

ARTICLE: CONSTITUTIONAL CONCERNS WITH THE TXDOT SANCTIONING PROCESS

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**SUMMARY:**

... TxDOT adopted rules governing the debarment of contractors in April 1982, rules governing the suspension of contractors in August 1982, rules governing supplemental procedures for debarment and suspension in November 1982, and rules governing the imposition of sanctions on maintenance contractors in 1998. ... Despite the fact that the procedural rules stack the odds against the contractor in favor of TxDOT and limit review of any final order, the contested case process may result in the recommendation or issuance of lesser sanctions. ... A review of the Paul and Siegert cases reveals that the United States Supreme Court recognizes that reputation is a constitutionally protected interest when a change in position accompanies it. ... Had the District formally debarred Trifax from bidding on government contracts, that would have unquestionably constituted a deprivation of liberty. ... The Procedural Process Due for a Suspended Contractor A suspension sanction and associated administrative rules may affect the contractor's constitutionally protected contract rights and liberty interests.

**TEXT:**

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I. Introduction

Any contractor who has established a business working for the Texas Department of Transportation (TxDOT) runs the risk of having that source of work taken away in an instant. The sanction process available to TxDOT allows it to unilaterally issue sanctions against a contractor, some of which prevent a contractor from obtaining new work or from completing existing contracts. A sanctioned contractor may contest TxDOT's issuance of sanctions, but the contractor faces an uphill battle since the process, as designed, favors TxDOT. Various rules, specifically those related to the suspension of a **[\*194]** contractor, may be the

proper subject of another collateral attack—a challenge to the constitutional validity of the administrative rules.

This article begins by describing the sanction process and the procedural mechanism for challenging legislative administrative rules. <sup>1</sup> A discussion of the constitutionally protected interests of a contractor that the issuance of sanctions may affect follows the description of the sanction process. <sup>2</sup> The final portion of the article addresses concerns with specific administrative rules and proposes modifications that, if implemented, would result in a meaningful and fair process that adequately protects the interests of both the government and the contractor. <sup>3</sup>

## II. The Sanction Process and Governing Administrative Rules

The Texas Transportation Commission seeks "to protect the health, welfare, and safety of the traveling public and the state's substantial investment in its system of state highways," which "requires procedures to ensure that only responsible contractors are eligible to bid on, enter, and subcontract under highway improvement contracts and that those contracts are fully performed in an efficient and timely manner." <sup>4</sup> Section 201.101 of the Texas Transportation Code allows the Texas Transportation Commission to adopt rules for the operation of TxDOT. <sup>5</sup> TxDOT adopted rules governing the debarment of contractors in April 1982, rules governing the suspension of contractors in August 1982, rules governing supplemental procedures for debarment and suspension in November 1982, and rules governing the imposition of sanctions on maintenance contractors in 1998. <sup>6</sup> The legislature adopted the most recent amendments to the rules governing the sanction process in 2004. <sup>7</sup> The rules governing contractor sanctions set forth the circumstances under which TxDOT may sanction a contractor and the procedures that the parties must follow. These rules are legislative administrative rules as they are based on a grant of legislative power. <sup>8</sup>

Presently, there are three sanctions that TxDOT can issue: (1) a reduction in bidding capacity, (2) debarment, and (3) suspension. <sup>9</sup> A reduction in bidding capacity refers to a decrease in the maximum dollar value that a contractor may have under contract with TxDOT at any given time. <sup>10</sup> Debarment is the **[\*195]** disqualification of a contractor from bidding on or entering into a construction, maintenance, or building contract with TxDOT, from participating as a subcontractor under such a contract, and from participating as a supplier of materials or equipment to be used in the construction or maintenance of state highways. <sup>11</sup> According to the definition, a debarred contractor cannot enter into any new contracts as either a general contractor, subcontractor, or supplier and generally cannot continue performing as a subcontractor or supplier under existing contracts. <sup>12</sup> A suspension, which is immediate and temporary, has the same effect as a debarment except that, unlike a debarment, it is effective while a contractor contests the sanction and ends only when a final order is entered in such a contest. <sup>13</sup> Specifically, the administrative rules define a suspension as:

Immediate, temporary disqualification of a contractor from bidding on or entering into a highway improvement contract, from participating as a subcontractor under a highway improvement contract, and from participating as a supplier of materials or equipment to be

used in the construction or maintenance of a part of the state highway system. Suspension differs from debarment because it may take effect prior to and during a hearing. <sup>14</sup>

A contractor involved in highway improvement contracts for TxDOT may function or seek to function as a general contractor, subcontractor, or supplier. <sup>15</sup> Thus, the business necessarily requires the ability to do one or more of the following: (1) to bid on or enter into such contracts, (2) to participate as a subcontractor under such contracts, or (3) to participate as a supplier of materials or equipment on construction or maintenance projects for the state highway system. <sup>16</sup> The issuance of sanctions, specifically the sanctions of suspension and debarment, directly affects these abilities.

TxDOT can generally issue sanctions for (1) convictions, pleas, or admissions associated with bidding crimes; (2) the commission of or conviction for an offense "indicating a lack of moral or ethical integrity" if the offense reflects on the contractor's business practices; (3) the disqualification of the contractor by a state or a federal government agency; (4) the failure to execute a contract with TxDOT after a bid is awarded; (5) the rejection of a bid due to contractor error two times during a three year period; (6) the failure to promptly notify TxDOT of debarment for a bidding crime or of a conviction for a bidding crime; or (7) a declaration of default on a contract with TxDOT. <sup>17</sup> It is important to note that TxDOT may impute the actions of someone acting on **[\*196]** behalf of a contractor to the contractor. <sup>18</sup> Similarly, the term "contractor" includes an "affiliated entity," which the administrative rules broadly define as "an entity so closely associated with another entity that the two entities will be treated as a single entity." <sup>19</sup> Affiliation generally relates to control or perceived control, although the term also includes any entities owned by the spouse or an immediate family member of the owner of the contractor. <sup>20</sup>

If TxDOT seeks to impose sanctions, it must consider all circumstances, including mitigating circumstances such as the contractor's culpability, the necessity of a lengthy debarment, restitution paid for damages incurred as a result of the contractor's actions, cooperation by the contractor in the investigation of bidding crimes, and the contractor's disassociation from individuals and entities previously involved in a bidding crime. <sup>21</sup> After such consideration, the executive director of TxDOT will determine which one of the four sanction levels will apply: (1) a fifty percent bidding capacity reduction for up to one year; (2) debarment for up to one year; (3) debarment of the contractor for up to three years; or (4) permanent debarment. <sup>22</sup> TxDOT may impose a lesser sanction instead of the maximum allowed. <sup>23</sup> For example, TxDOT may order debarment for a shorter time, may reduce bidding capacity by a lesser percentage, or may order a reduction in bidding capacity instead of debarment. <sup>24</sup> The executive director of TxDOT has discretion to eliminate or modify sanctions at any time if it is in the public interest. <sup>25</sup> The Texas Transportation Commission has this same power. <sup>26</sup>

Once TxDOT issues a sanction, it must notify the contractor within five days after the decision to impose the sanction by certified mail. <sup>27</sup> The notice must provide the general reasons for the sanction, summarize the underlying facts and circumstances for the sanction, state the effective date and length of the sanction, and inform the contractor that within ten days after receiving the notice, the contractor may petition for a hearing. <sup>28</sup> While a sanction generally becomes effective on the date stated in the notice, the effectiveness of a sanction—other than a suspension—is stayed from the date a petition for a contested case hearing is filed until a final order is entered. <sup>29</sup> The administrative rules provide that "[t]he imposition of

sanctions does not affect a contractor's contractual obligations or limit the commission's contractual [\*197] remedies." <sup>30</sup> But, this particular rule directly conflicts with the suspension and debarment sanctions which state that a contractor cannot participate as a subcontractor or supplier. <sup>31</sup>

