

THE TRAIL OF TEARS:
TXDOT CLAIMS AND PROCEDURES

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Matthew C. Ryan
Ryan M. Nord
ALLENSWORTH AND PORTER, L.L.P.
620 Congress Avenue, Suite 100
Austin, Texas 78701
(512) 708-1250

Presented by Matthew C. Ryan

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I. INTRODUCTION

The amount of construction work generated through the Texas Department of Transportation (“TxDOT”) each year is astounding. TxDOT will let at least \$5.2 billion of projects in its 2006 fiscal year, up from approximately \$4.5 billion in 2005.¹ The magnitude of this number becomes clearer when viewing the Engineering News Report magazine’s May 17, 2004 ranking of the top twenty transportation construction firms in the country, who *together* reported a total of \$17.8 billion in construction contract revenues.

The consistent growth of cities and commerce throughout this state has led to plans for a steady increase in transportation infrastructure construction, including a mammoth “Trans-Texas Corridor” that includes separate truck lanes, as well as freight and passenger rail.² All of this virtually guarantees that TxDOT projects will continue to be in high gear for the foreseeable future.

However, judging by the relatively miniscule number of claims heard at the State Office of Administrative Hearings (SOAH), the TxDOT contract dispute claims process would appear to be either incredibly efficient or heavily biased. The spreadsheet attached as Exhibit “A” is a redacted version of a document the authors received from TxDOT in response to an open records request that tracks claims against TxDOT that were argued at the SOAH level in recent years. As can be seen from the spreadsheet, despite the billions in allocated construction dollars, only two to twelve contractor disputes proceeded to the SOAH level each year. Most who have a familiarity with construction litigation will probably agree that this is atypical for the industry.

The construction-industry Golden Rule—the party with the gold makes the rules—certainly applies in its own way to TxDOT construction contracts and disputes arising out of them. In 1997, the Texas Legislature enacted Transportation Code § 201.112, which gives TxDOT the authority to adopt rules and procedures for the informal resolution of contract claims against TxDOT, provides for the right to a contested hearing if TxDOT and the contractor do not resolve the claim informally, and provides the right to judicial review of TxDOT’s final order following the contested case proceeding. The comments in section 201.112 state that it provides the exclusive legal remedy for resolution of contract disputes with TxDOT.

This paper will outline the claims procedure for disputes with TxDOT and focus on noteworthy contract provisions in TxDOT’s standard specifications, as well as several case studies, all in an effort to illustrate the potential net effect of the claims procedure, the consistently onerous contract terms, and the limited appeals process on the success and viability of claims against TxDOT. In particular, the paper will highlight the significant hurdles facing a contractor who seeks recovery from TxDOT, including:

¹ See “\$5.2 Billion in Spending – Texas Continues to Lead Nation in Highway Spending,” McGraw-Hill Construction Feature Story, January, 2006, accessible through the following URL: http://texas.construction.com/features/archive/0601_feature3.asp.

² For further detail, see <http://www.keeptexasmoving.com>, the website dedicated to the Trans-Texas Corridor project.

- (1) the difficult burden of proof (and procedural surprises) at the SOAH level;
- (2) the lack of authority of the administrative law judge to render a final and binding opinion (the ALJ issues a “Proposal for Decision” that is submitted to TxDOT’s Executive Director for adoption or rejection);
- (3) the exceedingly limited review of the Executive Director’s adoption or rejection of the ALJ’s Proposal for Decision;
- (4) the inability of the state district court to reverse and render (its only options are to reverse and remand or adopt the Executive Director’s decision); and
- (5) the thoroughly burdensome onerous contract provisions frequently seen in TxDOT contracts.

Despite these obstacles, there are certainly many contractors who have received fair treatment in and emerged successfully from the contested case process with TxDOT. However, understanding the rules of the game from the outset is essential to shaping realistic expectations and a productive approach to the claims process.

II. CONTRACT CLAIMS PROCEDURE

As indicated above, the contract claims procedure has a number of potential traps and biases that, unsurprisingly, tend to lean in TxDOT’s favor. Generally speaking, however, the contractor who seeks additional money or time for its work—or who otherwise cannot reach an agreement with TxDOT’s representatives in the project’s local district office—submits a claim to TxDOT’s Contract Claims Committee. The Contract Claims Committee then issues a proposed disposition.

If the contractor is not satisfied with the proposal, it may petition TxDOT’s Executive Director for the opportunity to have the dispute heard by the State Office of Administrative Hearings. The burden of proof on the contractor at the SOAH level is onerous indeed—the ALJ must affirm the Contract Claims Committee’s decision unless the ALJ finds that the substantial rights of the contractor were prejudiced by a decision that is based on error of law, unlawful procedure, not reasonably supported by evidence, or was arbitrary or capricious. In addition, the ALJ does not have authority to enter a final, binding opinion. Instead, the ALJ issues a “Proposal for Decision,” or PFD, which is submitted to TxDOT’s Executive Director for adoption or rejection.

If the contractor disputes the Executive Director’s disposition of the PFD, it may file an appeal with a state district court. The standard of review on appeal is the Substantial Evidence Rule standard, a statutorily based standard that makes it exceedingly difficult to overturn the Executive Director’s decision. Even if a contractor overcomes this standard of review, the district court does not have authority to reverse and render a decision on the merits. Rather, the court’s only option is to reverse and remand to the Executive Director.

A. Statutes Governing Claims Against TxDOT

Unlike many claims against political subdivisions of the State of Texas, contractor claims against TxDOT are not governed by Texas Government Code chapter 2260. Instead, Texas Transportation Code § 201.112 provides “the exclusive remedy at law for the resolution of a claim governed by that section,³ including claims arising out of a contract described by . . . Chapter 223.” Texas Transportation Code chapter 223 governs highway construction projects, and therefore contractors on highway construction projects must follow the claims procedure set out in the rules adopted by TxDOT’s Transportation Commission. These rules are located in Texas Administrative Code title 43. The sections of title 43 that are relevant to construction contracts include §§ 1.21-1.33 and 9.2, which are addressed in detail below.

B. Resolution of Claim at District Level

TxDOT’s standard specifications state that the contractor should attempt to resolve its claim with the project engineer at the district level.⁴ The text of this particular provision includes specific requirements, and it ultimately appears to be merely a recital of TxDOT’s preferred dispute resolution approach, rather than a condition precedent to pursuit of the other remedies set out in this statute.

C. TxDOT Contract Claims Committee

43 Texas Administrative Code § 9.2(b)(1) provides for a Contract Claims Committee at TxDOT, composed of members appointed by the department’s Executive Director, to review contractors’ claims.⁵ The Contract Claims Committee may include district engineers on a rotating basis, with a preference for engineers from districts that do not have a current contractual relationship with the contractor involved in the claim.⁶

The contractor is required to file a “detailed report and contract claim request” with the department office director⁷ under whose administration the contract was performed, the department’s Construction Division, or the Contract Claims Committee.⁸ “Documents filed with the office director *or* the Construction Division will be transmitted to the [Contract Claims] committee.”⁹ It is clear that it is not the office director, but the Contract Claims Committee, that decides contract disputes. The office director merely forwards the documents to the Contract Claims Committee if they are filed with the office director, rather than directly with the Contract Claims Committee.

³ TEX. TRANSP. CODE § 201.112, cmt.; *Tex. Dep’t of Transp. v. Jones Bros. Contracting*, 92 S.W.2d 477, 484 (Tex. 2002).

⁴ TxDOT Standard Specifications for Construction and Maintenance of Highways, Streets, and Bridges, § 4.4(B).

⁵ 43 TEX. ADMIN. CODE § 1.22(4).

⁶ *Id.*

⁷ An “office director” is defined as the “chief administrative officer of the responsible department office, such officer to be a district engineer, division director, or office director.” *Id.* at § 9.2(a)(7).

⁸ *Id.* at § 9.2(b)(2).

⁹ *Id.*

After receipt of the contractor's claim, the Contract Claims Committee secures detailed reports and recommendations from the responsible department office.¹⁰ Next, the Contract Claims Committee gives the contractor "an opportunity to informally discuss the disputed matters and . . . an opportunity to present relevant information and respond to information the committee has received from the department office."¹¹ As a practitioner's note, do not be lulled into a false sense of informality in this context, regardless of the tenor of conversations with TxDOT representatives; these representatives will almost certainly arrive at the "informal" discussion prepared to discuss the dispute in detail, and with the help of audio-visual aids, and a claimant's counsel should come prepared to do the same.

