

Legislative Update

Legislation of Interest to the Construction Bar Pending in the 81st Regular Session of the Legislature of the State of Texas

(Note: This Update is being provided in the middle the 81st Regular Session. Many changes will occur by the end of the Session. Some of the Bills will die. Some will pass. Most won't look the same as they did on April 16, 2009.

Presented to

Austin Bar Association Construction Law Section

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By

Steve Nelson EVP & General Counsel SureTec Insurance Company

Dallas • Houston • Austin • San Antonio • San Diego • Tampa • Atlanta

snelson@suretec.com

(512) 330-1850

www.suretec.com

During the 140 days of the Texas Legislative Session, thousands of bills are considered by our legislators. This Session, over 7,000 bills have been filed, a 1000 more than usual. If this Session is like those of the recent past, about 1500 of those bills will become new laws by the time the Session adjourns *sine die* on Monday, June 1, 2009. But then, there's not usual about this Session.

On any given day, in any given Session, our elected representatives are considering laws ranging from programs as diverse as eradicating boll weevils, fines for fishing with illegal trot lines, stop light cameras, school finance, child custody, capital punishment, car inspections, barber licensing, sales tax and the budget for the State of Texas. They hold committee hearings, chair committees, and meet as a body. They pass resolutions, confirm gubernatorial appointments, and host the visiting 4-H Clubs, PTA's, and constituent groups, take an occasional turn at the Speaker's Dias, and solve constituent problems with a myriad of state agencies.

For most, legislation is their "second job," as they are farmers, ranchers, teachers, doctors, salesmen, lawyers (lots of lawyers), accountants, airline pilots and engineers. Only a handful of them have any direct experience at all in construction matters.

The process, like making sausage, is one that some may not want to watch. But, if you do...and many of those 1500 or so bills will have a direct impact on your practice and your clients' business...and on how fast you drive, your taxes, the fines you pay, the liberties you enjoy, etc....then, you and your clients should follow the progress of the Legislature.

Until a few years ago, only lobbyists who subscribed to expensive legislative reporting services were able to track legislation effectively and on a timely basis. Today, however, an incredible amount of information is available free of charge to anyone with access to the Internet.

One of the most useful sources on the Internet is the Texas Legislature's Web Site, also known as **Texas Legislature ONLINE**, which can be found at www.capitol.state.tx.us. From this page, you can go into "Legislative Reports" or "Search Bills" and obtain lists of bills by number, filing date, author, subject, and keyword.

From these lists you can obtain and download the actual copies of the legislation, together with each bill's history (where the bill is located in the Legislative process) and official Bill Analysis (the explanation of the bill prepared by the House Bill Analysis Office or the Senate Research Center). You can also obtain information such as House Calendars (schedules for action on the House floor) and Senate Intent Lists (those bills which are eligible for consideration and which may be brought up for debate on the Senate floor on a given day), as well as

House and Senate Committee schedules. Useful information about Senators and House members is available as well.

The lists of bills by subject matter are often a good place to start in trying to locate legislation. Occasionally, a bill is miscategorized or is omitted from a relevant list. In most cases, however, the subject matter lists provide an accurate list of legislation pending within a given broad area of law.

The public access information available on the Internet is generally reliable. The information may not be as timely as the subscription services used by lobbyists, trade associations and other special interest groups. For example, the public access sources may take one or two days to post information about Committee action -- particularly in the last few weeks of the Legislative Session when things become rather hectic. The public access sites on the Internet provide most of the information an interested construction lawyer will need to locate, review, and monitor proposed legislation affecting the construction industry.

