

# **TxDOT Dispute Resolution Process for Construction Contract Claims Settlements**

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## I. INTRODUCTION

The Federal Highway Administration reports that state claims procedures must be designed to address issues of governmental immunity from construction claims, the authority of administrative review, and administrative settlement appeal.<sup>1</sup> In an effort to reduce the expenditure of human and economic resources on claims settlement, the 78th Texas Legislature adopted language endorsing the use of alternative dispute resolution regarding state agencies.<sup>2</sup> The 78th Legislature was the first to include alternative dispute resolution provisions in state agencies' Sunset

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1. See ROSS D. NETHERTON, U.S. DEP'T OF TRANSP., STATE LAWS AND REGULATIONS GOVERNING SETTLEMENT OF HIGHWAY CONSTRUCTION CONTRACT CLAIMS & CLAIM DISPUTES, REPORT NO. FHWA-TS-84-209, at 1 (1984) (on file with the author).

2. CENT. FOR DISPUTE RESOLUTION, 2003 TEXAS ADR LEGISLATIVE REPORT 2 (2003),

bills,<sup>3</sup> and in November 2002, the Sunset Advisory Commission officially enacted an across-the-board recommendation for state agencies to develop and implement alternative dispute resolution practices.<sup>4</sup> This recommendation is in accord with Texas policy on alternative dispute resolution by government agencies, as stated in the Governmental Dispute Resolution Act, chapter 2009 of the Government Code.<sup>5</sup> Further, Senate Bill 1147 incorporated alternative dispute resolution processes into the operations of the State Office of Administrative Hearings (“SOAH”),<sup>6</sup> a key player in the settlement of disputes related to Texas Department of Transportation (“TxDOT”) construction.

An established hierarchy of agency-level resolution processes are now in place that not only grant authorization for suits against the State but also provide guidelines for claims filed at various levels of administration.<sup>7</sup> TxDOT aims to resolve as many disputes as possible at the lower project-level before suits escalate to the district or agency levels. Once a dispute surpasses the project level, it is termed a claim.<sup>8</sup> Numerous preventative measures, including partnering and project, district, and agency-level dispute resolution procedures, have been developed to address disputes early before they mature into claims.<sup>9</sup> TxDOT recognizes that the resolution of disputes at the time they occur results in the least expenditure of time and economic resources.<sup>10</sup>

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available at <http://www.utexas.edu/law/academics/centers/cppdr/resources/2003%20Legislative%20Report.pdf> (last visited March 15, 2006).

3. *Id.* The Sunset Advisory Commission is a Texas oversight committee, which assesses the need for state agencies to exist and serves to enact fundamental changes to an agency’s mission or operations if needed. The Sunset process sets a date by which a state agency is abolished unless legislation is passed to continue its operation. This allows the Legislature to examine closely each agency and make changes to the agency’s mission or operations if necessary. Approximately twenty to thirty state agencies go through the Sunset process each legislative session.

4. *Id.*

5. *Id.*

6. SUNSET ADVISORY COMM’N, IMPLEMENTATION OF THE 2003 SUNSET LEGISLATION 6 (2005), [http://www.sunset.state.tx.us/79threports/compl\\_03.pdf](http://www.sunset.state.tx.us/79threports/compl_03.pdf).

7. See TEX. DEP’T OF TRANSP., CONSTRUCTION CONTRACT ADMINISTRATION MANUAL 8-2 to 8-5 (2004) [hereinafter CONSTRUCTION CONTRACT ADMINISTRATION MANUAL], <http://manuals.dot.state.tx.us:80/docs/colconst/forms/cah.pdf> (last visited Mar. 25, 2006) (discussing the dispute resolution policy and procedures).

8. *Id.* (defining a claim as “a dispute that is not resolved and requires formal action by the TxDOT Contract Claims Committee.”)

9. *Id.* at 3-10 to 3-12, 8-3 to 8-5.

10. *Id.*

## II. PROJECT LEVEL DISPUTE RESOLUTION: CRITICAL PATH MANAGEMENT, PROJECT PARTNERING AND DISPUTE RESOLUTION TRAINING

TxDOT's first line of defense against claim escalation is a proactive approach towards addressing claims at the project level. This approach is manifested through critical path management, the development of project-level partnering, and training to increase the competence of both area engineers and other district level staff in dispute resolution.

### A. CRITICAL PATH MANAGEMENT

The concept of Critical Path Management ("CPM") was developed in the late 1950s to address different construction planning and control problems in the United States.<sup>11</sup> For example, in one case, the U.S. Navy needed to control contracts for its Polaris program.<sup>12</sup> The contracts in question dealt with the research, development, and manufacturing of new component parts. As these parts were being made for the first time, their manufacturing cost and time could not be estimated accurately.<sup>13</sup> In this case, three separate time estimates were projected: "optimistic, pessimistic, and most likely."<sup>14</sup> These three estimates were then used in a mathematical model called the Program Evaluation and Review Technique ("PERT").<sup>15</sup> This technique, similar to the CPM method developed later, projected realistic time estimates despite the existence of major uncertainties.<sup>16</sup>

A second case instrumental in the development of CPM involved the E.I. du Pont de Nemours Company, which was constructing several chemical plants in the United States.<sup>17</sup> These large-scale projects required that both construction time and cost be estimated accurately.<sup>18</sup> The method of Project Planning and Scheduling ("PPS"), was implemented in this case to project realistic estimates for cost and time.<sup>19</sup> The PPS technique was the direct predecessor of the CPM method.<sup>20</sup>

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11. JAMES M. ANTILL & RONALD W. WOODHEAD, *CRITICAL PATH METHODS IN CONSTRUCTION PRACTICE* 2 (2d ed. 1970).

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* The PERT method "was developed by a research team consisting of the U.S. Navy Special Projects Office and the Booz, Allen, and Hamilton" consulting firm. F.H. (BUD) GRIFFIS & JOHN V. FARR, *CONSTRUCTION PLANNING FOR ENGINEERS* 92 (M.D. Morris ed., 2000).

16. ANTILL & WOODHEAD, *supra* note 11, at 2.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* CPM was developed by Morgan Walker of E. I. Du Pont, and James E. Kelly, then with Remington Rand Univac Corporation. GRIFFIS & FARR, *supra* note 15, at 92.