Next, the Contract Claims Committee must provide written notice of its proposed disposition to the contractor.¹² If the Contract Claims Committee's proposed written disposition is acceptable, the contractor must advise the Contract Claims Committee within 20 days of receipt of the notice, and the chairman of the Contract Claims Committee then forwards the agreed disposition to the Texas Transportation Commission (a three-member body appointed by the governor) for a final and binding order on the claim.¹³ Incidentally, the rules do not indicate whether the Transportation Commission has authority to reject the Executive Director's decision and, if so, what happens if it does.

If the contractor finds the proposed disposition unacceptable, it may petition the TxDOT's Executive Director for a formal administrative hearing to litigate the claim pursuant to 43 Texas Administrative Code § 1.21 *et seq.* The contractor has 20 days after receipt of the notice to petition the Executive Director for a formal administrative hearing; otherwise, the recommendation becomes final.¹⁴

D. Effect of Contract Claims Committee Proceedings on SOAH Hearing

43 Texas Administrative Code § 9.2(b)(8) states that the proceedings before the department office director or the Contract Claims Committee are "in the nature of an attempt to mutually resolve the claim without litigation and are not admissible for any purpose" in the SOAH proceeding. Likewise, all oral communications, reports, or other written documentation "prepared by department staff" in connection with the proceedings at the district or Contract Claims Committee levels are not admissible for any purpose at SOAH. *Id.* This language seems to allow for the possibility of a one-way privilege that is limited to protection of TxDOT, rather than the contractor. A cautious practitioner may want to take this into consideration in evaluating the potential admissibility of documents presented at the district level and/or to the Contract Claims Committee in a possible subsequent SOAH proceeding.

¹⁰ *Id.* at § 9.2(b)(3).

¹¹ *Id.* at § 9.2(b)(4).

¹² *Id.* at § 9.2(b)(5).

¹³ *Id.*

¹⁴ *Id.* at § 9.2(b)(8).

E. Hearing at the State Office of Administrative Hearings

i. Petition TxDOT's Executive Director for SOAH Hearing

If the Contract Claims Committee's proposed disposition is unacceptable, the contractor may petition the Executive Director for a formal administrative hearing at SOAH, to review the Executive Director's proposed disposition pursuant to Texas Administrative Code §§ 1.21 *et seq.* The contractor has 20 days after receipt of the notice of the Contract Claims Committee's proposed disposition to petition for such a formal administrative hearing; otherwise, the Contract Claims Committee's recommendation becomes final.¹⁵ If it chooses to proceed, the claimant must file an original and four copies of the petition with the Executive Director.¹⁶

43 Texas Administrative Code § 1.24 addresses the required content of the petition:

(a) A petition must include:

- (1) the name of the petitioner;
- (2) the names of all other known persons with an interest in the outcome of the contested case;
- (3) a concise statement of the facts on which the petitioner relies, including as an attachment, if applicable, the document issued by the department that notified the petitioner of the decision or action challenged by the petitioner;
- (4) a statement of the relief demanded by the petitioner;
- (5) any other matter required by statute;
- (6) the signature of the petitioner or the petitioner's authorized representative; and
- (7) a department reference number, if applicable.

(b) No document including a settlement offer by a party may be enclosed with the petition, and the petition may not refer to the substance of a settlement offer.

(c) If the petition concerns a contract claim, a copy of the detailed report and request filed under §9.2(b)(2) of this title (relating to Contract Claim Procedure) must be enclosed with the petition, and the petition must state the date on which the petitioner received written notice of the proposed disposition by the contract claim committee under §9.2(b)(6) of this title. The petition and its attachments may not otherwise refer to the proposed disposition and may not include a copy of the written notice of the proposed disposition.

In addition, the petition should comply with the requirements of SOAH's procedural rule concerning petitions. That rule can be found at 1 Texas Administrative Code § 155.29 which states:

¹⁵ *Id.* at § 9.2(b)(8).

¹⁶ 43 TEX. ADMIN. CODE § 1.23.

(a) Content generally. Requests for relief in a contested case may be submitted either orally as part of the record at a prehearing conference or hearing; or typewritten or printed on paper 8 1/2 inches wide and 11 inches long, and timely filed at SOAH. Photocopies are acceptable if copies are clear and legible.

All pleadings shall contain or be accompanied by the following:

- (1) The name of the party seeking relief;
- (2) The docket number assigned to the case by SOAH;
- (3) The style of the case;
- (4) A concise statement of facts relied upon by the pleader;
- (5) A clear statement of the type of relief, action, or order desired by the pleader, and identification of the specific grounds supporting the relief requested;
- (6) An indication whether a hearing is needed on the relief sought;
- (7) A certificate of service, as required by § 155.25(b) of this title (related to Service of Documents on Parties);
- (8) Any other matter required by statute or rule;
- (9) A certificate of conference, if required;
- (10) The signature of the submitting party or the party's authorized representative; and
- (11) A reference in the title of the pleading to a request for a hearing if the movant seeks a hearing.

(b) Amendment or supplementation of pleadings. A party may amend or supplement its pleadings by written filing. An amendment or supplementation that includes information, requests for relief, changes to the scope of the hearing, or other matters that unfairly surprise other parties may not be filed later than ten days before the date of the hearing, except by agreement of all parties and consent of the judge. The judge may establish other deadlines for filing amendments or supplementation of pleadings with notice to all parties.

The Executive Director then reviews the petition to determine whether the contractor is entitled to a SOAH hearing. 43 Texas Administrative Code § 1.25 states:

(a) The executive director will examine a petition and make a preliminary determination whether the petition states a claim that entitles the petitioner to initiate a contested case and whether the petition meets the procedural requirements of §1.23 and §1.24 of this subchapter and of Government Code, Chapter 2001.

(b) If the executive director finds that the petition does not meet all legal requirements, the executive director will return the petition to the petitioner along with a statement of the reasons for rejecting it. The petitioner will be given at least 10 days in which to file a corrected petition.

(c) If a corrected petition is rejected under this section, the executive director will return the corrected petition to the petitioner along with a statement of the reasons for rejecting it. The petitioner will not be given an opportunity to file another corrected petition.

(d) The executive director's preliminary determination of a petition's legal sufficiency is without prejudice to the department's right to assert in litigation that a contested case should be dismissed for any reason.

This passage in the Texas Administrative Code does not indicate what circumstances allow a contractor the right to pursue a hearing. What it does do, however, is provide a mechanism that can produce fatal consequences for noncompliance with simple procedural rules. It is worth repeating, then, the hurdles that a contractor must clear at this stage of the claims process. If the Executive Director finds that the petition does not meet all the legal requirements, the Executive Director returns the petition to the petitioner along with a statement of the reasons for rejecting it, and the petitioner has ten days to file a corrected petition.¹⁷ If the corrected petition is rejected, it is returned to the petitioner with a statement of the reasons for rejecting it, ***and the petitioner does not receive another opportunity to correct it.***¹⁸

If the Executive Director finds that the petition meets all of the legal requirements, which are undefined as indicated above, TxDOT must initiate a contested case proceeding in accordance with the rules of SOAH.¹⁹

ii. Contested Case at SOAH—Standard of Review of the Executive Director's Proposed Disposition and Burden of Proof

The standard of review at the SOAH level is limited indeed:

The standard of review is whether the agency's actions were based on fraud, misconduct, or such gross mistake as would imply bad faith or failure to exercise an honest judgment for:

(A) contract claims²⁰

Based on this standard, the deck is clearly stacked against the contractor at the SOAH hearing, notwithstanding other significant issues (including procedural traps for those unfamiliar with the SOAH rules). In addition, the burden of proof is on the party seeking recovery of damages or penalties.²¹

¹⁷ *Id.* at 1.25(b).

¹⁸ *Id.* at § 1.25(c).

¹⁹ SOAH's rules of procedure are located in Chapter 155 of the Texas Administrative Code.

²⁰ 43 TEX. ADMIN. CODE § 1.26(c)(2).

²¹ 43 TEX. ADMIN. CODE § 1.26(d).

iii. The Administrative Law Judge's Decision Is Not Final

Perhaps the most important thing to know about the SOAH proceeding is that the Administrative Law Judge (“ALJ”) does not have the authority to issue a final order in the matter.²² Rather, the ALJ may only enter a Proposal for Decision (“PFD”) after the close of the evidentiary hearing, including findings of fact and conclusions of law.²³ The ALJ’s PFD then comes before TxDOT’s Executive Director for final rendering of a decision, as detailed below.²⁴

A party may file exceptions to the ALJ’s PFD within 20 days of service of the PFD.²⁵ The excepting party’s opponent may then file a reply to the exceptions within 15 days.²⁶ Counsel should note that SOAH’s rules of procedure only allow 15 days to file exceptions to the order. Although SOAH’s rules of procedure state that they only apply to the extent that they do not conflict with other applicable statutes²⁷ (and the 20-day deadline in 43 Texas Administrative Code § 1.30(a) should therefore govern), a cautious practitioner may want to take the safest route and file exceptions within 15 days.

