

**RULES FOR ADMINISTRATIVE SERVICES**  
*Administrative Rules of the Texas Department of Licensing and Regulation*  
*16 Texas Administrative Code, Chapter 55*

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## Subchapter A. General Provisions.

### 55.1. **Authority.** *(New section adopted effective July 1, 2009, 34 TexReg 4323)*

These rules are promulgated under the authority of Texas Occupations Code, Chapter 51. These rules apply except in the event of a conflict with other statutory provisions related to specific programs regulated by the Commission and the Department.

### 55.10. **Definitions.** *(New section adopted effective July 1, 2009, 34 TexReg 4323)*

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

- (1) **ALJ**--Administrative law judge employed by the State Office of Administrative Hearings.
- (2) **Alternative Dispute Resolution (ADR) Administrator**--The trained coordinator designated by the Commission:
  - (A) to coordinate and oversee the negotiated rulemaking and ADR procedures used by the Department;
  - (B) to serve as a resource for any training needed to implement the negotiated rulemaking and ADR procedures; and
  - (C) to collect data concerning the effectiveness of the negotiated rulemaking and ADR procedures. The ADR Administrator also may conduct ADR proceedings.
- (3) **Alternative Dispute Resolution (ADR) Procedures**--Alternative processes to judicial forums or administrative agency contested case proceedings for the voluntary settlement of contested matters through the facilitation of an impartial third-party.
- (4) **Claim**--A demand for damages by the contractor based upon the Department's alleged breach of the contract.
- (5) **Commission**--Texas Commission of Licensing and Regulation.
- (6) **Contested case or proceeding**--A proceeding in which the legal rights, duties, or privileges of a party are to be determined by the Commission and/or Executive Director after an opportunity for adjudicative hearing.
- (7) **Counterclaim**--A demand by the Department relating to the contractor's claim.
- (8) **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 chapter.
- (9) **Department**--Texas Department of Licensing and Regulation.
- (10) **General Counsel**--The attorney designated by the Texas Department of Licensing and Regulation, who provides legal representation to the Commission and the Department.
- (11) **Interested parties**--All persons who have timely submitted bids or proposals to provide goods or services pursuant to a contract with the Department or who have requested in writing to the Department to be notified of a vendor protest.
- (12) **Mediation**--A confidential, informal dispute resolution process in which an impartial person, the mediator, facilitates communication between or among the parties to promote reconciliation, settlement, or understanding among them.
- (13) **Mediator**--The person who presides over a mediation proceeding. The mediator shall encourage and assist the parties in reaching a settlement but may not compel or coerce the parties to enter into a settlement agreement. The mediator may be a Department employee, an employee from another Texas state agency, or a person in the mediation profession who is not a Texas state employee ("private mediator").
- (14) **Parties**--The contractor and the Department, having entered into a contract in connection with which a claim of breach of contract has been filed under Subchapter D.

- (15) **Person**--Any individual, partnership, corporation, or other legal entity, including a state agency or governmental subdivision.
- (16) **Protesting Party**--Any actual or prospective bidder, offeror, proposer, or contractor who submits a protest to the Department under Subchapter C.
- (17) **Purchasing Officer**--A Departmental employee who has received certification as a Texas Public Purchaser and who is responsible for assisting with Departmental purchases, and who has been designated the Purchasing Officer for the purchase in question.

#### **Subchapter B. Procurements.**

**55.20. Historically Underutilized Businesses Program.** *(New section adopted effective July 1, 2009, 34 TexReg 4323)*

Pursuant to Texas Government Code, Chapter 2161, §2161.003, the Commission adopts by reference the rules of the Texas Comptroller of Public Accounts in 34 TAC, Part 1, Chapter 20, Subchapter B.

**55.30. Bid Opening and Tabulation.** *(New section adopted effective July 1, 2009, 34 TexReg 4323)*

- (a) The Commission adopts by reference the rules of the Texas Comptroller of Public Accounts in 34 TAC §20.35.
- (b) The adoption of this rule is required by Texas Government Code, §2156.005(d).

