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XX.

TEXAS WORKFORCE COMMISSION

The rules are adopted under Texas Labor Code §§301.0015 and 302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

Chapter 800. GENERAL ADMINISTRATION

SUBCHAPTER A. GENERAL PROVISIONS

§800.1. Short Title and Purpose

These rules may be cited as the General Provisions Rules. The purpose of this subchapter is to set forth the general provisions applicable to the Commission.

The provisions of this §800.1 adopted to be effective December 20, 1998, as published in the Texas Register, December 11, 1998, 23 TexReg 12691.

§800.2. Definitions

The following words and terms, when used in this part, relating to the Texas Workforce Commission, shall have the following meanings, unless the context clearly indicates otherwise.

- (1) Agency--The unit of state government established under Texas Labor Code Chapter 301 that is presided over by the Commission and administered by the Executive Director to operate the integrated workforce development system and administer the unemployment compensation insurance program in this state as established under the Texas Unemployment Compensation Act, Texas Labor Code Annotated, Title 4, Subtitle A, as amended. The definition of "Agency" shall apply to all uses of the term in rules contained in this part, or unless otherwise defined, relating to the Texas Workforce Commission that are adopted after February 1, 2001.
- (2) Allocation--The amount approved by the Commission for expenditures to a local workforce development area during a specified program year, according to specific state and federal requirements.
- (3) Board--A Local Workforce Development Board created pursuant to Texas Government Code §2308.253 and certified by the Governor pursuant to Texas Government Code §2308.261. This includes such a Board when functioning as the Local Workforce Investment Board as described in the Workforce Investment Act §117 (29 U.S.C.A. §2832), including those functions required of a Youth Council, as provided for under the Workforce Investment Act §117(i). The definition of "Board" shall apply to all uses of the term in the rules contained in this part, or unless otherwise defined, relating to the Texas Workforce Commission that are adopted after February 1, 2001. Boards are subrecipients as defined in OMB Circular A-133.
- (4) Child Care--Child care services funded through the Commission, which may include services funded under the Child Care and Development Fund, WIA, and other funds available to the Commission or a Board to provide quality child care to assist families seeking to become independent from, or who are at risk of becoming dependent on, public assistance while parents are either working or participating in educational or training activities in accordance with state and federal statutes and regulations.
- (5) Choices--The employment and training activities created under §31.0126 of the Texas Human Resources Code and funded under TANF (42 U.S.C.A. 601 *et seq.*) to assist persons who are receiving temporary cash assistance, transitioning off, or at risk of becoming dependent on temporary cash assistance or other public assistance in obtaining and retaining employment.

- (6) Commission--The body of governance of the Texas Workforce Commission composed of three members appointed by the Governor as established under Texas Labor Code §301.002 that includes one representative of labor, one representative of employers and one representative of the public. The definition of "Commission" shall apply to all uses of the term in rules contained in this part, or unless otherwise defined, relating to the Texas Workforce Commission that are adopted after February 1, 2001.
- (7) Formal Measures--Workforce development services performance measures adopted by the Governor and developed and recommended through the Texas Workforce Investment Council (TWIC).
- (8) Employment Service--A program to match qualified job seekers with employers through a statewide network of one-stop career centers. (The Wagner-Peyser Act of 1933 (Title 29 U.S.C., Chapter 4B) as amended by the Workforce Investment Act of 1998 (P.L. 105-220))
- (9) Executive Director--The individual appointed by the Commission to administer the daily operations of the Agency, which may include a person delegated by the Executive Director to perform a specific function on behalf of the Executive Director.
- (10) Local Workforce Development Area (workforce area)--Workforce areas designated by the Governor pursuant to Texas Government Code §2308.252 and functioning as a Local Workforce Investment Area, as provided for under the Workforce Investment Act §116 and §189(i)(2) (29 U.S.C.A., §2831 and §2939).
- (11) One-Stop Service Delivery Network--A one-stop-based network under which entities responsible for administering separate workforce investment, educational and other human resources programs and funding streams collaborate to create a seamless network of service delivery that shall enhance the availability of services through the use of all available access and coordination methods, including telephonic and electronic methods. Also referred to as the Texas Workforce Network.
- (12) Performance Measure--An expected performance outcome or result.
- (13) Performance Target--A contracted numerical value setting the acceptable and expected performance outcome or result to be achieved for a performance measure, including Core Outcome Formal Measures. Achievement between 95 and 105 percent of the established target is considered meeting the target.
- (14) Program Year--The twelve-month period applicable to the following as specified:
 - (A) Child Care: October 1 - September 30;
 - (B) Choices: October 1 - September 30;
 - (C) Employment Service: October 1 - September 30;
 - (D) Supplemental Nutrition Assistance Program Employment and Training: October 1 - September 30;
 - (E) Project RIO: October 1 - September 30;
 - (F) Trade Act services: October 1 - September 30;
 - (G) Workforce Investment Act (WIA) Adult, Dislocated Worker, and Youth formula funds: July 1 - June 30;
 - (H) WIA Alternative Funding for Statewide Activities: October 1 - September 30; and
 - (I) WIA Alternative Funding for One-Stop Enhancements: October 1 - September 30.

- (15) Project Reintegration of Offenders (RIO)--A program that prepares and transitions ex-offenders released from Texas Department of Criminal Justice or Texas Youth Commission incarceration into gainful employment as soon as possible after release, consistent with provisions of the Texas Labor Code, Chapter 306, Texas Government Code §2308.312, and the Memorandum of Understanding with the Texas Department of Criminal Justice and the Texas Youth Commission.
- (16) Supplemental Nutrition Assistance Program Employment and Training (SNAP E&T)--A program to assist SNAP recipients to become self-supporting through participation in activities that include employment, job readiness, education, and training, activities authorized and engaged in as specified by federal statutes and regulations (7 U.S.C.A. §2011), and Chapter 813 of this title relating to Supplemental Nutrition Assistance Program Employment and Training.
- (17) TANF--Temporary Assistance for Needy Families, which may include temporary cash assistance and other temporary assistance for eligible individuals, as defined in the Personal Responsibility and Work Opportunities Reconciliation Act of 1996, as amended (7 U.S.C.A. §201.1 *et seq.*) and the Temporary Assistance for Needy Families statutes and regulations (42 U.S.C.A. §601 *et seq.*, 45 Code of Federal Regulations (C.F.R.) Parts 260 - 265). TANF may also include the TANF State Program (TANF SP), relating to two-parent families, which is codified in Texas Human Resources Code, Chapter 34.
- (18) Trade Act Services--Programs authorized by the Trade Act of 1974, as amended (and 20 C.F.R. Part 617) providing services to dislocated workers eligible for Trade benefits through Workforce Solutions Offices.
- (19) TWIC--Texas Workforce Investment Council appointed by the Governor pursuant to Texas Government Code §2308.052 and functioning as the State Workforce Investment Board (SWIB), as provided for under the Workforce Investment Act §111(e) (29 U.S.C.A. §2821(e)). In addition, pursuant to the Workforce Investment Act §194(a)(5) (29 U.S.C.A. §2944(a)(5)), TWIC maintains the duties, responsibilities, powers, and limitations as provided in Texas Government Code §§2308.101 - 2308.105.
- (20) WIA--Workforce Investment Act (P.L. 105-220, 29 U.S.C.A. §2801 *et seq.*). References to WIA include references to WIA formula-allocated funds unless specifically stated otherwise.
- (21) WIA Formula-Allocated Funds--Funds allocated by formula to workforce areas for each of the following separate categories of services: WIA Adult, Dislocated Worker and Youth (excluding the Secretary's and Governor's reserve funds and rapid response funds).
- (22) Workforce Solutions Offices Partner--An entity that carries out a workforce investment, educational, or other human resources program or activity, and that participates in the operation of the One-Stop Service Delivery Network in a workforce area consistent with the terms of a memorandum of understanding entered into between the entity and the Board.

The provisions of this §800.2 adopted to be effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

§800.3. Historically Underutilized Businesses

- (a) The Commission is committed to assisting Historically Underutilized Businesses (HUBs) as defined in Texas Government Code §2161.001(2) in their efforts to participate in contracts to be awarded by the Commission. This includes assisting HUBs to meet or exceed the procurement utilization goals set forth in 34 Texas Administrative Code (TAC), Part 1, Chapter 20, Subchapter B (relating to the Historically Underutilized Business Program).

- (b) The Commission shall take positive steps to inform HUBs of opportunities to provide identified state services that it determines may best be provided through a competitive process.

The provisions of this §800.3 adopted to be effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

§800.4. Gifts

The Commission shall adhere to the Texas Ethics Commission's rules relating to the acceptance of gifts or other benefits from persons appearing before or regulated by the Commission pertaining to the Commission officers and employees and as adopted by the Texas Ethics Commission at 1 TAC Part II.

The provisions of this §800.4 adopted to be effective December 20, 1998, as published in the Texas Register, December 11, 1998, 23 TexReg 12691.

§800.5. Commission Professional Development Program

- (a) **Scope and Purpose.** The Commission provides training opportunities to enhance job skills and to retain a well qualified, trained, professional workforce dedicated to the Commission's mission. The Professional Development Program training includes instruction, teaching, or other education received by a state employee that is not normally received by other state employees and that is designed to enhance the ability of the employee to perform the employee's job. This section establishes eligibility and related requirements for employee participation in the Commission's Professional Development Program.
- (b) **Eligibility.** The executive director or the executive director's designee will determine an employee's eligibility for the professional development program. Factors to be considered include, but are not limited to:
 - (1) an employee's job performance;
 - (2) a recommendation from the employee's supervisor;
 - (3) the relationship of the training to the employee's position; and
 - (4) any other factor deemed relevant by the executive director or his designee.
- (c) **Restitution from Employees for Training Costs.** The employee training is conditional upon all of the following:
 - (1) The employee shall attend and satisfactorily complete the training, including passing tests or other types of performance measures where required.
 - (2) At the discretion of the executive director or the executive director's designee, the employee shall complete and file with the Commission prior to the commencement of the training, on forms prescribed by the Commission, an employee training agreement that sets forth the terms and conditions of the training assistance, including a provision for working for the Agency for a prescribed period of time or paying back the amount of the assistance.
 - (3) For any training paid for by the Commission, where the employee does not perform the employee's regular duties for three or more months due to the training, the employee shall:
 - (A) work for the agency following the training for at least one month for each month of the training period, prorated as appropriate; or
 - (B) pay the Commission for all costs associated with the training that were paid before, during, or after the training, including any amounts of the employee's salary that were paid and that were not accounted for as paid vacation or compensation leave.