Once a contractor receives the required notice informing the contractor that TxDOT issued sanctions, it has the right to a contested hearing to challenge the sanctions. <sup>32</sup> Within ten days after receipt of the notice, the contractor may initiate a contested case in the State Office of Administrative Hearings by filing a detailed petition and one copy with the executive director at TxDOT's headquarters. <sup>33</sup> The standard of review is reasonableness because none of the exceptions provided under the TxDOT administrative rules seem to apply. <sup>34</sup> The issue of who bears the burden of proof-TxDOT or the contractor-is not quite as clear. Title 43, section 1.26(d) of the Texas Administrative Code addresses the applicable burden of proof and states in its entirety: "A party seeking monetary damages or penalties shall bear the burden of proof. In all other instances, the party challenging a department decision or action shall bear the burden of proof." <sup>35</sup> The rule is silent as to whether the term "monetary" defines both the terms "damages" and "penalties" or only damages. The rule is also silent as to whether the term penalties includes sanctions. A contractor can argue that there is no substantive distinction between the term "sanction" and the term "penalty." In Black's Law Dictionary, sanction has been defined as "[a] penalty or coercive measure that results from failure to comply with a law, rule, or order." <sup>36</sup> Courts outside of Texas have held that penalty is synonymous and interchangeable with sanction. <sup>37</sup> Numerous courts, including the Supreme Court of the United States and appellate courts of Texas, have used the definition of sanction as found in Black's Law Dictionary. <sup>38</sup> However, the rulemaking history for section 1.26 states that "the department may allocate the burden of proof, but only allocates the burden to the department where money [\*198] is sought by the department. In all other instances, the party challenging a department decision or action bears the burden of proof." <sup>39</sup> At the conclusion of a contested case hearing, there is opportunity for limited judicial review of a final order. <sup>40</sup>

Although the sanction process favors TxDOT and the chances of overturning the issuance of sanctions are slim, it is generally in a contractor's best interest to challenge the issuance of sanctions. Despite the fact that the procedural rules stack the odds against the contractor in favor of TxDOT and limit review of any final order, the contested case process may result in the recommendation or issuance of lesser sanctions. Additionally, the contested case process is the only means to challenge the actual issuance of sanctions. But the Texas Government Code provides another process by which a contractor can attack the administrative rules themselves. <sup>41</sup>

### III. Challenging the Validity of Administrative Rules on Constitutional Grounds

A contractor may challenge the validity of administrative rules in a declaratory judgment action pursuant to section 2001.038 of the Texas Government Code. <sup>42</sup> Specifically, "[t]he validity or applicability of a rule . . . may be determined in an action for declaratory judgment if it is alleged that the rule or its threatened application interferes with or impairs, or threatens to interfere with or impair, a legal right or privilege of the plaintiff." <sup>43</sup> Under the Texas Government Code, the term "rule"

(A) means a state agency statement of general applicability that:

(i) implements, interprets, or prescribes law or policy; or

(ii) describes the procedure or practice requirements of a state agency;

(B) includes the amendment or repeal of a prior rule; and

(C) does not include a statement regarding only the internal management or organization of a state agency and not affecting private rights or procedures. <sup>44</sup>

A contractor may only bring this action in a Travis County District Court, and the state agency must be made a party to the action. <sup>45</sup> The Texas Government Code also provides a procedural mechanism for transferring the claim to the Third District Court of Appeals should the district court find "that the public interest requires a prompt, authoritative determination of the validity or **[\*199]** applicability of the rule in question and the case would ordinarily be appealed." <sup>46</sup>

In asserting a claim for declaratory judgment under section 2001.038 of the Texas Government Code, a contractor properly invokes that section if a justiciable controversy exists and the application of the rules at issue interfere with or impair the legal rights of the contractor. <sup>47</sup> The Texas "due course of law clause and the federal due process clause are textually different, but [courts] generally construe the due course clause in the same way as its federal counterpart. Accordingly, [courts] rely on federal and Texas case law that addresses due process issues in analyzing [a] constitutional challenge." <sup>48</sup> The reason for due process and due course of law is that they keep the state from depriving people of liberty and property without notice or a hearing. <sup>49</sup> To state a valid due process or due course of law claim, a plaintiff must first assert that its interests are constitutionally protected. <sup>50</sup> The easiest and best test of due process of law is to check if there are rudiments of fair play. <sup>51</sup> The Due Process Clause contains two components-procedural and substantive. <sup>52</sup> This article addresses only the procedural component.

The procedural component of due process entitles citizens to "notice and an opportunity to be heard at a meaningful time . . . in a meaningful manner" before the state takes away any rights to life, liberty, or property. <sup>53</sup> The opportunity for people to voice their opinions is "meaningful" even if the state first deprives the person of life, liberty, or property, as long as the hearing provides the person "'a fair opportunity to challenge the accuracy and legal validity of the [deprivation]' and a 'clear and certain remedy.'" <sup>54</sup> Generally, a contractor has a legal right to procedural due process before the state takes its constitutionally protected interests such as contract rights or liberty interests. <sup>55</sup> **[\*200]** To establish that a

procedural due process violation occurred, one applies a two-part analysis: (1) whether the claimant has an interest protected by procedural due process; and (2) if so, what procedural process the claimant should receive. <sup>56</sup>

#### IV. Justiciable Controversy and Governmental Immunity

The Austin Court of Appeals has stated "section 2001.038, like other causes of action, requires the existence of a justiciable controversy to establish the district court's subject-matter jurisdiction." <sup>57</sup> A justiciable controversy is "definite and concrete and must impact the legal relations of parties having adverse legal interests." <sup>58</sup> Under a declaratory judgment action seeking a declaration that administrative rules are invalid, a justiciable controversy generally exists. There would likely be a definite and concrete controversy between the contractor and TxDOT because the contractor would contend certain administrative rules are invalid and unconstitutional, and TxDOT would presumably contend that such rules are valid. This controversy would impact the legal relations of the contractor and TxDOT because if the rules are invalid and unconstitutional then the contractor cannot be sanctioned pursuant to those rules. The parties thus have adverse legal interests because the contractor would seek a judgment that the administrative rules are invalid, and TxDOT would request the court to deny such a judgment.

The plain language of section 2001.038 designates Travis County as the mandatory jurisdiction when challenging the validity of an agency rule. <sup>59</sup> Section 2001.038(b) states that "[t]he action may be brought only in a Travis County district court." <sup>60</sup> Section 2001.038 (c) states that "[t]he state agency must be made a party to the action." <sup>61</sup> The Texas legislature expected that a challenge to the validity or applicability of an administrative rule could be raised in district court if the challenge meets the requirement that the claimant's rights are being threatened, interfered with, or impaired. <sup>62</sup> Furthermore, the **[\*201]** Texas legislature intended for the state agency to be made party to such a lawsuit. <sup>63</sup> Regarding any defense of sovereign immunity or governmental immunity, the Texas Supreme Court recognized that the predecessor to section 2001.038 constituted a waiver of governmental immunity. <sup>64</sup> The Austin Court of Appeals has consistently recognized that section 2001.038 is "an express waiver of governmental immunity from suit for an action that properly invokes that section" <sup>65</sup> and that "section 2001.038 is a grant of original jurisdiction and, moreover, waives sovereign immunity." <sup>66</sup>

#### V. The Contractor's Property Interest in Contract Rights

One legal right or privilege that the sanction rules may affect is a contractor's property interest. A statute or an express or implied contract can create a property interest. <sup>67</sup> The United States Supreme Court recognized the following:

The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests-property interests-may take many forms.