The exceptions and replies must include the following information and/or meet these requirements:

- (1) the names of the parties;
- (2) a concise statement of the facts and law on which the submitting party relies;
- (3) a statement of the relief desired;
- (4) the signature of the submitting party or party’s authorized representative;
- (5) each special exception must be separately numbered, separately set forth and concisely stated, and incorporate all facts relating to that specific exception; and
- (6) any other matter required by statute.²⁸

The Executive Director may change a finding of fact or conclusion of law made by the Administrative Law Judge, or may vacate or modify an order issued by the ALJ.²⁹ 43 Texas Administrative Code § 9.2(b)(9) states:

²² See 43 TEX. ADMIN. CODE § 9.2(b)(7).

²³ See 1 TEX. ADMIN. CODE § 155.9(a) (SOAH procedural rule addressing a “proposal for decision,” where the ALJ does not have authority to enter a final order).

²⁴ 43 TEX. ADMIN. CODE § 9.2(b)(7).

²⁵ 43 TEX. ADMIN. CODE § 1.30(a).

²⁶ *Id.*

²⁷ 43 TEX. ADMIN. CODE § 9.2(b)(9).

²⁸ 43 TEX. ADMIN. CODE § 131(2, 3).

²⁹ *Id.*

The administrative law judge's proposal for decision in a formal administrative hearing provided in paragraph (6) of this subsection shall be submitted to the executive director for adoption. The executive director may change a finding of fact or conclusion of law made by the administrative law judge or may vacate or modify an order issued by the administrative law judge. The executive director shall provide a written statement containing the reason and legal basis for any change.

It is unclear whether Texas Government Code § 2001.58 modifies this general provision to provide standards under which TxDOT's Executive Director may change findings of fact or law. Section 2001.58 states:

- (e) A state agency may change a finding of fact or conclusion of law made by the administrative law judge, or may vacate or modify an order issued by the administrative judge, only if the agency determines:
 - (1) that the administrative law judge did not properly apply or interpret applicable law, agency rules, written policies provided under Subsection (c), or prior administrative decisions;
 - (2) that a prior administrative decision on which the administrative law judge relied is incorrect or should be changed; or
 - (3) that a technical error in a finding of fact should be changed.

The agency shall state in writing the specific reason and legal basis for a change made under this subsection.

In any case, it seems clear that this language affords the Executive Director broad, and largely unilateral, authority to change the findings of fact and conclusions of law.

If the contractor disagrees with the Executive Director's adoption or rejection of the Proposal for Decision, its only recourse is to appeal to the state district court. However, as discussed below, this is a limited appeal, because the standard of review is exceedingly limited and because the district court does not have authority to render a decision on its own on the merits—instead, it may only reverse and remand for further proceedings at the administrative level.

iv. SOAH's Rules of Procedure

A comprehensive and detailed review of each of SOAH's procedural rules is beyond the scope of this paper, but this topic has been addressed in the author's prior paper to this conference in 2003 (though careful attention should be paid to any changes to the rules since that time). Following are some important differences between SOAH's rules and the Texas Rules of Civil Procedure:

- Motions must be filed no later than seven days before the hearing, except for good cause shown. Responses to motions, generally, must be filed on the earlier of five days after receipt of the motion or at the hearing.³⁰
- Each party may serve only two sets of interrogatories, but each set may contain up to thirty interrogatories.³¹
- Requests for issuance of subpoenas are conducted through TxDOT.³²
- Discovery responses are due twenty days after receipt, and objections must be filed within ten days in a separate written instrument.³³
- Motions to compel must be filed within 10 days of receipt of the discovery objections.³⁴
- A party may request to have a witness appear by telephone.³⁵

F. Appeal of the Executive Director’s Final Disposition to the District Court

i. Prerequisites to Appeal

The Transportation Code allows for judicial review of the Executive Director’s final order.³⁶ The party seeking the review must file a motion for rehearing within 20 days of notice of the final order.³⁷ ***A timely motion for rehearing is a prerequisite to appeal,³⁸ and failure to file a timely motion for rehearing deprives the district court of jurisdiction to review the agency decision.***³⁹ If the motion for rehearing is denied, the party is entitled to judicial review under Texas Government Code § 2001.171 *et seq.* If the agency modifies its original order, the party must file a new motion for rehearing if it disagrees with the new order.⁴⁰ The motion for rehearing must conform to the requirements for exceptions and replies to the ALJ’s PFD, as set forth in section II(e)(iii) above.

The party seeking judicial review must file a petition for review within 30 days after the decision becomes final and appealable.⁴¹ The petition should be filed in Travis County District Court.⁴²

³⁰ 1 TEX ADMIN. CODE § 155.30.

³¹ 1 TEX ADMIN. CODE § 155.31(d)(1).

³² 1 TEX ADMIN. CODE § 155.31(e).

³³ 1 TEX ADMIN. CODE § 155.31(g).

³⁴ 1 TEX ADMIN. CODE § 155.31(l).

³⁵ 1 TEX ADMIN. CODE § 155.45.

³⁶ TEX. TRANSP. CODE § 201.112(d).

³⁷ TEX. GOV’T CODE § 2001.146(a).

³⁸ TEX. GOV’T CODE § 2001.145

³⁹ *Temple I.S.D. v. English*, 896 S.W.2d 167, 169 (Tex. 1995).

⁴⁰ *Ector County Commissioners v. Central Educ. Agency*, 786 S.W.2d 449, 450 (Tex. App.—Austin 1990, writ denied) (holding new motion for rehearing required with respect to new order even if new order entered at the behest of the agency and not due to contestant’s original motion for rehearing).

⁴¹ TEX. GOV’T CODE § 2001.176.

ii. Scope of Review and Authority of the District Court

The district court only reviews the validity or invalidity of the Executive Director's order. It may not substitute a new or modified order to replace the Executive Director's decision.⁴³ This limited appeal is based on the separation-of-powers provision of the Texas Constitution.⁴⁴ The review is performed under Texas Government Code § 2001.174, which only allows the court to affirm, in whole or in part, or reverse and remand for further proceedings as follows:

If the law authorizes review of a decision in a contested case under the substantial evidence rule or if the law does not define the scope of judicial review, a court may not substitute its judgment for the judgment of the state agency on the weight of the evidence on questions committed to agency discretion but:

- (1) may affirm the agency decision in whole or in part; and
- (2) shall reverse or remand the case for further proceedings if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
 - (A) in violation of a constitutional or statutory provision;
 - (B) in excess of the agency's statutory authority;
 - (C) made through unlawful procedure;
 - (D) affected by other error of law;
 - (E) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or
 - (F) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

In *Texas Department of Transportation v. T. Brown Constructors, Inc.*,⁴⁵ the Austin Court of Appeals reviewed whether it was proper for the district court to reweigh evidence and use its own discretion in determining the amount owed on a claim by a highway contractor against TxDOT. The contractor contended that TxDOT owed it in excess \$3,000,000 for costs it incurred because TxDOT interpreted the contract specifications and supervised the project in an arbitrary and capricious manner.

⁴² TEX. GOV'T CODE § 2001.176(b)(1).

⁴³ TEX. GOV'T CODE § 2001.174.

⁴⁴ TEX. CONST. ART. II, § 1; *Tex. Dept. of Transp. v. T. Brown Constructors, Inc.*, 947 S.W.2d 655, 659 (Tex. App.—Austin 1997, review denied).

⁴⁵ 947 S.W.2d 655 (Tex. App.—Austin 1997, pet. denied).

