RRC STAFF OPINION

*Please Note: This communication is either 1) only the recommendation of an RRC staff attorney as to action that the attorney believes the Commission should take on the cited rule at its next meeting, or 2) an opinion of that attorney as to some matter concerning that rule. The agency and members of the public are invited to submit their own comments and recommendations (according to RRC rules) to the Commission.*

AGENCY: NC DEPARTMENT OF TRANSPORTATION

RULE CITATION: 19A NCAC 01C .0201

RECOMMENDED ACTION:

 Return the rule to the agency for failure to comply with the Administrative Procedure Act

 Approve, but note staff’s comment

X Object, based on:

 X Lack of statutory authority

 Unclear or ambiguous

 Unnecessary

 Failure to adopt the rule in accordance with the APA

 Extend the period of review

COMMENT:

*There is no authority cited for the requirement that a contractor with a [“valid”] claim against the Department of Transportation (DOT) for any amount he claims is due to “exhaust whatever informal negotiation steps the Chief Engineer has established” before resorting to any other options allowed him by law. [I have asked the agency to delete or define “valid.” It seems to me that whether the claim is “valid” is precisely the question to be answered about the claim. I do not believe there would be a serious issue about that technical change request.]*

*There are two problems with this provision:*

*The first is that there is no authority cited to require a claimant to “exhaust … informal negotiations” before undertaking either of the two statutory options.*

*The first authority cited, G.S. 136-29, provides:*

**§ 136‑29.  Adjustment and resolution of Department of Transportation contract claim.**

(a)        A contractor who has completed a contract with the Department of Transportation let in accordance with Article 2 of this Chapter and who has not received the amount he claims is due under the contract may submit a verified written claim to the Secretary of Transportation for the amount the contractor claims is due. The claim shall be submitted within 60 days after the contractor receives his final statement from the Department and shall state the factual basis for the claim.

The Secretary or the Secretary's designee shall investigate a submitted claim within 90 days of receiving the claim or within any longer time period agreed to by the Secretary or the Secretary's designee and the contractor. The contractor may appear before the Secretary or the Secretary's designee, either in person or through counsel, to present facts and arguments in support of the claim. The Secretary or the Secretary's designee may allow, deny, or compromise the claim, in whole or in part. The Secretary or the Secretary's designee shall give the contractor a written statement of the decision on the contractor's claim.

(b)        A contractor who is dissatisfied with the Secretary or the Secretary's designee's decision on the contractor's claim may commence a contested case on the claim under Chapter 150B of the General Statutes. The contested case shall be commenced within 60 days of receiving the written statement of the decision.

(c)        As to any portion of a claim that is denied by the Secretary or the Secretary's designee, the contractor may, in lieu of the procedures set forth in subsection (b) of this section, within six months of receipt of the final decision, institute a civil action for the sum he claims to be entitled to under the contract by filing a verified complaint and the issuance of a summons in the Superior Court of Wake County or in the superior court of any county where the work under the contract was performed. The procedure shall be the same as in all civil actions except that all issues shall be tried by the judge, without a jury.

(d)       The provisions of this section shall be part of every contract let in accordance with Article 2 of this Chapter between the Department of Transportation and a contractor. A provision in a contract that conflicts with this section is invalid.  (1939, c. 318; 1947, c. 530; 1957, c. 65, s. 11; 1963, c. 667; 1965, c. 55, s. 11; 1967, c. 873; 1973, c. 507, ss. 5, 17, 18; 1977, c. 464, s. 7.1; 1983, c. 761, s. 191; 1987, c. 847, s. 3; 2009‑266, s. 16.)

*This is a statute that is designed to specifically address handling claims for money owed by the DOT to a claimant. In (a) and (b) it allows him – and one could argue after reading (b) and (c) that it requires him – to file a claim with the secretary of the DOT before pursuing either a contested case hearing in the Office of Administrative Hearings under (b) or an action in Superior Court as set out in (c). There is nothing in that statute that requires the claimant to engage in informal negotiations. It even adds in (d) that these provisions “shall be a part of every contract” the department lets and that any “provision in a contract that conflicts with this section is invalid.” If the department cannot put such a provision requiring “informal negotiation” before engaging in other legal pursuits in a contract, it certainly has no authority to put it in a rule.*

*There is a provision in the APA, G.S. 150B-22, addressing informal negotiations that the agency also cites as rulemaking authority:*

Article 3.