#### **Subchapter C. Vendor Protests.**

**55.40. Protest Procedures.** *(New section effective July 1, 2009, 34 TexReg 4323)*

- (a) A protesting party who wishes to submit a grievance regarding the solicitation, evaluation, or award of a contract may formally protest to the Purchasing Officer. Such protests must be in writing and received by the Purchasing Officer within 10 business days after the protesting party knows, or should have known, of the occurrence of the action which is protested. Filed protests must conform to the requirements of this subsection and subsection (c), and shall be resolved in accordance with the procedure set forth in subsections (d) - (j). Copies of the protest must be mailed, hand-delivered or sent by facsimile transmission to the Purchasing Officer and other interested parties.
- (b) In the event of a timely protest under this section, the Department shall not proceed further with the solicitation or with the award of the contract unless the Executive Director, after consultation with the Purchasing Officer and the General Counsel, makes a written determination that the award of the contract without delay is necessary to protect the best interests of the Department and the State.
- (c) Formal protest must be sworn and contain:
  - (1) a specific identification of the statutory or regulatory provision(s) that the action complained of is alleged to have violated;
  - (2) a specific description of each act alleged to have violated the statutory or regulatory provision(s) identified in paragraph (1);
  - (3) a precise statement of the relevant facts;
  - (4) identification of the issue or issues the protesting party argues must be resolved;
  - (5) argument and authorities the protesting party offers in support of the protest; and
  - (6) a statement that copies of the protest have been mailed, hand-delivered or sent by facsimile transmission to the Department and all other identifiable interested parties.
- (d) The Purchasing Officer shall have the authority, prior to an appeal to the Executive Director to settle and resolve the dispute concerning the solicitation or award of a contract. The Purchasing Officer may solicit written responses to the protest from interested parties.
- (e) If the protest is not resolved by mutual agreement, the Purchasing Officer may proceed, after consultation with the General

Counsel, with the issuance of a written determination on the protest as follows:

- (1) The Purchasing Officer may determine that no violation of rules or statutes has occurred and shall so inform the protesting party, the Executive Director, and any other interested parties by letter that includes the reasons for the determination.
  - (2) If the Purchasing Officer determines that a violation of the rules or statutes may have occurred in a case where a contract has not been awarded, the Purchasing Officer shall so inform the protesting party, the Executive Director and other interested parties by letter that includes the reasons for the determination and the appropriate remedial action.
  - (3) If the Purchasing Officer determines that a violation of the rules or statutes may have occurred in a case where a contract has been awarded, the Purchasing Officer shall so inform the protesting party, the Executive Director and other interested parties by letter that includes the reasons for the determination, which may include a declaration that the contract is void.
- (f) The protesting party may appeal a determination of a protest by the Purchasing Officer to the Executive Director. An appeal of the Purchasing Officer's determination must be in writing and must be received in the Department's office no later than 10 business days after the date of the Purchasing Officer's determination. The appeal shall be limited to a review of the Purchasing Officer's determination. Copies of the appeal must be mailed or delivered by the protesting party to the Purchasing Officer and other interested parties and must contain a certified statement that such copies have been provided.
- (g) The Executive Director may confer with the General Counsel in a review of the matter appealed. The Executive Director has the discretion to consider documentation timely submitted by Departmental staff and interested parties. The Executive Director also has the discretion to refer the matter to the Commission for consideration at a regularly scheduled open meeting or may go forward with issuing a written decision on the protest.
- (h) If a protest is appealed to the Executive Director under subsection (f) and thereafter is referred to the Commission by the Executive Director under subsection (g), specific requirements apply as follows:
- (1) The Executive Director shall deliver copies of the appeal and responses of interested parties, if any, to the Commission.
  - (2) The Commission may consider documents that Departmental staff or interested parties have submitted and may confer with the General Counsel in their review of the appeal.
  - (3) The Commission's determination of the appeal shall be made on the record and reflected in the minutes of the open meeting, and shall be final.
- (i) A protest or appeal that is not filed timely will not be considered unless good cause for the delay is shown or unless the Executive Director determines that a protest or appeal raises issues significant to procurement practices or procedures.
- (j) A decision issued either by the Commission in open meeting, or in writing by the Executive Director, shall be the final administrative action of the Department.