The CPM method assumes that a construction project's activities form a network, defined as a "diagram of activities joined in interconnected links that reflect relationships among complex interrelated tasks."<sup>21</sup> Further, it assumes that one pathway through the network can be used to determine the duration of a construction project. This one pathway is referred to as the "critical path," and "the [minimum] duration of the project is computed by the sum of the 'expected' durations of each activity on the critical path."<sup>22</sup> With CPM, project tasks are diagrammed in detail.<sup>23</sup> Calculations are utilized to estimate activity durations and resource expenditures in each network.<sup>24</sup> Once CPM calculations have been performed, an accurate project scheduling bar chart can be created.<sup>25</sup> A delay in the completion of individual activities anywhere along this critical path—such as a temporary stoppage caused by a dispute—will lead to a delay in the completion of the overall project.<sup>26</sup> However, it is important to note that the network of activities is itself not a schedule, but is rather used in a series of mathematical calculations to produce scheduling data.<sup>27</sup>

The development of CPM networks can assist in the management of project design, scheduling, and control.<sup>28</sup> Districts often utilize CPM methods to assist in the design and execution of construction projects.<sup>29</sup> The critical path may be used to substantiate activity relationships when claims arise.<sup>30</sup> It is also a beneficial scheduling tool to avoid project delay in dispute situations.<sup>31</sup> The CPM tool provides engineers and contractors with a better estimate of a dispute's impact on project development.

The process of agency-wide CPM policy implementation at TxDOT began in 1992.<sup>32</sup> By 1995, formal training was introduced to educate engineers about the potential of claims clarification through critical path scheduling.<sup>33</sup> Compared to the previous system of project-level dispute risk management, the TxDOT CPM system provides a more uniform arrangement by which the agency can address contractor claims.<sup>34</sup>

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21. GRIFFIS & FARR, *supra* note 15, at 92.

22. *Id.*

23. ANTILL & WOODHEAD, *supra* note 11, at 2.

24. GRIFFIS & FARR, *supra* note 15, at 96-102, 106-10.

25. *Id.* at 92, 103.

26. *Id.* at 102.

27. *Id.* at 103.

28. ANTILL & WOODHEAD, *supra* note 11, at 1.

29. *See* GRIFFIS & FARR, *supra* note 15, at 92.

30. JAMES J. O'BRIEN, CPM IN CONSTRUCTION MANAGEMENT 367 (1984).

31. ANTILL & WOODHEAD, *supra* note 11, at 1, 4-5.

32. Interview with Shirley Macik, Administrative Assistant to the Contract Claim Committee (July 20, 2004).

33. *Id.*

34. *Id.*

## B. PROJECT PARTNERING

TxDOT currently employs project partnering as a proactive approach to construction claims prevention on the project level.<sup>35</sup> Partnering is defined as

a long-term commitment between two or more organizations for the purpose of achieving specific business objectives by maximizing the effectiveness of each participant's resources . . . . The relationship is based [on] trust, dedication to common goals and . . . understanding of each other's individual expectations and values. Expected benefits include improved efficiency and cost effectiveness, increased opportunity for innovation, and . . . continuous improvement of quality products and services.<sup>36</sup>

Partnering develops stronger relationships among members of a project team and promotes "trust and commitment, a common mission statement, shared goals, interdependence, [and] accountability . . . ." <sup>37</sup> "It is a concept that is intended to accentuate the positive and overcome the weaknesses that thrive in an adversarial milieu."<sup>38</sup> The desired result of the application of these ends is primarily cost reduction through project efficacy and claims reduction.

It is important to observe that many of the goals installed by partnering initiatives reflect basic principles utilized in the execution of dispute resolution. Shared goals and interdependence are each fundamental objectives in the resolution of interpersonal and inter-organizational conflict.<sup>39</sup> In relation to organizational communication, the perception of interdependent goals can lead to shared ideas, open-minded consideration and improved productivity.<sup>40</sup> The application of partnering ideals to multi-organizational projects encourages productivity while instilling basic conflict resolution principles.<sup>41</sup>

The concept of partnering is particularly applicable to contractor complaints stemming from the competitive bidding process. The rules and guidelines of competitive bidding cannot fully protect the public sector

35. See Kenneth M. Grajek, et al., *Partnered Project Performance in Texas Department of Transportation*, 6 J. INFRASTRUCTURE SYS. 73, 73 (2000).

36. CONSTR. INDUS. INST., IN SEARCH OF PARTNERING EXCELLENCE, SPECIAL PUBLICATION 17-1, at iv (1991).

37. PROJECT TEAM BLDG. TASK FORCE, CONSTR. INDUS. INST., TEAM BUILDING: IMPROVING PROJECT PERFORMANCE, PUBLICATION 37-1, at 3 (1993).

38. CPR INST. FOR DISP. RESOL., 1994 CPR MODEL ADR PROCEDURES AND PRACTICES (MAPP), MODEL ADR PROCEDURE: PREVENTING AND RESOLVING CONSTRUCTION DISPUTES, pt. I, at I-137 (Catherine Cronin-Harris ed., 1994).

39. See generally Dean Tjosvold, *The Goal Interdependence Approach to Communication in Conflict: An Organizational Study*, in THEORY AND RESEARCH IN CONFLICT MANAGEMENT 15, at 16, 18, 25 (M. Afzalur Rahim ed., 1990).

