.~~

(b) ~~To be enforceable, a settlement agreement must be in writing and signed by representatives of the contractor and the unit of state government who have authority to bind each respective party.~~

(c) ~~A partial settlement does not waive a parties' rights under the Government Code, Chapter 2260, as to the parts of the claims or counterclaims that are not resolved.~~

~~§417.914. Costs of Negotiation.~~

Unless the parties agree otherwise, each party shall be responsible for its own costs incurred in connection with a negotiation, including, without limitation, the costs of attorney's fees, consultant's fees and expert's fees.

~~§417.915. 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 process in accordance with this subchapter on or before the 270th day after the unit receives the notice of claim, or after the expiration of any extension agreed to by the parties pursuant to §417.910(f) of this title (relating to Timetable), the contractor may file a request with the unit of state government 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 unit of state government 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 §417.910(f) of this title (relating to Timetable).~~

~~(c) The unit of state government 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 unit of state government 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.~~

~~§417.916. Mediation Timetable.~~

~~(a) The contractor and unit of state government may agree to mediate the dispute at any time before the 270th day after the unit of state government receives a notice of claim of breach of contract, or before the expiration of any extension agreed to by the parties in writing.~~

~~(b) A contractor and unit of state government 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.~~

~~§417.917. Conduct of Mediation.~~

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

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

~~(c) 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.~~

~~§417.918. 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 should 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 Section 154.052, Civil Practice and Remedies Code, private mediators, SOAH, the Center for Public Policy Dispute Resolution at The University of Texas School of Law, an alternative dispute resolution system created under Chapter 152, Civil Practice and Remedies Code, 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 subsection §417.919 of this title (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 governmental unit or contracting entity.~~

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

~~§417.919. 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.~~

~~§417.920. Confidentiality of Mediation and Final Settlement Agreement.~~

~~(a) A mediation conducted under this division is confidential in accordance with Government Code, §2009.054.~~

~~(b) The confidentiality of a final settlement agreement to which a unit of state government is a signatory that is reached as a result of the mediation is governed by Government Code, Chapter 552.~~

~~§417.921. Costs of Mediation.~~

~~Unless the contractor and unit of state government agree otherwise, each party shall be responsible for its own costs incurred in connection with the mediation, 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.

~~§417.922. Settlement Approval Procedures.~~

~~The parties' settlement approval procedures shall be disclosed by the parties prior to the mediation. To the extent possible, the parties shall select 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.~~

~~§417.923. Initial Settlement Agreement.~~

~~Any settlement agreement reached during the mediation shall be signed by the representatives of the contractor and the unit of state government, and shall describe any procedures required to be followed by the parties in connection with final approval of the agreement.~~

~~§417.924. Final Settlement Agreement.~~

~~(a) A final settlement agreement reached during, or as a result of mediation, 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 unit of state government who have authority to bind each respective party.~~

~~(b) 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.~~

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

~~§417.925. Referral to the State Office of Administrative Hearings.~~

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

~~§441.201. Notice of Claim.~~

~~(a) For purposes of this Subchapter, the term contractor shall also have the meaning given that term in TEX. GOV'T CODE ANN. ch. 2260 (Vernon 2000 & Supp. 2004).~~

~~(b) To file a claim of breach of contract under TEX. GOV'T CODE ANN. ch. 2260 (Vernon 2000), the contractor must deliver written notice of the claim to the Commission's executive director.~~

~~(c) The notice must be signed by the contractor's authorized representative and delivered by hand, certified mail return receipt requested, or other verifiable delivery service.~~

~~(d) The claim must specifically describe:~~

~~—(1) the nature of the alleged breach of contract, including the date of the event which forms the basis of the claim and the contract provision(s) breached;~~

~~—(2) the damages claimed, including the amount and the method used to calculate them; and~~

~~—(3) the legal basis for filing the claim, including the relationship between the alleged breach and the damages claimed.~~

~~(e) The contractor must submit supporting documentation with the notice of claim.~~

~~(f) The notice must be delivered no later than 180 days after the date of the event that forms the basis of the claim.~~

~~(g) Any amount(s) owed by the contractor shall be deducted from the total damages claimed. This includes amounts owed for work not performed or work not performed in substantial compliance with the terms of the contract. The total amount of damages (after deduction of amount owed by contractor) may not exceed the contracted amount or include consequential or similar damages, exemplary damages, any damages based on an unjust enrichment theory, attorney's fees or home office overhead.~~

~~§441.202. Agency Counterclaim.~~

~~(a) The Commission may file a counterclaim of breach of contract.~~

~~(b) Written notice of counterclaim must be delivered to the authorized representative of the contractor who signed the notice of claim of breach of contract.~~

~~(c) The notice must be delivered by hand, certified mail return receipt requested, or other verifiable delivery service.~~