#### **Subchapter D. Negotiation of Certain Contract Disputes.**

**55.50. Applicability.** *(New section effective July 1, 2009, 34 TexReg 4323)*

- (a) In addition to the words and terms defined in §55.10, other words and terms, when used in this subchapter, shall have the meaning assigned by Texas Government Code, Chapter 2260, unless the context clearly indicates otherwise.
- (b) This subchapter applies to claims for breach of contract asserted by a contractor against the Department under Texas Government Code, Chapter 2260.
- (c) 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 another unit of state government;
  - (3) between the Department and a local governmental body, or a political subdivision of another state;

- (4) between a subcontractor and a contractor;
- (5) within the exclusive jurisdiction of state or local regulatory bodies;
- (6) within the exclusive jurisdiction of federal courts or regulatory bodies; or
- (7) that are funded solely by federal grant funds.

**55.51. Prerequisites to Suit.** *(New section effective July 1, 2009, 34 TexReg 4323)*

The procedures contained in this subchapter and Subchapter E are exclusive and required prerequisites to suit against the Department under Texas Civil Practice & Remedies Code, Chapter 107 and Texas Government Code, Chapter 2260.

**55.52. Sovereign Immunity.** *(New section effective July 1, 2009, 34 TexReg 4323)*

This subchapter does not waive the Department's sovereign immunity to suit or liability.

**55.53. Notice of Claim for Breach of Contract.** *(New section effective July 1, 2009, 34 TexReg 4323)*

- (a) A contractor asserting a claim of breach of contract under Texas 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 Department officer designated in the contract to receive a notice of claim of breach of contract under Texas Government Code, Chapter 2260; if no person is designated in the contract, the notice shall be delivered to the Department; 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 relationship between the alleged breach and the damages claimed.
- (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.

**55.54. Department Counterclaim.** *(New section effective July 1, 2009, 34 TexReg 4323)*

- (a) If the Department asserts a counterclaim under Texas Government Code, Chapter 2260, the 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 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) 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.
  - (d) Nothing herein precludes the Department from initiating a lawsuit for damages against the contractor in a court of competent jurisdiction.

**55.55. Duty to Negotiate.** *(New section effective July 1, 2009, 34 TexReg 4323)*

The parties shall negotiate in accordance with the timetable set forth in §55.56 to attempt to resolve all claims and counterclaims filed under this subchapter. No party is obligated to settle with the other party as a result of the negotiation. The parties may agree to mediate a claim in accordance with Subchapter E.

**55.56. Timetable.** *(New section effective July 1, 2009, 34 TexReg 4323)*

- (a) Following receipt of a contractor's notice of claim, the Department or designated representative 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), the parties shall begin negotiations within a reasonable period of time, not to exceed 120 days after 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 the deadline set forth in subsection (b).
- (d) Subject to subsection (e), 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.
- (f) The contractor may request a contested case hearing before the State Office of Administrative Hearings (SOAH) pursuant to §55.61 after the 270th day after the Department receives the contractor's notice of claim, or the expiration of any extension agreed to under subsection (e).
- (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 and before the expiration of any extension agreed to by the parties pursuant to subsection (e). The mediation shall be governed by Subchapter E.
- (h) Nothing in this section is intended to prevent the parties from commencing negotiations earlier than the deadline established in subsection (b), or from continuing or resuming negotiations after the contractor requests a contested case hearing before SOAH.