Pending Bills

It is difficult to know where to start and stop when listing bills that are "significant" to any particular industry. Certainly, the State's budget and its spending on capital improvements have a tremendous impact on the construction industry. There are the myriad of bills that have been filed and have no chance of passing. So, picking those on which to report is much like the task of a restaurant critic trying to name the "best" Mexican restaurants in Austin. You will leave some out...and some will cease to exist before you go to print. Due to the House Speaker's election, things got off to a slow start this Session. By the time this paper is copied and presented, some will be destined for demise. Accordingly...**PLEASE REMEMBER THAT THE SESSION DOES NOT ADJOURN UNTIL JUNE 1, 2009. EVERYTHING IN THAT SUMMARY COULD HAVE, AND WILL LIKELY HAVE, CHANGED BY THEN. PLEASE GO TO WWW.CAPITOL.STATE.TX.US TO CHECK THE STATUS OF THESE BILLS BEFORE ASSUMING THAT ANY HAVE BECOME, OR MIGHT BECOME, LAW.**

Topic	Bills	Description
Alternative Delivery Methods for Public Procurement	SB 1110 by Jackson	This bill consolidates procurement statutes currently found in various locations, including the Education Code (Chapter 44) and the Local Government Code (Chapter 271) and the Government Code (Chapter 2166) into one location (the Government Code). This bill consolidates those construction rules, unifying the authorization, definitions, and limitations in one code section. It reconciles minor differences in the language that applied to each. It seeks to maintain and promote competition and transparency in selecting both the method of construction and the service providers. The bill is similar to bills in the 79th Legislature (HB2525) and the 80th Legislature (HB447) which were both passed but vetoed by the governor, Passed on Local Calendar in Senate this morning; HB 2106 by Geren is Companion, referred to State Affairs
Arbitration Agreements	SB 222 by West	voids many arbitration agreements; geared mostly toward consumer and labor issues, but potentially affects those arbitration agreements in standard commercial contracts; Referred to Senate Jurisprudence Committee
Arbitration Agreements	HB 2696 by Gattis, sort of a step sister to SB 222 by West	allows arbitration clauses in contracts as long as both parties initial the clause and as long as agreeing to the clause isn't a condition of accepting the contract. It has some of the same can't-abridge-constitutional-rights language that West's Bill does; Heard in Judiciary & Civil Jurisprudence on 4/15
Arbitration Agreements	HB 1083 by Elkins	provides that a court may not order mediation in an action that is subject to the Federal Arbitration Act; Left pending in Judiciary and Civil Jurisprudence Committee
Civil Design-Build Phase-in	SB 229 by West and HB 667 by Callegari	Amends the phase-in section in the Civil Design-Build statute to allow entities over 100,000 to use the process after 9/1/09. SB229 has passed the Senate and has been referred to County Affairs; On Local & Consent Calendar in House
Competitive Bidding Threshold for Counties;	HB 78 by Flynn, HB 117 by Heflin and SB 253 by Estes	Raises competitive bidding threshold for counties from \$25,000 to \$50,000.; HB 78 is in Calendars in the House; HB117 has been reported out of the County Affairs Committee;
Competitive Bidding Thresholds and Change Orders	HB 987 by Creighton and SB 624 by West	Raises the competitive procurement/bidding threshold for local governments and school districts from \$25k to \$50k, allows for electronic bids, and amends some change order requirements; HB987 by been passed by the House; SB 624 has been referred to Intergovernmental Relations

Topic	Bills	Description
Construction Manager-Agent Registration	HB 1606 by Branch	Requires that anyone providing construction management-agent services to governmental entities be registered by the State. It establishes qualification standards a CM-Agent must meet in order to be registered and it also establishes a professional liability insurance requirement for the CM-Agent to maintain for the protection of the governmental entity. Architects and engineers who provide CM-Agent services to a governmental entity are exempt from the registration process if they are duly licensed and in good standing with the State; HB1606 referred to State Affairs; SB 1090 referred to Government Organization
Contractor Licensing	HB 1291 by Eiland	would require regulation of certain disaster remediation contractors; left pending in House Insurance Committee
Crane Operators Licensing	HB1807 by Giddings	would regulate crane operators, signal persons and riggers; pending in Licensing Committee
Disabled Veterans as HUB's	HB 268 by Lucio	This bill would add veterans with a service-connected disability to the list of economically disadvantaged persons; referred to Defense & Veteran's Affairs.
Indemnification Provisions in Construction Contracts	SB 555 by Duncan and HB 818 by Eiland	Prohibits many broad based indemnity provisions in construction contracts. Restrictions will be imposed on "broad form" indemnity clauses and contractual requirements for similar "broad form" additional insured endorsements. An indemnitor may be required to indemnify and defend the indemnitee from claims arising from the indemnitor's negligence (and the negligence of its contractors and subcontractors of any tier) but not from the negligence of the indemnitee. However, these restrictions will not apply to claims arising from personal injuries of employees of the indemnitor or its contractors or subcontractors of any tier. In other words, the legislation will not prohibit "broad form" indemnity and requirements for "broad form" additional insured coverage for claims arising from "on-the-job" injuries of employees of the indemnitor (or the employees of its contractors and subcontractors of any tier). These restrictions will apply to all construction contracts, including subcontract agreements; SB555 passed the Senate; ref'd to Judiciary & Civil Jurisprudence