Administrative Hearings.

**§ 150B‑22.  Settlement; contested case.**

It is the policy of this State that any dispute between an agency and another person that involves the person's rights, duties, or privileges, including licensing or the levy of a monetary penalty, should be settled through informal procedures. In trying to reach a settlement through informal procedures, the agency may not conduct a proceeding at which sworn testimony is taken and witnesses may be cross‑examined. If the agency and the other person do not agree to a resolution of the dispute through informal procedures, either the agency or the person may commence an administrative proceeding to determine the person's rights, duties, or privileges, at which time the dispute becomes a "contested case." (1985 (Reg. Sess., 1986), c. 1022, s. 1(11); 1991, c. 418, s. 16.)

*The above statute does not require a person to engage in any sort of informal proceedings. Nor does it allow an agency to require that. It is also important to note that this is a general statute addressing all state agencies and the policies and procedures that “should” be followed before a citizen is forced to engage in a contested case hearing. The first statute cited above is specifically addressed to the DOT and the settlement of claims against that agency.*

*There is another problem with this rule. Even if there were authority for the agency to require a claimant to engage in these “informal negotiations,” there is no authority for the chief engineer to establish “whatever … steps” he wanted someone to engage in, apparently whenever he wanted to, without going through rulemaking.*

*The other two statutes cited as authority for this rule do not seem as relevant to this particular issue. However they are set out for your easier reference:*

**§ 143B‑10.  Powers and duties of heads of principal departments.**

(a)        Assignment of Functions. – Except as otherwise provided by this Chapter, the head of each principal State department may assign or reassign any function vested in him or in his department to any subordinate officer or employee of his department.

(b)        Reorganization by Department Heads. – With the approval of the Governor, each head of a principal State department may establish or abolish within his department any division. Each head of a principal State department may establish or abolish within his department any other administrative unit to achieve economy and efficiency and in accordance with sound administrative principles, practices, and procedures except as otherwise provided by law. When any such act of the head of the principal State department affects existing law the provisions of Article III, Sec. 5(10) of the Constitution of North Carolina shall be followed.

Each Department Head shall report all reorganizations under this subsection to the President of the Senate, the Speaker of the House of Representatives, the Chairmen of the Appropriations Committees in the Senate and the House of Representatives, and the Fiscal Research Division of the Legislative Services Office, within 30 days after the reorganization if the General Assembly is in session, otherwise to the Joint Legislative Committee on Governmental Operations and the Fiscal Research Division of the Legislative Services Office, within 30 days after the reorganization. The report shall include the rationale for the reorganization and any increased efficiency in operations expected from the reorganization.

(c)        Department Staffs. – The head of each principal State department may establish necessary subordinate positions within his department, make appointments to those positions, and remove persons appointed to those positions, all within the limitations of appropriations and subject to the State Personnel Act. All employees within a principal State department shall be under the supervision, direction, and control of the head of that department. The head of each principal State department may establish or abolish positions, transfer officers and employees between positions, and change the duties, titles, and compensation of existing offices and positions as he deems necessary for the efficient functioning of the department, subject to the State Personnel Act and the limitations of available appropriations. For the purposes of the foregoing provisions, a member of a board, commission, council, committee, or other citizen group shall not be considered an "employee within a principal department."