The provisions of this §800.5 adopted to be effective February 12, 2007, as published in the Texas Register, February 9, 2007, 32 TexReg 553.

§800.6. Charges for Copies of Public Records.

- (a) General Procedure. Except as otherwise specified in this chapter, for public information requests under Texas Government Code, Chapter 552, the Commission hereby adopts by reference the definitions, methods, procedures, and charges for copies of public records required under the Office of the Attorney General rules (1 TAC, Part 3, Chapter 70), as may be amended.
- (b) Written requests may be submitted:
 - (1) in person or by mail addressed to: Officer for Public Information, Texas Workforce Commission, 101 East 15th Street, Austin, Texas 78778-0001; or
 - (2) by e-mail or facsimile to designated e-mail addresses and facsimile numbers on the Agency's Web page.
- (c) Standard Fees. The Commission may establish a standard fee for the handling of common categories of requests that the Commission frequently receives when the costs of responding to such requests are substantially similar in most cases.
- (d) Adjustments for Actual Cost. In the event that the actual costs of responding to a given request are significantly lower or higher than the standard fee charged for that type of request, actual costs will be charged in lieu of the standard fee.
- (e) Unemployment Insurance-Related Requests.
 - (1) Unemployment insurance (UI)-related records are exempt from Texas Government Code, Chapter 552.
 - (2) No charge will be assessed to an individual or an employing unit for copies of records pertaining to that individual or employing unit when the provision of records is deemed by the Commission to be reasonably required for the proper administration of the Texas Unemployment Compensation Act (Texas Labor Code, Title 4, Subtitle A).
 - (3) UI-related requests for purposes other than the administration of the Texas Unemployment Compensation Act shall be assessed a fee.
- (f) Requests by Other Governmental Entities. Notwithstanding any other provision in this section, provision of information to other governmental agencies for purposes other than the administration of the Texas Unemployment Compensation Act will be made only on a cost reimbursable basis, with all costs being calculated in accordance with OMB Circular A-87, consistent with generally accepted accounting principles or applicable regulations including, but not limited to, 20 C.F.R. §603.1 *et seq.* Charges to other governmental entities can be waived only when the request is of an isolated or infrequent nature and when the costs of responding to a particular request are negligible.
- (g) Certified Records. In addition to the fees the Commission may charge for providing copies of records, the Commission shall charge a fee of \$15.00 for preparation of a certification instrument, which may be attached to one or more pages of records covered by the certification instrument.

The provisions of this §800.6 adopted to be effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

§800.7. Agency Vehicles.

- (a) Purpose and Intent. The purpose of this rule is to implement the provisions of Texas Government Code §2171.1045. The intent of the Commission is to ensure that the use and management of vehicles by the Agency is consistent with the State Vehicle Fleet Management Plan (Plan) as adopted by the Texas Comptroller of Public Accounts, Office of Vehicle Fleet Management. The Plan is available on the Comptroller's Web site, or can be requested from the Agency.
- (b) The Commission adopts by reference and shall implement the provisions contained in the Plan as referenced in subsection (a) of this section including the following general provisions on use of vehicles by the Agency.
 - (1) Vehicles, with the exception of vehicles assigned to field employees, are assigned to the Agency motor pool and may be available for checkout.
 - (2) The Agency may assign a vehicle to an individual administrative or executive employee on a regular or everyday basis only if there is a documented finding that the assignment is critical to the needs and mission of the Agency.
 - (3) The Agency will work with the Texas Comptroller of Public Accounts to identify, apply for, and if possible, use any waiver or exemption provisions where the recognition of conditions specific to the Agency would further the general purpose of fiscal efficiency and good business practices.

The provisions of this §800.7 adopted to be effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

§800.8. Suspension of Rules.

The Commission may suspend the operation of one or more of the provisions in this title, on either a statewide or other basis, if the Commission finds a public emergency or imperative public necessity exists, and the Commission finds that the suspension will best serve the public health, safety, or welfare.

The provisions of this §800.8 adopted to be effective January 23, 2006, as published in the Texas Register, January 20, 2006, 31 TexReg 405.

§800.9. Donations.

- (a) Purpose. The purpose of this section is to establish rules for the acceptance of donations made to the Commission.
- (b) General Authority to Accept Donations. Texas Labor Code §301.021 allows the Commission to accept a donation of services or money that it determines furthers the lawful objectives of the Commission.
- (c) General Prohibitions Regarding Donations.
 - (1) Texas Labor Code §301.021(b) and (c) identify entities that the Commission is not authorized to accept donations from; and
 - (2) Texas Government Code §575.005 states that the Commission is not authorized to accept donations from entities in contested cases.
- (d) Analysis of Offered Donations. The Agency, prior to the Commission's consideration of a donation, shall perform an inquiry and analysis to determine if there is a detrimental effect to accepting the donation. Texas Government Code §551.073 allows the Commission to hold a closed meeting regarding an identified detrimental effect as determined by the Agency.

- (e) Acceptance of Donations. Acceptance of donations by the Commission on behalf of the Agency shall:
 - (1) be in an open meeting by a majority of the voting members of the Commission;
 - (2) be reported in the public records of the Commission and include the name of the donor, and the purpose and a description of the donation;
 - (3) be in the form of monetary or in-kind assets; and
 - (4) have a minimum value of \$500.00.
- (f) Donation Agreement. Following acceptance of the donation by the Commission, the donor and the Agency shall execute a donation agreement, which includes:
 - (1) description of the donation, including a statement of the value;
 - (2) statement by the donor attesting to the donor's ownership rights in the donation and the donor's authority to make the donation;
 - (3) signature of the donor or designee;
 - (4) signature of the Agency designee;
 - (5) restrictions on the use of the donations, if any, agreed to by the donor and Commission;
 - (6) mailing address of the donor and principal place of business if the donor is a business entity;
 - (7) statement identifying any official relationship between the donor and the Agency; and
 - (8) statement advising the donor to seek legal and/or tax advice from its own legal counsel.
- (g) Administration of Donations. The Agency shall:
 - (1) deposit monetary donations to the credit of the Texas Workforce Commission account of the state General Revenue Fund;
 - (2) disburse monetary donations at the Agency's direction. All monetary gifts are automatically appropriated to the Commission in accordance with the General Appropriations Act; and
 - (3) use the donations for the purpose specified by the donor, to the extent possible, and in accordance with any local, state, and federal laws. In no event shall donations be used for purposes not within the Agency's statutory authority.
- (h) Texas Government Code, Chapter 572, governs the standards of conduct between the Agency and donors.
- (i) Public Records.
 - (1) Documents and other information pertaining to the official business of the Commission are public information and are subject to the Texas Public Information Act (Texas Government Code, Chapter 552).
 - (2) If the Commission determines an exception to the Texas Public Information Act is applicable, it may seek a determination from the Attorney General of Texas regarding the confidentiality of information relating to a donation before releasing the requested information.
- (j) Conflict of Laws. These rules shall not conflict with a requirement of a statute regulating the conduct of an officer or employee of a state agency or the procedures of the Agency. In the event that there appears to be a conflict between these rules and a state statute, the state statute controls.

The provisions of this §800.9 adopted to be effective December 28, 2009, as published in the Texas Register, December 25, 2009, 34 TexReg 9484.

SUBCHAPTER B. ALLOCATIONS

§800.51. Scope and Purpose

- (a) The purpose of this rule is to interpret Texas Labor Code, §302.062 , relating to the allocation of available funds for workforce training and services from the Texas Workforce Commission to workforce areas, as well as Texas Labor Code, §301.001 and §302.002, which establish the Texas Workforce Commission to operate an integrated workforce development system in this state, in particular through the consolidation of job training, employment, and employment-related programs, and direct the Executive Director to consolidate the administrative and programmatic functions under the authority of the Commission, to achieve efficient and effective delivery of services. It is the intent of the Commission to allocate funds to workforce areas for the purpose of meeting or exceeding statewide performance measures as set forth in the state General Appropriations Act and consistent with the authority reflected in Texas Labor Code Section 302.004, satisfying federal program requirements, and operating an integrated workforce development system. This subchapter sets forth the funding to be allocated to workforce areas and the methods and procedures to be followed, in order to accomplish the consolidation and integration of workforce development programs. The Commission is committed, whenever possible, to allocating an amount of funds available for workforce training and services greater than the minimum level set by law.
- (b) Funds allocated or reallocated under this subchapter will only be made available under the terms of a properly executed contract between the Commission and a certified workforce board with an approved plan.
- (c) The allocation formulas described in this subchapter will only be applicable for allocations and executed contracts for a complete program year. For contract periods of less than a complete program year, the allocated amounts will be negotiated between the Commission and the Board, based upon the remaining months of the program year.
- (d) Subsections (a)-(c) of this section shall apply to all sections contained in this subchapter unless a section specifically states otherwise.
- (e) Funds available to the Commission that are not otherwise allocated or reallocated under this subchapter, may be used by the Commission for purposes authorized by state and federal laws and regulations.
- (f) Notwithstanding any other provision of the rules contained in this part, the level of funding allocated to a workforce area may be determined, modified or reallocated by the Commission for one or more of the following reasons:
 - (1) to ensure full utilization of the funding;
 - (2) to ensure compliance with State and federal requirements applicable to the State;
 - (3) to meet the State's federal participation rates;
 - (4) to respond to caseload changes; or
 - (5) to respond to unforeseen demographic or economic changes.

The provisions of this §800.51 adopted to be effective August 23, 2004, as published in the Texas Register, August 20, 2004, 29 TexReg 8148.

