

TASBO 2021 **Engage**

LEARN.
CONNECT.
GROW.



ANNUAL CONFERENCE

The Vendor Complaint Policy

The Why? - The What? - The How?

DAVID HANSEN & RICARDO RIVERA

2/12/21

TASBO 2021
Engage



ANNUAL CONFERENCE

LEARN.
CONNECT.
GROW.

So You Want to Change the World

Surprise! You've Been Sued!

Surprise Change Orders

Stale Disputes Ferment (and not like a "fine wine.")

A Vendor Grievance Policy has ALWAYS been a good idea.

In 2005, the idea grew teeth.

In 2005 the Texas Legislature Ended Governmental Immunity for Breach of Contract Claims and Inspired an Idea that waited 14 years to validate.

To validate the idea it took:

- Getting Beat

- Getting Beat Again

- The Texas Supreme Court Agreeing that the First Time you got beat, the courts were wrong

- Getting Beat One Last Time

- Getting one of the courts that beat you to change its mind.

- A School District's Willingness to Enact, Enforce, and Entrust a Process

Your Presenters

DAVID HANSEN

Shareholder - Eichelbaum Wardell
Hansen Powell and Muñoz P.C. -
dph@edlaw.com (800) 488-9045

Practicing school law for over 20
years. General Counsel for 18
years; Training School Personnel in
Construction Procurement for over
18 years; Trial and Appellate
attorney; and Editor of School
Construction Basics

RICARDO RIVERA

Assistant Superintendent of Operations
- Mission Consolidated Independent
School District – Rriver49@mcisd.org

In addition to his other duties, Mr.
Rivera has been the primary
administrator responsible for
coordinating construction procurement,
design, construction administration,
closeout, and dispute resolution
activities for the school district since
2005.

Learning Objectives

1. You will understand why it makes sense to adopt a vendor grievance policy.
2. You will know what a vendor grievance policy does, where it will be located in your policy, and what it should contain.
3. You will learn how to adopt the policy, how to make use of the policy, and how to avoid common pitfalls that could be used to negate your policy.

1.1 - Why adopt a vendor grievance policy?

The Best Reason By a **MILE**

To solve little problems before they become big problems

It requires the vendor to communicate the substance of its claims and not to hold back.

Timelines in the policy ensure that the claim will be heard and resolved close to the time when it arose

The policy gives the Board a chance to resolve an issue before a Vendor files a lawsuit on a disputed issue.

Prevents Surprise Litigation

Mitigates Threats of Litigation

1.2 - Why adopt a vendor grievance policy?

Mitigates the impact of ambiguous and sometimes hidden disputes that a vendor might use as leverage for concessions or more compensation at contract closeout

For example: “Well, we had a weather delay that set us back about a year ago that you didn’t approve.” Or “We didn’t charge for that extra rock we had to excavate, but we will if you don’t agree to this change.”

A Vendor’s failure to comply with the policy can result in dismissal of a breach of contract suit based on Governmental Immunity.

In other disputes, failure to comply could result in dismissal for other reasons.

Mission Consolidated Independent School District
v.
ERO International,
579 S.W.3d 123, 126
(Tex.App.—Corpus Christi 2019, no pet.).

Texas Local Government Code Section §271.154 Contractual Adjudication Procedures Enforceable

Mission CISD Board Policy CJ(LOCAL)

Mission CISD

v.

ERO Intl.

THE
TEST

Architect v. School District

Board Policy CJ(LOCAL) Incorporated Into Contract (1st one in the state with this policy)

Identified it as a “Contractual Adjudication Procedure” in the contract

Arch Failed to Timely File at Level I

MCISD Filed a “Plea to the Jurisdiction” (to dismiss on ground of Government Immunity)

Policy was attached to and clearly incorporated into the contract.

Trial Court Denied (we lost)

The Court of Appeals Reversed (we . . .

... Validated the Idea That Compliance with a Contractual Adjudication Procedure was a Jurisdictional Prerequisite to Suit.
The Court Dismissed the Case.
The Plaintiff Did Not Seek Review in the Texas Supreme Court.

2.1 - Vendor Grievance Policy: How does it work?

When you have one and incorporate it into your procurement documents:

It serves as a system to identify and resolve disputes that arise from the Vendor - School District relationship.

If you follow the Mission model, when the Vendor has a complaint about something to do with their relationship with the District:

The Vendor files a complaint just like an employee would do under a policy like DGBA(LOCAL).

In the complaint the Vendor would bring its disputes to the District's attention in a timely manner.

A three level hearing process would apply. Decisions would be issued at each level in accordance with the timeline set forth in the policy.

The Vendor must explain the dispute. The Vendor risks losing claims it doesn't make and so it is encouraged to give a thorough explanation of its claims to the administration and to the Board of Trustees.