(d)       Appointment of Committees or Councils. – The head of each principal department may create and appoint committees or councils to consult with and advise the department. The General Assembly declares its policy that insofar as feasible, such committees or councils shall consist of no more than 12 members, with not more than one from each congressional district. If any department head desires to vary this policy, he must make a request in writing to the Governor, stating the reasons for the request. The Governor may approve the request, but may only do so in writing. Copies of the request and approval shall be transmitted to the Joint Legislative Commission on Governmental Operations. The members of any committee or council created by the head of a principal department shall serve at the pleasure of the head of the principal department and may be paid per diem and necessary travel and subsistence expenses within the limits of appropriations and in accordance with the provisions of G.S. 138‑5, when approved in advance by the Director of the Budget. Per diem, travel, and subsistence payments to members of the committees or councils created in connection with federal programs shall be paid from federal funds unless otherwise provided by law.

An annual report listing these committees or councils, the total membership on each, the cost in the last 12 months and the source of funding, and the title of the person who made the appointments shall be made to the Joint Legislative Commission on Governmental Operations by March 31 of each year.

(e)        Departmental Management Functions. – All management functions of a principal State department shall be performed by or under the direction and supervision of the head of that principal State department. Management functions shall include planning, organizing, staffing, directing, coordinating, reporting, and budgeting.

(f)        Custody of Records. – The head of a principal State department shall have legal custody of all public records as defined in G.S. 132‑1.

(g)        Budget Preparation. – The head of a principal State department shall be responsible for the preparation of and the presentation of the department budget request which shall include all funds requested and all receipts expected for all elements of the department.

(h)        Plans and Reports. – Each principal State department shall submit to the Governor an annual plan of work for the next fiscal year prior to the beginning of that fiscal year. Each principal State department shall submit to the Governor an annual report covering programs and activities for each fiscal year. These plans of work and annual reports shall be made available to the General Assembly. These documents will serve as the base for the development of budgets for each principal State department of State government to be submitted to the Governor.

(i)         Reports to Governor; Public Hearings. – Each head of a principal State department shall develop and report to the Governor legislative, budgetary, and administrative programs to accomplish comprehensive, long‑range coordinated planning and policy formulation in the work of his department. To this end, the head of the department may hold public hearings, consult with and use the services of other State agencies, employ staff and consultants, and appoint advisory and technical committees to assist in the work.

(j)         Departmental Rules and Policies. – The head of each principal State department and the Director of the Office of State Personnel may adopt:

(1)        Rules consistent with law for the custody, use, and preservation of any public records, as defined in G.S. 132‑1, which pertain to department business;

(2)        Rules, approved by the Governor, to govern the management of the department, which shall include the functions of planning, organizing, staffing, directing, coordinating, reporting, budgeting, and budget preparation which affect private rights or procedures available to the public;

(3)        Policies, consistent with law and with rules established by the Governor and with rules of the State Personnel Commission, which reflect internal management procedures within the department. These may include policies governing the conduct of employees of the department, the distribution and performance of business and internal management procedures which do not affect private rights or procedures available to the public and which are listed in (e) of this section. Policies establishing qualifications for employment shall be adopted and filed pursuant to Chapter 150B of the General Statutes; all other policies under this subdivision shall not be adopted or filed pursuant to Chapter 150B of the General Statutes.

Rules adopted under (1) and (2) of this subsection shall be subject to the provisions of Chapter 150B of the General Statutes.

This subsection shall not be construed as a legislative grant of authority to an agency to make and promulgate rules concerning any policies and procedures other than as set forth herein. (1973, c. 476, s. 10; c. 1416, ss. 1, 2; 1977, 2nd Sess., c. 1219, s. 46; 1983, c. 76, ss. 1, 2; c. 641, s. 8; c. 717, s. 78; 1985 (Reg. Sess., 1986), c. 955, ss. 97, 98; 1987, c. 738, s. 147; c. 827, s. 1; 1991 (Reg. Sess., 1992), c. 1038, s. 15; 2006‑203, s. 101.)

**§ 150B‑1.  Policy and scope.**

(a)        Purpose. – This Chapter establishes a uniform system of administrative rule making and adjudicatory procedures for agencies. The procedures ensure that the functions of rule making, investigation, advocacy, and adjudication are not all performed by the same person in the administrative process.

(b)        Rights. – This Chapter confers procedural rights.

