

A BILL TO BE ENTITLED

AN ACT

relating to resolution of disputes arising under construction contracts.

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

SECTION 1. Title 7, Civil Practice and Remedies Code, is amended by adding Chapter 160 to read as follows:

CHAPTER 160. DISPUTE RESOLUTION BOARDS

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 160.001. DEFINITION.

In this chapter, "construction contract" means a contract between the state of Texas, a political subdivision or private real property owner and a contractor for the improvement of real property in this state.

Sec. 160.002. METHOD OF ADOPTION.

A dispute arising under a construction contract may be submitted to a dispute resolution board in accordance with this chapter if the contract includes language that reflects the intent of the parties to use the process provided by this chapter.

Sec. 160.003. PUBLIC CONSTRUCTION CONTRACTS.

Each construction contract entered into by a state agency or political subdivision that does not provide for submission of disputes arising under the contract to a dispute resolution board under this chapter must contain a provision stating that the use of dispute resolution under this chapter was actively considered and rejected.

[Sections 160.004-160.050 reserved for expansion]

SUBCHAPTER B. DISPUTE RESOLUTION BOARD

Sec. 160.051. COMPOSITION AND SELECTION OF BOARD.

- (a) A dispute resolution board consists of three persons selected in accordance with this section.
- (b) On or before the 15th day after the date a construction contract subject to this chapter is executed, each party to the contract shall select one nominee qualified to serve as a board member under this chapter and communicate the name and qualifications of the nominee to the other party for approval.
- (c) A party may accept or reject the other party's nomination on or before the seventh day after the date the party receives notice of the nomination.
- (d) A nominee that is not rejected during the period prescribed by Subsection (c) is considered approved.
- (e) If a nominee is rejected, the party who nominated the person shall nominate another qualified person.
- (f) Once two board members nominated by the parties are accepted, those board members shall nominate a third qualified person to be chairperson of the board. Each party may accept or reject the nomination on or before the 15th day after the date the party receives notice of the nomination. If the nominee for chairperson is not rejected by one of the parties in the time prescribed by this subsection, the nominee is considered accepted. If the nominee is rejected by a party, the two approved board members shall make additional nominations for chairperson until a nomination is accepted by the parties. If rejected, two additional nominations shall be made to select a Chairman. If any party fails to timely make a nomination or has rejected two nominations by the other party, any party may make an application to the district court where the work will be constructed to appoint a qualified person to the board and/or as chairman.

Sec. 160.052. QUALIFICATIONS OF BOARD MEMBERS.

- (a) A board member selected by a party to the construction contract must have:
 - (1) at least 3 years of technical or managerial experience in engineering, construction, or architecture; and
 - (2) experience in:
 - (A) one or more of the general types of construction involved in the contract;
 - (B) the interpretation of construction contract documents; and
 - (C) the analysis and resolution of construction issues.
- (b) The chairperson of the board must have:
 - (1) at least 5 years of experience in the person's profession;
 - (2) at least 5 years of experience in:
 - (A) construction dispute resolution;
 - (B) adjudication;
 - (C) arbitration; or
 - (D) service as a judge; and
 - (3) competence in the interpretation of construction contract documents and the analysis and resolution of construction claims.
- (c) Each person who serves on a board must have:
 - (1) experience serving on a dispute resolution board, on a dispute review board, on a dispute adjudication board, or as an adjudicator or judge; or
 - (2) 40 hours of classroom training in the mechanisms of dispute resolution boards, construction adjudication, construction arbitration, or construction mediation in courses conducted by an alternative dispute resolution organization approved by the parties or any court making an appointment.

Sec. 160.053. CONFLICTS OF INTEREST; NEUTRALITY.

- (a) A member of a dispute resolution board may not have any current or prior involvement in the contract or construction project that is the subject of the dispute that could compromise the person's ability to review the dispute impartially.
- (b) Except for providing services as a dispute resolution board member, arbitrator, or mediator on a matter involving the owner or contractor, a board member may not, at the time of service on the board or during the two years before the person begins serving on the board, have:
 - (1) employment with, an ownership interest in, or an existing business or financial relationship, including the provision of fee-based consulting services, with:
 - (A) a party to the contract under which the dispute arises;
 - (B) a third-party construction manager for the contractor;
 - (C) any subcontractor or sub-consultant to the contractor; or
 - (D) another contractor or construction manager for the owner;
 - (2) a financial interest in the contract;
 - (3) involvement, directly or indirectly, in the preparation of the bid documents for the contract or a bid by any bidder for the invitation to bid for the contract; or
 - (4) involvement in the management or administration of the contract.
- (c) Except for participation in the board's activities as provided by the construction contract and the board's contract entered into under Section 160.054, the owner or contractor may not solicit advice from or consult with the board or individual members of the board on matters related to the conduct of the work under the construction contract or resolution of problems under the construction contract that might compromise the board's integrity.

- (d) A board member may not advocate for a party to the construction contract.
- (e) A board member has a continuing duty to avoid conflicts of interest and shall promptly disclose to the other board members and the parties any matter that could reasonably give rise to a perception of partiality or non-neutrality.
- (f) After disclosure of all matters which could reasonably give rise to a perception of partiality or of possible conflict of interest, the parties may waive such and permit the service of any qualified potential Board member.