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. . . To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. <sup>68</sup>

It is a basic premise of contract interpretation that courts construe unambiguous contracts as a matter of law. <sup>69</sup> When a contract is unambiguous, "the court must enforce [it] as written." <sup>70</sup> Presumably the parties intended for every clause to have some effect. <sup>71</sup> Texas courts give terms "their plain, ordinary, and generally accepted meaning unless the instrument shows that the parties used them in a technical or different sense." <sup>72</sup>

In a subcontract or supply contract for a TxDOT project, a contractor will generally have the contractual right, and obligation, to perform the requisite scope of work or provide the requisite materials and to receive payment for such work or materials. <sup>73</sup> These benefits, to perform services and to receive payment, would appear to be protected property interests of the contractor that deserve constitutional protection. Any contractor functioning as a subcontractor or supplier would have a legitimate claim of entitlement to such benefits. A suspension sanction directly affects these interests because the contractor cannot perform existing contracts-the sanction disqualifies the contractor "from participating as a subcontractor" and "from participating as a supplier" on construction or maintenance projects. <sup>74</sup> Therefore, the contractor may challenge the suspension sanction rules through the declaratory judgment process under section 2001.038 of the Texas Government Code as they may affect a contractor's constitutionally protected property interests. <sup>75</sup>

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### VI. The Contractor's Liberty Interest in Reputation

The sanction rules may also affect a contractor's liberty interest. The right of contract is one of the essential liberties that the Texas Constitution guarantees its citizens. <sup>76</sup> The United States Supreme Court has stated that a liberty interest

denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential

to the orderly pursuit of happiness by free men. <sup>77</sup>

The Texas Supreme Court stated "where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, the minimal requirements of due process must be satisfied." <sup>78</sup>

In the context of independent contractors dealing with the government, a liberty interest is affected when a potential bidder may not bid on government contracts due to charges of fraud or dishonesty:

One who has been dealing with the government on an ongoing basis may not be blacklisted, whether by suspension or debarment, without being afforded procedural safeguards including notice of the charges, an opportunity to rebut those charges, and, under most circumstances, a hearing. While the deprivation of the right to bid on government contracts is not a property interest, the bidder's liberty interest is affected when that denial is based on charges of fraud and dishonesty. The minimum requirements of due process are notice and an opportunity for hearing appropriate to the nature of the case. <sup>79</sup>

Courts have consistently recognized that a government contractor "blacklisted" by suspension or debarment has a constitutionally protected interest in his reputation. <sup>80</sup> Nevertheless, some cases have broadly held that **[\*204]** injury to reputation is not a constitutionally protected liberty interest. <sup>81</sup> In light of the specific holdings by the various courts regarding independent contractors dealing with the government, each of those cases is distinguishable. In these cases, the position that reputation is not a protected liberty interest directly traces back to the opinions of Paul v. Davis and Siegert v. Gilley. <sup>82</sup> The contention that reputation is not a constitutionally protected interest is perhaps generally accurate, but it is subject to an important exception applicable to a sanctioned contractor. A review of the Paul and Siegert cases reveals that the United States Supreme Court recognizes that reputation is a constitutionally protected interest when a change in position accompanies it. <sup>83</sup>

In Paul, the complainant, Edward Charles Davis III, sought damages from the chief of police after the police distributed a flyer to local stores identifying **[\*205]** Davis as an "active shoplifter." <sup>84</sup> The police had previously arrested Davis for shoplifting but there was no conviction and the charge was outstanding. <sup>85</sup> Davis claimed that the distribution of the flyer and its identification of him as an active shoplifter deprived him of his constitutionally protected liberty interests. <sup>86</sup> The Court noted that Davis did not assert a classical defamation claim but chose to assert his claim as a constitutional claim regarding the deprivation of rights. <sup>87</sup> The Court rejected the constitutional claim and reasoned that earlier decisions did "not establish the proposition that reputation alone, apart from some more tangible interests such as employment, is either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause." <sup>88</sup> The Paul Court distinguished an earlier case where the Court had found an affected liberty interest when the police posted a notice in liquor stores instructing the stores not to make sales or gifts of liquor to certain individuals. <sup>89</sup> Without more, the Paul Court noted, the stigma resulting from the posting in the earlier case did not implicate due process. <sup>90</sup> But the governmental action in the earlier case had not

only produced a stigma; it also deprived the individual of a right he previously held under state law, specifically the right to buy or obtain liquor. <sup>91</sup> As the governmental action in Paul was stigmatizing but did not result in any change in legal status, the court denied the liberty interest claims. <sup>92</sup> The holding of Paul is that in order to invoke the procedural guarantees contained in the due process clause based on damage to reputation due to action of the state, such damage must alter or extinguish a right or status previously recognized. <sup>93</sup> In other words, Paul requires a claimant to show either stigma or damage to reputation plus a change of legal status in order to establish a claim based on a protected liberty interest.

In Siegert, Frederick A. Siegert, a clinical psychologist employed at a federal hospital, sought damages and alleged that his former supervisor had violated Siegert's liberty interests by writing a negative recommendation letter. <sup>94</sup> Siegert asserted a constitutional claim based on the theory that the former supervisor's actions, undertaken with malice, deprived him of a liberty interest. <sup>95</sup> Specifically, he based his claims on the fact that he lost his position at the government facility, an Army hospital refused to consider his application for employment, and he was generally unable to find comparable work because **[\*206]** of the letter. <sup>96</sup> Similar to the observation in Paul, the Court noted that "[d]efamation, by itself, is a tort actionable under the laws of most States, but not a constitutional deprivation." <sup>97</sup> The Court recognized that "injury to reputation by itself was not a 'liberty' interest protected under the Fourteenth Amendment." <sup>98</sup> The most important point from the case is the recognition that "[t]he alleged defamation was not uttered incident to the termination of Siegert's employment by the hospital . . . ." <sup>99</sup> The United States Supreme Court affirmed the dismissal of Siegert's claim as Siegert had "failed to allege the violation of a clearly established constitutional right." <sup>100</sup> Thus, Siegert would seem to further refine the holding of Paul by perhaps requiring stigmatizing statements to be made at or near the time of the deprivation.

The Paul and Siegert cases, and the opinions relying on those holdings, concern harms that common law defamation claims more directly address, while the line of cases directly dealing with contractors being suspended or debarred by the government involve exclusion from a trade or profession. The United States Court of Appeals for the District of Columbia Circuit fully explained this distinguishing factor:

We begin our analysis of the constitutional claim with two due process principles that fit together somewhat uneasily in the circumstances of this case. First, a person's "right to . . . follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' . . . concept[] of the Fifth Amendment." Because this "liberty concept" protects corporations as well as individuals, formally debarring a corporation from government contract bidding constitutes a deprivation of liberty that triggers the procedural guarantees of the Due Process Clause. Second, persons whose future employment prospects have been impaired by government defamation "lack . . . any constitutional protection for the interest in reputation." This principle derives from Paul v. Davis, which held that police distribution of a flyer labeling the plaintiff an "Active Shoplifter[]," though "seriously impair[ing] his future employment opportunities," infringed no liberty interest because it harmed only the plaintiff's reputation. Reiterating this principle in Siegert v. Gilley, the Supreme Court held that a plaintiff whose former government employer sent an admittedly libelous letter of reference that "would undoubtedly . . . impair his future employment prospects" stated no constitutional violation "so long as such damage flows from injury caused by the defendant to a plaintiff's reputation."