~~(d) The notice must specifically describe:~~

~~–(1) the nature of the counterclaim;~~

~~–(2) the damages or offsets, including the amount and the method used to calculate them; and~~

~~–(3) the legal theory supporting the counterclaim.~~

~~(e) The notice of counterclaim must be delivered to the contractor no later than 90 calendar days after receipt of notice of the claim.~~

~~§441.203. Timetable for Negotiations and Contested Case Hearings.~~

~~(a) The Commission's executive director must examine the contractor's claim and the Commission's counterclaim, if any, and initiate negotiations.~~

~~(b) Except as provided in subsection (c) of this section, negotiations shall begin no more than 60 calendar days following the latest of:~~

~~–(1) the date of termination of the contract;~~

~~–(2) the completion date in the original contract; or~~

~~–(3) the date the notice of claim of breach of contract is received by the Commission.~~

~~(c) The Commission may delay the negotiations until the 181st calendar day after the date of the event giving rise to the claim of breach of contract. The Commission shall give the contractor written notice of the delay and notify the contractor when it is ready to begin negotiations.~~

~~(d) The parties must complete the negotiations as a prerequisite to a contested case hearing no later than 270 days after the Commission receives the notice of claim of breach of contract. The negotiation period may be extended through a written agreement signed by the authorized representatives of each party.~~

~~(e) The parties may agree to mediate the dispute at any time before the 270th day after the Commission receives the notice of claim of breach of contract, or before the expiration of any extension agreed to in writing by the parties.~~

~~(f) If negotiations fail to resolve the dispute, the case may be submitted to the State Office of Administrative Hearings (SOAH).~~

~~–(1) The contractor may file a request for contested case hearing with the Commission if a complete settlement agreement has not been reached 270 calendar days after the date the claim is delivered to the Commission, or after the expiration of any extension agreed to in writing by the parties.~~

~~–(2) The parties may agree to submit the case to SOAH before the 270th day if they have reached a partial settlement or if an impasse has been reached in the negotiations and proceeding to a contested case hearing would serve the interests of justice.~~

~~–(3) The parties may continue to negotiate or mediate after a request for contested case hearing is referred to the SOAH.~~

~~§441.204. Conduct of Negotiations.~~

~~(a) Any limitations on the settlement authority of the representatives participating in the negotiations must be disclosed by the parties as soon as possible. To the extent possible, the parties shall select negotiators who are knowledgeable about the dispute and who are in a position to reach agreement or can credibly recommend approval of an agreement.~~

~~(b) Negotiation may be conducted by any method, technique, or procedure authorized under the contract or agreed upon by the parties. The contractor and the Commission may conduct negotiations with the assistance of one or more neutral third parties.~~

~~(c) The parties may choose to mediate the dispute according to §141.205 of this title (relating to Mediation).~~

~~(d) To facilitate meaningful negotiation, the parties must exchange relevant documentation that supports their claims, defenses, counterclaims or positions.~~

~~(e) Any settlement reached during the negotiation must be put in writing and signed by representatives of the contractor and the Commission. The agreement must describe any procedures that must be followed to secure final approval.~~

~~(f) The final settlement must be documented in writing and signed by representatives of the contractor and the Commission with authority to bind the respective party. If the settlement does not resolve all issues raised by the claim and counterclaim, the agreement must specifically identify the issues that are not resolved.~~

~~(g) Unless the contractor and the Commission agree otherwise, each party shall be responsible for its own costs.~~

~~§441.205. Mediation.~~

~~(a) The contractor and the Commission may agree to mediate a claim through an impartial third party. Mediation is a forum in which an impartial person facilitates communication between parties to promote reconciliation, settlement, or understanding, but does not impose his own judgment on the issues.~~

~~(b) The mediation shall be governed by the provisions of the Governmental Dispute Resolution Act, TEX. GOV'T CODE ANN. ch. 2009 (Vernon 2003 & Supp. 2004).~~

~~(c) The Commission and the contractor shall select an impartial third party that is acceptable to both. The impartial third party must:~~

~~–(1) possess the qualifications required under TEX. CIV. PRAC. & REM. CODE ANN.~~

~~§154.052 (Vernon Supp. 2004);~~

~~–(2) be subject to the standards and duties prescribed by TEX. CIV. PRAC. & REM. CODE ANN. §154.053 (Vernon 1997); and~~

~~–(3) have the qualified immunity prescribed by TEX. CIV. PRAC. & REM. CODE ANN. §154.055 (Vernon 1997), if applicable.~~

~~(d) A mediation conducted under this section is confidential in accordance with TEX. GOV'T CODE ANN. §2009.054 (Vernon 2000).~~