(c)        Full Exemptions. – This Chapter applies to every agency except:

…

(d)       Exemptions from Rule Making. – Article 2A of this Chapter does not apply to the following:

…

(e)        Exemptions From Contested Case Provisions. – The contested case provisions of this Chapter apply to all agencies and all proceedings not expressly exempted from the Chapter. The contested case provisions of this Chapter do not apply to the following:

…

(8)        The Department of Transportation, except as provided in G.S. 136‑29.

…

(f)        Exemption for the University of North Carolina. – Except as provided in G.S. 143‑135.3, no Article in this Chapter except Article 4 applies to The University of North Carolina.

(g)        Exemption for the State Board of Community Colleges. – Except as provided in G.S. 143‑135.3, no Article in this Chapter except Article 4 applies to the State Board of Community Colleges.

RRC STAFF OPINION

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AGENCY: NC DEPARTMENT OF TRANSPORTATION

RULE CITATION: 19A NCAC 02A .0102

RECOMMENDED ACTION:

 Return the rule to the agency for failure to comply with the Administrative Procedure Act

 Approve, but note staff’s comment

X Object, based on:

 X Lack of statutory authority

 Unclear or ambiguous

 Unnecessary

 Failure to adopt the rule in accordance with the APA

Extend the period of review

COMMENT:

*There is no authority cited for the secretary of the DOT to delegate his rulemaking authority to the chief engineer, as found in item (22). The agency has rulemaking authority only because the legislature delegated that authority to the agency. Absent a specific authorization from the legislature to sub-delegate that authority, the agency cannot give it to anyone else.*

*Even though G.S. 143B-10(a) appears to be a broad grant of authority for an agency head to delegate a “function of the department” it was never intended to allow an agency head to pass down to any employee of the department the ability to make rules affecting everybody in the state. For this to occur there must be a quite specific delegation from the General Assembly.*

*In addition the last sentence of G.S. 143B-10(j) is a specific limitation on the delegation authority of a department head. It provides that “[t]his subsection shall not be construed as a legislative grant of authority to an agency to make and promulgate rules concerning any policies and procedures other than as set forth herein.” Another way of reading that is an agency cannot “make ... rules concerning ... policies and procedures” including delegating the agency’s rulemaking policies and procedures without specific authority.*

§ 143B‑10.  Powers and duties of heads of principal departments.

(a)        Assignment of Functions. – Except as otherwise provided by this Chapter, the head of each principal State department may assign or reassign any function vested in him or in his department to any subordinate officer or employee of his department.

(b)        Reorganization by Department Heads. – With the approval of the Governor, each head of a principal State department may establish or abolish within his department any division. Each head of a principal State department may establish or abolish within his department any other administrative unit to achieve economy and efficiency and in accordance with sound administrative principles, practices, and procedures except as otherwise provided by law. When any such act of the head of the principal State department affects existing law the provisions of Article III, Sec. 5(10) of the Constitution of North Carolina shall be followed.

Each Department Head shall report all reorganizations under this subsection to the President of the Senate, the Speaker of the House of Representatives, the Chairmen of the Appropriations Committees in the Senate and the House of Representatives, and the Fiscal Research Division of the Legislative Services Office, within 30 days after the reorganization if the General Assembly is in session, otherwise to the Joint Legislative Committee on Governmental Operations and the Fiscal Research Division of the Legislative Services Office, within 30 days after the reorganization. The report shall include the rationale for the reorganization and any increased efficiency in operations expected from the reorganization.

(c)        Department Staffs. – The head of each principal State department may establish necessary subordinate positions within his department, make appointments to those positions, and remove persons appointed to those positions, all within the limitations of appropriations and subject to the State Personnel Act. All employees within a principal State department shall be under the supervision, direction, and control of the head of that department. The head of each principal State department may establish or abolish positions, transfer officers and employees between positions, and change the duties, titles, and compensation of existing offices and positions as he deems necessary for the efficient functioning of the department, subject to the State Personnel Act and the limitations of available appropriations. For the purposes of the foregoing provisions, a member of a board, commission, council, committee, or other citizen group shall not be considered an "employee within a principal department."