Sec. 160.054. CONTRACT WITH BOARD.

- (a) On or before the 15th day after the date the chairperson of the board is selected, the board members and parties to the construction contract shall execute a standard three-party agreement in which the board members agree to:
 - (1) endeavor to assist the parties in preventing and resolving disputes during the term of the construction contract;
 - (2) read and become familiar with all the contract documents, including the specifications, plans, addenda, progress schedule and updates, weekly progress reports, minutes of progress meetings, change orders, and other documents relevant to the performance of the contract and necessary to the board's work;
 - (3) visit the construction site as soon as practicable after selection of the board and reserve at least one day each month for project site visits and visit the site at least bimonthly, or more frequently if beneficial; and
 - (4) keep abreast of the construction activities and become familiar with the work in progress.
- (b) The frequency, time, and duration of visits required under the board's contract shall be mutually agreed on by the board, owner, and contractor, or if the parties and the board do not agree, scheduled by the board.
- (c) The board shall also agree to consider, fairly and impartially, each dispute referred to the board by a party to the construction contract and provide written recommendations to the owner and contractor based on the relevant provisions of the construction contract, any applicable law, and the facts and circumstances involved in the dispute. The board's recommendations shall express, clearly and completely, the logic and reasoning leading the board to the recommendations so that all the parties fully understand and can use the recommendations to assist them in negotiating a resolution of the dispute. The board's recommendations may address issues of entitlement, unjust enrichment, or both.

[Sections 160.055-160.100 reserved for expansion]

SUBCHAPTER C. DUTIES OF PARTIES TO CONSTRUCTION CONTRACT

Sec. 160.101. OWNER DUTIES. The owner shall:

- (1) provide each board member with a copy of all contract documents, including the specifications, plans, addenda, progress schedule and updates, weekly progress reports, minutes of progress meetings, change orders, and any other documents relevant to the performance of the contract and necessary to the board's work; and
- (2) provide the board with:
 - (A) conference facilities at or near the construction site; and
 - (B) secretarial and copying services.

Sec. 160.102. CONTRACTOR DUTIES. The contractor shall

furnish each board member with relevant documents prepared by the contractor, such as progress schedules, to supplement the documents provided by the owner.

[Sections 160.103-160.150 reserved for expansion]

SUBCHAPTER D. OPERATION OF BOARD

Sec. 160.151. BOARD ACTIVITY AND EXPENSES.

- (a) The board shall be active throughout the term of the construction contract. The cost of the board's activity must be included as a capital expense of the project.
- (b) The total cost of a qualified minority or historically underutilized dispute resolution board administrative organization, including the expense of the board members, counts toward meeting all minority set-aside goals or provisions required by law.
- (c) The board shall begin operation on the written authorization of the owner received after the board's contract under Section 160.054 is executed and end operation at the end of the term of the construction contract after the final payment due under the construction contract has been made.

Sec. 160.152. IMMUNITY.

- (a) Each board member, in the performance of the member's duties on the board, acts in the capacity of an independent agent intended to facilitate the resolution of disputes and not as an employee of the owner or the contractor.
- (b) To the fullest extent permitted by law, each board member is entitled to quasi-judicial immunity for an action or decision associated with the consideration, hearing, and recommendation of a resolution for a dispute referred to the board. Each board member shall be held harmless for any personal or professional liability arising from or related to board activities.
- (c) To the fullest extent permitted by law, the owner and contractor shall indemnify each board member for claims, losses, demands, costs, and damages, including reasonable attorney's fees, for bodily injury, property damage, or economic loss arising out of or related to the member's carrying out of board functions. Indemnification provided under this subsection is a joint and several obligation of the owner and the contractor.

Sec. 160.153. INFORMAL PROCEEDINGS AND RECOMMENDATIONS.

- (a) The owner and contractor may agree, with respect to any issue, claim, or dispute, to request that the board act in an advisory capacity to assist in resolution of the issue, claim, or dispute at a formal hearing before the board.
- (b) For the purposes of an informal proceeding under this section, each party shall submit a written submission not longer than two written pages to the board. To the extent possible, the parties shall also submit to the board written questions for the board agreed to by the parties.
- (c) On submission of an informal proceeding to the board under this section, either party may request an opportunity to give an oral presentation to the board, and the board may request an oral presentation by the parties. An oral presentation under this subsection must take place during a regularly scheduled meeting of the board. Unless a time limit for oral presentations is agreed to by the parties, the board shall establish a time limit for oral presentations.
- (d) The board shall present its advisory recommendation to the parties orally not later than four hours after the conclusion of any oral presentation by the parties.
- (e) The parties and the board are not bound in any way by the advisory recommendation, and the same matter may be heard again in a formal hearing before the board.

- (f) The parties shall agree that an advisory recommendation is not admissible in any administrative or judicial proceeding for any reason and may not offer or move for admission of an advisory recommendation.

Sec. 160.154. FORMAL FINDINGS AND RECOMMENDATIONS.