**55.57. Conduct of Negotiation.** *(New section effective July 1, 2009, 34 TexReg 4323)*

- (a) A negotiation under this division may be conducted by any method, technique, or procedure authorized under the contract or agreed upon by the parties. The parties may conduct negotiations with the assistance of one or more neutral third parties. The parties may choose to mediate their dispute in accordance with Subchapter E.
- (b) To facilitate meaningful evaluation and negotiation of the claims and any counterclaims, the parties may exchange relevant documents that support their respective claims, defenses, counterclaims or positions.
- (c) The Department may also negotiate, mediate, or settle with a contractor concerning any assertion by a contractor which does not constitute either a notice of claim or a claim under this subchapter or Texas Government Code, Chapter 2260. Such actions by the Department do not constitute a waiver of sovereign immunity or of statutory or regulatory requirements for a notice of claim.

**55.58. Settlement Approval Procedures.** *(New section effective July 1, 2009, 34 TexReg 4323)*

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.

**55.59. Settlement Agreement.** *(New section effective July 1, 2009, 34 TexReg 4323)*

- (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 the Department, or the Department's authorized representative, and a representative of the contractor who has authority to bind the contractor.
- (c) A partial settlement does not waive a contractor's rights under Texas Government Code, Chapter 2260, as to the parts of the claim that are not resolved.

**55.60. Cost of Negotiation.** *(New section effective July 1, 2009, 34 TexReg 4323)*

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 attorneys' fees, consultant's fees and expert's fees.

**55.61. Contested Case Hearings for Contract Disputes.** *(New section effective July 1, 2009, 34 TexReg 4323)*

- (a) If a claim of breach of contract is not resolved in its entirety through negotiation or mediation in accordance with this subchapter or Subchapter E on or before the 270th day after the Department receives the notice of claim, or after the expiration of any extension agreed to by the parties pursuant to §55.56(e), the contractor may file a request with the Department for a contested case hearing before SOAH.
- (b) A request for a contested case hearing must state the legal and factual basis for the claim and must be delivered to the Department within 90 days after the 270th day or the expiration of any written extension agreed to pursuant to §55.56(e).
- (c) The Department shall forward the contractor's request for contested case hearing to the SOAH within a reasonable period of time, not to exceed thirty (30) days, after receipt of the request. Referral of a request for hearing to SOAH does not constitute waiver by the Department of statutory or regulatory requirements for the notice of claim, the claim, or the request for hearing.
- (d) The parties may agree to submit the case to the 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.
- (e) Contested case hearings shall be conducted in compliance with Texas Government Code, Chapter 2260, this subchapter, and the rules and procedures of the SOAH applicable to hearings on contract claims.
- (f) Provisions of Chapter 60 of this title, regarding requests for and conduct of contested case hearings, do not apply to hearings conducted under this subchapter.

**Subchapter E. Mediation of Certain Contract Disputes.**

**55.70. Applicability.** *(New section adopted effective July 1, 2009, 34 TexReg 4323)*

- (a) In addition to the words and terms defined in §55.10, other words and terms, when used in this subchapter, shall have the meaning assigned by Texas Government Code, Chapter 2260, unless the context clearly indicates otherwise.
- (b) This subchapter applies to claims for breach of contract asserted by a contractor against the Department under Texas Government Code, Chapter 2260.
- (c) 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 another unit of state government;

- (3) between the Department and a local governmental body, or a political subdivision of another state;
- (4) between a subcontractor and a contractor;
- (5) within the exclusive jurisdiction of state or local regulatory bodies;
- (6) within the exclusive jurisdiction of federal courts or regulatory bodies; or
- (7) that are funded solely by federal grant funds.

**55.71. Prerequisites to Suit.** *(New section adopted effective July 1, 2009, 34 TexReg 4323)*

The procedures contained in this subchapter and Subchapter D are exclusive and required prerequisites to suit against the Department under Texas Civil Practice & Remedies Code, Chapter 107 and Texas Government Code, Chapter 2260.

**55.72. Sovereign Immunity.** *(New section adopted effective July 1, 2009, 34 TexReg 4323)*

This subchapter does not waive the Department's sovereign immunity to suit or liability.