§800.52. Definitions

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise:

- (1) **Accrued Expenditures** - Charges incurred during a given period for goods and tangible property received and services performed that cause decreases in net financial resources.
- (2) **All-Family Participation Rate** -The percentage of all families receiving TANF benefits that a state must engage in an approved work activity for a specified number of hours per week as provided by the Personal Responsibility and Work Opportunities Reconciliation Act of 1996, §407, as amended.
- (3) **Contract Closeout Settlement Package** - Financial, performance and other reports required as a condition of the contract, which must be submitted when one of the following conditions is met:
 - (A) the contract has expired;
 - (B) all available funds for the contract period have been paid out;
 - (C) all accrued expenditures chargeable to the specific contract have been incurred; or
 - (D) the period of available funds has expired or been terminated.
- (4) **Contract Period** - The length of time in which a contract for allocated funds between the Commission and a Board is in effect and during which funds may be expended for a specified purpose, unless prohibited by a federal grantor agency. A contract period longer than a program year shall be specified under the terms of a properly executed contract.
- (5) **Deobligation** - An action adopted by the Commission to decrease an amount for a specific program and contract period in a contract with a Board for allocated funds, on the basis of provisions as set forth in §800.73 and §800.74 of the Commission rules.
- (6) **Equal Base Amount** - An amount equivalent to .10% (one-tenth of one percent) of a total allocation which shall be provided equally to each workforce area.
- (7) **Hold Harmless/Stop Gain** - A procedure that assures that a relative proportion of an allocation to a workforce area is not below 90% of the corresponding proportion for the past two years, or that the current year proportion is not above 125% of the prior two-year relative proportion.
- (8) **Monthly expenditure report** - A written or electronically submitted report by a Board that contains information regarding services for each category of funding allocated by the Commission, and in which the Board lists expenditures and obligations by category of funding.
- (9) **Obligation** - A debt established by a legally binding contract, letter of agreement, sub-grant award, or purchase order, which has been executed prior to the end of a contract period, for goods and services provided by the end of the contract period, and which will be liquidated 60 calendar days after the end of a contract period, unless such definition is superseded by federal requirements.
- (10) **Relative proportion of the program year** - The corresponding part of the program year that is used to compare expenditures. That is, if 50% of the program year has transpired, then the relative proportion of the program year is 50%.
- (11) **WIA Formula Allocated Funds** - Funds allocated by formula to workforce areas for each of the following separate categories of funding: WIA Adult, Dislocated Worker, and Youth.

The provisions of this §800.52 adopted to be effective July 12, 2006, as published in the Texas Register, July 7, 2006, 31 TexReg 5465.

§800.53. Choices

- (a) Funds available to the Commission to provide Choices services will be allocated to the workforce areas using a need-based formula, in order to meet state and federal requirements, as set forth in subsection (b) of this section.
- (b) At least 80 percent of the Choices funds will be allocated to the workforce areas on the basis of:
 - (1) the relative proportion of the total unduplicated number of all families with Choices work requirements residing within the workforce area during the most recent calendar year to the statewide total unduplicated number of all families with Choices work requirements;
 - (2) an equal base amount; and
 - (3) the application of a hold harmless/stop gain procedure.
- (c) No more than 10 percent of Choices funds expended as part of a workforce area's allocation shall be used for administrative costs, as defined by the appropriate federal regulations and Commission policy.

The provisions of this §800.53 adopted to be effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

§800.54. Supplemental Nutrition Assistance Program Employment and Training

- (a) Funds available to the Commission to provide SNAP E&T services under 7 U.S.C.A. §2015(d) will be allocated to the workforce areas using a need-based formula, as set forth in subsection (b) of this section.
- (b) At least 80% of the SNAP E&T funds will be allocated to the workforce areas on the basis of:
 - (1) of the relative proportion of the total unduplicated number of mandatory work registrants receiving SNAP benefits residing within the workforce area during the most recent calendar year to the statewide total unduplicated number of mandatory work registrants receiving SNAP benefits;
 - (2) an equal base amount; and
 - (3) the application of a hold harmless/stop gain procedure.
- (c) No more than 10% of the funds expended as part of a workforce area's allocation shall be used for administrative costs, as defined by federal regulations and Commission policy.

The provisions of this §800.54 adopted to be effective September 14, 2009, as published in the Texas Register, September 11, 2009, 34 TexReg 6341.

§800.57. Employment Services

- (a) Employment Services funds available to the Commission to provide Employment Services under §7(a) of the Wagner-Peyser Act (29 U.S.C.A. Chapter 4B) will be utilized by the Commission as set forth in subsection (b) of this section.
- (b) At least 80% of the Employment Services funds under §7(a) of the Wagner-Peyser Act (29 U.S.C.A. Chapter 4B, including §49(c)) will be utilized by the Commission within the workforce areas according to the established federal formula, as follows:

- (1) Two-thirds will be based on the relative proportion of the total civilian labor force residing within the workforce area to the statewide total civilian labor force;
 - (2) One-third will be based on the relative proportion of the total number of unemployed individuals residing within the workforce area to the statewide total number of unemployed individuals; and
 - (3) the application of a hold harmless/stop gain procedure.
- (c) No more than 10% of the funds expended as part of a workforce area's allocation shall be used for administrative costs, as defined by appropriate federal regulations and Commission policy.

The provisions of this §800.57 adopted to be effective August 23, 2004, as published in the Texas Register, August 20, 2004, 29 TexReg 8148.

§800.58. Child Care

- (a) Funds available to the Commission for child care services will be allocated to the workforce areas using need-based formulas, as set forth in this section.
- (b) Child Care and Development Fund (CCDF) Mandatory Funds authorized under the Social Security Act §418(a)(1), as amended, together with state general revenue Maintenance of Effort (MOE) Funds, Social Services Block Grant funds, TANF funds, and other funds designated by the Commission for child care (excluding any amounts withheld for state-level responsibilities) will be allocated on the following basis:
 - (1) 50 percent will be based on the relative proportion of the total number of children under the age of five years old residing within the workforce area to the statewide total number of children under the age of five years old, and
 - (2) 50 percent will be based on the relative proportion of the total number of people residing within the workforce area whose income does not exceed 100 percent of the poverty level to the statewide total number of people whose income does not exceed 100 percent of the poverty level.
- (c) CCDF Matching Funds authorized under the Social Security Act §418(a)(2), as amended, together with state general revenue matching funds and estimated appropriated receipts of donated funds, will be allocated according to the relative proportion of children under the age of 13 years old residing within the workforce area to the statewide total number of children under the age of 13 years old.
- (d) CCDF Discretionary Funds authorized under the Child Care and Development Block Grant Act of 1990 §658B, as amended, will be allocated according to the relative proportion of the total number of children under the age of 13 years old in families whose income does not exceed 150 percent of the poverty level residing within the workforce area to the statewide total number of children under the age of 13 years old in families whose income does not exceed 150 percent of the poverty level.
- (e) The following provisions apply to the funds allocated in subsections (b) - (d) of this section:
 - (1) Sufficient funds must be used for direct child care services to ensure Commission-approved performance targets are met.
 - (2) Children eligible for Transitional and Choices child care shall be served on a priority basis to enable parents to participate in work, education, or training activities.
 - (3) No more than 5 percent of the total expenditure of funds may be used for administrative expenditures as defined in federal regulations contained in 45 C.F.R. §98.52, as may be

amended unless the total expenditures for a workforce area are less than \$5,000,000. If a workforce area has total expenditures of less than \$5,000,000, then no more than \$250,000 may be used for administrative expenditures.

- (4) Each Board shall set the amount of the total expenditure of funds to be used for quality activities consistent with federal and state statutes and regulations.
- (5) The Board shall comply with any additional requirements adopted by the Commission or contained in the Board contract.
- (6) Allocations of child care funds will include applications of hold harmless/stop gain procedures.

The provisions of this §800.58 adopted to be effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

§800.61. Welfare to Work

The provisions of this §800.61 repealed effective August 23, 2004, as published in the Texas Register, August 20, 2004, 29 TexReg 8148.

§800.62. School-to-Careers

The provisions of this §800.62 repealed effective August 23, 2004, as published in the Texas Register, August 20, 2004, 29 TexReg 8148.

§800.63. Workforce Investment Act (WIA)

- (a) Definitions. The following words and terms when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.
 - (1) Area of substantial unemployment--As defined in WIA §127(b)(2)(B) (29 U.S.C.A. §2852(b)(2)(B)) and WIA §132(b)(1)(B)(v)(III) (29 U.S.C.A. §2862(b)(1)(B)(v)(III)).
 - (2) Disadvantaged adult--As defined in WIA §132(b)(1)(B)(v)(IV) (29 U.S.C.A. §2862(b)(1)(B)(v)(IV)).
 - (3) Disadvantaged youth--As defined in WIA §127(b)(2)(C) (29 U.S.C.A. §2852(b)(2)(C)).
- (b) Scope and Authority. Funds available to the Commission under Title I of WIA for youth activities, adult employment and training activities, and dislocated worker employment and training activities shall be allocated to workforce areas or reserved for statewide activities in accordance with:
 - (1) the provisions of prior consistent state law as authorized by WIA §194(a)(1)(A) (29 U.S.C.A. §2944(a)(1)(A)), including but not limited to Texas Labor Code §302.062, as amended, and Subchapter B of this title (relating to Allocations and Funding);
 - (2) the WIA and related federal regulations as amended; and
 - (3) the WIA State Plan.
- (c) Reserves and Allocations for Youth and Adult Employment and Training Activities. The Commission shall reserve no more than 15% and shall allocate to workforce areas at least 85% of the youth activities and adult employment and training activities allotments from the United States Department of Labor.

