

THE DISPUTE RESOLUTION CLAUSE, CHAPTER 2260, *TEXAS GOVERNMENT CODE*

History:

In 1999, the Texas Legislature passed a law often referred to as the "Required ADR Statute." It is now in the [Government Code, Chapter 2260](#). It describes a procedure for resolving certain contract claims against the State or a State agency. This statute requires, among other things, that State agencies place a [clause](#) in every contract to which the statute applies stating that the procedures must be used to try to resolve a dispute arising under the contract. The procedure applies to (i) contracts by which the State acquires goods or services and (ii) construction contracts.

The Statute:

Before this statute existed, a contractor with a dispute with a State agency under a contract had to ask the Texas Legislature, which only meets for 6 months every other year, to pass a special private bill to permit the contractor to sue the State. Because the State has "sovereign immunity", this was not easy to accomplish.

The statute defines a procedure that replaces the old regime of obtaining Legislative consent to sue. It requires those contractors whose contracts are covered by the statute to use the statutory procedures to resolve any dispute the contractor has with the State. Section 2260.005 says in no uncertain terms that the procedures are the *exclusive* and *required* prerequisites to filing a lawsuit against the State.

The procedure provides, first, for negotiation and mediation of disputes. The head of the State agency, or another individual in the agency who might be designated in a contract, negotiates with the contractor in an effort to try to resolve the dispute. They may negotiate one-on-one or they may hire a mediator if they wish. If they can't resolve the matter to the contractor's satisfaction, the statute authorizes a "Contested Case Hearing" where both sides present their case to an administrative law judge in the State Office of Administrative Hearings. The judge is authorized to award damages of less than \$250,000 to the contractor. If the judge decides that the claim involves more than that, he has to make a report to the Legislature recommending either that the Legislature pay the additional damages (appropriate money to cover the higher claim), or that the Legislature should not appropriate the extra money and that it deny the contractor the right to sue the State. That is the end of the process. There is no appeal.

State agencies are required by the statute to insert in each contract for goods or services and in construction contracts a clause drafted by the State Attorney General's office. The intent is to comply with the requirement to have a contract clause in State agency contracts and to convey in one to three paragraphs the gist of what the statute says. Because the statute is much longer than three paragraphs, this is not an easy task.

Although individuals may request to edit the contract clause to make it describe some other process, that approach just does not work. State agencies are not at liberty to change the process that the statute requires. State agencies can, however, edit the clause in ways that do not change the description of the procedure. For example, agencies can go into more detail or less detail, and describe who the people will be that will carry out the negotiations. However, a State agency cannot agree to use some other process first, instead, or later.

Mutuality

One more matter: with one exception, this statute does not apply to State claims against a contractor. At first blush this probably seems unfair, but if you consider the reason that the procedure is there at all, that is, to make it possible for a person or entity to resolve a dispute with an agency that *can't* easily be sued, there's no need for the procedure when the agency wants to resolve a dispute with a person or entity that *can* be sued. In practice, the State is likely to use ADR anyway, but not the procedure required by the Government Code, Chapter 2260.

The exception is for claims that a State makes against a contractor after the contractor has already initiated the procedures set out in the statute. These are called "counterclaims" to the contractor's claims, and the procedure applies to all of the claims either party makes, once it has started.

In addition, the fact that State agencies are free to sue a contractor on any claims except counterclaims explains why the contract clause states that the agency has not "waived its right to seek redress in the courts." Although there may be requests to make this mutual, saying that neither the University, *nor the contractor* has waived rights to seek redress in the courts, this modification is not allowable. The right to sue is not mutual. There is a big impediment to a contractor's right to seek redress in the courts: the State's sovereign immunity.