The ALJ issued a proposal for decision granting the contractor \$56,295.00, and TxDOT's Executive Director adopted this proposal. Brown sought review of the decision in the district court. The district court reversed the decision and awarded Brown \$3,318,001.33. On appeal, the Austin Court of Appeals held that it was error for the district court to reweigh the evidence and exercise its own discretion in determining the amount owed. Referring to the separation-of-powers provision of the Texas Constitution, the court further held that "[a]lthough courts have authority to hold that an agency erred and must correct its error, courts cannot dictate how to correct the error if, by doing so, the court effectively usurps the authority and discretion delegated to the agency by the legislature."⁴⁶ The court held that the district court "had the power to determine whether the order was made in violation of the standards set forth in Texas Government Code § 2001.174, but was without authority to render a judgment that usurped the agency's authority and discretion."⁴⁷ The district court's ruling in Brown's favor was therefore declared void, and its rendition was held to be fundamental error.

iii. Standard of Review

The district court reviews the Executive Director's decision under the Substantial Evidence Rule. This label is actually misleading, because standards other than the substantial evidence standard apply to the review, as discussed below. Under the Substantial Evidence Rule, the court reverses and remands if the substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (A) in violation of a constitutional or statutory provision;
- (B) in excess of the agency's statutory authority;
- (C) made through unlawful procedure;
- (D) affected by other error of law;
- (E) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or
- (F) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

The review is confined to the record developed at the SOAH hearing.⁴⁸ However, the court does not need to consider evidence that is incredible, perjured, or unreasonable, because such evidence is not considered substantial.⁴⁹

The substantial evidence test is an exceedingly low threshold. The Austin Court of Appeals has held:

⁴⁶ *Id.* at 659.

⁴⁷ *Id.* at 660.

⁴⁸ *SEE* TEX. GOV'T CODE § 2001.175(e).

⁴⁹ *Civil Servs. Comm'n v. Clemmer*, 754 S.W.2d 242, 244 (Tex. App.—Houston [1st Dist.] 1988, no writ).

Under the substantial evidence test, the agency's action will be sustained if reasonable minds could reach the conclusion that the agency must have reached in order to reach its conclusion. If the evidence supports either an affirmative or a negative finding on a particular issue, the agency's finding must be upheld. Indeed, the evidence in the record may actually preponderate against the agency's decision, yet satisfy the substantial evidence standard.⁵⁰

The agency's decision will be considered arbitrary or capricious unless the agency articulates a rational connection between the facts found and the agency's decision.⁵¹ As one court held, the district court must remand "if it concludes that the agency has not actually taken a hard look at the salient problems and has not genuinely engaged in reasoned decision-making."⁵² A court may reverse an agency order that appears valid on its face as arbitrary or capricious when (1) the court's ultimate holding is inconsistent with a prior decision of the same agency related to the same parties, [FN52] (2) the parties are before the same agency with the same legal issue and substantially the same facts but with opposite results, [FN53] and (3) the previous order of the same agency as to the same issue of law is construed differently than the present order. [FN54]⁵³

Under the substantial evidence standard of review, an administrative determination of a question of law, such as the meaning of an unambiguous contract, is not entitled to a presumption of validity.⁵⁴ Even under the Substantial Evidence Rule, legal determinations are reviewed under a *de novo* standard.⁵⁵

iv. Burden of Proof

The burden is on the contractor challenging the decision, and "the findings and inferences, conclusions, and decisions of an administrative agency are presumed to be supported by substantial evidence, and the burden is on the contestant to prove otherwise."⁵⁶

⁵⁰ *Hunter Indus. Facilities v. Tex. Natural Res. Comm'n*, 910 S.W.2d 96, 103 (Tex. App.—Austin 1995, writ denied).

⁵¹ *Outdoor Sys., Inc. v. Tex. Dep't of Transp.*, No. 03-99-00748-CV (Tex. App.—Austin July 27, 2000, no pet.), 2000 WL 1028498 (not designated for publication).

⁵² *Starr County v. Starr Indus. Servs., Inc.* 584 S.W.2d 352, 356 (Tex. Civ. App.—1979, writ ref'd n.r.e.).

⁵³ Ron Beal, ADMINISTRATIVE LAW 2004 UPDATE AND ANALYSIS, 57 Baylor Law Review 359 (Spring 2004) (citing, in FN 52, *City of El Paso v. el Paso Elec. Co.*, 851 S.W.2d 896, 901 (Tex. App.—Austin 1993, writ denied); in FN 53, *BMW of N. Am., L.L.C. v. Motor Vehicle Bd. & Motor vehicle Div. of the Tex. Dep't of Transp.*, 115 S.W.3d 722, 726-27 (Tex. App.—Austin 2003, pet. Denied); *Occidental Permian Ltd. V. R.R. Comm'n*, 47 S.W.3d 801, 810-12 (Tex. App.—Austin 2001, no pet.); *Retama Dev. Corp. v. Tex. Workforce Comm'n*, 971 S.W.2d 136, 139-40 (Tex. App.—Austin 1998, no pet.); in FN 54, *Flores v. Employees ret. Sys. of Tex.*, 74 S.W.3d 532, 544-45 (Tex. App.—Austin 2002, pet. denied)).

⁵⁴ *Cities of Abilene v. Public Util Comm'n*, 146 S.W.3d 742 (Tex. App.—Austin 2004, no pet.); *Buddy Gregg Motor Homes, Inc. v. Motor Vehicle Bd. of Tex. Dept. of Transp.*, 156 S.W.3d 91 (Tex. App.—Austin 2004, pet. denied).

⁵⁵ *Nobles v. Emplees. Retirement Sys.*, 53 S.W.3d 483, 490 (Tex. App.—Austin 2001, no pet.).

⁵⁶ *Tex. Health Facilities Comm'n v. Charter Medical-Dallas, Inc.*, 665 S.W.2d 446, 453 (Tex. 1977)

III. NOTEWORTHY STANDARD CONTRACT PROVISIONS

A. TxDOT Contracts in General

TxDOT maintains its own book of general contract provisions and specifications. The specifications include standard contract provision (§§1.1-9.8), as well as project-specific specifications, such as concrete strength and backfill requirements. The contract typically includes an “addendum acknowledgment” that lists which standard specifications are adopted and incorporated into the contract. The addendum acknowledgement also lists the “special provisions” located in the addendum. The special provisions modify or supplement the general provisions or specifications found in the book of standard specifications.

The following sections provide excerpts of standard TxDOT contract provisions that the authors have found noteworthy, often because they constitute traps for contractors who do not dot every “I” and cross every “T” during the course of a project. Given the Executive Director’s broad authority to determine the result of a contractor’s claim, special attention paid to these and other contract provisions during the project could well prove to be the stitch in time that saves nine.

B. Responsibility for Errors in the Plans

2.5. Examining Documents and Work Locations. Examine the proposal form, plans, specifications, and specified work locations before submitting a bid for the work contemplated. Submitting a bid will be considered evidence that the Bidder has performed this examination.

Borings, soil profiles, water elevations, and underground utilities shown on the plans were obtained for use of the Department in the preparation of plans. This information is provided for the Bidder’s information only and the Department makes no representation as to the accuracy of the data. Be aware of the difficulty of accurately classifying all material encountered in making foundation investigations, the possible erosion of stream channels and banks after survey data have been obtained, and the unreliability of water elevations other than for the date recorded.

Oral explanations, instructions, or consideration for contractor-proposed changes in the proposal given during the bidding process are not binding. Only requirements included on the proposal and associated specifications and plans and in subsequent Department-issued addenda are binding.

To allow the Department to reply before the bid opening date, request explanations of documents in adequate time.

Immediately notify the Department of any error, omission, or ambiguity discovered in any part of the bid package. The Department will issue an addendum when appropriate.

C. Beginning the work

[The following provision is noteworthy because it allows TxDOT, after the contract is executed, to issue additional plans and potentially expand the scope of work dramatically:]

3.8. Beginning of Work. Do not begin work until authorized in writing by the Engineer. For a routine maintenance Contract, do not begin work until work is authorized in writing and a certificate of insurance showing coverages in accordance with the Contract requirements is provided and accepted. Upon execution of the Contract the Department may begin issuing work orders. **Work orders may include additional plans** describing the work (for non-site-specific work or Contracts) and the allowable number of working days (for recurring maintenance or non-site-specific work or Contracts). The additional plans associated with the work order will become a part of the Contract.

D. Changes in the Work

4.2. Changes in the Work. The Engineer reserves the right to make changes in the work including addition, reduction, or elimination of quantities and alterations needed to complete the Contract. Perform the work as altered. These changes will not invalidate the Contract nor release the Surety.

If the changes in quantities or the alterations do not significantly change the character of the work under the Contract, the altered work will be paid for at the Contract unit price. If the changes in quantities or the alterations significantly change the character of the work, the Contract will be amended by a change order. If no unit prices exist, this will be considered extra work and the Contract will be amended by a change order. Provide cost justification as requested, in an acceptable format. Payment will not be made for anticipated profits on work that is eliminated.

Agree upon the scope of work and the basis of payment for the change order before beginning the work. If there is no agreement, the Engineer may order the work to proceed under Article 9.5, "Force Account" or by making an interim adjustment to the Contract. In the case of an adjustment, the Engineer will consider modifying the compensation after the work is performed.