The case before us reveals the tension between these two lines of due process cases. Had the District formally debarred Trifax from bidding on government contracts, that would have unquestionably constituted a deprivation of liberty. Conceding that it was not formally debarred, however, [\*207] Trifax claims to have suffered "broad preclusion" from government contracting. In view of the fact that formal debarment would constitute a deprivation of liberty, it would be odd if broad preclusion, equivalent in every practical sense to formal debarment, did not also constitute a deprivation simply because the harm was reputational. For exactly this reason, and notwithstanding the strong language in *Paul v. Davis* and *Siegert v. Gilley*, we have held on several occasions that government stigmatization that broadly precludes individuals or corporations from a chosen trade or business deprives them of liberty in violation of the Due Process Clause.

These employment and government contracting due process cases establish what we call a "reputation plus" requirement—plaintiffs must show not only that the government harmed their reputation, but also that the resulting stigma "altered [their] status in a tangible way." This "change in status requirement," explains why *Paul v. Davis* and *Siegert v. Gilley* have no applicability to the claims here: Both cases involve harms analogous to common-law defamation, while the "reputation plus" cases involve harms approaching, in terms of practical effect, formal exclusion from a chosen trade or profession, as in *Old Dominion*. The key inquiry then is this: Has the government, by attacking personal or corporate reputation, achieved in substance an alteration of status that, if accomplished through formal means, would constitute a deprivation of liberty? <sup>101</sup>

A suspension sanction generally implies dishonesty or a lack of integrity. <sup>102</sup> Once suspended, the damage to a contractor's reputation would coincide with a change in status as the contractor may no longer bid on government contracts with TxDOT or function as a subcontractor despite the fact that it was previously able to do so. <sup>103</sup> These facts satisfy all elements of the reputation plus requirement in showing an affected liberty interest when dealing with reputation. <sup>104</sup> Additionally, TxDOT will generally inform the public about the identity of suspended or debarred contractors as well as inform other contractors who have pending contracts with the sanctioned contractor about the issuance of sanctions. <sup>105</sup> Therefore, a contractor may appropriately challenge the suspension sanction rules through the declaratory judgment [\*208] process under section 2001.038 of the Texas Government Code as it may affect a contractor's constitutionally protected liberty interests. <sup>106</sup>

## VII. The Procedural Process Due for a Suspended Contractor

A suspension sanction and associated administrative rules may affect the contractor's constitutionally protected contract rights and liberty interests. <sup>107</sup> The Due Course of Law Clause of the Texas Constitution and the Due Process Clause of the Fourteenth Amendment to the United States Constitution protect these interests. <sup>108</sup> The deprivation of a contractor's rights resulting from the issuance of a suspension sanction may occur without adequate due process and render the rules invalid. The three-part balancing test set out by the United States Supreme Court in *Mathews v. Eldridge* determines the procedure necessary to satisfy due process requirements in a particular context: (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of such interest through the

procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. <sup>109</sup> To determine what process is necessary, a balance must be struck between the government's interests in suspending and debaring the contractor and the contractor's property interest in continuing to be able to perform work and receive payment or its liberty interest in having an opportunity to bid on and receive government contracts free from a cloud of fraud or dishonesty. <sup>110</sup>

#### A. The Private Interests that Will be Affected by the Official Action

As discussed previously, the official action of TxDOT suspending a contractor may affect the contractor's private interests-both its ability to continue performing work and receiving payment for such work, and its ability to continue its business operations free from a cloud of fraud or dishonesty. <sup>111</sup> These interests are fundamental rights protected by both the Texas Constitution and the federal Constitution. <sup>112</sup> Thus, the private interests potentially affected by the official action of TxDOT in suspending a contractor are paramount as they directly affect the contractor's ability to function. A contractor performing work for TxDOT obviously has an interest entitled to procedural due process [**\*209**] protection-otherwise, the contested case process regarding the issuance of sanctions would be meaningless.

#### B. The Risk of an Erroneous Deprivation and the Probable Value of Additional or Substitute Procedural Safeguards

There is a high risk of an erroneous deprivation of a contractor's interests through the use of the rules regarding a suspension and the applicable procedural mechanism for contesting the suspension. As stated previously, an opportunity for a hearing may be considered "meaningful"-even if the hearing is available only after the deprivation-if the hearing provides the person "a fair opportunity to challenge the accuracy and legal validity of the [deprivation]" and a "clear and certain remedy." <sup>113</sup> This does not negate the requirement that the opportunity to be heard occur at a meaningful time. <sup>114</sup> Based on these standards, the TxDOT administrative rules do not provide for a meaningful opportunity to be heard, and any hearing may not occur in a meaningful time.

##### 1. Burden of Proof

The fact that a contractor may bear the burden to prove that TxDOT acted unreasonably, which leads to concerns about the fairness of the hearing, potentially taints the contested case process. <sup>115</sup> There is great risk in placing the burden of proof on the contractor because this allows TxDOT to make unilateral, subjective decisions, perhaps with complete disregard for its own rules, and then requires the contractor to prove that such actions were unreasonable. This risk of erroneous deprivation of the contractor's rights weighs against imposing the burden of proof on the contractor.

The party seeking to take away constitutionally protected interests should bear the burden of proof. The contractor who seeks merely to preserve his right to work should not bear the burden of proof. Allocating the burden of proof in this manner provides greater assurance that TxDOT will adhere to its own **[\*210]** administrative rules or that it will ultimately be responsible for its failure to do so. This suggestion would be of particular benefit when the suspension is based on subjective standards, such as when sanctions are based on mere suspicion and not issued as the result of a concrete event like a conviction. <sup>116</sup>

## 2. Timing of Contested Case Hearing

There is no notice or opportunity to be heard concerning the suspension as it is immediate and continues until a final order is entered. Because a suspension and debarment must occur simultaneously, a contractor may contest the debarment but is never afforded an opportunity to contest the suspension until the hearing on the debarment, which may occur many months later. <sup>117</sup> Because TxDOT does not stay a suspension during the contested case hearing, the contractor cannot work, as if the contractor was already debarred. <sup>118</sup> Given the identical nature of the substantive definition of "debarment" and "suspension," the contested case hearing basically allows a contractor to challenge the validity of the debarment, but TxDOT debars the contractor while the contractor challenges it. <sup>119</sup> No meaningful opportunity to be heard regarding the suspension exists. <sup>120</sup> In fact, no opportunity to be heard exists. Any purported hearing on the suspension, which is in actuality a hearing on the debarment, occurs after the deprivation and does not provide a contractor a fair opportunity to challenge the accuracy and legal validity of the suspension; therefore, any hearing on the suspension is not meaningful. <sup>121</sup>

The logistical challenge to holding a meaningful hearing lies in the State Office of Administrative Hearings process, which provides for discovery. <sup>122</sup> The contractor will likely feel significant pressure to hold the hearing as soon as possible in order to lessen the impact of a suspension sanction on the contractor's business. By requesting a hearing to challenge a suspension sanction through the contested case process in such a short time frame, the contractor will be unfairly rushed and limited as to what discovery it can conduct. This, in turn, means the contractor will be less informed of the allegations asserted against it and possibly hindered in obtaining essential information necessary to show that TxDOT's actions were unreasonable. For example, if TxDOT failed to follow the proper internal audit process and issued **[\*211]** sanctions based on an erroneous report, the contractor would have virtually no opportunity to discover this information. If the contractor avails itself of the benefits from the discovery process, it will delay the hearing and the contractor becomes unable to work in the interim. The result yields either a hearing that may not constitute a meaningful "opportunity to be heard," as there is no opportunity to obtain critical evidence, or a hearing that may not occur "at a meaningful time," as it occurs well after the deprivation of the protected interests. <sup>123</sup> This risk of an erroneous deprivation of the contractor's rights weighs against both a premature hearing on the merits and a delayed hearing on the merits.