40. See *id.* at 24.

41. See *id.* at 24-26.

from the negative effects of litigation.<sup>42</sup> In response, TxDOT and associated general contractors have incorporated the partnering system to meet the needs of public sector construction projects.<sup>43</sup> “In a ‘best-bid’ environment, litigation . . . by the contractor would be counterproductive and destructive [to the] mutually beneficial relationship.”<sup>44</sup> This is known as “project partnering,”<sup>45</sup> and in addition to offering the regular benefits of partnering, project partnering also provides training methods and project facilitators during a project’s early stages for the purpose of improving communication among construction project team members.<sup>46</sup>

TxDOT initiated its official partnering program in April 1992.<sup>47</sup> The positive results included better work environments, faster project completion, and fewer contract disputes.<sup>48</sup> With the implementation of the Partnering Plus Program in December 1996, partnering was required for all TxDOT construction projects and TxDOT employees and contractors received project partnering training.<sup>49</sup> This training included single-project, team-building seminars that instructed employees and contractors on how to maximize project schedules and cost benefits.<sup>50</sup>

The comparison of partnered TxDOT construction projects to non-partnered projects demonstrates that partnering positively influences “completion times, dispute resolution and project team relations.”<sup>51</sup> Participants have reported the most beneficial elements of partnering preparation as “identification of problem-solving techniques and issue escalation tactics.”<sup>52</sup> Indeed, according to a 1997 Texas Performance Review, TxDOT saved \$7 million over five years after implementing project partnering in 1992.

Texas agencies’ use of ADR has reduced construction costs and time and the number of contractor claims. TxDOT reported that during the last five

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42. See Grajek, *supra* note 35, at 73-75.

43. See *id.*

44. FHWA INT’L TECH. SCANNING PROGRAM, SUMMARY REPORT OF THE CONTRACT ADMINISTRATION TECHNIQUES FOR QUALITY ENHANCEMENT STUDY TOUR (CATQUEST), at 20 (1994) [hereinafter CATQUEST], available at <http://ntl.bts.gov/DOCS/catquest.html> (last visited Jan. 13, 2006).

45. See Grajek, *supra* note 35, at 74 (providing that the term project partnering is used “to describe the voluntary partnering activities conducted by a project-by-project basis within a continuous framework.”).

46. See DOUGLAS D. GRANSBERG, ET AL., TEX. TECH. UNIV., EVALUATION OF THE TxDOT PARTNERING PLUS PROGRAM, PROJECT NO. 0-1729, at 1, available at <http://www.txdot.state.tx.us/business/partnering/documents/Finalreport.pdf>.

47. Grajek, *supra* note 35, at 75.

48. See *id.*

49. See GRANSBERG, *supra* note 46, at 1.

50. See *id.* at 2.

51. Grajek, *supra* note 35, at 73 (language provided in the Abstract).

52. *Id.* at 79.

years, after implementing an ADR process that included partnering, only a few projects had major disputes. According to a report on partnering at TxDOT, “partnering is having a positive impact on schedule duration and claims costs.” According to the study, partnered projects had a higher on-schedule percentage than non-partnered projects, resulting in an estimated savings of \$7 million.<sup>53</sup>

### C. AREA ENGINEERS AND OTHER DISTRICT LEVEL STAFF

TxDOT policy also attempts to address disputes at the project level by equipping various personnel with necessary conflict resolution skills through dispute resolution training.<sup>54</sup> It is often the area engineer, defined as the “engineer in charge of a series of construction projects in a specified geographical area . . . [such as] districts or regions[,]”<sup>55</sup> who is first in line to resolve project-level disputes. Project-level dispute resolution procedure is outlined in the Guide Specifications for Highway Construction, developed in 1962 by the American Association of State Highway and Transportation Officials (“AASHTO”) to promote uniformity among states’ contract administration procedures.<sup>56</sup> The 1962 AASHTO Guide Specifications provide:

The [e]ngineer will decide all questions which may arise as to the quality and acceptability of materials furnished and work performed and as to the rate of progress of the work; all questions which may arise as to the interpretation of the plans and specifications; all questions as to the acceptable fulfillment of the contract on the part of the Contractor.<sup>57</sup>

Additionally, in 1987 and 1988, the State Department of Highways and Public Transportation enacted a dispute resolution policy and contract claim procedure for the resolution of disputes and claims between the department and contractors.<sup>58</sup> The purpose of Administrative Circular No. 10-87 (“AC-10-87”) was the promotion of a more cooperative attitude between area engineers and contractors and the establishment of procedure for the resolution of disputes at the district level.<sup>59</sup> AC-10-87 provides:

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53. TEXAS PERFORMANCE REVIEW, DISTURBING THE PEACE, CROSS GOVERNMENT ISSUES, CG 14: IMPROVE ALTERNATIVE DISPUTE RESOLUTION (1996), <http://www.window.state.tx.us/tptr/tptr4/c8.cg/c814.html>.

54. See generally GRANSBERG, *supra* note 46, at 1-33.

55. ROSS D. NETHERTON, NAT’L COOP. HIGHWAY RESEARCH PROGRAM, CONSTRUCTION CONTRACT CLAIMS: CAUSES AND METHODS OF SETTLEMENT 4 (1983) (available from the Transportation Research Board).

56. See *id.* at 18.

57. *Id.*

58. STATE DEP’T OF HIGHWAYS & PUB. TRANSP., ADMINISTRATIVE CIRCULAR NO. 10-87, at 1 (1987).

59. *Id.* at 1-2.

When the contractor appeals the District's final decision, the District is to request the Construction Division to review the dispute and the District's final decision. The Construction Division will then review the information presented by the contractor and the information presented by the District and make a recommendation to the District for disposition of the matter *in compliance with the contract provisions*. That recommendation shall be founded on fairness to the contractor and to the State. It will be the District's responsibility to notify the contractor in writing of their final decision on his appeal.<sup>60</sup>

In his analysis of contract claims, Netherton states that the AASHTO Guide Specifications, although a separate document, is considered to be part of the official contract between engineers and contractors "in the same way that private construction contracts treat the general conditions as an integral part of the agreement between owner and contractor."<sup>61</sup> The area engineer and district staff should work together to resolve disputes with the project contractor.<sup>62</sup> In addition to the area engineer, the district construction engineer and district engineer should be available to address the contractor's concerns.<sup>63</sup>

Section 104.02 of the 1962 AASHTO Guide Specifications gave contracting agencies the authority to make necessary changes at any time during the progress of work as long as any changes made are within the scope of the contract.<sup>64</sup> The power to adjust the course of the work as necessary and adjust time and compensation for performance after the contract has been established serves a practical need. Work site conditions may require that changes be made immediately and this authority helps agencies sidestep potential disputes between contractors and engineers.<sup>65</sup>

#### D. CLAIM RESOLUTION AT THE PROJECT LEVEL

The State Department of Highways and Public Transportation and TxDOT strongly encourage the resolution of disputes at the project level during the time period of contract.<sup>66</sup> Netherton notes, however, that dispute resolution at the project level is generally "informal, and concentrates on establishing the facts."<sup>67</sup> Furthermore, Netherton states:

In many instances, once the factual situation producing a claim is clarified, the parties can agree on the technical measures that solve the problem, and

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60. *Id.* at 2 (emphasis added).