A significant change in the character of the work occurs when:

- the character of the work for any Item as altered differs materially in kind or nature from that in the Contract or
- a major item of work varies by more than 25% from the original Contract quantity. (The 25% variance is not applicable to non-site specific Contracts.)

When the quantity of work to be done under any major item of the Contract is more than 125% of the original quantity stated in the Contract, then either party to the Contract may request an adjustment to the unit price on the portion of the work that is above 125%.

When the quantity of work to be done under any major item of the Contract is less than 75% of the original quantity stated in the Contract, then either party to the Contract may request an adjustment to the unit price. For routine maintenance Contracts only, if an adjusted unit price cannot be agreed upon, the Engineer may determine the unit price by multiplying the Contract unit price by the factor in Table 1.

Table 1
Quantity-Based Price Adjustment Factors

% of original Quantity	Factor
≥ 50 and < 75	1.05
≥ 25 and < 50	1.15
<25	1.25

If the changes require additional working days to complete the Contract, Contract working days will be adjusted in accordance with Item 8, “Prosecution and Progress.”

E. Differing Site Conditions

4.3. Differing Site Conditions. During the progress of the work, differing subsurface or latent physical conditions may be encountered at the site. The two types of differing site conditions are defined as:

- those that differ materially from those indicated in the Contract, and
- unknown physical conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inherent in the work provided for in the Contract.

Notify the Engineer in writing when differing site conditions are encountered. The Engineer will notify the Contractor when the Department discovers differing site conditions. Unless directed otherwise, suspend work on the affected items and leave the site undisturbed. The Engineer will investigate the conditions and determine whether differing site conditions exist. If the differing site conditions cause an increase or decrease in the cost or number of working days specified for the performance of the Contract, the Engineer will make adjustments, excluding the loss of anticipated profits, in accordance with the Contract. **Additional compensation will be made only if the required written notice has been provided.** (Emphasis Added.)

F. Requests for Additional Compensation

4.4. Requests and Claims for Additional Compensation. Notify the Engineer in writing of any intent to request additional compensation once there is knowledge of the basis for the request. An assessment of damages is not required to be part of this notice but is desirable. The intent of the written notice requirement is to provide the Engineer

an opportunity to evaluate the request and to keep an accurate account of the actual costs that may arise. Minimize impacts and costs.

If written notice is not given, the Contractor waives the right to additional compensation unless the circumstances could have reasonably prevented the Contractor from knowing the cost impact before performing the work. Notice of the request and the documentation of the costs will not be construed as proof or substantiation of the validity of the request. Submit the request in sufficient detail to enable the Engineer to determine the basis for entitlement, adjustment in the number of working days specified in the Contract and compensation.

A. Delay Claims. The intent of paying for delay damages is to reimburse the Contractor for actual expenses arising out of a compensable impact. No profit or force account markups, other than labor burden, will be allowed. If the Contractor requests compensation for delay damages and the delay is determined to be compensable, then standby equipment costs and project overhead compensation will be based on the duration of the compensable delay and will be limited as follows:

1. Standby Equipment Costs.

- Standby costs will not be allowed during periods when the equipment would have otherwise been idle.
- No more than 8 hours of standby will be paid during a 24-hour day, nor more than 40 hours per week, nor more than 176 hours per month.
- Standby will be paid at 50% of the rental rates found in the Rental Rate Blue Book for Construction Equipment and calculated by dividing the monthly rate by 176 and multiplying by the regional adjustment factor and the rate adjustment factor. Operating costs will not be allowed.

2. Project Overhead. Project overhead will be determined from actual, costs that the Contractor will be required to document. Project overhead is defined as the administrative and supervisory expenses incurred at the work locations.

3. Home Office Overhead. The Department will not compensate the Contractor for home office overhead.

B. Dispute or Claims Procedure. Work with the Engineer to resolve all issues. If an issue cannot be resolved within a time frame agreed to by the Engineer, elevate the issue to appropriate District staff. If the issue cannot be resolved within the time frame established by the District, the Contractor may submit a contract claim to be handled in accordance with the Department's contract claim procedure maintained by the Construction Division. It is the Contractor's responsibility to prove or justify all claims and requests in a timely manner.

G. Engineer Decision Provision

5.1. Authority of Engineer. The Engineer⁵⁷ has the authority to observe, test, inspect, approve, and accept the work. The Engineer decides all questions about the quality and acceptability of materials, work performed, work progress, Contract interpretations, and acceptable Contract fulfillment. The Engineer has the authority to enforce and make effective these decisions. The Engineer acts as a referee in all questions arising under the terms of the Contract. The Engineer's decisions will be final and binding.

When parties to a private construction agreement provide for questions under the contract to be decided by the owner's engineer, the engineer's decision is final and conclusive.⁵⁸ Courts compare the binding nature of the engineer's decision to that of an arbitrator, with the same standard of review.⁵⁹ It is unclear whether this common law principle would alter the "substantial evidence" standard in Texas Government Code 2001.174. However, the typical engineer or architect decision provision case is quite possibly distinguishable, because the architect or engineer in private contract situations is typically a third party, even though the owner hires the design professional. In this instance, the "Engineer" is TxDOT's Executive Director, whose ultimate decision after SOAH proceedings is largely immunized from challenge by the Government Code.

There are two potentially applicable standards of review where a contract contains an engineer decision provision. A reasonableness standard applies where the contract is a "satisfaction" contract. On the other hand, where the district court reviews an "agreed-upon referee's" decision, the court reviews the decision under a partiality, fraud, misconduct or gross error standard.⁶⁰

In 2002, the Texas Supreme Court addressed the district court's standard of review of a TxDOT Executive Director's decision, holding that a court should only reverse TxDOT's decision upon a showing of partiality, fraud, misconduct, or error.⁶¹ In *Jones Brothers*, the contractor sought additional compensation after the Business Opportunity Program ("BOP") office, a TxDOT subdivision charged with administering the Disadvantaged Enterprise programs, refused the contractor's request to replace an underperforming minority subcontractor. The contract provision at issue was as follows, in pertinent part:

Prior to terminating or removing a DBE subcontractor named in this commitment, the Contractor must demonstrate to the satisfaction of the Business Opportunity Program Office in Austin that the originally designated DBE was not willing or able to perform.

⁵⁷ "Engineer" is defined as the Executive Director or authorized representative of the Executive Director.

⁵⁸ *City of San Antonio v. McKenzie Const. Co.*, 150 S.W.2d 989 (Tex. 1941); *Westech Eng., Inc. v. Clearwater Constructors, Inc.*, 835 S.W.2d 190, 202-03 (Tex. App.—Austin 1992, no writ).

⁵⁹ *City of San Antonio v. McKenzie Constr. Co.*, 150 S.W.2d 989, 996 (Tex. 1941).

⁶⁰ *Tex. Dep't of Transp. v. Jones Bros. Dirt & Paving Contractors, Inc.*, 92 S.W.3d 477 (Tex. 2002).

⁶¹ *Id.*

The contractor claimant contended that the subcontractor's failure to properly perform its work caused the delay in its performance, and that the GC incurred \$139,000 in additional costs as a result. The claimant also contended that it should not have been charged the liquidated damages TxDOT assessed against it. The Contract Claims Committee denied the contractor's claims, whereupon the contractor sought a SOAH hearing. The ALJ rejected the contractor's claim for additional cost, but also held that the contractor was not liable for liquidated damages. The Executive Director adopted the ALJ's recommendation and issued a final order denying recovery on Jones Brothers' claims for additional compensation, and awarding reimbursement for liquidated damages charged. The contractor rejected this order, and petitioned the district court for review of the BOP's decision.

The district court reversed the Executive Director's decision, and awarded Jones Brothers damages and attorneys' fees. The Austin Court of Appeals, in turn, reversed the district court's decision, ordering that the claim be remanded to TxDOT for review under the reasonableness standard. The case then went to the Texas Supreme Court for review.

The *Jones Brothers* court, discussing the two standards for reviewing decisions under a contract's satisfaction provision, held that the partiality, fraud, misconduct, or gross error standard applied. The court distinguished the Texas Supreme Court's *Black Lake* opinion, in which the court held that where an inspector's decision is final and conclusive only for the contractor, and where the governmental agency could overrule the inspector's decision, the governmental agency's decision is reviewed under the reasonableness standard.

