

Construction Contracting

Legislative Update, Key Provisions, & Lessons from the Field

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87th Legislature – Update

- Five Significant Construction Bills
 - HB 692 – Retainage
 - HB 2581 – Competition & Transparency
 - HB 3583 – Energy Savings Contracts
 - SB 219 – Contractor Liability for Design
 - HB 3069 – Statute of Repose

Retainage Bill – HB 692

- Effective immediately
- Requires Contract Language to
 - 1) Define Substantial Completion
 - 2) Provide conditions for release of retainage at substantial or final completion
- Disallows retainage exceeding 10% for contracts < \$5M
- Caps retainage at 5% for contracts > \$5M
- Permits interest on retainage for contracts > \$10M awarded using procurement method other than competitive bidding

HB 692 - Retainage

- Bill attempts to address perception that owners hold retainage too long and use it to leverage warranty repairs or extra work
- Allows Owner to withhold retainage if a dispute exists – with written notice
 - Permits Contractor to cure noncompliant work
 - Or Offer owner reasonable compensation instead of correction
 - No obligation by Owner to accept offer
- Codified Gov't Code ch. 2252 – Effective June 1, 2021

Competition & Transparency

- HB 2581 – Amends Tex. Gov't Code ch. 2269
 - Permits Contractor to request documents related to the evaluation of the offeror's submission
 - Owner must provide to requestor all evaluative documents and ranking information
 - CSP – Price must be 50%
 - Unless governing body determines public interest requires lower value – Not less than 36.9%
 - 7 days after award, Owner must provide evaluations and any scores to offerors and make publicly available

Competitive Procurement Compliance

- HB 3583 – Amends Loc. Gov't Code ch. 302
 - Intended to promote energy efficiency projects and had exempted them from procurement
 - Certain abuses –Bill aims to eliminate that
 - Excludes water/wastewater projects from 302

Contractor's Design Liability

- *Lonergan Case*
 - Contractor owned the warranty for adequacy of design – as to the Owner.
 - Not comprehensive
 - Extended as to adequacy
 - Did not eliminate defective design claims
- HB 219
 - Reverses Lonergan
 - Effective Sept. 1
 - Not Comprehensive
 - Excludes Utility Scale Water & Electrical Infrastructure
 - Does not exclude roads, highways & bridges
 - Makes clause to contract around bill unenforceable

Statute of Repose

- HB 3069
 - Public Owners previously had 10 years to file suit for construction or design
 - Tex. Civ. Prac. & Rem. Code §16.061 limits applicability of ch. 16 to cities.
 - But repose not exempt – 16.008 & 16.009
 - New law lowers repose period to 8 years from 10 years but provides extension of the period if notice given prior to expiration



Contract Terms



Hot Button Issues

Liquidated Damages

To Include or
Not to Include –

The \$64,000
question

Liquidated Damages

- Pros –
 - Predictable measure of risk for delay
 - Ease of applicability by Owner
 - Generally enforceable
- Cons –
 - Often underestimated
 - Exclusivity of remedy
 - Rarely enforced



- **Contract Terms**

Performance &
Project
Management

Dispute & Claim
Mitigation or
Avoidance



Essential Terms & Provisions

Project Management

- Standard of Performance & Warranty
 - Adequacy of Design
- Acceptance of Work
- Waiver of Consequential Damages
- Dispute Resolution/Venue
- Insurance



Key Terms –

Claim

Mitigation &

Avoidance

- No Damages for Delay
- Unforeseen Underground Conditions
- Notice & Waiver of Claims
 - Presentment/Submission
 - Interim Releases with Payment
 - Acceptance of Final Payment
- Indemnity
- Equipment

Questions ?