**55.73. Mediation.** *(New section adopted effective July 1, 2009, 34 TexReg 4323)*

The parties may agree to mediate, through an impartial third party who is acceptable to both parties, a claim filed under Subchapter D. The parties may be assisted in the mediation by legal counsel or other individual.

**55.74. Appointment of the Mediator.** *(New section adopted effective July 1, 2009, 34 TexReg 4323)*

- (a) For each claim referred for mediation, the ADR Administrator shall:
  - (1) preside over the mediation proceeding,
  - (2) assign a Departmental mediator,
  - (3) appoint a mediator from another state agency, or
  - (4) appoint a private mediator.
- (b) A private mediator may be hired provided that:
  - (1) the parties unanimously agree to use a private mediator;
  - (2) the parties unanimously agree to the selection of the person to serve as the private mediator; and
  - (3) the private mediator agrees to be subject to the direction of the ADR Administrator and to all time limits imposed by the ADR Administrator, statute or regulation.
- (c) If a private mediator or a mediator from another state agency is used, the costs for the services of the mediator shall be apportioned equally among the parties, unless otherwise agreed upon by the parties, and shall be paid directly to the mediator.
- (d) Unless the parties agree otherwise in writing, each party shall be responsible for its own costs incurred in connection with the mediation, including without limitation, costs of document reproduction, attorney's fees, consultant fees and expert fees.
- (e) The ADR Administrator may assign a substitute or additional mediator to a proceeding as the ADR Administrator deems necessary.

**55.75. Qualifications of the Mediator.** *(New section adopted effective July 1, 2009, 34 TexReg 4323)*

- (a) All mediators must have completed a minimum of 40 hours of Texas mediation training as prescribed under Texas Civil Practices and Remedies Code, Chapter 154.



- (b) All mediators shall subscribe to the ethical guidelines for mediators adopted by the ADR Section of the State Bar of Texas.

**55.76. Disqualifications of the Mediator.** *(New section adopted effective July 1, 2009, 34 TexReg 4323)*

- (a) If the mediator is a SOAH ALJ, that person will not also sit as the ALJ for the case if the claim goes to hearing.
- (b) If the mediator is an employee of the Department and the dispute does not settle, that mediator will not have any further contact or involvement concerning the claim.

**55.77. Qualified Immunity of the Mediator.** *(New section adopted effective July 1, 2009, 34 TexReg 4323)*

The mediator shall have the qualified immunity prescribed by the Texas Civil Practice and Remedies Code §154.055, if applicable.

**55.78. Confidentiality of Mediation and Final Settlement Agreement.** *(New section adopted effective July 1, 2009, 34 TexReg 4323)*

- (a) A mediation conducted under this division is confidential in accordance with Texas Government Code, §2009.054 and Texas Civil Practice and Remedies Code §154.053 and §154.073.
- (b) The confidentiality of a final settlement agreement, to which the Department is a signatory that is reached as a result of the mediation is governed by the Public Information Act, Texas Government Code, Chapter 552.

**55.79. Settlement Approval Procedures.** *(New section adopted effective July 1, 2009, 34 TexReg 4323)*

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.

**55.80. Initial Settlement Agreement.** *(New section adopted effective July 1, 2009, 34 TexReg 4323)*

Any settlement agreement reached during mediation shall be signed by representatives of the contractor and the Department, and shall describe any procedures that the parties must follow to obtain final and binding approval of the agreement.

**55.81. Final Settlement Agreement.** *(New section adopted effective July 1, 2009, 34 TexReg 4323)*

A final settlement agreement reached during or as a result of a mediation that resolves an entire claim or counterclaim, or any designated and severable portion of a claim or counterclaim, shall comply with §55.59.

**55.82. Referral to State Office of Administrative Hearings.** *(New section adopted effective July 1, 2009, 34 TexReg 4323)*

If mediation does not resolve the claim to the satisfaction of the contractor, the contractor may request that the claim be referred to SOAH in accordance with §55.61.