Topic	Bills	Description
Liability for Acts of Independent Contractors	HB 1288 by Eiland	HB 1288 responds to the Entergy v. Summers case, proposing significant changes to Chapter 95 of the Civil Practices and Remedies Code; HB 1288 expands a property owner's liability for injuries that occur in connection with construction on the owner's premises. Under current law (Chapter 95, Civil Practice and Remedies Code), an owner is not liable for personal injury, death, or property damage to a contractor or subcontractor, or their employees, arising from a construction-related accident unless: (1) the property owner exercises or retains some control over the work, or (2) the owner had actual knowledge of the danger or condition resulting in the injury and failed to adequately warn. HB 1288 subjects a property owner to liability even if the owner did not have actual knowledge of the danger or condition alleged to have caused the employee's injury. Instead, an owner is liable if the owner created or had actual or constructive knowledge of the danger or condition and failed either to correct or warn of the danger or condition; Referred to Judiciary and Civil Jurisprudence
Lis Pendens, Expunction of Notices of	HB 396 by Hartnett	This bill deals with lis pendens notices. It would require a notice to all parties with an interest within 7 days of the filing a notice of record. It also sets requirements for a motion to expunge a lis pendens; Passed the House and received in the Senate
Mechanic's Liens	HB 669 by Solomons	This bill attempts to take the bite out of the penalty provisions of Section 12.002 of the Texas Civil Practice & Remedies Code, by adding good faith and technical error defenses for filing improper mechanic's liens. The bill does not lessen or change the requirements for valid liens. Reported favorably from House Business & Industry Committee, No Senate Companion
Omnibus Clean Air Bill	SB 16 by Averitt	Seeks to improve air quality through a variety of ways including energy efficient building codes, energy efficient standards for consumer goods, incentive programs for clean coal plants, grants for emissions technology, and others; passed by Senate and received in the House; no companion
Owner Controlled/Contractor Controlled Insurance Programs	HB 3759 by Smithee	This bill will deal with Consolidated Insurance programs like OCIP's, ROCIP's, and CCIP's. The bill will have a multitude of requirements for those wanting to use these types of insurance programs; referred to House Insurance Committee
Preference to Local Bidders	SB 447 by Wentworth and HB 707 by Rose	Allows municipalities of less than 250,000 to choose the bid of a local bidder that is not the lowest bid, if the bid is within 5% of the lowest bid for construction of a building, road, street, bridge, utility, or storm drainage facility; SB 447 has had a hearing and is left pending in Intergovernmental Relations; HB 707 is scheduled for hearing in Urban Affairs on 4/16/2009