2.2 - Vendor Grievance Policy: How does it work?

The dispute may be resolved or dismissed as untimely - either way should avert litigation.

If the problem is unresolved, mediation can be more successful because you have developed facts.

When a vendor fails to comply with the policy, the possibility of the dismissal of a future suit looms large at mediation.

Vendor Grievance Policy: Where should it be located in your policy?

Board Policy CJ(LOCAL)

Vendor and Contractor Complaints

Guiding Principles and Application

The following provisions apply to all complaints or grievances from:

1. All persons, corporations, partnerships, or any other entity that seeks engagement in or has engaged in a contractual relationship with the District to provide goods or services; and
2. All persons, corporations, partnerships, or any other entity that claims to have performed services or provided goods to the District based on any understanding it may have had with any officer, employee, or agent of the District.

The complaints or grievances shall be related to or arising from:

1. The administration or performance of contracts or an alleged contract for goods or services by the District, its agents, its employees, or its contractors; or
2. The acts of the District or any of its employees, officers, agents, or contractors related to a contract or an alleged contract for goods or services, including the alleged negligent or intentional conduct of any District employees, officers, agents, or contractors.

This policy constitutes a contractual adjudication procedure enforceable under Texas Local Government Code 271.154.

This policy shall not apply to persons who are employees of the

2.3 - Vendor Grievance Policy: What should it contain?

Overall, it is best that it be written to be easily understandable by an non-lawyer.

Use Existing Policies as a Model (DGBA, FNG, and GF provide tested examples).

A requirement that the Complaint be submitted in **writing** on a **form provided by the District**.

A requirement to state in the Complaint **the date** the District took the disputed action.

A requirement to articulate claims in the Complaint and that claims will be waived if not articulated and timely filed.

2.4 - Vendor Grievance Policy: What should it contain?

A requirement that the Policy be followed before a lawsuit can be filed.

A deadline in which to file a Complaint **relative to the time of the action the gave rise to the dispute.**

A process for appeal ending with the Board of Trustees

A provision that includes mandatory consequences **that may not be waived by any employee** for failure to file a grievance in a timely manner.

3.1 - How to adopt the policy

Review vendor grievance policies of other school districts.

Draft the Policy.

Try to make the Policy consistent with current District practices for other disputes.

Consult with the District's counsel to review for enforceability.

Present to Board of Trustees with an explanation of the purposes.

Review District procurement documents to determine where to include references to the Policy.

The Board adopts the policy in accordance with Board Policy BF.

3.2 - How to Make use of the Policy

The policy should be referenced in your bidding documents.

It should be included in your general conditions.

It should be incorporated into your purchase orders.

It should be physically attached to your contracts.

It is important to be upfront about its existence when the process is incorporated into a contract as a “contractual adjudication procedure.

Don't Make Exceptions.

Be Formal - Formal is Fair.

3.3 - Common Pitfalls and Challenges

Apply the Policy AS WRITTEN.

ENFORCE DEADLINES - If the Complaint is late and the policy requires dismissal - Dismiss it.

EXCEPTIONS to compliance may destroy your immunity.

Exceptions have been construed by one court as a waiver of the contractual adjudication procedures.

“Contractual Adjudication Procedures” will be new ground for judges and mediators. Help them understand what they are looking at.

Get your lawyers to help you with your contracts and with complaints.

If you write responses to the complaints, consistently refer to the processes as “Contractual Adjudication Procedures.”

Courts aren’t eager to dismiss vendor lawsuits - so play your part as written.

Adjudication Procedure Practice

When the Board of Trustees hears a timely complaint:

Bring your best documentation and arguments; and

Really try to resolve the complaint

If you have the authority and a reason to do so, resolve it before it reaches the Board

It is your dry run for trial - if you argue your case well enough, they may not pursue the claim further.

Use the Adjudication Procedure as your chance to evaluate the vendor's arguments and their proof.

If the Complaint is late - Don't accidentally revive it.

In an appeal of timeliness, be clear that timeliness is the sole issue for consideration.

Include the statement the script so as not to inadvertently waive the deadlines.

Involve your attorneys to advise and assist with substantial disputes.

Summary

Use the Policy to solve little problems before they become big problems.

The Policy may be adopted as Board Policy CJ(LOCAL).

Incorporate the Policy into your contracts and Purchasing Documents as a “Contractual Adjudication Procedure.”

Require uniform compliance with the procedure - Be formal.

If a Vendor files after the deadline and the policy requires dismissal stop there and consult your legal counsel. Do not let your actions be construed as a waiver.

Questions?

Thank you.
If you think of questions later-on, call any time.

David Hansen
dph@edlaw.com
(800) 488-9045



EICHELBAUM WARDELL
HANSEN POWELL & MUÑOZ, P.C.