61. NETHERTON, *supra* note 55, at 18 (alteration in original).

62. CONSTRUCTION CONTRACT ADMINISTRATION MANUAL, *supra* note 7, at 8-3.

63. STATE DEP'T OF HIGHWAYS & PUB. TRANSP., *supra* note 58, at 2-3

64. *See* NETHERTON, *supra* note 55, at 18.

65. *Id.*

66. STATE DEP'T OF HIGHWAYS & PUB. TRANSP., *supra* note 58, at 2.

67. *See* NETHERTON, *supra* note 55, at 18.



on an appropriate change order, including additional compensation, when warranted. In such cases, the result is likely to be a negotiated settlement, implemented voluntarily by the field engineer's action under the authority to order changes within the scope of the contract. The field engineer's position in these situations has been compared to that of a tightrope walker; they must exercise extreme care to avoid, on one hand, being overly generous with the claimant, and, on the other, denying a claim that is justified.<sup>68</sup>

### III. DISTRICT LEVEL DISPUTE RESOLUTION

Disputes that remain unsettled by project-level management require district-level dispute resolution. According to AC-10-87, the Construction Division is responsible for creating and staffing an internal claims section.<sup>69</sup> The Project Management Branch of the Construction Division directs dispute management at the district level.<sup>70</sup> This section works with District personnel and meets with contractors to obtain any additional information since the filing of the dispute claim.<sup>71</sup>

Critical path method is used to determine the scope and validity of the contractor's claim.<sup>72</sup> It is important to note that contractors often have little experience with the development of a claim. In these situations, the Project Management Branch of the Construction Division may provide the contractor with claim development assistance to expedite the claims process. TxDOT and the claimant contractor work to develop an accurate representation of the claims' critical path disruption.<sup>73</sup> Appropriate claims development utilizing critical path illustration has led directly to resolution at the district level for some disputes. Critical path representation elucidates agency requirements for certain claims settlement. Figure 2 illustrates the dispute resolution process at the district level.

### IV. AGENCY AND STATE LEVEL DISPUTE RESOLUTION

#### A. CONTRACT CLAIM COMMITTEE

The original contract claim procedure stipulated by AC-10-87 was adopted by the state of Texas on June 10, 1988, and revised on January 10,

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68. *Id.*

69. STATE DEP'T OF HIGHWAYS & PUB. TRANSP., *supra* note 58, at 3. In the case of Texas, this is the Project Management Branch. CONSTRUCTION CONTRACT ADMINISTRATION MANUAL, *supra* note 7, at 8-5.

70. CONSTRUCTION CONTRACT ADMINISTRATION MANUAL, *supra* note 7, at 8-3, 8-5.

71. *Id.*

72. O'BRIEN, *supra* note 30, at 367.

73. See Michael Peter Lehmann, Contract Claims and Disputes on Texas Highway Construction Projects, at 12, 41 (May 1991) (Master's thesis, Texas A&M University) (on file with author).

1999 as reflected in title 43, section 9.2 of the Texas Administrative Code.<sup>74</sup> TxDOT established the policy outlined by section 9.2 in accordance with section 201.112 of the Transportation Code, which outlines the procedure for the Contract Claim Committee (“CCC”).<sup>75</sup> CCC is composed of a chairperson and three members and was developed to address claims that transcend resolution at the district level.<sup>76</sup> CCC members are appointed by the State Engineer-Director for the State Department of Highways and Public Transportation.<sup>77</sup> The contractor initiates the dispute claim procedure by filing a detailed report with the district engineer, the director of the Construction Division, or the CCC.<sup>78</sup> If the report is filed with the district engineer or director of the Construction Division, the claim will be forwarded to the CCC that will administer the contract claim procedure.<sup>79</sup> This report includes contractor and project reference information, a summary of the claim and requested amount of time or compensation, a detailed explanation of the issues involved in the claim, justification for TxDOT responsibility for compensation related to claim issues, and a specific summary of the calculation of damages resulting in the claim.<sup>80</sup> Figure 3 shows the dispute resolution process at the agency level.

The Committee also receives claim reports from the district including critical path representation of the district’s position.<sup>81</sup> CCC regularly consults with the Construction Division’s Project Management Branch, the district, and related administration in their investigation of dispute claims.<sup>82</sup> Following consultation, the CCC schedules an initial meeting with the contractor to confer on issues related to the claim.<sup>83</sup> This meeting between the CCC and contractor, however, is strictly informal. As subsection (5) provides:

The committee will then afford the contractor an opportunity for a meeting

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74. See 43 TEX. ADMIN. CODE § 9.2 (1999).

75. 23 Tex. Reg. 10360 (proposed Oct. 9, 1998) (proposed amendment to 43 TEX. ADMIN. CODE § 9.2).

76. 43 TEX. ADMIN. CODE § 9.2(b)(1).

77. Allison J. Synder, *Claims and Dispute Resolution Procedures of State Agencies Relating to Construction Contracts*, FINDLAW.COM, Feb. 1997, <http://library.findlaw.com/1997/Feb/1/126228.html> (referring to 43 TEX. ADMIN. CODE § 1.68).

78. 43 TEX. ADMIN. CODE § 9.2(b)(2).

79. *Id.*; see also STATE DEP’T OF HIGHWAYS & PUB. TRANSP., *supra* note 58, at 3 (providing that “[c]ontractor disputes that cannot be resolved under the contract provisions may be submitted to the Contractors Review Committee through the District and the Construction Division.”).

80. See Letter from Arnadeo Saenz, J.R., Chairman, Contract Claim Committee, to the Contractors (Apr. 11, 2002) (on file with the author) (providing as an attachment a suggested format for filing claims).

81. Synder, *supra* note 77.

82. 43 TEX. ADMIN. CODE § 9.2(b)(4).