Topic	Bills	Description
Preferences to Vendors providing health benefits	HB 535 by Anchia	This bill requires the comptroller and all state agencies to give preference to vendors that provide health benefits to employees provided they pay 100% of the premium for full-time employees and 75% for each dependent of full-time employees who elect to participate in the coverage; Left pending in State Affairs Committee
Professional License Number Required on Certain Documents	HB 735 and HB 972 by Quintanilla	HB 735 requires individuals that have a professional license or registration from the state to prominently display the license or registration number on any document, advertisement, business card, or logo provided to the public. HB 972 limits it to those who advertise to a consumer at a consumer's home in person, over a telephone, through a salesperson, or through a written communication, HB 972 has had a hearing in Business & Industry and has been left pending in subcommittee
Professional Services Procurement	HB 1105 by Launbenberg	This bill would effectively gut the original intent of the Professional Services Procurement Act by introducing fees and locale to the qualification based procurement process for architects, engineers, and surveyors; referred to State Affairs, no public hearing yet; no companion
Residential Construction Commission	HB 1635 by T. Smith	This bill would abolish the Texas Residential Construction Commission; Left Pending in Subcommittee in Business & Industry
Sovereign Immunity	HB 3203 by Hartnett	Would amend Section 271.153(a) of the Local Government Code to add reasonable and necessary attorneys' fees as are equitable and just as recoverable in a breach of contract action against cities and schools; scheduled for public hearing on 4/20 in Judiciary & Civil Jurisprudence
Sovereign Immunity	SB 1183 by Wentworth	Would provide for a waiver by the State of sovereign immunity to suit for breach of contract for disputes with an amount in controversy in excess of \$250,000; referred to State Affairs
Sovereign Immunity	SB 1457 by Corona	would waive governmental sovereign immunity for violation of Prompt Pay Act; referred to State Affairs
Trust Fund Statute	HB 1513 by Smith of Harris	HB 1513 attempts to deal with the harsh affects of the Bankruptcy preferential transfer statute. The legislation would revise the Trust Fund Act to: a) state that trust funds in the hands of a Construction Trustee are expressly removed from the debtor's bankruptcy estate; b) state that the commingling of funds by a Construction Trustee with other funds of the Construction Trustee does not destroy the trust nature of the funds; c) state that the Trust Fund Act applies to both public and private projects in Texas, whether bonded or not; Reported out of Business & Industry and in Calendars Committee; SB 1137 by Jackson is Companion- no activity

By: Duncan

S.B. No. 555

A BILL TO BE ENTITLED

1 AN ACT

2 relating to indemnification provisions in construction contracts.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

4 SECTION 1. The Civil Practice and Remedies Code is amended
5 by adding Title 10 to read as follows:

6 TITLE 10. ADDITIONAL MISCELLANEOUS PROVISIONS

7 CHAPTER 502. INDEMNITY PROVISIONS IN CONSTRUCTION CONTRACTS

8 Sec. 502.001. DEFINITIONS. In this chapter:

9 (1) "Claim" includes a loss or liability for a claim,
10 damage, expense, or governmentally imposed fine, penalty,
11 administrative action, or other action.

12 (2) "Construction contract" means a contract,
13 subcontract, or agreement or a performance bond assuring the
14 performance of any of the foregoing, entered into or made by an
15 owner, contractor, construction manager, subcontractor, supplier,
16 material or equipment lessor, for the construction, alteration,
17 renovation, remodeling, repair, or maintenance of, or for the
18 furnishing of material or equipment for, a building, structure,
19 appurtenance, or other improvement to or on public or private real
20 property, including moving, demolition, and excavation connected
21 with the real property. The term includes an agreement to which a
22 contractor and an owner's lender are parties regarding an
23 assignment of the construction contract or other modifications to
24 the construction contract.

1 (3) "Indemnitor" means a party to a construction
2 contract that is required to provide indemnification or additional
3 insured status to another party to the construction contract or to a
4 third party.

5 Sec. 502.002. PERMISSIBLE CONTRACT PROVISION. Parties may
6 agree in a construction contract upon an indemnity or additional
7 insured provision that is not prohibited by this chapter.