Allowing for an expedited hearing on the suspension, independent of the hearing on the debarment, will assist in alleviating the negative impact of either a premature or delayed hearing. <sup>124</sup> This provides a reasonable means of dealing with the issue because a suspension

sanction and a debarment sanction are in effect two separate sanctions. <sup>125</sup> To the extent a contractor seeks to challenge a debarment sanction, it would be afforded a greater period of time in which to develop its case. By challenging the suspension sanction, the contractor would have the ability to participate in a hearing much earlier than if it availed itself of the full benefits from the discovery process. Basically, by allowing the contractor to participate in a hearing for each sanction, its rights are more fully and fairly protected. <sup>126</sup> It is worth noting that the Federal Acquisition Regulations contemplate a separate hearing for a suspension and a debarment sanction. <sup>127</sup> In addition, the parties could employ some form of expedited discovery or initial disclosure process to facilitate an efficient exchange of information.

### 3. Rights of Affiliates

TxDOT's administrative rules provide the following:

Affiliation may be found when one entity has the power to control another entity, directly or indirectly; when a third party has the power to control two or more other entities, directly or indirectly; when the owner of one entity is a spouse or immediate family member of the owner of the other entity; or when two entities have been so closely allied through an established course of dealings (such as loans, joint ventures, common ownership, common board members, common management, or joint advertising) that the public would reasonably perceive the two entities as under common control. <sup>128</sup>

#### **[\*212]**

This definition, which automatically includes all immediate family members as affiliates of the owner of a contractor entity, is at odds with the federal debarment regulations. <sup>129</sup> Those regulations explain that evidence regarding interests among family members is only an "[i]ndicia of control," which is-and should be-the real issue in determining affiliation. <sup>130</sup> Additionally, no formal process by which an affiliate can seek reinstatement exists, and an affiliate may only submit unspecified information to TxDOT and hope TxDOT reconsiders the issuance of sanction. <sup>131</sup>

Use of these rules and the definition of "affiliate" present a high risk of erroneous deprivation. For example, under these rules the mere fact that someone is an immediate family member of one of the owners of a contractor automatically renders that person suspended. <sup>132</sup> That person may have done absolutely nothing to justify debarment or suspension, and that person could try to begin operating as a contractor years later but would still suffer consequences for acts occurring well in the past.

The probable value of additional or substitute procedural safeguards would be great. Presently, TxDOT does not have a procedure in place that reinstates an affiliate to work on TxDOT projects. <sup>133</sup> Allowing a formal procedure by which an affiliate can petition to work for TxDOT again, rather than the ambiguous discretionary process presently available, gives innocent family members the opportunity to work for TxDOT in the future. The federal rules provide that familial status is only an indicia of control and focuses on control as the real

issue. <sup>134</sup> The TxDOT rules are much too broad-to the point of outweighing TxDOT's interest in protecting the public as compared to the rights of affiliate family members to seek work.

### C. The Government's Interest

The government bases its interest in sanctioning a contractor on TxDOT's goal to "ensure that only responsible contractors are eligible to bid on, enter, and subcontract under highway improvement contracts and that those contracts are fully performed in an efficient and timely manner." <sup>135</sup> The government can adequately protect this interest even if it implements the proposed additional or substitute procedural requirements.

#### **[\*213]**

Regarding the burden of proof, placing the burden of proof on TxDOT rather than the contractor requires no increased fiscal or administrative burden, merely a change in the administrative rules. Regarding an expedited hearing, an expedited hearing on the suspension independent of the hearing on the debarment entails greater fiscal and administrative burdens. However, the balancing of these interests determines the necessary procedures. Even though the balancing of these interests may result in an increased fiscal or administrative burden, that issue alone is insufficient to dismiss the use of such a procedure. Regarding affiliates, TxDOT should view familial status as only an indicator of control rather than a principal factor in determining affiliation-this requires no increased fiscal or administrative burden, merely a change in the administrative rules. The implementation of a structured process by which an affiliate or contractor can seek reinstatement does entail greater fiscal and administrative burdens. But, the burden is somewhat limited, as the process would primarily involve the review of information rather than a formal proceeding.

Under each of the proposed additional and substitute procedural requirements, established sanction procedures continue to protect the government's interest. The procedural requirements only apply when a contractor disputes the reasonableness of the issuance of sanctions or attempts reinstatement. The process does not change when the contractor does not dispute or challenge the issuance of sanctions or seek reinstatement.

### VIII. Conclusion

The existing rules do not adequately protect a suspended contractor's interests. The proposed additional or substitute procedural safeguards are examples of changes that TxDOT could employ. Each may not be entirely feasible or even necessary. These examples are based on the belief that a contractor and its affiliates should be entitled to receive the utmost protection before the government prevents it from continuing its business operations. The balance between the contractor's liberty interest and property interest in continuing its business operations and TxDOT's interest in protecting the public favors greater protection of the contractor's interests.

## Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > General Overview

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection

Real Property Law > Construction Law > General Overview

## FOOTNOTES:

<sup>1</sup> See discussion *infra* Part II.

<sup>2</sup> See discussion *infra* Part III.

<sup>3</sup> See discussion *infra* Parts IV-VI.

<sup>4</sup> 43 Tex. Admin. Code § 9.100 (2008) (Tex. Transp. Comm'n, Purpose).

<sup>5</sup> See Tex. Transp. Code § 201.101(1) (Vernon 2008). "The commission shall: (1) adopt rules for the operation of the department . . . ." *Id.*

<sup>6</sup> See 27 Tex. Reg. 3032 (Apr. 12, 2002).

<sup>7</sup> See 29 Tex. Reg. 10583-84 (Nov. 12, 2004).

<sup>8</sup> See Tex. Workers' Comp. Comm'n v. Patient Advocates, 136 S.W.3d 643, 659 n.6 (Tex. 2004). "A 'legislative' administrative rule is one that is based on a grant of legislative power." *Id.*

<sup>9</sup> See 43 Tex. Admin. Code §§ 9.105, .106 (Tex. Transp. Comm'n, Suspension, Sanctions).

<sup>10</sup> See *id.* §§ 9.12, .101(1) (Tex. Transp. Comm'n, Qualification of Bidders, Definitions).

<sup>11</sup> See *id.* § 9.101(5) (Tex. Transp. Comm'n, Definitions).

<sup>12</sup> See *id.*

<sup>13</sup> See *id.* §§ 9.101(11), .105(b) (Tex. Transp. Comm'n, Definitions, Suspension).

<sup>14</sup> *Id.* § 9.101(11) (Tex. Transp. Comm'n, Definitions).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> See *id.* § 9.106(a) (Tex. Transp. Comm'n, Sanctions).

<sup>18</sup> See *id.* § 9.102(f) (Tex. Transp. Comm'n, Procedure).

<sup>19</sup> See *id.* § 9.101(4) (Tex. Transp. Comm'n, Definitions).

<sup>20</sup> See id.

<sup>21</sup> See id. § 9.104(b)-(c) (Tex. Transp. Comm'n, Application of Sanctions).

<sup>22</sup> See id. §§ 9.104(d), .106(b) (Tex. Transp. Comm'n, Application of Sanctions, Sanctions).

<sup>23</sup> See id. § 9.104(f) (Tex. Transp. Comm'n, Application of Sanctions).

<sup>24</sup> See id.

<sup>25</sup> See id. § 9.104(g).

<sup>26</sup> See id. § 9.103(c) (Tex. Transp. Comm'n, Opportunity for Hearing).

<sup>27</sup> See id. § 9.102(c) (Tex. Transp. Comm'n, Procedure).