The *Jones Brothers* court noted two distinguishing factors from *Black Lake*, in a somewhat artificial and confusing analysis of this issue. First, the contract made the BOP's decision binding on all parties, not just the contractor, and no provision gave TxDOT the right to overrule the BOP's decision. In *Black Lake*, the inspector's decisions were final and were only binding on the contractor. Second, the court noted that *Black Lake* did not turn on the fact that Black Lake's own inspectors had final authority to determine if performance was satisfactory. The Court of Appeals, which held that the review was to be performed under the reasonableness standard, based its decision on the fact that the BOP is a subdivision of TxDOT, which led the court of appeals to hold that the satisfaction clause was effectively subject to the determination of TxDOT.

The Supreme Court held that the fact that the BOP was a subdivision of TxDOT was not a "crucial factor" in determining what review standard applies. Instead, the *Jones Brothers* court held that the *Black Lake* opinion turned on the ability of Black Lake itself to overrule the inspector's decisions. The court also cited cases "in which the courts applied a partiality, fraud, or gross error standard to review the engineer's decision under the satisfaction clause, [where] the engineer was an employee of a party to the contract,"⁶² including state highway construction contracts.

⁶² *Id.* at 482-83 (citing *City of San Antonio v. McKenzie*, 150 S.W.2d 989, 996 (Tex. 1941); *State v. Martin Bros.*, 160 S.W.2d 58, 61 (Tex. 1942) (This case involved a state highway construction project. The parties agreed in the contract that the engineer would act as a referee on all questions arising under the contract. The contract provided that the engineer's decisions were final and binding. The court, following the decision in *City of San Antonio v. Mackenzie*, held the contractor had to allege and prove that the engineer's decision was based

Although it is difficult to determine where the distinction lies, given this convoluted analysis by the Supreme Court, it is binding precedent that would be difficult to overcome and distinguish. The court ultimately held that policy requires that it refrain from substituting its judgment for that of an agency whose sole purpose is to administer a specific governmental function, and this case demonstrates to what extent the courts will go to protect this policy.

By contrast, in *Jensen Construction Company v. Dallas County*,⁶³ the court distinguished the *Martin* opinion cited in *Jones Brothers*, holding that although the contract at issue defining the authority of the engineer was essentially the same as the pertinent provision in *Martin*, it was distinguishable because the *Jensen* contract did not contain the following further grant of authority:

The engineer will act as referee in all questions arising under the terms of the contract between the parties thereto and his decisions shall be final and binding.

The court instead read the contract as resembling the *Black Lake* contract, holding that it provided that the performance would be to the satisfaction of one of the parties to the contract, the County's project engineer.⁶⁴ Therefore, the unreasonableness test applied to determine whether to uphold the engineer's decision.

The stricter standard—partiality, fraud, misconduct, or gross error—would probably be the standard of review applicable in this case. Article 5.1 of the contract gives the engineer final authority to settle contract disputes. Article 5.2 states that the “Engineer will act as referee in all questions arising under the terms of the contract between the parties thereto and his decisions shall be final and binding.”

When parties to a construction agreement agree to empower an engineer to resolve questions or disputes arising under their agreement, a presumption arises that the engineer's decision is correct and is made within the scope of the engineer's authority. *City of San Antonio v. McKenzie Constr. Co.*, 150 S.W.2d 989, 996 (Tex. 1941). The *McKenzie* court, treating the deciding engineer as an arbitrator, stated:

When parties to a building contract agree to submit questions which may arise thereunder to the decision of the engineer, his decision is final and conclusive: unless in making it he is guilty of fraud, misconduct, or such gross mistake as would imply bad faith or failure to exercise an honest judgment. *Galveston H. & S. A. Ry. Co. v. Henry & Dilley*, 65 Tex. 685; 4 Tex.Jur. p. 709, sec. 4, and authorities there cited. Under this rule it would be hard to define the exact character or quantum of proof required to show that an umpire or arbitrator has

on partiality, fraud, misconduct, or gross error); *Austin Bridge Co. v. Teague*, 152 S.W.2d 1091, 1093 (Tex. 1941) (applying partiality, fraud, misconduct, or gross error standard of review to “State Highway Engineer's” decision under satisfaction clause); *Austin Bridge Co. v. State*, 427 S.W.2d 925, 937 (Tex. Civ. App.—Austin 1968, writ ref'd n.r.e.) (absent pleadings and proof that State engineer's decision was based on partiality, fraud, misconduct, or gross error, engineer had exclusive and final authority to determine satisfaction of performance).

⁶³ 920 S.W.2d 761 (Tex. App.—Dallas 1996, writ denied).

⁶⁴ *Id.* at 775.

been guilty of fraud, misconduct, or gross mistake. However, it certainly can be said that when an engineer is called on to make a decision under a construction contract such as this his decision cannot be set aside for fraud, misconduct, or gross mistake, simply by proving that some other engineer would have acted differently or given a different decision. Also, we think an engineer's decision under a contract like this cannot be impeached simply on a conflict of evidence as to what he ought to have decided. This must be true, because any other rule would simply leave the matter open for a court or jury to substitute its judgment and discretion for the judgment and discretion of the engineer; and such a procedure or rule would practically nullify the arbitration or umpire agreement. The decision of an engineer or architect under a contract like this is presumed to be correct, and to have been given while acting within the scope of his authority. 4 Tex.Jur. p. 711, s 5.

Austin Bridge Co. v. State, 550 S.W.2d 135 (Tex.Civ.App. 1977).

H. Contractor responsibility for code and regulation compliance

7.1. Laws to be Observed. Comply with all federal, state, and local laws, ordinances, and regulations that affect the performance of the work. The Contractor is not required to comply with city electrical ordinances not included in this Contract. Indemnify and save harmless the State and its representatives against any claim arising from violation by the Contractor of any law, ordinance, or regulation.

This Contract is between the Department and the Contractor only. No person or entity may claim third-party beneficiary status under this Contract or any of its provisions, nor may any non-party sue for personal injuries or property damage under this Contract.

I. Indemnification of TxDOT

7.12. Responsibility for Damage Claims. Indemnify and save harmless the State and its agents and employees from all suits, actions, or claims and from all liability and damages for any injury or damage to any person or property due to the Contractor's negligence in the performance of the work and from any claims arising or amounts recovered under any laws, including workers' compensation and the Texas Tort Claims Act. Indemnify and save harmless the State and assume responsibility for all damages and injury to property of any character occurring during the prosecution of the work resulting from any act, omission, neglect, or misconduct on the Contractor's part in the manner or method of executing the work; from failure to properly execute the work; or from defective work or material.

Pipelines and other underground installations that may or may not be shown on the plans may be located within the right of way. Indemnify and save harmless the State from any suits or claims resulting from damage by the Contractor's operations to any pipeline or underground installation. At the pre-construction conference, submit the scheduled

sequence of work to the respective utility owners so that they may coordinate and schedule adjustments of their utilities that conflict with the proposed work.

If the Contractor asserts any claim or brings any type of legal action (including an original action, third-party action, or cross-claim) against any Commissioner or individual employee of the Department for any cause of action or claim for alleged negligence arising from the Contract, ***the Contractor will be ineligible to bid on any proposed Contract with the Department during the pendency of the claim or legal action.*** (Emphasis added.)

J. Utilities

In cases that the authors of this paper have reviewed, TxDOT has amended Article 8.2, which addresses scheduling, through a supplemental provision as follows:

It is anticipated that utility construction and/or adjustment of existing utility lines will not be completed before the Contractor on this project begins construction operations.

It shall be the responsibility of the Contractor on this project to . . . prosecute the work in such manner and sequence that there will be no interference with the utility work

No additional compensation will be allowed for any hindrance or delay in construction operations that may be attributed to this utility work or to observance of the requirements herein outlined.

The supplemental language includes a no-damages-for-delay or -hindrance provision.

However, a no-damages-for-delay provision does not apply where: (1) the delay was not intended or contemplated by the parties to be within the purview of the clause; (2) the delay resulted from fraud, misrepresentation, or other bad faith on the part of the owner; (3) the delay extended such an unreasonable time that the contractor would have been justified in abandoning the contract; or (4) the clause specifically applies to specified delays and the present delay is not one of those.⁶⁵ Damages resulting from delays attributable to arbitrary and capricious acts of the owner do not come within the protection of a no-damages-for-delay clause.⁶⁶ The *Hubbell* court defined “arbitrary and capricious” as “willful and unreasoning actions,” “without due consideration” and “in disregard of the rights of other parties.”

This provision specifically contemplated the likelihood that utility relocation would need to be accounted for in scheduling, and that the utilities will not be completed upon commencement of construction. It is difficult to imagine a more direct and comprehensive delay

⁶⁵ *City of Houston v. R.F. Ball Const. Co., Inc.*, 570 S.W.2d 75, 77 (Tex. Civ. App.—Houston [14th Dist.] 1978, no writ).