- (d) Reserves and Allocations for Dislocated Worker Employment and Training Activities. The Commission shall allocate the dislocated worker employment and training allotment in the following manner:
- (1) reserve no more than 15% for statewide workforce investment activities;
 - (2) reserve no more than 25% for state level rapid response and additional local assistance activities and determine the proportion allocated to each activity; and
 - (3) allocate at least 60% to workforce areas.
- (e) State Adopted Elements, Formulas, and Weights. The Commission shall implement the following elements, formulas, and weights adopted for Texas in the WIA State Plan in allocating WIA funds to workforce areas.
- (1) WIA adult employment and training activities funds not reserved by the Commission under §800.63(c) of this section shall be allocated to the workforce areas as provided in WIA §132(b)(1)(B) and §133(b)(2) (29 U.S.C.A. §2863(b)(2)) based on the following:
 - (A) 33 1/3 percent on the basis of the relative number of unemployed individuals in areas of substantial unemployment in each workforce area, compared to the total number of unemployed individuals in areas of substantial unemployment in the State;
 - (B) 33 1/3 percent on the basis of the relative excess number of unemployed individuals in each workforce area, compared to the total excess number of unemployed individuals in the State; and
 - (C) 33 1/3 percent on the basis of the relative number of disadvantaged adults in each workforce area, compared to the total number of disadvantaged adults in the State.
 - (2) WIA dislocated worker employment and training activities funds not reserved by the State under §800.63(d) of this section shall be allocated to the workforce areas as provided in WIA §133(b)(2) (29 U.S.C.A. §2863(b)(2)) based on the following factors:
 - (A) insured unemployment;
 - (B) average unemployment;
 - (C) Worker Adjustment and Retraining Notification Act (29 U.S.C.A. §2101 *et seq.*) data;
 - (D) declining industries;
 - (E) farmer-rancher economic hardship; and
 - (F) long-term unemployment.
 - (3) WIA youth activities funds not reserved by the Commission under §800.63(c) of this section shall be allocated to the workforce areas as provided in WIA §128(b)(2) (29 U.S.C.A. §2853(b)(2)) based on the following:
 - (A) 33 1/3 percent on the basis of the relative number of unemployed individuals in areas of substantial unemployment in each workforce area, compared to the total number of unemployed individuals in all areas of substantial unemployment in the State;
 - (B) 33 1/3 percent on the basis of the relative excess number of unemployed individuals in each workforce area, compared to the total excess number of unemployed individuals in the State; and
 - (C) 33 1/3 percent on the basis of the relative number of disadvantaged youth in each workforce area, compared to the total number of disadvantaged youth in the State.

- (f) In making allocations of WIA formula funds, the Commission will apply hold harmless procedures, as set forth in federal regulations (20 CFR 667.135).
- (g) No more than 10% of the funds expended as part of a workforce area's allocation shall be used for administrative costs, as defined by federal regulations and Commission policy.
- (h) Reserved Funds. The Commission shall make available the funds reserved under §§800.63(c) and 800.63(d)(1) of this section to provide required and, if funds are available, allowable statewide activities as outlined in WIA §§129 and 134 (29 U.S.C.A. §§2854 and 2864).
- (i) The Commission may allocate such proportion of available WIA Alternative Funding for Statewide Activities as it determines appropriate, utilizing a distribution methodology that is based on the proportionality of all amounts of WIA formula funds allocated during the same program year, as well as an equal base amount.
- (j) The Commission may allocate such amounts of available WIA Alternative Funding for Statewide Activities as funding for One-Stop Enhancements, as it determines appropriate.
- (k) Expenditure Level for Statewide Activity Funding. A Board shall demonstrate an 80 percent expenditure level of prior year WIA allocated funds in order to be eligible to receive WIA Alternative Funding for Statewide Activities and WIA Alternative Funding for One-Stop Enhancements. The Commission may reduce the amount of WIA Alternative Funding for Statewide Activities and WIA Alternative Funding for One-Stop Enhancements if a Board fails to achieve an 80 percent expenditure level of prior year WIA formula allocated funds.

The provisions of this §800.63 adopted to be effective August 23, 2004, as published in the Texas Register, August 20, 2004, 29 TexReg 8148.

§800.65. Project Reintegration of Offenders

- (a) Funds available to the Commission to provide Project Reintegration of Offenders (Project RIO) services shall be allocated to workforce areas using a need-based formula, as set forth in subsection (b) of this section.
- (b) At least 80 percent of the Project RIO funds will be allocated to workforce areas on the basis of:
 - (1) the relative proportion of the total unduplicated number of parolees residing within the workforce area during the most recent calendar year to the statewide total unduplicated number of parolees;
 - (2) an equal base amount; and
 - (3) the application of a hold harmless/stop gain procedure.
- (c) No more than 10 percent of the funds expended as part of a workforce area's allocation shall be used for administrative costs, as defined by federal regulations and Commission policy.

The provisions of this §800.65 adopted to be effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

§800.66. Trade Act Services

- (a) Funds available to the Commission to provide Trade Act services shall be provided to workforce areas as set forth in this section.
- (b) Amounts for training and services for trade-affected workers, consistent with statute and regulations, will be made available to workforce areas as follows. The Commission shall approve:

- (1) an initial Trade Adjustment Assistance (TAA) funding amount for each workforce area, on an annual basis; and
- (2) the factors to be considered for distribution of additional funds, which may include:
 - (A) number of individuals in TAA-approved training;
 - (B) number of Trade-certified layoffs in the workforce area;
 - (C) number of employees from Trade-certified companies;
 - (D) layoffs identified through the Worker Adjustment and Retraining Notification Act process in the workforce area;
 - (E) demonstrated need;
 - (F) the cost of training; and
 - (G) other factors as determined by the Commission.
- (c) Evaluations will be made periodically as to the sufficiency and reasonableness of amounts made available to each workforce area, expenditures for training, and amounts reported for administration. The Agency shall make additional distributions, based on the evaluations and upon requests by Boards, using the factors approved by the Commission.
- (d) In the event that a determination is made that Trade Act funding available to the Commission may be insufficient to meet all qualified needs for the remainder of the year at any time during the program year, the Agency will:
 - (1) rely on the evaluations referenced in subsection (c) of this section to estimate short-term needs;
 - (2) make recommendations for deobligation and redistribution between workforce areas; and
 - (3) make requests for additional TAA funding from the U.S. Department of Labor as appropriate.
- (e) No more than 15 percent of the funds expended for Trade Act training, services, and other allowable program activities shall be used for administrative costs, as defined by federal regulations. The Commission shall establish policy limitations for the expenditure of administrative funds at the state and Board levels.

The provisions of this §800.66 adopted to be effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

§800.67. Veterans' Employment and Training

The provisions of this §800.67 repealed effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

§800.71. General Deobligation and Reallocation Provisions

- (a) Purpose. The purpose of this rule is to promote effective service delivery, financial planning, and management to ensure full utilization of funding, and to reallocate funds to populations in need.
- (b) Scope. Sections 800.71 - 800.77 of this subchapter shall apply to funds provided to workforce areas under a contract between the Board and the Commission for the following categories of funding:
 - (1) Child Care
 - (2) Choices

- (3) Employment Service
- (4) SNAP E&T
- (5) Project RIO
- (6) WIA Alternative Funding for Statewide Activities
- (7) WIA Alternative Funding for One-Stop Enhancements

The provisions of this §800.71 adopted to be effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

§800.72. Reporting Requirements

- (a) A Board shall submit a monthly financial report, including accrued expenditures and obligations, on or before the 20th calendar day of the following month that list information as required by the Commission for the reporting period.
- (b) The Commission may require that a Board amend expenditure reports as the result of Commission reviews, audits, or other evaluations.
- (c) A Board shall submit a contract closeout settlement package on or before 60 days following the end of the contract period.
- (d) The Commission may suspend payments, advances, or reimbursements to Boards in the cash draw system if required financial reports or contract closeout settlement packages are not submitted by the deadline.
- (e) The Executive Director may approve a Board's request of extension for the submission of a required financial report or contract closeout settlement package, if such extension request is received on a timely basis with sufficient justification.

The provisions of this §800.72 adopted to be effective August 23, 2004, as published in the Texas Register, August 20, 2004, 29 TexReg 8148.

§800.73. Child Care Match Requirements and Deobligation

- (a) A Board shall meet the following requirements for unmatched federal child care funds that are contingent upon a Board securing local funds.
 - (1) By the end of the fourth month following the beginning of the program year, a Board shall secure donations, transfers, and certifications totaling at least 100 percent of the amount it needs to secure in order to access the unmatched federal child care funds available to the workforce area at the beginning of the program year.
 - (2) Throughout the program year and by the end of the twelfth month, a Board shall ensure completion of all donations, transfers, and certifications consistent with the contribution schedules and payment plans specified in the local agreements.
 - (3) The Commission may withhold the federal matching amounts associated with local match that are not completed after the end of the twelfth month, as set forth in paragraph (2) of this subsection.
- (b) The Commission may deobligate, at any time following the fourth month of the program year, all or part of the difference between a Board's actual level of secured and completed match and the level of performance that is required, as set forth in subsection (a) of this section.

The provisions of this §800.73 adopted to be effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

§800.74. Midyear Deobligation of Funds

- (a) The Commission may deobligate funds from a workforce area during the program year if a workforce area is not meeting the expenditure thresholds set forth in subsection (b) of this section.
 - (1) Workforce areas that fail to meet the expenditure thresholds set forth in subsection (b) of this section at the end of months five, six, seven, or eight of the program year (i.e., midyear) will be reviewed to determine the causes for the underexpenditure of funds, except as set forth in subsection (d) of this section.
 - (2) The Commission shall not deobligate more than the difference between a workforce area's actual expenditures and the amount corresponding to the relative proportion of the program year.
 - (3) The Commission shall not deobligate funds from a workforce area that failed to meet the expenditure thresholds set forth in subsection (b) of this section, if within 60 days prior to the potential deobligation period the Commission executes a contract amendment for a supplemental allocation or reallocation of funds in the same program funding category.
- (b) The Commission may deobligate the following funds midyear, as set forth in subsection (a) of this section, if a workforce area fails to achieve the expenditure of an amount corresponding to 90 percent or more of the relative proportion of the program year:
 - (1) Child care (with the exception of unmatched federal child care funds that are contingent upon a workforce area securing local funds, as set forth in §800.73 of this subchapter)
 - (2) Choices
 - (3) Employment Service
 - (4) SNAP E&T
 - (5) Project RIO
 - (6) WIA Alternative Funding for Statewide Activities
 - (7) WIA Alternative Funding for One-Stop Enhancements
- (c) A workforce area subject to deobligation for failure to meet the requirements set forth in this section shall, upon request by the Commission, submit a written justification with a copy to the Board Chair. The written justification shall provide sufficient detail regarding the actions a workforce area will take to address its deficiencies, including:
 - (1) expansion of services proportionate to the available resources;
 - (2) projected service levels and related performance;
 - (3) reporting outstanding obligations; and
 - (4) any other factors a workforce area would like the Commission to consider.
- (d) To the extent this section is found not to comply with federal requirements, or should any related federal waivers expire, the Commission will be subject to federal requirements in effect, as applicable.