(d)       Appointment of Committees or Councils. – The head of each principal department may create and appoint committees or councils to consult with and advise the department. The General Assembly declares its policy that insofar as feasible, such committees or councils shall consist of no more than 12 members, with not more than one from each congressional district. If any department head desires to vary this policy, he must make a request in writing to the Governor, stating the reasons for the request. The Governor may approve the request, but may only do so in writing. Copies of the request and approval shall be transmitted to the Joint Legislative Commission on Governmental Operations. The members of any committee or council created by the head of a principal department shall serve at the pleasure of the head of the principal department and may be paid per diem and necessary travel and subsistence expenses within the limits of appropriations and in accordance with the provisions of G.S. 138‑5, when approved in advance by the Director of the Budget. Per diem, travel, and subsistence payments to members of the committees or councils created in connection with federal programs shall be paid from federal funds unless otherwise provided by law.

An annual report listing these committees or councils, the total membership on each, the cost in the last 12 months and the source of funding, and the title of the person who made the appointments shall be made to the Joint Legislative Commission on Governmental Operations by March 31 of each year.

(e)        Departmental Management Functions. – All management functions of a principal State department shall be performed by or under the direction and supervision of the head of that principal State department. Management functions shall include planning, organizing, staffing, directing, coordinating, reporting, and budgeting.

(f)        Custody of Records. – The head of a principal State department shall have legal custody of all public records as defined in G.S. 132‑1.

(g)        Budget Preparation. – The head of a principal State department shall be responsible for the preparation of and the presentation of the department budget request which shall include all funds requested and all receipts expected for all elements of the department.

(h)        Plans and Reports. – Each principal State department shall submit to the Governor an annual plan of work for the next fiscal year prior to the beginning of that fiscal year. Each principal State department shall submit to the Governor an annual report covering programs and activities for each fiscal year. These plans of work and annual reports shall be made available to the General Assembly. These documents will serve as the base for the development of budgets for each principal State department of State government to be submitted to the Governor.

(i)         Reports to Governor; Public Hearings. – Each head of a principal State department shall develop and report to the Governor legislative, budgetary, and administrative programs to accomplish comprehensive, long‑range coordinated planning and policy formulation in the work of his department. To this end, the head of the department may hold public hearings, consult with and use the services of other State agencies, employ staff and consultants, and appoint advisory and technical committees to assist in the work.

(j)         Departmental Rules and Policies. – The head of each principal State department and the Director of the Office of State Personnel may adopt:

(1)        Rules consistent with law for the custody, use, and preservation of any public records, as defined in G.S. 132‑1, which pertain to department business;

(2)        Rules, approved by the Governor, to govern the management of the department, which shall include the functions of planning, organizing, staffing, directing, coordinating, reporting, budgeting, and budget preparation which affect private rights or procedures available to the public;

(3)        Policies, consistent with law and with rules established by the Governor and with rules of the State Personnel Commission, which reflect internal management procedures within the department. These may include policies governing the conduct of employees of the department, the distribution and performance of business and internal management procedures which do not affect private rights or procedures available to the public and which are listed in (e) of this section. Policies establishing qualifications for employment shall be adopted and filed pursuant to Chapter 150B of the General Statutes; all other policies under this subdivision shall not be adopted or filed pursuant to Chapter 150B of the General Statutes.

Rules adopted under (1) and (2) of this subsection shall be subject to the provisions of Chapter 150B of the General Statutes.

This subsection shall not be construed as a legislative grant of authority to an agency to make and promulgate rules concerning any policies and procedures other than as set forth herein. (1973, c. 476, s. 10; c. 1416, ss. 1, 2; 1977, 2nd Sess., c. 1219, s. 46; 1983, c. 76, ss. 1, 2; c. 641, s. 8; c. 717, s. 78; 1985 (Reg. Sess., 1986), c. 955, ss. 97, 98; 1987, c. 738, s. 147; c. 827, s. 1; 1991 (Reg. Sess., 1992), c. 1038, s. 15; 2006‑203, s. 101.)