83. *Id.* § 9.2(b)(4), (5).

to *informally* discuss the disputed matters and to provide the contractor an opportunity to present relevant information and respond to information the committee has received from the department office.<sup>84</sup>

CCC meeting attendants typically include the Committee, CCC chairman, and representatives for the claimant contractor and the district involved in the claim.<sup>85</sup> The contractor presents the claim, the Committee clarifies the details of the claim where necessary, and the district refutes the claim from their position.<sup>86</sup> This presentation is succeeded by a series of CCC clarification and rebuttals.<sup>87</sup> At the close of the meeting, committee members collectively deliberate a decision regarding the presented claim and rebuttals privately.<sup>88</sup> In accordance with section 201.112 (b) of the Transportation Code, decisions by the CCC are binding. A dissatisfied contractor may appeal the CCC's resolution by formally requesting an administrative hearing with the Texas SOAH to resolve the claim under section 2001.057 of the Government Code.<sup>89</sup>

The contract claim process is a modified arbitration process, it is informal, and as Lehmann states, "attendance of attorneys is discouraged as the presence of legal counsel often restricts the free flow of conversation."<sup>90</sup> This arbitration process is modified within TxDOT as "rights" arbitration, whereby the arbiter (CCC) presents a resolution based on the interpretation and application of a project's contract terms.<sup>91</sup> Three methods exist for the selection of arbitrators: (1) they may be selected by the parties involved in the dispute; (2) they may be selected by the National Panel of Construction Arbitrators as maintained by the American Arbitration Association ("AAA"); or (3) each individual party may select arbitrators who, in turn, choose a neutral arbitrator to settle the dispute or to form a panel.<sup>92</sup> Thus, it should be noted that the Contract Claim Procedure, as outlined by title 43, section 9.2 of the Texas Administrative Code, adheres to most of the construction industry dispute resolution standards of the AAA. Excluding procedures specific to AAA improvement, these standards include: "[1] express arbitrator authority to

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84. *Id.* § 9.2(b)(5) (emphasis added).

85. *See id.* § 9.2(b)(1), (5) (providing in subsection (1) that the executive director will name the members and chairman of the contract claim committee and in subsection (5) that the primes contractor will be afforded an opportunity to meet informally to discuss the disputed matters, present relevant information, and respond to the information the committee has received).

86. Lehmann, *supra* note 73, at 43-44.

87. *Id.*

88. *Id.* at 44.

89. TEX. TRANSP. CODE ANN. § 201.112(b) (2005).

90. Lehmann, *supra* note 73, at 43.

91. *See* JOHN S. MURRAY, ALAN SCOTT RAU & EDWARD F. SHERMAN, *ARBITRATION* 17 (1996) (discussing the difference between "rights" and "interest" arbitration).

92. Lehmann, *supra* note 73, at 19.

control the discovery process; [2] broad arbitrator authority to control the hearing; and [3] a concise written breakdown of the award . . . .”<sup>93</sup>

Two main exceptions, however, eliminate CCC proceedings from the legal interpretation of arbitration. First, the discovery process is essentially contractor summary and Committee investigation.<sup>94</sup> Counsel is also replaced by representative presentations. Second, while two of the Committee members who preside over a meeting originate from districts disinterested in the outcome of the claim, the employment of CCC members by an agency party to the dispute is inconsistent with arbitration.<sup>95</sup> “Contractors perceive these [types of] proceedings as subject to bias in favor of the agency’s staff, and have recommended that disputed claims be submitted to outside mediation panels.”<sup>96</sup>

Many highway agencies, including those in Alabama, Arkansas, West Virginia, Texas and Maine, do not believe that outside mediation would improve settlement results, instead relying on CCC member proficiency and the ability to issue a well-informed, professional decision.<sup>97</sup> Netherton subcategorizes this group of highway agencies in his 1983 report, “Construction Contract Claims: Causes and Methods of Settlement,” for the National Cooperative Highway Research Program.<sup>98</sup> Netherton groups Alabama, Arkansas and West Virginia into one group, which “declares that the doctrine bars suits against the state in its regular courts and directs that in the absence of that remedy claimants may request recovery in a special tribunal—Alabama’s Board of Adjustment, Arkansas’ State Claims Commission, and West Virginia’s Court of Claims.”<sup>99</sup>

Texas, a state which denies claimants access to the courts, falls into Netherton’s second subcategory. This subgroup denies “claimants access to the courts and refers [claimants] to procedures established as part of the legislative process.”<sup>100</sup> The Texas state constitution contains no provision relating to suits against the State or its agencies; neither has the Legislature enacted a general waiver of sovereign immunity. Disputes between the contractor and TxDOT must be handled according to administrative procedures, in accordance with the Supplementary Conditions for State of Texas Building Construction Contracts of the Texas Depart-

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93. AM. ARB. ASS’N., CONSTRUCTION INDUSTRY ARBITRATION AND MEDIATION RULES, REGULAR PROCEDURES (2001), <http://www.adr.org/sp.asp?id=22180> (last visited Oct. 19, 2005).

94. See 43 TEX. ADMIN. CODE § 9.2(b)(1), (4).

95. See Lehmann, *supra* note 73, at 23.

96. NETHERTON, *supra* note 55, at 1.

97. See *id.* at 17-18.

98. *Id.*

99. *Id.*

100. *Id.*

ment of Transportation.<sup>101</sup> In the case of Texas, some of these procedures have already been stated, such as the screening of dispute claims by a review committee (including the district engineer, Construction Division, and CCC).