The provisions of this §800.74 adopted to be effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

§800.75. Second-Year WIA Deobligation of Funds

- (a) In each month of the second year in which the WIA formula funds are available, the Commission may deobligate funds if a workforce area's unobligated balance of WIA formula funds exceeds 20 percent of the allocation for each category of WIA formula funds for the program year.
- (b) The Commission shall not deobligate more than the difference between a workforce area's actual expenditures and the amount of unobligated funds that exceed 20 percent of the allocation for each category of WIA formula funds for the program year.
- (c) The Commission shall not deobligate funds from a workforce area that failed to meet the expenditure thresholds set forth in subsection (a) of this section if within 60 days prior to the potential deobligation period, the Commission executes a contract amendment for a supplemental allocation or reallocation of funds in the same program funding category.

The provisions of this §800.75 adopted to be effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

§800.76. Voluntary Deobligation of Funds

To request a voluntary deobligation of funds allocated to the workforce area, a workforce area's executive director shall submit a written request to the Commission with a copy to the Board Chair.

The provisions of this §800.76 adopted to be effective September 14, 2009, as published in the Texas Register, September 11, 2009, 34 TexReg 6341.

§800.77. Reallocation of Funds

- (a) Reallocation. A workforce area may be eligible for reallocation of the following funds allocated by the Commission:
 - (1) Child care (including unmatched federal child care funds that are contingent upon a workforce area securing local funds)
 - (2) Choices
 - (3) Employment Service
 - (4) SNAP E&T
 - (5) Project RIO
 - (6) WIA Formula Funds
 - (7) WIA Alternative Funding for Statewide Activities
 - (8) WIA Alternative Funding for One-Stop Enhancements
- (b) Eligibility.
 - (1) For a workforce area to be eligible for a reallocation of child care funds (excluding unmatched federal funds that are contingent upon a workforce area securing local funds), and the funds set forth in subsection (a)(2) - (8) of this section, the Commission may consider whether a workforce area:
 - (A) has met targeted expenditure levels as required by §800.74(a) of this subchapter, as applicable, for that period;
 - (B) has not expended or obligated more than 100 percent of the workforce area's allocation for the category of funding;

- (C) has demonstrated that expenditures conform to cost category limits for funding;
 - (D) has demonstrated the need for and ability to use additional funds;
 - (E) has an established plan for working with at least one of the Governor's industry clusters, as specified in the local Board plan;
 - (F) is current on expenditure reporting;
 - (G) is current with all single audit requirements; and
 - (H) is not under sanction.
- (2) For a workforce area to be eligible for a reallocation of unmatched federal child care funds that are contingent upon a workforce area securing local funds, the Commission may consider:
- (A) whether a workforce area has met the level for securing and completing local match requirements set out in §800.73(a) of this subchapter; and
 - (B) the applicable factors listed in paragraph (1) of this subsection, including factors in paragraph (1)(B) - (H) of this subsection.
- (c) The Commission may reallocate funds to an eligible workforce area based on the applicable method of allocation, as set forth in this subchapter, and may modify the amount to be reallocated by considering the following:
- (1) the amount specified in a workforce area's written request for additional funds;
 - (2) the amount available for reallocation versus the total dollar amount of requests;
 - (3) the demonstrated ability of a workforce area to effectively expend funds to address the need for services in the workforce area;
 - (4) the extent to which the project supports activities related to the Governor's industry clusters;
 - (5) the workforce area's performance during the current and prior program year; and
 - (6) related factors, as necessary, to ensure that funds are fully used.
- (d) To the extent this section is found not to comply with federal requirements, or should any related federal waivers expire, the Commission will be subject to federal requirements in effect, as applicable.

The provisions of this §800.77 adopted to be effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

SUBCHAPTER C. PERFORMANCE AND CONTRACT MANAGEMENT

§800.81. Performance

The provisions of this §800.81 repealed effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

§800.83. Performance Review and Assistance

The provisions of this §800.83 repealed effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

SUBCHAPTER D. INCENTIVE AWARD RULES

§800.101. Scope and Purpose

The provisions of this §800.101 repealed effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

§800.102. Definitions.

The provisions of this §800.102 repealed effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

§800.103. Types of Awards.

The provisions of this §800.103 repealed effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

§800.104. Data Collection.

The provisions of this §800.104 repealed effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

§800.105. Board Classification.

The provisions of this §800.105 repealed effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

§800.106. Performance Awards.

The provisions of this §800.106 repealed effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

§800.107. Workforce Investment Act Local Incentive Awards.

The provisions of this §800.107 repealed effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

§800.108. Job Placement Incentive Awards.

The provisions of this §800.108 repealed effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

SUBCHAPTER E. SANCTIONS

§800.151. Scope and Purpose

The provisions of this §800.151 repealed effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

§800.152. Definitions

The provisions of this §800.152 repealed effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

§800.161. Intent to Sanction

The provisions of this §800.161 repealed effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

§800.171. Sanctionable Acts

The provisions of this §800.171 repealed effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

§800.172. Sanction Status

The provisions of this §800.172 repealed effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

§800.174. Corrective Actions and Penalties

The provisions of this §800.174 repealed effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

§800.175. Corrective Actions and Penalties Under the Workforce Investment Act (WIA)

The provisions of this §800.175 repealed effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

§800.176. Informal Conferences and Informal Dispositions

The provisions of this §800.176 repealed effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

§800.181. Sanction Determination

The provisions of this §800.181 repealed effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

§800.191. Appeal.

The provisions of this §800.191 repealed effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

§800.192. Hearing Procedures.

The provisions of this §800.192 repealed effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

§800.193. Postponements, Continuances, and Withdrawals.

The provisions of this §800.193 repealed effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

§800.194. Evidence.

The provisions of this §800.194 repealed effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

§800.195. Hearing Officer Independence and Impartiality.

The provisions of this §800.195 repealed effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

§800.196. Ex Parte Communications.

The provisions of this §800.196 repealed effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

§800.197. Hearing Decision.

The provisions of this §800.197 repealed effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

§800.198. Motion for Reopening.

The provisions of this §800.198 repealed effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

§800.199. Motion for Rehearing.

The provisions of this §800.199 repealed effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

§800.200. Finality of Decision.

The provisions of this §800.200 repealed effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

SUBCHAPTER F. INTERAGENCY MATTERS

§800.201. Title and Purpose

- (a) These rules may be cited as Interagency Matters.
- (b) The purpose of these rules is to implement and interpret the provisions of the Texas Administrative Code, Chapter 40, Interagency Matters, and to provide notice to the public of the contents of the Memorandums of Understanding.

The provisions of this §800.201 adopted to be effective March 19, 1998, as published in the Texas Register, March 13, 1998, 23 TexReg 2829.

§800.202. Memorandum of Understanding with Texas Commission for the Deaf and Hard of Hearing

The Texas Workforce Commission hereby adopts by reference the terms of a memorandum of understanding entered into with the Texas Commission for the Deaf set out in 40 TAC §181.912(a) and (b) and 40 TAC §181.915 of this title (relating to the Texas Department of Correction and the Texas Workforce Commission). Copies of the memorandum of understanding are available at the Texas Workforce Commission, 101 East 15th Street, Room 614, Austin, Texas 78778.

The provisions of this §800.202 adopted to be effective March 19, 1998, as published in the Texas Register, March 13, 1998, 23 TexReg 2829.

§800.203. Memorandum of Understanding with Texas Education Agency

The Texas Workforce Commission hereby adopts by reference the terms of a memorandum of understanding on transition planning for students enrolled in special education. Said memorandum of understanding is set out at 19 TAC §89.1110. Copies are available at the Texas Workforce Commission, 101 East 15th, Room 614, Austin, Texas 78778.

The provisions of this §800.203 adopted to be effective March 19, 1998, as published in the Texas Register, March 13, 1998, 23 TexReg 2829.

§800.204. Memorandum of Understanding with Texas Department of Economic Development

The Texas Workforce Commission hereby adopts by reference the terms of a memorandum of understanding on program planning and budgeting relating to workforce development programs. Said memorandum of understanding is set out at 10 TAC §195.10. Copies are available at the Texas Workforce Commission, 101 East 15th, Room 614, Austin, Texas 78778.

The provisions of this §800.204 adopted to be effective March 19, 1998, as published in the Texas Register, March 13, 1998, 23 TexReg 2829.

§800.205. Memoranda of Understanding with a Governmental Entity Pursuant to Texas Government Code §497.0596(a)(4).

- (a) The Texas Workforce Commission hereby adopts by reference the terms of any memorandum of understanding relating to identifying potentially affected employers under a proposed private sector prison industries program and providing such information to the appropriate governmental entity to meet its notification requirements. Information provided to a governmental entity shall comply with the requirements of Texas Labor Code §301.085 and 40 TAC, Chapter 815, Subchapter E, of this title.
- (b) Any memorandum of understanding under subsection (a) of this section shall stipulate that:
 - (1) only publicly available data sources shall be used;
 - (2) costs incurred for producing the data shall be reimbursed to the Agency; and
 - (3) the information provided by the Agency is solely for the limited purpose of allowing the governmental entity to meet its notice requirements under Texas Government Code §497.0596 and is separate and apart from any certification described in Texas Government Code §497.059.
- (c) Copies of the memoranda of understanding are available at the Texas Workforce Commission, 101 East 15th, Room 614, Austin, Texas 78778.

The provisions of this §800.205 adopted to be effective July 12, 2010, as published in the Texas Register, July 9, 2010, 35 TexReg 6094.