RRC STAFF OPINION

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AGENCY: NC DEPARTMENT OF TRANSPORTATION

RULE CITATION: 19A NCAC 02B .0164

RECOMMENDED ACTION:

 Return the rule to the agency for failure to comply with the Administrative Procedure Act

 Approve, but note staff’s comment

X Object, based on:

 X Lack of statutory authority

 Unclear or ambiguous

 Unnecessary

 Failure to adopt the rule in accordance with the APA

Extend the period of review

COMMENT:

*There is no authority for the provision in (e), page 3 lines 6 and 7, where the Manager of the Right of Way Branch determines the number of pre-qualified firms outside of rulemaking without setting the standards for the determination.*

RRC STAFF OPINION

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AGENCY: NC DEPARTMENT OF TRANSPORTATION

RULE CITATION: 19A NCAC 02B .0165

RECOMMENDED ACTION:

 Return the rule to the agency for failure to comply with the Administrative Procedure Act

 Approve, but note staff’s comment

X Object, based on:

 X Lack of statutory authority

X Unclear or ambiguous

 X Unnecessary

 Failure to adopt the rule in accordance with the APA

Extend the period of review

COMMENT:

*There is no authority for the provision in (s), page 5 lines 23 – 25, to require a claimant who believes he is entitled to additional time or compensation to notify the Department within 30 days of the “final payment.” G.S. 136-29(a) gives a claimant 60 days to make such a claim.*

*It also fails to note that a claimant has a right to take its case into Wake County Superior Court if he so chooses. Paragraph (c) of that same statute gives him that right.*

*Finally the last sentence of paragraph (s) in the rule is a legal conclusion and as a legal conclusion is unnecessary. It also seems to contradict G.S. 136-29(c) which would make it lacking in authority. That statute gives a contractor the right to file a civil case in court without going through any other administrative remedies. And whether “[e]xhaustion of the administrative procedure described ... shall be a prerequisite to the firm’s right of review” is a question of law for some legal tribunal to provide. Therefore it is unnecessary. If the agency is attempting to write the law that it desired to prevail – go through administrative procedures before going to any contested case or other remedy, -- then that is outside their rulemaking authority.*

RRC STAFF OPINION

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AGENCY: NC DEPARTMENT OF TRANSPORTATION

RULE CITATION: 19A NCAC 02D .0414

RECOMMENDED ACTION:

 Return the rule to the agency for failure to comply with the Administrative Procedure Act

 Approve, but note staff’s comment

X Object, based on:

 X Lack of statutory authority

 Unclear or ambiguous

 Unnecessary

 Failure to adopt the rule in accordance with the APA

Extend the period of review

COMMENT:

*There are several places in this rule where the department is requiring things to be done based on standards “required by the District Engineer” or similar language. There is no authority cited to set these standards outside rulemaking.*

*The locations in this rule where these provisions are found are:*

 *(4)(b), lines 17 and 18*

 *(5), lines 21 and 22*

 *(7), lines 26 and 27*

RRC STAFF OPINION

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AGENCY: NC DEPARTMENT OF TRANSPORTATION

RULE CITATION: 19A NCAC 02E .0702

RECOMMENDED ACTION:

 Return the rule to the agency for failure to comply with the Administrative Procedure Act

 Approve, but note staff’s comment

X Object, based on:

 Lack of statutory authority

X Unclear or ambiguous

 Unnecessary

 Failure to adopt the rule in accordance with the APA

Extend the period of review

COMMENT:

*In (b), lines 13 and 14, it is unclear what constitutes “a large portion of the work required.”*

*Normally counsel would recommend a technical change and ask the agency to “delete or define ‘large’ or ‘a large portion of’ in this sentence. However because of the possibility that this might result in a major change in the rule not previously expected by the agency or public, counsel is recommending an objection.*

*On the other hand if the agency has a simple solution that is in line with their current practices and the expectations in this matter of the regulated public, then the RRC may be willing or desirous to accept any change as a technical change.*