⁶⁶ *Housing Authority of City of Dallas v. Hubbell*, 325 S.W.2d 880, 891 (Tex. Civ. App.—Dallas 1959, writ ref’d n.r.e.).

provision. However, in the case encountered by the authors, it was debatable whether the extent of the lack of utility relocation had been contemplated by the parties at the time of the contract.

A 1935 New York case is instructive in this context. *American Bridge Co. v. State*⁶⁷ involved construction of the Mid-Hudson Bridge at Poughkeepsie, New York, by multiple prime contractors working for the State of New York. American Bridge Company was to construct the superstructure of the bridge once a separate contractor, Blakeslee, completed construction of the substructure. Blakeslee's substructure work required installation of caissons in the Hudson River and was to be completed in time for American Bridge to begin work. Three months before completion of the substructure was due, one of the installed caissons tipped over. It soon became "apparent to all that the east pier would not be completed in time to receive the superstructure" as scheduled. In spite of the fact that the state knew that there was insufficient space at the fabricator or on the site to store the steel, the state's superintendent instructed American Bridge to begin fabrication.

There was no question that American Bridge incurred delay and suffered damages as a result of the state's direction to begin fabrication. The only question was whether the following contractual provision barred recovery:

It is anticipated that the main piers will be sufficiently completed to permit the erection of the towers to be started on the dates above given. In the case of delay in such dates the contractor will be given a corresponding extension of time in the dates of completion. It is expressly understood and agreed that no claim shall be made against the State for any damage due to delays in the completion of the main piers which are constructed under another contract.

This provision was found to be "perfectly clear in meaning and definitely limited in scope," relating solely to delays due to completion of the two piers. *Id.* at 535. Despite this, the court found that the damages were not caused by delay at all "but by the act of the state in directing that fabrication proceed despite the delay." *Id.* The court found that this instruction was active interference by the state and not covered by the no-damage-for-delay clause, holding:

"Here the contractor was not left free to make his own decisions as to the best method of minimizing the damages caused by the delay. It was instructed by the superintendent of public works to proceed with the fabrication without delay. A clause in the contract intended to apply to inaction forced upon this respondent by delays of another contractor, is now urged as a protection against the consequences of an affirmative course of action required by the state. Nothing in the language of the clause affords foundation for such a defense. This defense is not only quite technical, but is also inequitable"

More recently, in 1982, the U.S. Court of Appeals for the Eighth Circuit faced a similar case, with the same result. *United States Steel Corporation v. Missouri Pacific Railroad Co.*⁶⁸

⁶⁷ 245 A.D. 535, 283 N.Y.S. 577 (N.Y.A.D. 3 Dept., Nov. 20, 1935).

⁶⁸ 668 F.2d 495 (8th Cir. 1982).

arose from the construction of railroad bridges spanning the Arkansas River in Little Rock. Missouri Pacific Railroad (Mopac) was the owner of the project. Like the State of New York in *American Bridge*, Mopac let separate contracts for the substructure and superstructure of the bridge. The superstructure contractor, ABD, was required by its contract to monitor the progress of the substructure and develop its own schedule accordingly. Of course, the superstructure contractor also was required to follow the owner's instructions, including the notice to proceed.

ABD was scheduled to begin construction on September 1, 1969. In March, Mopac pushed back ABD's commencement date to November, 1969. In July, Mopac notified ABD that it was pushing back its commencement date again, this time to January, 1970. In August, Mopac informed ABD that it did not anticipate completion of the work preliminary to ABD's work by January, and it pushed the anticipated commencement date again to February. Mopac then issued an NTP in November.

When it issued the notice to proceed, Mopac knew that the pier work was being delayed by differing site conditions discovered along the riverbed and "should have known that delay by the [substructure contractor] was inevitable" Ultimately, significant pier revisions were required, and the superstructure contractor was delayed for 175 days.

The district court found, and the Eighth Circuit agreed, that Mopac's issuance of the notice to proceed with knowledge of the delays to the subsurface work was active interference that damaged the contractor's ability to plan and execute its work in a timely and economically efficient fashion. Damages were awarded despite a specific provision in the contract stating that "[f]ailure of the substructure contractor to complete his work on a specified date or dates shall not form a basis for claim for extra compensation by this superstructure contractor."

The court found that the contract put Mopac in a dominant position because it was allowed to determine when the contract work commenced. By issuing the notice to proceed, Mopac unfairly took advantage of its dominant position, leaving the contractor with no feasible choice except to comply. The court noted that the contractor was in no position to risk not proceeding because it would have risked "noncompliance which could result in a finding of breach or, in the event of late performance, assessment of liquidated damages." *Id.* at 439. The Pennsylvania Supreme Court has issued a similar case in *Gasparini Excavating Company v. Pennsylvania Turnpike Commission*.⁶⁹

In contrast, a Tennessee court held that a highway contractor was unable to establish an exception to a no-damages-for-delay clause where the Tennessee Department of Transportation did not complete the utility relocations addressed in the contract on time.⁷⁰ The court noted that although the no-damages-for-delay provision does "not completely relieve the government of its duties under a road construction contract, the provision shifts the risk of anything going wrong with the utility relocations to the contractor and limits the contractor's remedy to an extension of time."⁷¹

⁶⁹ 187 A.2d 157 (Pa. 1963).

⁷⁰ *Thomas & Assocs. v. The Metropolitan Gov't of Nashville*, No. M2001-00757-COA-R3-CV (June 6, 2003), 2003 WL 21302974.

⁷¹ *Id.*

K. TxDOT Has the Right to Suspend Work

8.4. Temporary Suspension of Work or Working Day Charges. The Engineer may suspend the work, wholly or in part, and will provide notice and reasons for the suspension in writing. Suspend and resume work only as directed in writing. When part of the work is suspended, the Engineer may suspend working day charges only when conditions not under the control of the Contractor prohibit the performance of critical activities. When all of the work is suspended for reasons not under the control of the Contractor, the Engineer will suspend working day charges.

L. Default

8.6. Abandonment of Work or Default of Contract. The Engineer may declare the Contractor to be in default of the Contract if the Contractor:

- fails to begin the work within the number of days specified,
- fails to prosecute the work to assure completion within the number of days specified,
- fails to perform the work in accordance with the Contract requirements,
- neglects or refuses to remove and replace rejected materials or unacceptable work,
- discontinues the prosecution of the work without the Engineer's approval,
- makes an unauthorized assignment,
- fails to resume work that has been discontinued within a reasonable number of days after notice to do so,
- is uncooperative, disruptive or threatening, or
- fails to conduct the work in an acceptable manner.

If any of these conditions occur, the Engineer will give notice in writing to the Contractor and the Surety of the intent to declare the Contractor in default. If the Contractor does not proceed as directed within 10 days after the notice, the Department may upon written notice declare the Contractor to be in default of the Contract. The Department will also provide written notice of default to the Surety. Working day charges will continue until completion of the Contract. The Contractor may also be subject to sanctions under the [Texas Administrative Code].

The Department will determine the method used for the completion of the remaining work as follows:

- **Contracts without Performance Bonds.** The Department will determine the most expeditious and efficient way to complete the work, and recover damages from the Contractor.
- **Contracts with Performance Bonds.** The Department will, without violating the Contract, demand that the Contractor's Surety complete the remaining work in accordance with the terms of the original Contract. A completing Contractor will be considered a subcontractor of the Surety. The Department reserves the right to approve or reject proposed subcontractors. Work may resume after the Department receives and approves certificates of insurance as required in Article 7.4, "Insurance and Bonds." Certificates of insurance may be issued in the name of the completing Contractor. The Surety is responsible for making every effort to expedite the resumption of work and completion of the Contract. The Department may complete the work using any or all materials at the work locations that it deems suitable and acceptable. Any costs incurred by the Department for the completion of the work under the Contract will be the responsibility of the Surety.

From the time of notification of the default until work resumes (either by the Surety or the Department), the Department will maintain traffic control devices and will do any other work it deems necessary, unless otherwise agreed upon by the Department and the Surety. All costs associated with this work will be deducted from money due to the Surety.

The Department will hold all money earned but not disbursed by the date of default. Upon resumption of the work after the default, all payments will be made to the Surety. All costs and charges incurred by the Department as a result of the default, including the cost of completing the work under the Contract, costs of maintaining traffic control devices, costs for other work deemed necessary, and any applicable liquidated damages or disincentives, will be deducted from money due the Contractor for completed work. If these costs exceed the sum that would have been payable under the Contract, the Surety will be liable and pay the Department the balance of these costs in excess of the Contract price.