SUBCHAPTER G. PETITION FOR ADOPTION OF RULES

§800.251. Title and Purpose

- (a) Title. These rules may be cited as the Petition for the Adoption of Rules.
- (b) Purpose. The purpose of these rules is to implement the provisions of Texas Government Code §2001.21 regarding agency procedure for addressing petitions for the adoption of rules.

The provisions of this §800.251 adopted to be effective April 19, 1998, as published in the Texas Register, April 10, 1998, 23 TexReg 3700.

§800.252. Definitions

The following words and terms, when used in this subchapter, shall have the following meaning, unless the context clearly indicates otherwise.

Commission--The Texas Workforce Commission.

The provisions of this §800.252 adopted to be effective April 19, 1998, as published in the Texas Register, April 10, 1998, 23 TexReg 3700.

§800.253. Submission and Petition Requirements

Any interested person may petition the Texas Workforce Commission (Commission) requesting the adoption of a rule. Petitioners should submit petitions in writing to the General Counsel of the Commission. The petition may be in any legible form but must contain at least the following information.

- (1) **Petitioner's Name and Address.** The petitioners' name, complete mailing address, and signature should appear in the request.
- (2) **Explanation and Justification.** A petitioner should include an explanation and justification of the proposed rule. The explanation should include a concise statement of the relevant background information necessary to understand the need for the rule, the existing problem that the proposed rule is to correct, and the foreseeable effects of the requested rule.
- (3) **Text.** A petitioner should include the text of the proposed rule reflecting added or deleted words. A reference to any existing rule including the title, chapter and section number, if applicable, should appear on the request.
- (4) **Authority.** A statement of the statutory or other authority for taking the requested action should also appear on the request.

The provisions of this §800.253 adopted to be effective April 19, 1998, as published in the Texas Register, April 10, 1998, 23 TexReg 3700.

§800.254. Review of Petition

Upon receipt of a substantially complete petition, the general counsel will forward a copy of the petition to the appropriate division director for a response.

- (1) **Division Response.** Within 20 days after receiving the petition from the general counsel, the division director shall respond in writing to the General Counsel recommending either denying the request or initiating the rulemaking process. The division director's response shall contain the reasons for the recommendation.
- (2) **General Counsel Recommendation.** Within 20 days after receiving the division director's response, the general counsel shall submit to the commissioners the petition, the division director's response and a written recommendation by the general counsel specifying the reasons for the recommendation.

The provisions of this §800.254 adopted to be effective April 19, 1998, as published in the Texas Register, April 10, 1998, 23 TexReg 3700.

§800.255. Commission Decision and Action

- (a) The Commissioners shall issue the final decision regarding the petition within 60 days after receipt of the petition from the petitioner to either:
 - (1) deny the petition in writing, stating the reasons for the denial; or
 - (2) initiate rulemaking proceedings in accordance with Texas Government Code, Chapter 2001, Administrative Procedure, Subchapter B, Rulemaking, as it may be amended.
- (b) The Commission may modify any proposed rule to ensure that it conforms to the format of commission rules, adequately addresses the perceived problem, and conforms to the filing requirements of the *Texas Register*.

The provisions of this §800.255 adopted to be effective April 19, 1998, as published in the Texas Register, April 10, 1998, 23 TexReg 3700.

SUBCHAPTER H. AGENCY MONITORING ACTIVITIES.

§800.301. Purpose.

The provisions of this §800.301 repealed effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

§800.302. Definitions.

The provisions of this §800.302 repealed effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

§800.303. Program and Fiscal Monitoring.

The provisions of this §800.303 repealed effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

§800.304. Program Monitoring Activities.

The provisions of this §800.304 repealed effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

§800.305. Fiscal Monitoring Activities.

The provisions of this §800.305 repealed effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

§800.306. Agency Monitoring Reports.

The provisions of this §800.306 repealed effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

§800.307. Resolution.

The provisions of this §800.307 repealed effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

§800.308. Agency Access to Records.

The provisions of this §800.308 repealed effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

§800.309 Commission Evaluation of Board Oversight Capacity.

The provisions of this §800.309 repealed effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

SUBCHAPTER I. SUBRECIPIENT AND CONTRACT SERVICE PROVIDER MONITORING ACTIVITIES.

§800.351. Scope and Purpose.

The provisions of this §800.351 repealed effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

§800.352. Definitions.

The provisions of this §800.352 repealed effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

§800.353. Subrecipient and Contract Service Provider Monitoring.

The provisions of this §800.353 repealed effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

§800.354. Risk Assessment.

The provisions of this §800.354 repealed effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

§800.355. Monitoring Plan.

The provisions of this §800.355 repealed effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

§800.357. Controls Over Monitoring.

The provisions of this §800.357 repealed effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

§800.358. Reporting and Resolution Requirements.

The provisions of this §800.358 repealed effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

§800.359. Independent Audit Requirements.

The provisions of this §800.359 repealed effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

§800.360. Access to Records.

The provisions of this §800.360 repealed effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

SUBCHAPTER K. CONTRACT NEGOTIATION, MEDIATION, AND OTHER ASSISTED NEGOTIATION OR MEDIATION PROCESSES.

§800.451. Purpose and Applicability.

- (a) Purpose. The Commission intends these rules to govern negotiation, mediation, and other assisted negotiation or mediation processes regarding a claim of breach of contract asserted by a contractor against the Agency under Texas Government Code, Chapter 2260. The Commission recognizes that the rules contained in this subchapter are not intended to replace procedures relating to breach of contract claims that are mandated by state or federal law. The parties to a contract are encouraged to resolve any disagreement concerning the contract in the ordinary course of contract administration under less formal procedures specified in the parties' contract.
- (b) Applicability.
 - (1) This chapter does not apply to an action of the Agency for which a contractor is entitled to a specific remedy pursuant to state or federal constitution or statute.
 - (2) This chapter does not apply to a contract action proposed or taken by the Agency for which a contractor receiving Medicaid funds under that contract is entitled by state statute or rule to a hearing conducted in accordance with Texas Government Code, Chapter 2001.
 - (3) This chapter does not apply to contracts:
 - (A) between the Agency and the federal government or its agencies, another state or nation;
 - (B) between the Agency and one or more other units of state government;
 - (C) between the Agency and a local governmental body, or a political subdivision of another state;
 - (D) between a subcontractor and a contractor;
 - (E) subject to §201.112 of the Transportation Code;
 - (F) within the exclusive jurisdiction of state or local regulatory bodies; or
 - (G) within the exclusive jurisdiction of federal courts or regulatory bodies.
- (c) Remedies. The procedures contained in this subchapter are exclusive and required prerequisites to suit under the Civil Practice and Remedies Code, Chapter 107, and the Texas Government Code, Chapter 2260. This subchapter does not waive the Commission's or Agency's sovereign immunity to suit or liability.

The provisions of this §800.451 adopted to be effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

§800.452. Definitions.

The following words and terms, when used in this chapter, shall have the following meaning, unless the context clearly indicates otherwise:

- (1) Claim -- A demand for damages by the contractor based upon the Agency's alleged breach of the contract.
- (2) Contract -- A written contract between the Agency and a contractor by the terms of which the contractor agrees either:
 - (A) to provide goods or services, by sale or lease, to or for the Agency; or
 - (B) to perform a project as defined by Texas Government Code, §2166.001.

- (3) Contractor -- Independent contractor who has entered into a contract directly with the Agency. The term does not include:
 - (A) The contractor's subcontractor, officer, employee, agent or other person furnishing goods or services to a contractor;
 - (B) An employee of the Agency; or
 - (C) A student at an institution of higher education.
- (4) Counterclaim -- A demand by the Agency based upon the contractor's claim.
- (5) Event -- An act or omission or a series of acts or omissions giving rise to a claim, including but not limited to the following:
 - (A) for goods or services:
 - (i) the failure of the Agency to timely pay for goods and services;
 - (ii) the failure to pay the balance due and owing on the contract price, including orders for additional work, after deducting any amount owed the Agency for work not performed under the contract or in substantial compliance with the contract terms;
 - (iii) the suspension, cancellation, or termination of the contract;
 - (iv) final rejection of the goods or services tendered by the contractor, in whole or in part;
 - (v) repudiation of the entire contract prior to or at the outset of performance by the contractor; or
 - (vi) withholding liquidated damages from final payment to the contractor.
 - (B) for a project:
 - (i) the failure to timely pay the unpaid balance of the contract price following final acceptance of the project;
 - (ii) the failure to make timely progress payments required by the contract;
 - (iii) the failure to pay the balance due and owing on the contract price, including orders for additional work, after deducting any amount owed the Agency for work not performed under the contract or in substantial compliance with the contract terms;
 - (iv) the failure to grant time extensions to which the contractor is entitled under the terms of the contract;
 - (v) the failure to compensate the contractor for occurrences for which the contract provides a remedy;
 - (vi) suspension, cancellation or termination of the contract;
 - (vii) rejection by the Agency, in whole or in part, of the "work," as defined by the contract, tendered by the contractor;
 - (viii) repudiation of the entire contract prior to or at the outset of performance by the contractor;
 - (ix) withholding liquidated damages from final payment to the contractor; or

- (x) refusal, in whole or in part, of a written request made by the contractor in strict accordance with the contract to adjust the contract price, the contract time, or the scope of work.
- (6) Goods -- Supplies, materials or equipment.
- (7) Mediation -- A consensual process in which an impartial third party, the mediator, facilitates communication between the parties to promote reconciliation, settlement, or understanding among them.
- (8) Negotiation -- A consensual bargaining process in which the parties attempt to resolve a claim and counterclaim.
- (9) Parties -- The contractor and the Agency that have entered into a contract in connection with which a claim of breach of contract has been filed under this chapter.
- (10) Project -- As defined in Texas Government Code §2166.001, a building construction project that is financed wholly or partly by a specific appropriation, bond issue or federal money, including the construction of:
 - (A) a building, structure, or appurtenant facility or utility, including the acquisition and installation of original equipment and original furnishing; and
 - (B) an addition to, or alteration, modification, rehabilitation, or repair of an existing building, structure, or appurtenant facility or utility.
- (11) Services -- The furnishing of skilled or unskilled labor or consulting or professional work, or a combination thereof, excluding the labor of an employee of the Agency.