## B. ADMINISTRATIVE HEARING

If a contractor is dissatisfied with the resolution of the CCC, the contractor may request a formal administrative hearing to resolve the dispute claim in accordance with section 2001.057 of the Government Code.<sup>102</sup> Conducted by SOAH, the formal administrative hearing is the final stage in the Texas public construction claims alternative dispute resolution process.<sup>103</sup> The TxDOT engineer-director selects the hearing officers for the administrative hearing; one of these officers is typically a high-ranking TxDOT employee who is not personally involved with the dispute claim.<sup>104</sup> The other member should be a neutral party not associated with TxDOT, usually a lawyer familiar with legal issues related to the construction industry.<sup>105</sup> The engineer-director then assigns one of the hearing members as a presiding officer. An administrative hearing is a legal proceeding presided over by an appointed administrative law judge.<sup>106</sup> Netherton remarks that because contracting agencies' top administrative officers often do not have direct knowledge of the situations that produced the dispute claims, the proceedings "seldom produce any entirely new evidence, but they provide opportunities for claimants to explain their version of the causal events and resulting damages, and give their interpretation of the contract's provisions governing liability."<sup>107</sup> It should be noted that the average settlement time for claims that go to administrative hearing is thirty months.<sup>108</sup> Cronin-Harris notes that large, complex cases may take several months to arbitrate, especially if they are not administered properly; she cites the following reasons for the lengthy process: "lack of cooperation between the parties; the assertion of legal challenges to arbitrability; the quality of administration by a sponsoring organization, if any; the difficulty of finding suitable arbitrators; and the extent to which discovery is allowed."<sup>109</sup> Evidently, the most important factor in the length of the proceedings for an administrative hearing is the expertise of the arbitrator(s). Clearly, an administrative hearing is by far

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101. Synder, *supra* note 77.

102. See TEX. TRANSP. CODE ANN. § 201.112(b); see also 43 TEX. ADMIN. CODE § 9.2(b)(6).

103. 43 TEX. ADMIN. CODE § 9.2(b)(9).

104. See Lehmann, *supra* note 73, at 44.

105. *Id.* at 44-45.

106. CONSTRUCTION CONTRACT ADMINISTRATION MANUAL, *supra* note 7, at 8-2.

107. NETHERTON, *supra* note 55, at 21.

108. Lehmann, *supra* note 73, at 41.

109. CPR INST. FOR DISP. RESOL., *supra* note 38, pt. I, at I-137.

the most time-consuming form of claims settlement available in current TxDOT practice. Figure 4 shows the path of disputes through the state level.

### C. LITIGATION

Only after all the steps in Texas' alternative dispute resolution process have been followed can a contractor take the ultimate legal measure of petitioning the State Legislature to file suit against TxDOT.<sup>110</sup> For all state highway agencies, including TxDOT, the drawback of litigation against the state agency is the increased cost of time and money.<sup>111</sup> Cronin-Harris reports:

In many jurisdictions the trial of a litigated case does not occur until many years after the case is filed. This poses a serious problem to many litigants, particularly plaintiffs who may not be entitled to prejudgment interest. Litigation costs tend to be time oriented; extension of the dispute commonly increases the cost substantially.<sup>112</sup>

According to Lehmann, however, "only three out of the 60 claims filed against the State from 1984 to 1990 have gone entirely through the departmental process and into litigation."<sup>113</sup>

### D. THE TxDOT CLAIMS LOG

A dispute is recorded by the TxDOT Construction Division once it requires a formal review by the Project Management Branch, and an inventory of these disputes is kept as the Construction Claims Log.<sup>114</sup> According to the log, the Division filed a total of 187 construction contract claims in the state of Texas between April 1993 and July 2004—an average of approximately seventeen claims per year.<sup>115</sup> Of these claims, 162 have been settled.<sup>116</sup>

The claims represent advanced disputes in twenty-four districts and three specialized divisions within TxDOT.<sup>117</sup> Table 1 shows the number of filed claims for each TxDOT sector from April 1993 to July 2004, as reported by the Construction Division.

The claims include contractor disputes regarding building, mainte-

110. Lehmann, *supra* note 73, at 15.

111. CPR INST. FOR DISP. RESOL., *supra* note 38, pt. I, at I-137 to 138.

112. *Id.* at I-137.

113. Lehmann, *supra* note 73, at 45.

114. See Tex. Dep't of Transp. Claims Log (2004) (unpublished Microsoft Excel File) (available by request from TxDOT, 7901 North IH-35, Austin, TX 78761-5426 / Tel: (512) 832-7000).

115. *Id.*

116. *Id.* at R4 – R197.

117. *Id.* at I5 – I197.

nance, and construction provisions to contracts.<sup>118</sup> The Claims Log substantiates the cost of claims to TxDOT. Forty-six of the 162 settled claims were settled at the district level.<sup>119</sup> Eighty-four claims were settled by the CCC, and twenty-three claims were settled by administrative hearing, which included two claims that were appealed through the SOAH.<sup>120</sup> The level of settlement was not reported for eight claims that were resolved by the General Services Division.<sup>121</sup>

Of the forty-six claims settled at the district level, fourteen were directly settled by a Change Order, eleven of which were resolved within the area engineer's authority.<sup>122</sup> District-level settlement amounts range from \$0 to \$503,214.58 with a total amount of \$2,522,089.56.<sup>123</sup> Only four of the forty-six settlements made at the district level resulted in zero-dollar settlements.<sup>124</sup> The average time for zero-dollar settlements at the district level was 9.82 months.<sup>125</sup>

The eighty-four settled claims by the CCC figures as 51.8% of the total number of settled claims in the last eleven years, including the two claims that were settled by administrative hearing.<sup>126</sup> The CCC settled claims ranged from zero dollars to \$23,500,000.<sup>127</sup> Twenty CCC claims were settled for zero dollars,<sup>128</sup> but the average time to settle the twenty, zero-dollar settlements at the agency level was 14.72 months—almost five months longer than the time it took for the zero-dollar settlements at the district level.<sup>129</sup>

Of the twenty-three claims that required administrative hearings, two decisions proceeded to appellate court.<sup>130</sup> Eight of the cases that extended beyond the agency level resulted in zero-dollar settlements.<sup>131</sup> An average of 24.6 months was required to complete these claims.<sup>132</sup> Clearly, administrative hearing is by far the most time-consuming form of claims settlement available in TxDOT practice.

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118. *See id.* at K5 – K197.

119. *Id.* at AC5 – AC197.

120. *Id.* at U5 – U197.

121. *Id.*

122. *Id.*

123. *Id.* at S5 – S197.

124. *Id.*

125. *See id.* at AC5 – AC197, N5 – N197, S5 – S197, T5 – T197.

126. *See id.* at AC5 – AC197.

127. *Id.* at S5 – S197, T5 – T197, AC5 – AC197.