8 Sec. 502.003. AGREEMENT VOID AND UNENFORCEABLE.

9 (a) Except as provided by Section 502.004, a provision in a
10 construction contract, or in an agreement collateral to or
11 affecting a construction contract, is void and unenforceable as
12 against public policy if it requires an indemnitor to indemnify,
13 hold harmless, or defend another party to the construction contract
14 or a third party against a claim to the extent that the claim is
15 caused by the negligence or fault, breach or violation of a statute,
16 ordinance, governmental regulation, standard, or rule, or breach of
17 contract of the indemnitee, its agent or employee, or any third
18 party under the control or supervision of the indemnitee, other
19 than the indemnitor or its agent, employee, or subcontractor of any
20 tier.

21 Sec. 502.004. EXCEPTION FOR EMPLOYEE CLAIM. Section
22 502.003 does not apply to a provision in a construction contract
23 that requires a person to indemnify, hold harmless, or defend
24 another party to the construction contract or a third party against
25 a claim for the bodily injury or death of an employee of the
26 indemnitor, its agent, or its subcontractor of any tier.

27 Sec. 502.005. UNENFORCEABLE ADDITIONAL INSURANCE

1 PROVISION. A provision in a construction contract that requires
2 the purchase of additional insured coverage, or any coverage
3 endorsement or provision within an insurance policy providing
4 additional insured coverage, is void and unenforceable to the
5 extent that it requires or provides coverage, the scope of which is
6 prohibited under this chapter for an agreement to indemnify, hold
7 harmless, or defend.

8 Sec. 502.006. EXCLUSIONS. This chapter does not affect:

9 (1) an insurance policy, including a policy issued
10 under an owner-controlled or owner-sponsored consolidated
11 insurance program or a contractor-controlled or
12 contractor-sponsored consolidated insurance program, except a
13 policy under Sections 502.003 and 502.005;

14 (2) a cause of action for breach of contract or
15 warranty that exists independently of an indemnity obligation;

16 (3) a provision in a construction contract that
17 requires the indemnitor to purchase or maintain insurance covering
18 the acts or omissions of the indemnitor;

19 (4) indemnity provisions contained in loan and
20 financing documents, other than construction contracts to which the
21 contractor and owner's lender are parties as provided under Section
22 502.001(2);

23 (5) general agreements of indemnity required by
24 sureties as a condition of execution of bonds for construction
25 contracts;

26 (6) the benefits and protections under the workers'
27 compensation laws of this state;

1 (7) the benefits or protections under the governmental
2 immunity laws of this state; or

3 (8) agreements subject to the provisions of Chapter
4 127.

5 Sec. 502.007. LIABILITY INSURANCE. This chapter does not
6 otherwise affect a construction contract provision that requires a
7 party to the contract to purchase:

8 (1) owners and contractors protective liability
9 insurance;

10 (2) railroad protective liability insurance;

11 (3) contractors all-risk insurance; or

12 (4) builders all-risk insurance.

13 Sec. 502.008. PROHIBITION OF WAIVER. The provisions of
14 this chapter may not be waived by contract or otherwise. Any
15 purported waiver is void and unenforceable.

16 Sec. 502.009. APPLICABILITY OF TEXAS LAW. Under this
17 chapter, the law of this state, exclusive of this state's
18 choice-of-law rules that would apply the laws of another
19 jurisdiction, shall apply to every construction contract agreement
20 affecting improvements to real property within the State of Texas.

21 SECTION 2. Section 2252.902, Government Code, is repealed.

22 SECTION 3. The changes in law made by this Act apply only to
23 an original construction contract with an owner of an improvement
24 or contemplated improvement that is entered into on or after the
25 effective date of this Act. If an original construction contract
26 with an owner of an improvement or contemplated improvement is
27 entered into on or after the effective date of this Act, the changes

1 in law made by this Act apply to a related subcontract, purchase
2 order contract, personal property lease agreement, and insurance
3 policy. If an original construction contract with an owner of an
4 improvement or contemplated improvement is entered into before the
5 effective date of this Act, that original construction contract and
6 a related subcontract, purchase order contract, personal property
7 lease agreement, and insurance policy are governed by the law in
8 effect immediately before the effective date of this Act, and that
9 law is continued in effect for that purpose.

10 SECTION 4. This Act takes effect September 1, 2009.