The provisions of this §800.452 adopted to be effective August 23, 2000, as published in the Texas Register, August 18, 2000, 25 TexReg 8063.

§800.453. Contractor Claim.

- (a) A contractor asserting a claim of breach of contract under the Texas Government Code, Chapter 2260, shall file notice of the claim as provided by this section that shall:
 - (1) be in writing and signed by the contractor or the contractor's authorized representative;
 - (2) be delivered by hand, certified mail return receipt requested, or other verifiable delivery service to the officer of the Agency designated in the contract to receive a notice of claim of breach of contract under the Texas Government Code, Chapter 2260; if no person is designated in the contract, the notice shall be delivered to the executive director; and
 - (3) state in detail:
 - (A) the nature of the alleged breach of contract, including the date of the event that the contractor asserts as the basis of the claim and each contractual provision allegedly breached;
 - (B) a description of damages that resulted from the alleged breach, including the amount and method used to calculate those damages; and
 - (C) the legal theory of recovery, i.e., breach of contract, including the causal relationship between the alleged breach and the damages claimed.
- (b) In addition to the mandatory contents of the notice of claim as required by subsection (a) of this section, the contractor may submit supporting documentation or other tangible evidence to facilitate the Agency's evaluation of the contractor's claim.

- (c) The notice of claim shall be delivered no later than 180 days after the date of the event that the contractor asserts as the basis of the claim.

The provisions of this §800.453 adopted to be effective August 23, 2000, as published in the Texas Register, August 18, 2000, 25 TexReg 8063.

§800.454. Agency Counterclaim.

- (a) The Agency, when asserting a counterclaim under Texas Government Code, Chapter 2260, shall file notice of the counterclaim as provided by this section that shall:
 - (1) be in writing;
 - (2) be delivered by hand, certified mail return receipt requested, or other verifiable delivery service to the contractor or representative of the contractor who signed the notice of claim of breach of contract; and
 - (3) state in detail:
 - (A) the nature of the counterclaim;
 - (B) a description of damages or offsets sought, including the amount and method used to calculate those damages or offsets; and
 - (C) the legal theory supporting the counterclaim.
- (b) In addition to the mandatory contents of the notice of counterclaim required by subsection (a) of this section, the Agency may submit supporting documentation or other tangible evidence to facilitate the contractor's evaluation of the unit's counterclaim.
- (c) The notice of counterclaim shall be delivered to the contractor no later than 60 days after the Agency's receipt of the contractor's notice of claim.
- (d) Nothing herein precludes the Agency from initiating a lawsuit for damages against the contractor in a court of competent jurisdiction.

The provisions of this §800.454 adopted to be effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

§800.455. Request for Voluntary Disclosure of Additional Information.

- (a) Upon the filing of a claim or counterclaim, parties may request to review and copy information in the possession or custody or subject to the control of the other party that pertains to the contract claimed to have been breached, including, without limitation:
 - (1) accounting records;
 - (2) correspondence, including, without limitation, correspondence between the Agency and outside consultants it utilized in preparing its bid solicitation or any part thereof or in administering the contract, and correspondence between the contractor and its subcontractors, materialmen, and vendors;
 - (3) schedules;
 - (4) the parties' internal memoranda; and
 - (5) documents created by the contractor in preparing its offer to the Agency and documents created by the Agency in analyzing the offers it received in response to a solicitation.
- (b) Subsection (a) of this section applies to all information in the parties' possession regardless of the manner in which it is recorded, including, without limitation, paper and electronic media.

- (c) The contractor and the Agency may seek additional information directly from third parties, including, without limitation, the Agency's third-party consultants and the contractor's subcontractors.
- (d) Nothing in this section requires any party to disclose the requested information or any matter that is privileged under Texas law.
- (e) Material submitted pursuant to this subsection and claimed to be confidential by the contractor shall be handled pursuant to the requirements of the Public Information Act.

The provisions of this §800.455 adopted to be effective August 23, 2000, as published in the Texas Register, August 18, 2000, 25 TexReg 8063.

§800.456. Costs.

Unless the contractor and the Agency agree otherwise, each party shall be responsible for its own costs incurred in connection with the negotiation, mediation, and other assisted negotiation or mediation processes, including costs of document reproduction for documents requested by such party, attorney's fees, and consultant or expert fees. The costs of the mediation process itself shall be divided equally between the parties.

The provisions of this §800.456 adopted to be effective August 23, 2000, as published in the Texas Register, August 18, 2000, 25 TexReg 8063.

§800.461. Duty to Negotiate.

The parties shall negotiate in accordance with the timetable set forth in §800.462 of this subchapter to attempt to resolve all claims and counterclaims. No party is obligated to settle with the other party as a result of the negotiation.

The provisions of this §800.461 adopted to be effective August 23, 2000, as published in the Texas Register, August 18, 2000, 25 TexReg 8063.

§800.462. Negotiation Timetable.

- (a) Following receipt of a contractor's notice of claim, the Agency's executive director or designated representative shall review the contractor's claim and the Agency's counterclaim, if any, and initiate negotiations with the contractor to attempt to resolve the claim and counterclaim.
- (b) Subject to subsection (c) of this section, the parties shall begin negotiations within a reasonable period of time, not to exceed the 120th day after the date the claim is received.
- (c) The Agency may delay negotiations, with written agreement of the parties, until after the 120th day after the date of the event giving rise to the claim of breach of contract.
- (d) The parties may conduct negotiations according to an agreed schedule as long as they begin negotiations no later than the 120th day after the claim is received.
- (e) Subject to subsection (f) of this section, the parties shall complete the negotiations that are required by this subchapter as a prerequisite to a contractor's request for contested case hearing no later than 270 days after the Agency receives the contractor's notice of claim.
- (f) The parties may agree in writing to extend the time for negotiations on or before the 270th day after the Agency receives the contractor's notice of claim. The agreement shall be signed by representatives of the parties with authority to bind each respective party and shall provide for the extension of the statutory negotiation period until a date certain. The parties may enter into a series of written extension agreements that comply with the requirements of this section.

- (g) The contractor may request a contested case hearing before the State Office of Administrative Hearings (SOAH) pursuant to §800.492 of this subchapter (relating to Request for Contested Case Hearing) after the 270th day after the Agency receives the contractor's notice of claim, or the expiration of any extension agreed to under subsection (f) of this section.
- (h) The parties may agree to mediate the dispute at any time before the 270th day after the Agency receives the contractor's notice of claim or before the expiration of any extension agreed to by the parties pursuant to subsection (f) of this section. The mediation shall be governed by §§800.471 - 800.473 of this subchapter.
- (i) Nothing in this section is intended to prevent the parties from agreeing to commence negotiations earlier than the deadlines established in subsections (b) and (c) of this section, or from continuing or resuming negotiations after the contractor requests a contested case hearing before SOAH.

The provisions of this §800.462 adopted to be effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

§800.463. Conduct of Negotiation.

- (a) A negotiation under this subchapter may be conducted by any method, technique, or procedure authorized under the contract or agreed upon by the parties, including, without limitation, negotiation in person, by telephone, correspondence, video conference, or any other method that permits the parties to identify their respective positions, discuss their respective differences, confer with their respective advisers, exchange offers of settlement, and settle.
- (b) The parties may conduct negotiations with the assistance of one or more neutral third parties. If the parties choose to mediate their dispute, the mediation shall be conducted in accordance with §§800.471-800.473 of this subchapter. Parties may choose other assisted negotiation or mediation processes, including, without limitation, processes such as those described in §§800.481 and 800.482 of this subchapter.
- (c) To facilitate the meaningful evaluation and negotiation of the claim(s) and any counterclaim(s), the parties may exchange relevant documents that support their respective claims, defenses, counterclaims or positions.
- (d) Material submitted pursuant to this subsection and claimed to be confidential by the contractor shall be handled pursuant to the requirements of the Public Information Act.

The provisions of this §800.463 adopted to be effective August 23, 2000, as published in the Texas Register, August 18, 2000, 25 TexReg 8063.

§800.471. Mediation.

- (a) Option to Mediate. The parties may agree to mediate the dispute at any time before the 120th day after the Agency receives the contractor's notice of claim or before the expiration of any extension agreed to by the parties pursuant to §800.462(f) of this subchapter. The mediation shall be governed by rules contained in this subchapter.
- (b) Timetable. A contractor and Agency may mediate the dispute even after the case has been referred to SOAH for a contested case. SOAH may also refer a contested case for mediation pursuant to its own rules and guidelines, whether or not the parties have previously attempted mediation.
- (c) Request for Referral. If mediation does not resolve all issues raised by the claim, the contractor may request that the claim be referred to SOAH by the Agency. Nothing in these rules prohibits the contractor and the Agency from mediating their dispute after the case has been referred for contested case hearing, subject to the rules of SOAH.

(d) Conduct of Mediation.

- (1) A mediator may not impose his or her own judgment on the issues for that of the parties. The mediator must be acceptable to both parties.
- (2) The mediation is subject to the provisions of the Governmental Dispute Resolution Act, Texas Government Code, Chapter 2009. For purposes of this subchapter, "mediation" is assigned the meaning set forth in the Civil Practice and Remedies Code, §154.023.
- (3) To facilitate a meaningful opportunity for settlement, the parties shall, to the extent possible, select representatives who are knowledgeable about the dispute, who are in a position to reach agreement, or who can credibly recommend approval of an agreement.

The provisions of this §800.471 adopted to be effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.

§800.472. Agreement to Mediate.