<sup>28</sup> See id.

<sup>29</sup> See id. §§ 9.102(c), .103(b) (Tex. Transp. Comm'n, Procedure, Opportunity for Hearing).

<sup>30</sup> See id. § 9.102(d).

<sup>31</sup> See id. § 9.101(5), (11) (Tex. Transp. Comm'n, Definitions).

<sup>32</sup> See id. § 9.103(a).

<sup>33</sup> See id. §§ 1.23, .24, 9.103(a) (Tex. Transp. Comm'n, Filing of Petition, Content for Petition, Opportunity for Hearing).

<sup>34</sup> See id. § 1.26(c) (Tex. Transp. Comm'n, Initiation of Contested Cases, Service of Notice of Hearing, Standard of Review, and Burden of Proof).

<sup>35</sup> Id. § 1.26(d).

<sup>36</sup> Black's Law Dictionary 1341 (7th ed. 1999).

<sup>37</sup> See, e.g., *Page Wellcome, Prof'l Serv. Corp. v. Home Ins. Co.*, 758 F. Supp. 1375, 1379 n.4 (D. Mont. 1991). "'Sanction' is synonymous with the term 'penalty.'" Id.; *Hillsborough County Hosp. Auth. v. Tampa Heart Inst.*, 472 So. 2d 748, 754 (Fla. 2d Dist. Ct. App. 1985). "We conclude this analysis to be sound after considering the interchangeable use and meaning of the terms 'penalty' and 'sanction.'" *Hillsborough County*, 472 So. 2d at 754.

<sup>38</sup> See, e.g., *Dep't of Energy v. Ohio*, 503 U.S. 607, 621 (1992); *Madeira v. Affordable Hous. Found., Inc.*, 469 F.3d 219, 239 (2d Cir. 2006); *Okmyansky v. Herbalife Int'l of Am., Inc.*, 415 F.3d 154, 161 (1st Cir. 2005); *McEvoy v. Aerotek, Inc.*, 34 P.3d 979, 985 (Ariz. Ct. App. 2001); *Dixon v. Home Indem. Co.*, 426 S.E.2d 381, 382 (Ga. Ct. App. 1992); *Mich. Bell Tel. Co. v. Sfat*, 442 N.W.2d 720, 724 (Mich. Ct. App. 1989); *Resolution Trust Corp. v. Tarrant County Appraisal Dist.*, 926 S.W.2d 797, 804 (Tex. App.-Fort Worth 1996, no writ).

<sup>39</sup> 30 Tex. Reg. 723 (Feb. 11, 2005) (codified at 43 Tex. Admin. Code §§ 1.21-.24, .26, .30).

<sup>40</sup> See Tex. Transp. Code Ann. § 201.112(d) (Vernon 2007).

<sup>41</sup> See Tex. Gov't Code Ann. § 2001.038(a) (Vernon 2007).

<sup>42</sup> See *id.*

<sup>43</sup> *Id.*

<sup>44</sup> See *id.* § 2001.003(6).

<sup>45</sup> *Id.* § 2001.038(b)-(c).

<sup>46</sup> See *id.* § 2001.038(f).

<sup>47</sup> *Id.*

<sup>48</sup> See Tex. Workers' Comp. Comm'n v. Patient Advocates, 136 S.W.3d 643, 658 (Tex. 2004) (citing Univ. of Tex. Med. Sch. at Houston v. Than, 901 S.W.2d 926, 929 (Tex. 1995)).

<sup>49</sup> See Skelton v. Comm'n for Lawyer Discipline, 56 S.W.3d 687, 693 (Tex. App.-Houston [14th Dist.] 2001, no pet.) (citing Nelson v. Clements, 831 S.W.2d 587, 591 (Tex. App.-Austin 1992, writ denied)).

<sup>50</sup> See NCAA v. Yeo, 171 S.W.3d 863, 867-68 (Tex. 2005).

<sup>51</sup> See Skelton, 56 S.W.3d at 693 (citing State v. Crank, 666 S.W.2d 91, 94 (Tex. 1984)).

<sup>52</sup> See Rylander v. Palais Royal, Inc. 81 S.W.3d 909, 916 (Tex. App.-Austin 2002, pet. denied); see also Skelton, 56 S.W.3d at 693; Jeffrey v. Bd. of Trs. of the Bells ISD, 261 F. Supp. 2d 719, 723 (E.D. Tex. 2003).

<sup>53</sup> See Patient Advocates, 136 S.W.3d at 658 (citing Mathews v. Eldridge, 424 U.S. 319, 333 (1976); Perry v. Del Rio, 67 S.W.3d 85, 92 (Tex. 2001)); Skelton, 56 S.W.3d at 693 (citing Ho v. Univ. of Tex. at Arlington, 984 S.W.2d 672, 683 (Tex. App.-Amarillo 1998, pet. denied)).

<sup>54</sup> Tex. Dep't of Pub. Safety v. Story, 115 S.W.3d 588, 592 (Tex. App.-Waco 2003, no pet.) (quoting McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, 496 U.S. 18, 39 (1990)).

<sup>55</sup> See Bd. of Regents v. Roth, 408 U.S. 564, 569-70 (1972). The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount. But the range of interests protected by procedural due process is not infinite. *Id.*

<sup>56</sup> See Univ. of Tex. Med. Sch. at Houston v. Than, 901 S.W.2d 926, 929 (Tex. 1995); Pierce v. Tex. Racing Comm'n, 212 S.W.3d 745, 758 (Tex. App.-Austin 2006, pet. denied).

<sup>57</sup> Tex. Logos L.P. v. Tex. Dep't of Transp., 241 S.W.3d 105, 123 (Tex. App.-Austin 2007, no pet.).

<sup>58</sup> McClure v. JPMorgan Chase Bank, 147 S.W.3d 648, 651 (Tex. App.-Fort Worth 2004, pet. denied); *In re C.T.H.*, 112 S.W.3d 262, 265 (Tex. App.-Beaumont 2003, no pet.); James v. Hubbard, 21 S.W.3d 558, 560 (Tex. App.-San Antonio 2000, no pet.); see also Reyna v.

City of Weslaco, 944 S.W.2d 657, 662 (Tex. App.-Corpus Christi 1997, no writ).

¶59 See *Tex. Gen. Indem. Co. v. Tex. Workers' Comp. Comm'n*, 36 S.W.3d 635, 637 (Tex. App.-Austin 2000, pet. denied); see also *Tex. Dep't of Transp. v. City of Sunset Valley*, 92 S.W.3d 540, 549 (Tex. App.-Austin 2002), rev'd on other grounds, 146 S.W.3d 637 (Tex. 2004). "The plain language of section 2001.038 confers jurisdiction upon a district court to resolve two issues: (1) whether a rule is valid, and/or (2) whether a rule is applicable." *Sunset Valley*, 92 S.W.3d at 549.

¶60 *Tex. Gov't Code Ann. § 2001.038(b)* (Vernon 2008).

¶61 *Id.* § 2001.038(c).

¶62 *Id.* § 2001.038(a).

¶63 *Id.* § 2001.038(c).

¶64 *Tex. Dep't of Protective & Regulatory Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 191-92 (Tex. 2004) (quoting *Tex. Dep't of Human Servs. v. ARA Living Ctrs.*, 833 S.W.2d 689, 693 (Tex. App.-Austin 1992, writ denied)). "TDHS also argues that ARA's suit to obtain declaratory relief is barred by the doctrine of governmental immunity. This assertion is also without merit. The legislature has, in section 12, given express statutory authorization to bring an action such as the present one. Accordingly, section 12 [now section 2001.038] represents an express waiver of governmental immunity from suit for an action that properly invokes that section of APTRA. We conclude, therefore, that the trial court had jurisdiction to hear the present case and that it was not barred by the doctrine of governmental immunity." *Id.* at 192.