128. *Id.* at S5 – S197, AC5 – AC197.

129. *Id.* at N5 – N197, S5 – S197, T5 – T197, AC5 – AC197.

130. *Id.* at U5 – U197.

131. *Id.* at S5 – S197, AC5 – AC197.

132. *Id.* at N5 – N197, S5 – S197, T5 – T197, U5 – U197.

## V. CONCLUSIONS AND RECOMMENDATIONS

Despite the existing alternate dispute resolution procedures and tactics employed by TxDOT, specific protocols for personnel and administration are still lacking. The agency's first line of defense against claim escalation is a proactive approach to addressing claims through the development of project-level partnering and competence in dispute resolution. Although area engineers carry enormous responsibility within TxDOT to resolve project and district-level disputes, CPM and other dispute resolution training is neither mandatory nor readily available. Increased and mandatory training in CPM and mediation-arbitration for area engineers could significantly reduce the number of claims that pass on to the CCC.

Zero-dollar settlements occur at the district, agency, and state levels.<sup>133</sup> While this particular settlement amount is favorable to TxDOT, the expenditure of resources beyond the district level is inefficient. Further research is necessary to determine appropriate methods to identify and manage these disputes before they develop into claims, perhaps including a root cause analysis.

Although the decision by the CCC is considered fairly binding, close to one-third of all dispute claims are appealed through administrative hearing.<sup>134</sup> SOAH issues the same decision as the CCC in a significant portion of the cases, which are zero-dollar settlements.<sup>135</sup> This suggests that contractor satisfaction with the CCC process is lacking.

Arbitration and mediation are effective alternatives to litigation. Giving claimants the option to request outside arbitration or mediation could increase overall satisfaction with the process. The potential for overwhelming inter-agency arbitration can be avoided by specifying arbitrator options. For example, the AAA and Center for Public Resources Legal Program offer free construction industry arbitrators, mediators and guidelines.

While there is room for improvement in the TxDOT claims settlement process, claims occur on less than 2% of TxDOT construction contracts.<sup>136</sup> Other state departments of transportation could certainly benefit from comparison with the TxDOT system.

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133. See *id.* at S5 – S197, AC5 – AC197.

134. See *id.* at U5 – U197.

135. See *id.* at S5 – S197, AC5 – AC197.

136. Grajek, *supra* note 35, at 77.



TABLE 1. DISTRIBUTION OF CONSTRUCTION CLAIMS AMONG DISTRICTS

District	Number of Claims 1993-2004
Abilene	8
Amarillo	4
<b>Atlanta</b>	<b>13</b>
<b>Austin</b>	<b>16</b>
<b>Beaumont</b>	<b>11</b>
Brownwood	0
Bryan	7
Childress	2
<b>Corpus Christi</b>	<b>10</b>
<b>Dallas</b>	<b>16</b>
<b>El Paso</b>	<b>12</b>
Fort Worth	8
<b>Houston</b>	<b>17</b>
Laredo	4
Lubbock	3
Lufkin	4
Odessa	2
Paris	2
Pharr	2
San Angelo	8
San Antonio	9
Tyler	8
Waco	6
Wichita Falls	5
Yoakum	7
Aviation Department	1
Construction Division	1
General Services Division	1
<b>Total</b>	<b>187</b>