- (a) Parties may agree to use mediation as an option to resolve a breach of contract claim at the time they enter into the contract and include a contractual provision to do so. The parties may mediate a breach of contract claim even absent a contractual provision to do so if both parties agree.
- (b) Any agreement to mediate shall include consideration of the following factors:
 - (1) The source of the mediator. Potential sources of mediators include governmental officers or employees who are qualified as mediators under Civil Practice and Remedies Code, §154.052, private mediators, SOAH, the Center for Public Policy Dispute Resolution at The University of Texas at Austin School of Law, an alternative dispute resolution system created under Civil Practice and Remedies Code, Chapter 152, or another state or federal agency or through a pooling agreement with several state agencies. Before naming a mediator source in a contract, the parties should contact the mediator source to be sure that it is willing to serve in that capacity. In selecting a mediator, the parties should use the qualifications set forth in §800.473 of this Subchapter (relating to Qualifications and Immunity of the Mediator).
 - (2) The time period for the mediation. The parties should allow enough time in which to make arrangements with the mediator and attending parties to schedule the mediation, to attend and participate in the mediation, and to complete any settlement approval procedures necessary to achieve final settlement. While this time frame can vary according to the needs and schedules of the mediator and parties, it is important that the parties allow adequate time for the process.
 - (3) The location of the mediation.
 - (4) Allocation of costs of the mediator.
 - (5) The identification of representatives who will attend the mediation on behalf of the parties, if possible, by name or position within the Agency or contracting entity.
 - (6) The settlement approval process in the event the parties reach agreement at the mediation.

The provisions of this §800.472 adopted to be effective August 23, 2000, as published in the Texas Register, August 18, 2000, 25 TexReg 8063.

§800.473. Qualifications and Immunity of the Mediator.

- (a) The mediator shall possess the qualifications required under Civil Practice and Remedies Code, §154.052, be subject to the standards and duties prescribed by Civil Practice and Remedies Code,

§154.053, and have the qualified immunity prescribed by Civil Practice and Remedies Code, §154.055, if applicable.

- (b) The parties should decide whether, and to what extent, knowledge of the subject matter and experience in mediation would be advisable for the mediator.
- (c) The parties should obtain from the prospective mediator the ethical standards that will govern the mediation.

The provisions of this §800.473 adopted to be effective August 23, 2000, as published in the Texas Register, August 18, 2000, 25 TexReg 8063.

§800.481. Other Assisted Negotiation and Mediation Processes.

- (a) Parties to a contract dispute under Texas Government Code, Chapter 2260 may agree, either contractually or when a dispute arises, to use other assisted negotiation and mediation (alternative dispute resolution) processes in addition to negotiation and mediation to resolve their dispute.
- (b) Factors Supporting the Use of Other Assisted Negotiation or Mediation Processes. The following factors may help parties decide whether one or more of the other assisted negotiation and mediation processes could help resolve their dispute:
 - (1) The parties recognize the benefits of an agreed resolution of the dispute;
 - (2) The expense of proceeding to contested case hearing at SOAH is substantial and might outweigh any potential recovery;
 - (3) The parties want an expedited resolution;
 - (4) The ultimate outcome is uncertain;
 - (5) There exists factual or technical complexity or uncertainty which would benefit from expertise of a third-party expert for technical assistance or fact-finding;
 - (6) The parties are having substantial difficulty communicating effectively;
 - (7) A mediator third party could facilitate the parties' realistic evaluation of their respective cases;
 - (8) There is an on-going relationship that exists between parties;
 - (9) The parties want to retain control over the outcome;
 - (10) There is a need to develop creative alternatives to resolve the dispute;
 - (11) There is a need for flexibility in shaping relief;
 - (12) The other side has an unrealistic view of the merits of their case; or
 - (13) The parties (or aggrieved persons) need to hear an evaluation of the case from someone other than their lawyers.

The provisions of this §800.481 adopted to be effective August 23, 2000, as published in the Texas Register, August 18, 2000, 25 TexReg 8063.

§800.482. Methods of Other Assisted Negotiation and Mediation Processes.

- (a) Methods. The Agency may elect any of the following methods, or a combination of these methods, or any assisted negotiation process if agreed to by the parties, in seeking resolution of disputes or other controversy arising under Texas Government Code, Chapter 2260. If the parties agree to use another assisted negotiation or mediation procedure, the parties shall agree in writing

to a detailed description of the process prior to engaging in the process that may include one or more of the following:

- (1) Mediation as set forth in this subchapter;
 - (2) Early evaluation by a third-party neutral;
 - (3) Neutral fact-finding by an expert; or
 - (4) Mini-trial.
- (b) Early evaluation by a third party.
- (1) This is a confidential conference where the parties and their counsel present the factual and legal bases of their claim and receive a non-binding assessment by an experienced neutral with subject-matter expertise or with significant experience in the substantive area of law involved in the dispute.
 - (2) After summary presentations, the third-party neutral identifies areas of agreement for possible stipulations, assesses the strengths and weaknesses of each party's position, and estimates, if possible, the likelihood of liability and the dollar range of damages that appear reasonable to him or her.
 - (3) This is a less complicated procedure than the mini-trial, described in subsection (d) of this section. It may be appropriate for only some issues in dispute, for example, where there are clear-cut differences over the appropriate amount of damages. This process may be particularly helpful when:
 - (A) The parties agree that the dispute can be settled;
 - (B) The dispute involves specific legal issues;
 - (C) The parties disagree on the amount of damages;
 - (D) The opposition has an unrealistic view of the dispute; or
 - (E) The neutral is a recognized expert in the subject area or area of law involved.
- (c) Neutral fact-finding by an expert.
- (1) In this process, a neutral third-party expert studies a particular issue and reports findings on that issue. The process usually occurs after most discovery in the dispute has been completed and the significance of particular technical or scientific issues is apparent.
 - (2) The parties may agree in writing that the fact-finding will be binding on them in later proceedings (and entered into as a stipulation in the dispute if the matter proceeds to contested case hearing), or that it will be advisory in nature, to be used only in further settlement discussions between representatives of the parties. This process may be particularly helpful when:
 - (A) Factual issues requiring expert testimony may be dispositive of liability or damage issues;
 - (B) The use of a neutral is cost effective; or
 - (C) The neutral's findings could narrow factual issues for contested case hearing.
- (d) Mini-trial.
- (1) A mini-trial is generally a summary proceeding before a representative of upper management from each party, with authority to settle, and a third-party neutral selected by agreement of the parties. A mini-trial is usually divided into three phases: a limited information exchange

phase, the actual hearing, and post-hearing settlement discussions. No written or oral statement made in the proceeding may be used as evidence or an admission in any other proceeding.

- (2) The information exchange stage should be brief, but it must be sufficient for each party to understand and appreciate the key issues involved in the case. At a minimum, parties should exchange key exhibits, introductory statements, and a summary of witnesses' testimony.
- (3) At the hearing, representatives of the parties present a summary of the anticipated evidence and any legal issues that must be decided before the case can be resolved. The third-party neutral presides over the presentation and may question witnesses and counsel, as well as comment on the arguments and evidence. Each party may agree to put on abbreviated direct and cross-examination testimony. The hearing generally takes no longer than 1-2 days.
- (4) Settlement discussions, facilitated by the third-party neutral, take place after the hearing. The parties may ask the neutral to formally evaluate the evidence and arguments and give an advisory opinion as to the issues in the case. If the parties cannot reach an agreed resolution to the dispute, either side may declare the mini-trial terminated and proceed to resolve the dispute by other means.
- (5) Mini-trials may be appropriate when:
 - (A) The dispute is at a stage where substantial costs can be saved by a resolution based on limited information gathering;
 - (B) The matter justifies the senior executive time required to complete the process;
 - (C) The issues involved include highly technical mixed questions of law and fact;
 - (D) The matter involves trade secrets or other confidential or proprietary information; or
 - (E) The parties seek to narrow the large number of issues in dispute.

The provisions of this §800.482 adopted to be effective August 23, 2000, as published in the Texas Register, August 18, 2000, 25 TexReg 8063.

§800.491. Settlement Agreement and Approval Procedures.

- (a) **Settlement Process.** The parties' settlement approval procedures shall be disclosed by the parties prior to the negotiation, mediation, or other assisted negotiation and mediation process, unless the parties agree otherwise in writing. To the extent possible, the parties shall select negotiators or representatives who are knowledgeable about the subject matter of the dispute, who are in a position to reach agreement, and who can credibly recommend approval of an agreement.
- (b) **Initial Settlement Agreement.** Any settlement agreement reached during the mediation shall be signed by the representatives of the contractor and the Agency, and shall describe any procedures required to be followed by the parties in connection with final approval of the agreement.
- (c) **Final Settlement Agreement.**
 - (1) A final settlement agreement reached during, or as a result of negotiation, mediation, or other assisted negotiation or mediation process that resolves an entire claim or any designated and severable portion of a claim, shall be in writing and signed by representatives of the contractor and the Agency who have authority to bind each respective party.
 - (2) If the settlement agreement does not resolve all issues raised by the claim and counterclaim, the agreement shall identify the issues that are not resolved.

- (3) A partial settlement does not waive a contractor's rights under the Texas Government Code, Chapter 2260, as to the parts of the claim that are not resolved.
- (d) Confidentiality of Mediation and Final Settlement Agreement.
 - (1) A mediation conducted under this section is confidential in accordance with Texas Government Code, §2009.054.
 - (2) The confidentiality of a final settlement agreement to which the Agency is a signatory that is reached as a result of the mediation is governed by Texas Government Code, Chapter 552.

The provisions of this §800.491 adopted to be effective August 23, 2000, as published in the Texas Register, August 18, 2000, 25 TexReg 8063.

§800.492. Request for Contested Case Hearing.

- (a) If a claim for breach of contract is not resolved in its entirety through negotiation, mediation, or other assisted negotiation or mediation process, in accordance with this subchapter on or before the 270th day after the Agency receives the notice of claim, or after the expiration of any extension agreed to by the parties pursuant to this subchapter, the contractor may file a request with the Agency for a contested case hearing before SOAH.
- (b) A request for a contested case hearing shall state the legal and factual basis for the claim, and shall be delivered to the chief administrative officer of the Agency or other officer designated in the contract to receive notice within a reasonable time after the 270th day or the expiration of any written extension agreed to pursuant to this subchapter.
- (c) The Agency shall forward the contractor's request for contested case hearing to SOAH within a reasonable period of time, not to exceed 10 business days, after receipt of the request.
- (d) The parties may agree to submit the case to SOAH before the 270th day after the notice of claim is received by the Agency if they have achieved a partial resolution of the claim or if an impasse has been reached in the negotiations and proceeding to a contested case hearing would serve the interests of justice.

The provisions of this §800.492 adopted to be effective February 7, 2011, as published in the Texas Register, February 4, 2011, 36 TexReg 592.