- (a) On the request of either party, the board shall conduct a formal hearing in accordance with this section.
- (b) The hearing shall be conducted by the board chairperson in accordance with any dispute resolution board rules and hearing procedures established by the board and with all members of the board present and participating.
- (c) The board shall allow each party to present the party's position on the dispute, with the contractor presenting first.
- (d) The board may ask any questions of the parties that the board considers appropriate.
- (e) The board may schedule continuations of the hearing from time to time. The board may not accept any further submissions or evidence from a party after the conclusion of the hearing unless the submission or evidence is expressly requested by the board.

Sec. 160.155. FINDINGS AND RECOMMENDATIONS.

- (a) After the hearing under Section 160.154 concludes, the board shall meet to formulate its findings and recommendations for resolution of the dispute. The board's deliberations shall be conducted in private and are confidential.
- (b) The board shall base its findings and recommendations on the contract provisions and the facts and circumstances of the dispute.
- (c) The board shall make a concerted effort to reach a unanimous decision but may issue its findings and recommendations with the agreement of two members. The findings and recommendations must be signed by all board members.
- (d) A dissenting member shall clearly indicate the member's dissent on the findings and recommendations and provide clearly identified separate dissenting findings and recommendations, which shall be included as part of the board's findings and recommendations.

Sec. 160.156. TIME FOR ISSUING FINDINGS AND RECOMMENDATIONS.

The board shall issue its findings and recommendations to the owner and the contractor on or before the 21st day after the date the hearing concludes or as otherwise determined by the board and agreed to by the parties.

Sec. 160.157. EFFECT OF FINDINGS AND RECOMMENDATIONS.

- (a) Although the purpose of the board findings and recommendations is to assist the parties in negotiating a resolution of their disputes, the written findings and recommendations shall be admitted, unless otherwise agreed by the parties, into evidence in any subsequent judicial, arbitral, or administrative proceeding.
- (b) A board member or other participant in a board hearing may not be required to testify as to what was said or presented at a board meeting or any hearing, conference, or other proceeding of the board.

Sec. 160.158. DISCLOSURE OF RECORDS.

The records of a dispute resolution board are not records of any government agency and any records, notes, or drafts taken or made by a board member are not subject to disclosure under any freedom of information law.

SECTION 2. This Act takes effect September 1, 2003.

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relating to resolution of disputes arising under construction contracts.

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

SECTION 1. Title 7, Civil Practice and Remedies Code, is amended by adding Chapter 161 to read as follows:

CHAPTER 161. TEXAS CONSTRUCTION DISPUTE ADJUDICATION ACT

SUBCHAPTER A. DISPUTE ADJUDICATION

161.01. Definitions.

161.02. In this chapter, "Adjudication" is a non-binding but temporarily dispositive contract mechanism for preventing and resolving disputes between the state of Texas, political subdivisions or private real property owners and the prime contractors constructing public or private works.

161.03. RESPONSIBILITY FOR CONSIDERATION.

It shall be the responsibility of the owners and prime contractors to recognize the probability of disputes arising during the construction process and to consider providing a mechanism for preventing disputes or for the early resolution of those disputes which do occur. The State and all subdivisions should consider the use of dispute adjudication on all projects. Every contract for the construction of public works should contain a provision that the use of adjudication was considered.

161.003. METHODS OF ADOPTING.

Adjudication may be included in a contract by stating the intention of the parties to use this Act, or by any other language and terms they may jointly agree.

SUBCHAPTER C. ADJUDICATION

161.004. PROVISIONS REQUIRED.

A party to a construction contract may provide in the contract for the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section. Such provisions of a contract shall:

- (a) enable a party to give notice at any time of his intention to refer a dispute to adjudication;
- (b) provide a timetable with the object of securing the appointment of a qualified adjudicator from a neutral appointing authority or district court and referral of the dispute to him within 7 days of such notice;
- (c) require the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred;
- (d) allow the adjudicator to extend the period of 28 days by up to 14 days, with the consent of the party by whom the dispute was referred;
- (e) impose a duty on the adjudicator to act impartially; and
- (f) enable the adjudicator to take the initiative in ascertaining the facts and the law.

161.005. QUALIFICATIONS OF ADJUDICATOR.

A person shall be qualified to serve as an adjudicator in a particular matter if they are neutral, possess the technical or professional knowledge or experience to understand the issues and make a written reasoned determination of the dispute and have a minimum of fifteen classroom hours of instruction in the adjudication process in a course conducted by an alternative dispute resolution organization approved by the parties or any court making the appointment.

161.006. DECISION TO BE IN WRITING.

The contract shall provide that the decision of the adjudicator shall be in writing, shall explain the basis for the decision, shall be summarily enforceable and temporarily binding until the dispute is finally determined by legal proceedings, by arbitration when the parties have agreed to arbitration or by agreement.

161.07. FINAL DETERMINATION.

The parties may agree to accept the decision of the adjudicator as finally determining the dispute.

161.08. IMMUNITY.

The adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator unless the act or omission is in bad faith, and any employee or agent of the adjudicator is similarly protected from liability.

SECTION 2. This Act takes effect September 1, 2003.