¶65 *Watson v. N. State Higher Educ. Auth. Inc.*, No. 03- 00-00139-CV, 2000 Tex. App. LEXIS 7017, \*19 (Tex. App.-Austin Oct. 19, 2000, pet. dismiss'd) (not designated for publication).

¶66 *Tex. Logos, L.P. v. Tex. Dep't of Transp.*, 241 S.W.3d 105, 123 (Tex. App.-Austin 2007, no pet.) (citing *Tex. Gov't Code Ann. § 2001.038(a), (c)*); *Tex. Dep't of Human Servs. v. ARA Living Ctrs. of Tex.*, 833 S.W.2d 689, 693 (Tex. App.-Austin 1992, writ denied); *Sw. Bell Tel. Co. v. Pub. Util. Comm'n*, 735 S.W.2d 663, 669 (Tex. App.-Austin 1987, no writ).

¶67 See *Ibarra v. Houston Indep. Sch. Dist.*, 84 F. Supp. 2d 825, 831 (S.D. Tex. 1999). "Generally, a property interest may be secured by a specific statutory provision, a formal contract, a mutually explicit understanding between the employee and the institution, or a specific practice that the institution maintains." *Id.*; *Evans v. City of Dallas*, 861 F.2d 846, 848 (5th Cir. 1988). "A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit" such as expressed in a contract or a statute. *Id.*; *Johnson v. Sw. Miss. Reg'l Med. Ctr.*, 878 F.2d 856, 858 (5th Cir. 1989). "A claim of entitlement to job tenure may be created directly by state statute or by a written contract, or by a 'mutually explicit understanding' enforceable under state law as an implied contract." *Id.*; *Irby v. Sullivan*, 737 F.2d 1418, 1421 (5th Cir. 1984). "The property interest can emanate from a statute, local ordinance, or rule, or from a mutually explicit understanding." *Id.*

¶68 *Bd. of Regents v. Roth*, 408 U.S. 564, 576-77 (1972).

¶69 See *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983). "If the written instrument is so worded that it can be given a certain or definite legal meaning or interpretation, then it is not ambiguous and the court will construe the contract as a matter of law." *Id.*

¶70 *Transcon. Gas Pipeline Corp. v. Texaco Inc.*, 35 S.W.3d 658, 665 (Tex. App.-Houston [1st Dist.] 2000, pet. denied).

¶71 See *Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996). "We presume that the parties to a contract intend every clause to have some effect." *Id.*

¶72 *Id.*

¶73 Tex. Transp. Code Ann. § 40 (Vernon 1997).

¶74 43 Tex. Admin. Code § 9.101(11) (2008) (Tex. Transp. Comm'n, Definitions).

¶75 Tex. Gov't Code Ann. § 2001.038 (Vernon 2007).

¶76 See *Travelers' Ins. Co. v. Marshall*, 76 S.W.2d 1007, 1025 (Tex. 1934). "The right to enter into lawful contracts is one of the guaranties of the Texas Constitution. This guaranty is one of the essential liberties of the citizen, and cannot be nullified by legislative enactment empowering courts to substantially rewrite his agreements." *Id.*

¶77 *Bd. of Regents v. Roth*, 408 U.S. 564, 572 (1972) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)); see also *Univ. of Tex. Med. Sch. at Houston v. Than*, 901 S.W.2d 926, 929-30 (Tex. 1995).

¶78 *Than*, 901 S.W.2d at 930 (citing *Goss v. Lopez*, 419 U.S. 565, 574 (1974)); *Roth*, 408 U.S. at 573).

¶79 *Transco Sec., Inc. v. Freeman*, 639 F.2d 318, 321 (6th Cir. 1981) (citations omitted).

¶80 See *Smith & Wesson v. United States*, 782 F.2d 1074, 1081 (1st Cir. 1986). *Old Dominion Dairy Prods. v. Sec'y of Def.*, 631 F.2d 953, 963-64 (8th Cir. 1989); accord *Sutton v. U. S. Dep't of Hous. & Urban Dev.*, 885 F.2d 471, 475 (8th Cir. 1989). "[A] bidder who lacks a property interest in a government contract might still have a liberty interest at stake 'where the suspension is based on charges of fraud and dishonesty.'" *Id.*; *ATL, Inc. v. United States*, 736 F.2d 677, 683 (Fed. Cir. 1984). "[I]n suspension cases it is recognized that, although a citizen has no right to a Government contract, and a bidder has no constitutionally protected property interest in such a contract, a bidder does have a liberty interest at stake, where the suspension is based on charges of fraud and dishonesty. Accordingly, the minimum requirements of due process come into play." *Id.*; *Old Dominion*, 631 F.2d at 963-64 (D.C. Cir. 1980). *Old Dominion* held that the government deprived a disappointed bidder of a constitutionally protected liberty interest when it made stigmatizing charges that "effectively foreclosed [the disappointed bidder's] freedom to take advantage of other Government employment opportunities, and barred [it] from all public employment." *Id.*; *Arrow Air Inc. v. United States*, 649 F. Supp. 993, 999 (D.D.C. 1986). The suspension and debarment cases do not recognize that a bidder has any constitutionally protected property interest in a government contract; rather, they recognize only that a contractor has a protected liberty interest at stake where he is deprived of the opportunity to bid based upon charges of fraud, dishonesty, or lack of integrity. In such situations, it has been held that the contractor may not be barred or eliminated from the procurement process without prior notice and an opportunity for a hearing on those charges. *Id.*; *Joseph Constr. Co. v. Veterans Admin. of the U.S.*, 595 F. Supp. 448, 450 (D.C. Ill. 1984). In examining a due process claim, we must first determine whether the plaintiff has been deprived of a life, property or liberty interest protected by the Fifth Amendment; we must then determine what process is due the plaintiff. A contractor's liberty interest is affected when it is denied the right to bid on government contracts based upon charges of fraud or dishonesty. *Id.* (citation omitted); *Swinehart v. McAndrews*, 221 F. Supp. 2d 552, 556-57 (D. Pa. 2002). "[When] a plaintiff has been denied only a specific job assignment or the opportunity to bid on or otherwise obtain

future government contracts, that denial only implicates a liberty interest where the barrier is based on charges of fraud or dishonesty." *Id.*; *Labalokie v. Capitol Area Intermediate Unit*, 926 F. Supp. 503, 508 (D. Pa. 1996). "It is settled law that there can be no property interest in obtaining future government contracts, and that suspension or debarment from bidding on such contracts only implicates a liberty interest if it is based upon charges of fraud or dishonesty." *Id.*; *Shermco Indus., Inc. v. Sec'y of Air Force*, 584 F. Supp. 76, 87 (D.C. Tex. 1984). "Shermco had a protected liberty interest that was affected by its suspension by the Air Force for fraud and dishonesty." *Id.*

<sup>81</sup> See *Grey v. Dallas Indep. Sch. Dist.*, No. Civ. A. 3:04-CV-1164K, 2005 U.S. Dist. LEXIS 37475, at \*14 (D.C. Tex. Dec. 31, 2005). "[T]he United States Supreme Court has repeatedly held that injury to reputation is not a constitutionally protected liberty interest." *Id.* *Siegert v. Gilley*, 500 U.S. 226, 233 (1991); see also *Paul v. Davis*, 424 U.S. 693, 708-09 (1976); *Finch v. Fort Bend Indep. Sch. Dist.*, 333 F.3d 555, 561 n.3 (5th Cir. 2003). "[M]ere injury to reputation, even if defamatory, does not constitute the deprivation of a liberty interest." *Id.* *Paul*, 424 U.S. at 711- 12; *NCAA v. Yeo*, 171 S.W.3d 863, 868 (Tex. 2005). "[T]he United States Supreme Court has held that reputation alone is not a protected liberty or property interest." *Id.* *Paul*, 424 U.S. at 701.

