

## ASSERTING A CONTRACT CLAIM AGAINST TxDOT

By R. Carson Fisk (as seen in *Texas Construction* March 2008)

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A contract claim is a claim arising under a construction, maintenance, or building contract with TxDOT and includes claims for additional compensation, time extensions, or any other remedy concerning contractual rights or obligations. They can only be brought by a prime contractor. Generally, a contract claim request must be filed no later than one year after notice of default or termination, as applicable, or final acceptance, whichever is earlier. The request needs to be filed with TxDOT's construction division, the TxDOT engineer who administered the project, or the contract claim committee. It must include a specific certification as well as a detailed report stating the relevant facts, a description of any requested additional compensation, cost data, and any supporting documentation. TxDOT is permitted to file a counter-claim.

Before making a decision on the claim, the contract claim committee will gather information, study the relevant issues, and may meet informally with the contractor, oftentimes without counsel. There is no timeframe for making a decision, although the contractor will be notified once a decision is made. If the contractor does not object to the decision, it must file a written statement informing TxDOT of that fact within 20 days after its receipt. TxDOT will prepare the final settlement documents and the contractor is to sign them. If the contractor objects to the decision, the contractor must file a petition to initiate a contested case within 20 days after receipt of the decision. If the contractor fails to file a petition, the right to a contested case hearing is waived.

A petition and one additional copy are to be filed with the executive director of TxDOT. The petition must meet specific requirements and must include, in part, a copy of the contract claim request, the detailed report, and a statement as to when the contract claim committee decision was received. The petition should not otherwise refer to the decision nor should a copy of the decision be included with the petition. If the petition meets the applicable requirements, a contested case will be initiated to be heard in the State Office of Administrative Hearings, known as SOAH. If the applicable requirements are not met, the contractor will be given one opportunity to correct the petition.

At the hearing, the contractor must usually show that TxDOT's actions were based on fraud, misconduct, or such other gross mistake as would imply bad faith or failure to exercise an honest judgment. There is an opportunity for discovery and SOAH is granted powers similar to those that are present in a court of law. Once a hearing has been held, SOAH's proposal for decision is submitted to the executive director of TxDOT who "may change a finding of fact or conclusion of law...or may vacate or modify an order issued by the administrative law judge." A written statement containing the reasoning and legal basis must also be included. TxDOT has routinely asserted that there are no limitations imposed on the executive director's power to change a finding of fact or

conclusion of law. However, the Austin Court of Appeals has recently reaffirmed that this is not the case.

In *State of Texas v. Mid-South Pavers Inc.*, Mid-South brought a contract claim related to a project that was completed in 2001. The claim was for approximately \$2,000,000 plus attorneys' fees and interest. After a contested case, SOAH recommended that Mid-South be awarded approximately \$1,100,000 on its principal claim, approximately \$100,000 in attorneys' fees, as well as interest. TxDOT's executive director determined that the final order should award Mid-South approximately \$600,000 and that the claims for attorneys' fees and interest should be denied. The district court reversed the final order and TxDOT appealed. The Austin Court of Appeals stated that the final order "must be supported by substantial evidence considering the reliable and probative evidence in the record as a whole" and that it must also be consistent with "the executive director's statutory authority and be free of constitutional, statutory, procedural, or other legal error and may not be arbitrary or capricious or otherwise characterized by an abuse of discretion." As TxDOT had made changes not supported by substantial evidence and failed to include a written statement, it had acted in violation of these standards. The court also acknowledged that, where TxDOT has not timely paid for goods or services that it contracted for, a contractor can: (1) recover attorneys' fees from TxDOT and (2) recover prompt payment interest, which is generally the rate of one percent plus the prime rate, regardless of whether a bona fide dispute exists between TxDOT and the contractor.

While the contract claim procedure and associated contested case hearing process are far from balanced, a contractor asserting a contract claim can be assured that there are at least some protections available to it. There are limitations imposed on TxDOT during this process and a contractor may be able to recover meaningful relief in the form of attorneys' fees and interest should TxDOT decide to use the procedural rules to delay a final or acceptable resolution of a contract claim.