In case the costs incurred by the Department are less than the amount that would have been payable under the Contract if the work had been completed by the Contractor, the Department will be entitled to retain the difference.

If a Contractor defaults, the requirement that 30% of the work be done by the Contractor is suspended. However, Department approval of all subcontractors continues to be required. DBEs must continue to be used in accordance with the commitments previously approved by the Department.

If it is determined, after the Contractor is declared in default, that the Contractor was not in default, the rights and obligations of the parties will be the same as if the termination

had been issued for the convenience of the public as provided in Article 8.7, "Termination of Contract."

M. Termination

8.7. Termination of Contract. The Department may terminate the Contract in whole or in part whenever:

the Contractor is prevented from proceeding with the work as a direct result of an executive order of the President of the United States or the Governor of the State;

the Contractor is prevented from proceeding with the work due to a national emergency, or when the work to be performed under the Contract is stopped, directly or indirectly, because of the freezing or diversion of materials, equipment or labor as the result of an order or a proclamation of the President of the United States;

the Contractor is prevented from proceeding with the work due to an order of any federal authority;

the Contractor is prevented from proceeding with the work by reason of a preliminary, special, or permanent restraining court order where the issuance of the restraining order is primarily caused by acts or omissions of persons or agencies other than the Contractor; or the Department determines that termination of the Contract is in the best interest of the State or the public. This includes but is not limited to the discovery of significant hazardous material problems, right of way acquisition problems, or utility conflicts that would cause substantial delays or expense to the Contract.

A. Procedures and Submittals. The Engineer will provide written notice to the Contractor of termination specifying the extent of the termination and the effective date. Upon notice, immediately proceed in accordance with the following:

- stop work as specified in the notice;
- place no further subcontracts or orders for materials, services, or facilities, except as necessary to complete a critical portion of the Contract, as approved by the Engineer;
- terminate all subcontracts to the extent they relate to the work terminated;
- complete performance of the work not terminated;

- settle all outstanding liabilities and termination settlement proposals resulting from the termination for public convenience of the Contract;
- create an inventory report, including all acceptable materials and products obtained for the Contract that have not been incorporated in the work that was terminated (include in the inventory report a description, quantity, location, source, cost, and payment status for each of the acceptable materials and products); and
- take any action necessary, or that the Engineer may direct, for the protection and preservation of the materials and products related to the Contract that are in the possession of the Contractor and in which the Department has or may acquire an interest.

B. Settlement Provisions. Within 60 calendar days of the date of the notice of termination, submit a final termination settlement proposal, unless otherwise approved. The Engineer will prepare a change order that reduces the affected quantities of work and adds acceptable costs for termination. No claim for loss of anticipated profits will be considered. The Department will pay reasonable and verifiable termination costs including:

- all work completed at the unit bid price and partial payment for incomplete work;
- the percentage of tem 500, “Mobilization,” equivalent to the percentage of work complete or actual cost that can be supported by cost records, whichever is greater;
- expenses necessary for the preparation of termination settlement proposals and support data;
- the termination and settlement of subcontracts; storage, transportation, restocking, and other costs incurred necessary for the preservation, protection, or disposition of the termination inventory; and
- other expenses acceptable to the Department.

IV. Damages

A. Consequential Damages

It is not entirely clear whether consequential damages are available under TxDOT contracts. Section 201.112 of the Transportation Code does not impose a limit on the types or amount of damages recoverable. In contrast, Texas Government Code § 2260.003 (which

applies to claims against the State, excluding, among others, claims on highway construction projects), limits damages to the amount owing on the contract price, including orders for additional work. Section 22600.03 expressly excludes consequential damages, damages based on unjust enrichment, attorney's fees, and home office overhead. Transportation Code § 201.112 does not contain a similar restriction, which creates an opportunity to argue that consequential damages are recoverable.

In the aforementioned *Crawford* case, the court tangentially referred to consequential damages. This case involved a claim that was not, under the court's holding, subject to Transportation Code 201.112 because the claim preceded the application of this statute. Crawford obtained legislative approval to sue TxDOT. Crawford ultimately accepted payment for his actual damages, and the court held that his claim for actual damages was properly dismissed. In discussing the claim, the court stated, "We do not believe that section 201.112 applies in this case to require Crawford to submit his allegations of consequential damages to a new administrative hearing."

The *Crawford* court ultimately held that the trial judge correctly granted summary judgment against Crawford's claim for actual damages, but that the judge erred in dismissing Crawford's claim for consequential damages. This statement, and the holding that Crawford could pursue consequential damages against TxDOT, may allow for an argument that consequential damages are recoverable under the Transportation Code § 201.112 scheme.

Ultimately, the terms of TxDOT's own contract may provide the final word on whether consequential damages are available to construction claimants. In a recent case, the authors reviewed one contractor's agreement and unearthed a provision stating that "[t]he Contractor shall accept the compensation, as provided in the contract, as full payment . . . for any loss or damage which may arise from the nature of the work. . . ." This provision could very well preclude recovery of consequential damages.

B. Attorneys' Fees

Construction law practitioners are familiar with several grounds for requesting attorneys' fees while prosecuting a claim. Perhaps foremost among them is Chapter 38 of the Texas Civil Practice and Remedies Code, which allows a prevailing party to recover its attorneys' fees in a contract cause of action. However, several Texas courts have held that, while § 38.001 of that statute applies to individuals and corporations, the state is considered to be neither of those. Generally speaking, attorneys' fees are not recoverable against the State in pursuing a TxDOT claim.⁷²

⁷² See *R.C. Crawford v. Tex. Dep't of Transp.*, No. 03-04-00029-CV (Tex. App.—Austin Aug. 26, 2001) (mem. op.); see also *State v. Bodisch*, 775 S.W.2d 73, 74 (Tex. App.—Austin 1989, writ denied); *Base-Seal, Inc. v. Jefferson County*, 901 S.W.2d 783, 786-87 (Tex. App.—Beaumont 1995, writ denied) (interpreting Texas Civil Practice Remedies Code § 38.001's application to an individual and corporation, and holding that the State is neither).

V. CASE STUDIES

A contractor, Jordan Paving, recently presented a claim to TxDOT and later to SOAH. Jordan Paving was a 30-year contractor that had historically done 80 to 85% of its work for TxDOT. Jordan Paving claimed approximately \$450,000 for damages due to delays caused by the Department. The Contract Claims Committee denied Jordan Paving's claim in its entirety. Jordan rejected the Contract Claims Committee's decision and petitioned for a SOAH hearing.

The ALJ, in a lengthy and detailed 63-page proposal for decision, awarded approximately \$290,000 to Jordan. The Proposal for Decision, including its findings of fact and conclusions of law, was then sent to TxDOT's Executive Director. The Executive Director refused to adopt the pertinent findings of fact and conclusion of law, and thereby reduced Jordan's recovery to \$3,800, a stipulated sum for increased cost of barricades, in his final order. A copy of the order is attached to this paper as Exhibit "B." As the order demonstrates, TxDOT's Executive Director gave scant explanation for the adoption or rejection of the ALJ's findings of fact and conclusions of law. The Supreme Court ultimately upheld the Executive Director's order.

As noted earlier in this paper, attached at Exhibit "A" is a redacted version of a chart the authors received from TxDOT in response to an open records request. The chart tracks claims against TxDOT that rose to the SOAH level. As can be seen from the chart, the Contract Claims Committee has often offered pennies on the dollar in response to contractors' claims. The chart also makes clear that the Executive Director has frequently reduced awards proposed by the ALJ, sometimes in dramatic fashion. However, the chart also indicates that, in some instances, the Executive Director has followed the ALJ's ruling, even when the ruling differed substantially from the Contract Claims Committee's proposed disposition. This chart may be a useful tool in establishing realistic expectations at the outset of the TxDOT claims process.

VI. CONCLUSION

The Legislature has granted TxDOT broad authority to make rules concerning resolution of contractor claims against it. While the rules may be drafted decidedly in TxDOT's favor, there are multiple instances where contractors have received all or the majority of the damages they claimed from TxDOT. As with any dispute process, better paperwork and meticulous claim preparation will undoubtedly set the stage for greater success.

As indicated above, the claims process is fraught with obstacles to recovery. Parties with claims against TxDOT should enter the fray with their eyes wide open, a thorough understanding of applicable procedures—at TxDOT, SOAH, and in the courts above—and use these factors to form a realistic assessment of the possibility and scope of recovery.