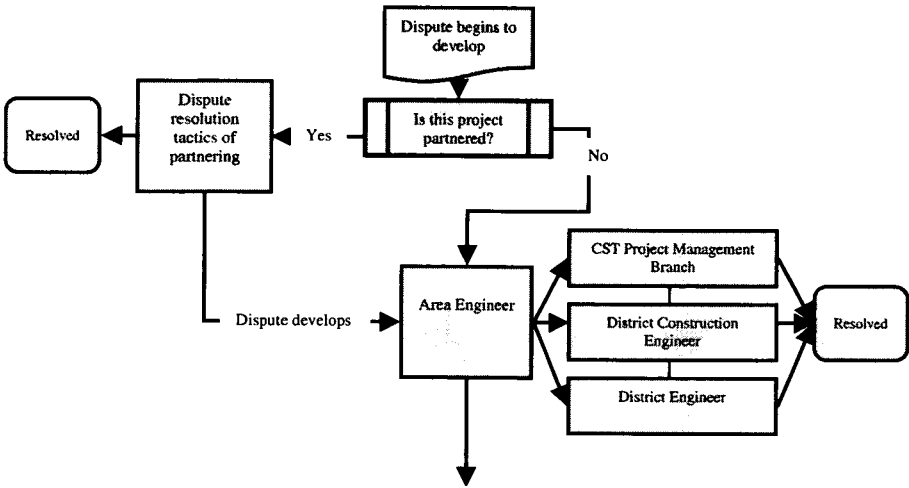


FIGURE 1. PROJECT-LEVEL DISPUTE RESOLUTION PROCESS

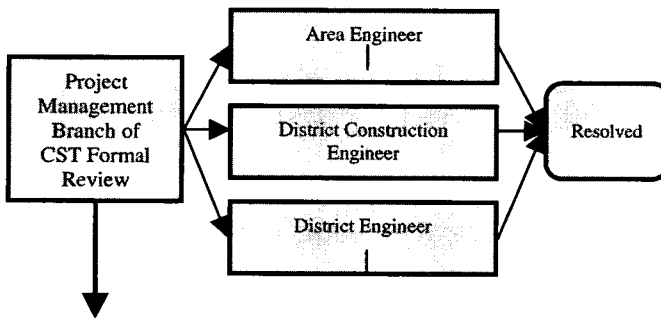


FIGURE 2. DISTRICT-LEVEL DISPUTE RESOLUTION PROCESS

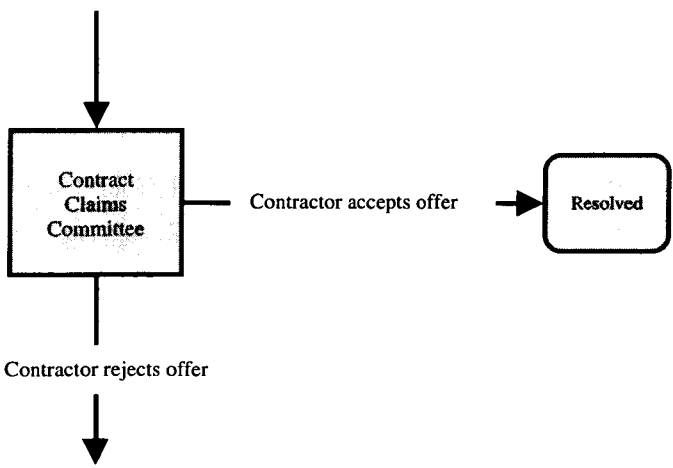


FIGURE 3. AGENCY-LEVEL DISPUTE RESOLUTION PROCESS

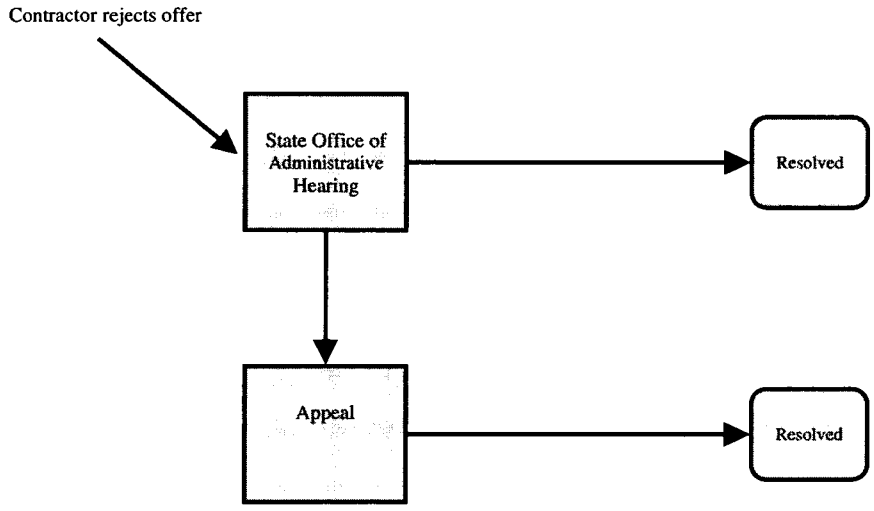


FIGURE 4. STATE-LEVEL DISPUTE RESOLUTION PROCESS

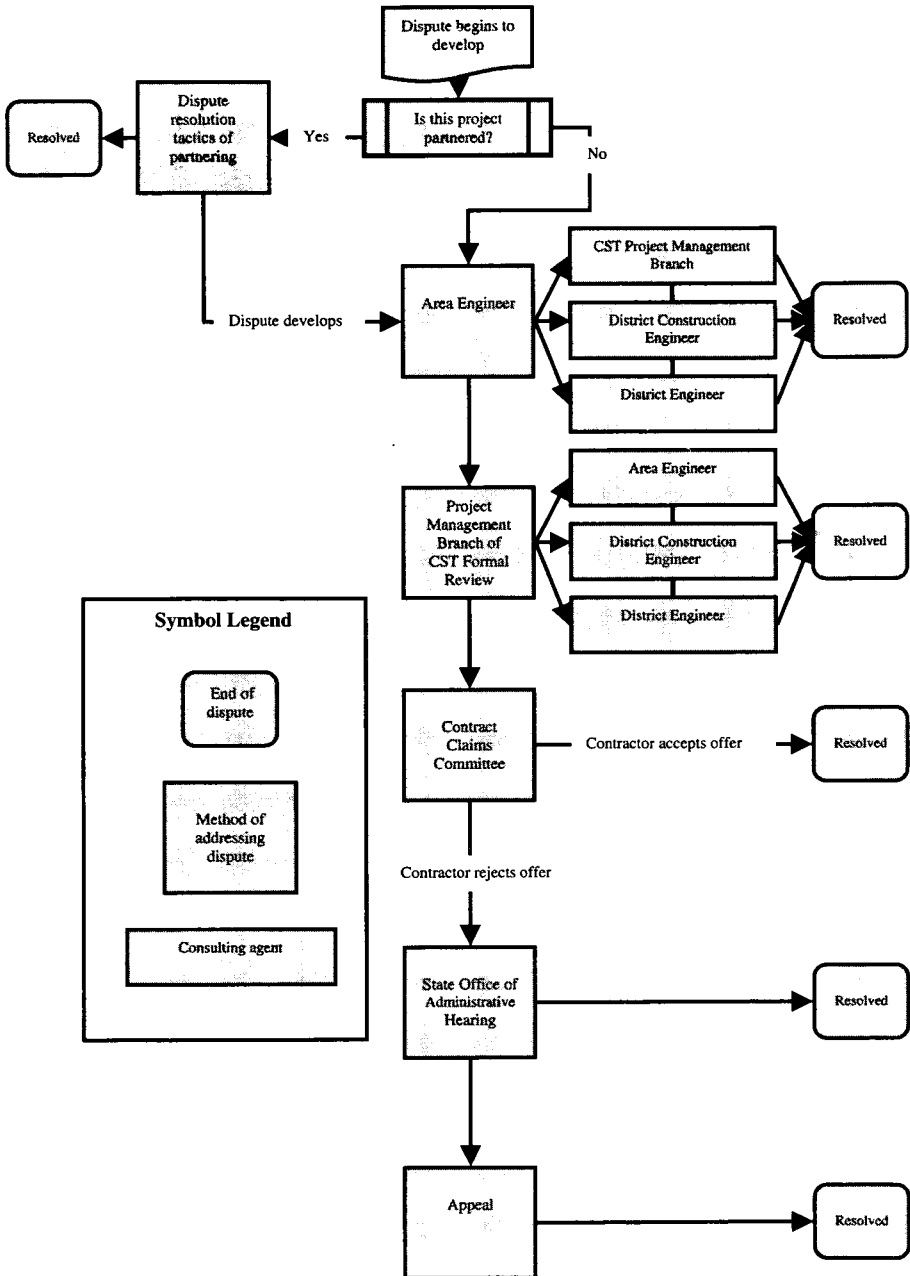


FIGURE 5. TXDOT DISPUTE RESOLUTION PROCESS