<sup>82</sup> *Paul*, 424 U.S. 693; *Siegert*, 500 U.S. 226.

<sup>83</sup> See *Paul*, 424 U.S. 693; *Siegert*, 500 U.S. 226.

<sup>84</sup> *Paul*, 424 U.S. at 695.

<sup>85</sup> *Id.* at 695-96.

<sup>86</sup> *Id.* at 697.

<sup>87</sup> *Id.* at 698.

<sup>88</sup> *Id.* at 701.

<sup>89</sup> *Id.* at 707 (citing *Wisconsin v. Constantineau*, 400 U.S. 433, 434 n.2 (1971)).

<sup>90</sup> *Id.* at 709.

<sup>91</sup> *Id.* at 708-09.

<sup>92</sup> *Id.* at 711-12.

<sup>93</sup> *Id.*

<sup>94</sup> *Siegert v. Gilley*, 500 U.S. 226, 227-29 (1991).

<sup>95</sup> *Id.* at 229.

<sup>96</sup> *Id.* at 232.

<sup>97</sup> *Id.* at 233.

<sup>98</sup> *Id.* (citing *Paul*, 424 U.S. at 708-09).

<sup>99</sup> *Id.* at 234.

<sup>100</sup> *Id.* at 231.

<sup>101</sup> Trifax Corp. v. Dist. of Columbia, 314 F.3d 641, 643-44 (D.C. Cir. 2003) (emphasis added) (internal citations omitted).

<sup>102</sup> See 43 Tex. Admin. Code § 9.106(a) (2008) (Tex. Transp. Comm'n, Sanctions). The executive director can issue sanctions for: (1) convictions, pleas, or admissions associated with bidding crimes; (2) the commission of or conviction for an offense indicating a lack of moral or ethical integrity if the offense reflects on the contractor's business practices; (3) the disqualification of the contractor by a state or a federal government agency; (4) the failure to execute a contract with TxDOT after the awarding of a bid; (5) the rejection of a bid because of a contractor error twice in a three year period; (6) the failure to promptly notify TxDOT of a conviction of a bidding crime or debarment; or (7) a declaration of default on a contract with TxDOT. *Id.*

<sup>103</sup> See *id.* § 9.106(b).

<sup>104</sup> See *supra* notes 75-80 and accompanying text.

<sup>105</sup> See Construction Division, Debarred/Sanctioned Contractors, <http://www.txdot.gov/services/construction/default.htm> (last visited Oct. 28, 2008).

<sup>106</sup> See Tex. Gov't Code Ann. § 2001.038 (Vernon 2008).

<sup>107</sup> See discussion *supra* Part III.

<sup>108</sup> Tex. Const. art. I, § 19; U.S. Const. amend. XIV, § 1.

<sup>109</sup> See *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976) (setting forth the applicable balancing test).

<sup>110</sup> See *Shermco Indus. Inc. v. Sec'y of Air Force*, 584 F. Supp. 76, 87-88 (N.D. Tex. 1984) (recognizing the existence of these interests).

<sup>111</sup> See discussion *supra* Part IV and V.

<sup>112</sup> See discussion *supra* Part IV and V.

<sup>113</sup> *Tex. Dep't of Pub. Safety v. Story*, 115 S.W.3d 588, 592 (Tex. App.-Waco 2003, no pet.) (quoting *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 39 (1990)).

<sup>114</sup> See *Tex. Workers' Comp. Comm'n v. Patient Advocates*, 136 S.W.3d 643, 658 (Tex. 2004) (citing *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Perry v. Del Rio*, 67 S.W.3d 85, 92 (Tex. 2001)); *Skelton v. Comm'n for Lawyer Discipline*, 56 S.W.3d 687, 693 (Tex. App.-Houston [14th Dist.] 2001, no pet.) (citing *Ho v. Univ. of Tex. at Arlington*, 984 S.W.2d 672, 684 (Tex. App.-Amarillo 1998, pet. denied)).

<sup>115</sup> See 43 Tex. Admin. Code § 1.26(d) (Tex. Transp. Comm'n, Initiation of Contested Cases, Service of Notice of Hearing, Standard of Review, and Burden of Proof); *Sloan v. Dep't of Hous. & Urban Dev.*, 231 F.3d 10 (D.C. Cir. 2000). [A]ppellants were given clear notice of the charges against them and a fair opportunity to prepare a defense; they were then afforded extensive rights to a full hearing before an ALJ, during which the Government carried the burden of proof, followed by an appeal to the Secretary and then judicial review. *Id.* at 18.

<sup>116</sup> See, e.g., 43 Tex. Admin. Code § 9.106(a)(3) (Tex. Transp. Comm'n, Sanctions).

"The executive director may sanction a contractor for the following reasons: . . . commission of acts indicating a lack of moral or ethical integrity and reflecting on the business practices of the contractor, if the executive director has probable cause to believe that the acts have been committed." Id.

<sup>n117</sup> See id. § 9.105(a) (Tex. Transp. Comm'n, Suspension).

<sup>n118</sup> See id. § 9.103(b) (Tex. Transp. Comm'n, Opportunity for Hearing).

<sup>n119</sup> Id. § 9.103(a).

<sup>n120</sup> See id.

<sup>n121</sup> See id.

<sup>n122</sup> See Tex. Gov't Code Ann. §§ 2001.89-.102 (Vernon 2008); 1 Tex. Admin. Code § 155.31 (State Office of Admin. Hearings, Discovery); 43 Tex. Admin. Code § 1.27 (Tex. Transp. Comm'n, Discovery).

<sup>n123</sup> See *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

<sup>n124</sup> But see 48 C.F.R. § 9.407-3 (2007).

<sup>n125</sup> See 48 C.F.R. § 9.406-4 (2007); see also id. § 9.407-4.

<sup>n126</sup> But see 43 Tex. Admin. Code § 9.101(11) (Tex. Transp. Comm'n, Definitions).

<sup>n127</sup> See 48 C.F.R. 9.406-3, 9.407-3.

<sup>n128</sup> 43 Tex. Admin. Code § 9.101(4) (Tex. Transp. Comm'n, Definitions).

<sup>n129</sup> See 48 C.F.R. § 9.403; contra 43 Tex. Admin. Code § 9.101(4).

<sup>n130</sup> See 48 C.F.R. § 9.403.

<sup>n131</sup> See 43 Tex. Admin. Code § 9.103(c) (Tex. Transp. Comm'n, Opportunity for Hearing). "In the public interest, the commission may reduce, eliminate, or modify sanctions imposed under this section at any time." Id.; see also id. § 9.104(g) (Tex. Transp. Comm'n, Application of Sanctions). "In the public interest the executive director may reduce, eliminate, or modify sanctions at any time." Id.

<sup>n132</sup> See id. § 9.104(g); see also 48 C.F.R. § 9.403; 43 Tex. Admin. Code § 9.101(4) (Tex. Transp. Comm'n, Definitions).

<sup>n133</sup> See generally 43 Tex. Admin. Code § 9.102 (Tex. Transp. Comm'n, Procedure) (illustrating the procedure for sanctions of contractors).

<sup>n134</sup> See 48 C.F.R. § 9.403.

<sup>n135</sup> See 43 Tex. Admin. Code § 9.100 (Tex. Transp. Comm'n, Purpose).