~~(e) A final settlement agreement signed by the Commission under this section is subject to or excepted from required disclosure in accordance with TEX. GOV'T CODE ANN. ch. 552 (Vernon 2000 & Supp. 2003).~~

~~(f) Unless the contractor and the Commission agree otherwise, the costs of the mediator shall be divided equally between the parties and each party shall be responsible for its own costs.~~

~~(g) Any limitations on the settlement authority of the representatives participating in the negotiations must be disclosed by the parties before mediation begins.~~

~~(h) Any settlement reached during the mediation must be put in writing and signed by representatives of the contractor and the Commission. The agreement must describe any procedures that must be followed to secure final approval.~~

~~(i) The final settlement must be documented in writing and signed by representatives of the contractor and the Commission with authority to bind the respective party. If the settlement does not resolve all issues raised by the claim and counterclaim, the agreement must specifically identify the issues that are not resolved.~~

~~(j) If mediation does not resolve the claim to the satisfaction of the contractor, the contractor may file a request that the claim be referred to SOAH pursuant to TEX. GOV'T CODE ANN. ch. 2260 (Vernon 2000 & Supp. 2004). The request for referral must be filed according to the timetable described in §141.203 of this title (relating to Timetables for Negotiations and Contested Case Hearings).~~

Proposed New Rules

Regular Print = Proposed new language.

§4.11. Purpose.

This subchapter governs negotiation and mediation of certain contract claims against the Department of State Health Services (department), pursuant to Government Code, Chapter 2260.

§4.12. Applicability.

(a) This subchapter applies to the Department of State Health Services (department).

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

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

(d) This subchapter does not apply to contracts:

(1) between the department and the federal government or its agencies, another state, or another nation;

(2) between the department and one or more units of state government;

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

(4) within the exclusive jurisdiction of federal courts or regulatory bodies.

§4.13. Definitions.

The following words and terms, when used in this subchapter, have the following meaning, unless the context clearly indicates otherwise.

(1) Claim--A demand for damages by the contractor based upon the Department of State Health Services' (department) alleged breach of the contract.

(2) Commissioner--The commissioner of the department.

(3) Contract--A written agreement between the department and a contractor by the terms of which the contractor agrees to provide goods or services, by sale or lease, to or for the department.

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

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

(B) an employee of the department.

(5) Counterclaim--A demand by the department based upon the contractor's claim.

(6) Day--A calendar day. If an act is required to occur on a day falling on a Saturday, Sunday, or holiday, the first working day that is not one of these days should be counted as the required day for purpose of this subchapter.

(7) Event--An act or omission, or a series of acts or omissions, giving rise to a claim.

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

(9) 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, but does not impose his judgment on the issues.

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

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

(12) 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 department.

(13) Unit of state government--The state or an agency, department, commission, bureau, board, office, council, court, or other entity that is in any branch of state government and that is created by the Constitution or statute of this state, including a university system or institution of higher education. The term does not include a county, municipality, court of a county or municipality, special purpose district, or other political subdivision of this state.

§4.14. Prerequisites to Suit.

The procedures contained in this subchapter are exclusive and required prerequisites to suit under Civil Practice and Remedies Code, Chapter 107, and Government Code, Chapter 2260.

§4.15. Notice of Claim of Breach of Contract.

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

(b) The notice of claim 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 commissioner or other officer of the Department of State Health Services designated in the contract to receive a notice of claim of breach of contract under Government Code, Chapter 2260; if no person is designated in the contract, the notice shall be delivered to the Commissioner, and

(3) state the following 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.

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

(d) 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.

§4.16. Agency Counterclaim.

(a) To assert a counterclaim under Government Code, Chapter 2260, the Department of State Health Services (department) shall file notice of the counterclaim as provided by this section.

(b) The notice of counterclaim 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 the following 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.

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

(d) The notice of counterclaim shall be delivered to the contractor no later than 60 days after the department's receipt of the contractor's notice of claim.

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

§4.17. 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, the following:

(1) accounting records;

(2) correspondence, including, without limitation, correspondence between the Department of State Health Services (department) and outside consultants it utilized in preparing its 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 department and documents created by the department 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 department may seek additional information directly from third parties, including, without limitation, the department'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 section and claimed to be confidential by the contractor shall be handled pursuant to the requirements of the Public Information Act, Government Code, Chapter 552.

§4.18. Timetable for Negotiation and Mediation.

(a) Following receipt of a contractor's notice of claim, the commissioner or other designated representative shall review the contractor's claim(s) and the Department of State Health Services' (department) counterclaim(s), if any, and initiate negotiations with the contractor to attempt to resolve the claim(s) and counterclaim(s).

(b) The parties shall begin negotiations within a reasonable period of time, not to exceed 120 days following the date the department receives the contractor's notice of claim.

(c) The parties may conduct negotiations according to an agreed schedule as long as they begin negotiations no later than 120 days following the date the department receives contractor's notice of claim.

(d) Subject to subsection (e) 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 department receives the contractor's notice of claim.

(e) The parties may agree in writing to extend the time for negotiations on or before the 270th day after the department 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.

(f) The contractor may request a contested case hearing before the State Office of Administrative Hearings (SOAH) pursuant to §4.23 of this title (relating to Request for Contested Case Hearing) on or before the 270th day after the department receives the contractor's notice of claim, or the expiration of any extension agreed to under subsection (d) of this section.

(g) The parties may agree to mediate the dispute at any time before the 120th day after the department receives the contractor's notice of claim or before the expiration of any extension agreed to by the parties pursuant to subsection (e) of this section. A contractor and the department may mediate the dispute even after the case has been referred to SOAH for a contested case. Any mediation shall be governed by this subchapter.

(h) Nothing in this section is intended to prevent the parties from agreeing to commence negotiations earlier than the deadline established in subsection (b) of this section, or from

continuing or resuming negotiations after the contractor requests a contested case hearing before SOAH.

§4.19. 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, by correspondence, by video conference, or by any other method that permits that 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 impartial third parties. If the parties choose to mediate their dispute, the mediation shall be conducted in accordance with this subchapter. Parties may choose an assisted negotiation process other than mediation.

(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 section and claimed to be confidential by the contractor shall be handled pursuant to the requirements of the Public Information Act, Government Code, Chapter 552.

§4.20. Settlement Approval Procedures for Negotiation.

The parties' settlement approval procedures shall be disclosed prior to, or at the beginning of, negotiations. To the extent possible, the parties shall select negotiators 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.

§4.21. Negotiated Settlement Agreement.

(a) A settlement agreement may resolve an entire claim or any designated and severable portion of a claim.

(b) To be enforceable, a settlement agreement must be in writing and signed by representatives of the contractor and the Department of State Health Services who have authority to bind each respective party.

(c) A partial settlement does not waive the parties' rights under Government Code, Chapter 2260, as to the parts of the claims or counterclaims that are not resolved.

§4.22. Costs of Negotiation.

Unless the parties agree otherwise, each party shall be responsible for its own costs incurred in connection with a negotiation, including, without limitation, the costs of attorney's fees, consultant's fees, and expert's fees.

§4.23. 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 process in accordance with this subchapter on or before the 270th day after the Department of State Health Services (department) receives the notice of claim, or after the expiration of any extension agreed to by the parties pursuant to §4.18(d) of this title (relating to Timetable for Negotiation and Mediation), the contractor may file a request with the department for a contested case hearing before the State Office of Administrative Hearings (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 commissioner 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 §4.18(e) of this title.

(c) The department 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 department 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.

§4.24. Mediation.

(a) The contractor and the Department of State Health Services (department) may agree to mediate a claim through an impartial third party by including a contractual provision to do so at the time of entering into a contract, or, absent a contractual provision, by mutual agreement.

(b) The mediation shall be governed by the provisions of the Governmental Dispute Resolution Act, Government Code, Chapter 2009.

(c) The department and the contractor shall select an impartial third party that is acceptable to both. The impartial third party must:

(1) possess the qualifications required under Civil Practice and Remedies Code, §154.052;

(2) be subject to the standards and duties prescribed by Civil Practice and Remedies Code, §154.053; and

(3) have the qualified immunity prescribed by Civil Practice and Remedies Code, §154.055, if applicable.

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

(e) A final settlement agreement signed by the department under this section is subject to or exempted from required disclosure in accordance with the Public Information Act, Government Code, Chapter 552.

(f) Unless the contractor and the department agree otherwise, the costs of the mediator shall be divided equally between the parties, and each party shall be responsible for its own costs, including costs of document reproduction requested by such party, attorney's fees, and consultant's or expert's fees.

(g) 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. Any limitations on the settlement authority of the representatives participating in the negotiations must be disclosed by the parties before mediation begins.

(h) Any settlement reached during the mediation must be put in writing and signed by representatives of the contractor and the department. The agreement must describe any procedures that must be followed to secure final approval.

(i) The final settlement agreement must be documented in writing and signed by representatives of the contractor and the department with authority to bind the respective party. If the settlement does not resolve all issues raised by the claim and counterclaim, the agreement must specifically identify the issues that are not resolved.

(j) If mediation does not resolve one or more of the claims to the satisfaction of the contractor, the contractor may file a request that the claim(s) be referred to the State Office of Administrative Hearings pursuant to Government Code, Chapter 2260, as to the claim(s) that is not resolved. The request for referral must be filed according to the timetable described in §4.18 of this title (relating to Timetable for Negotiation and Mediation).