

By: Chisum, Thompson, et al.

H.B. No. 541

Substitute the following for H.B. No. 541:

By: Elkins

C.S.H.B. No. 541

A BILL TO BE ENTITLED

AN ACT

relating to contingent payment clauses in certain construction contracts.

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

SECTION 1. Subchapter D, Chapter 35, Business & Commerce Code, is amended by adding Section 35.521 to read as follows:

Sec. 35.521. AGREEMENT FOR PAYMENT OF CONSTRUCTION SUBCONTRACTOR. (a) In this section:

(1) "Contingent payment clause" means a provision in a contract for construction management or for the construction of improvements to real property or the furnishing of materials for the construction, that provides that the contingent payor's receipt of payment from another is a condition precedent to the obligation of the contingent payor to make payment to the contingent payee for work performed or materials furnished.

(2) "Contingent payor" means a party to a contract with a contingent payment clause that conditions payment by the party on the receipt of payment from another person.

(3) "Contingent payee" means a party to a contract with a contingent payment clause, other than an architect or engineer, whose receipt of payment is conditioned on the contingent payor's receipt of payment from another person.

(4) "Improvement" includes new construction, remodeling, or repair.

1           (5) "Obligor" means the person obligated to make  
2 payment to the contingent payor for an improvement.

3           (6) "Primary obligor" means the owner of the real  
4 property to be improved or repaired under the contract, or the  
5 contracting authority if the contract is for a public project. A  
6 primary obligor may be an obligor.

7           (b) This section does not apply to a contract that is solely  
8 for design services.

9           (c) A contingent payor or its surety may not enforce a  
10 contingent payment clause to the extent that the nonpayment by the  
11 contingent payor is the result of the fault of the contingent payor  
12 or a contractor or subcontractor of the contingent payor other than  
13 the contingent payee.

14           (d) Except as provided by Subsection (f) or (g), a  
15 contingent payor or its surety may not enforce a contingent payment  
16 clause as to work performed or materials delivered after the 10th  
17 day after the date on which the contingent payor receives written  
18 notice from the contingent payee objecting to the further  
19 enforceability of the contingent payment clause as provided by this  
20 section. The written notice is effective only if it is sent after  
21 the 30th day after the accrual of an unpaid indebtedness, other than  
22 retainage, owed to the contingent payee for work performed or  
23 materials furnished under the contract between the contingent payor  
24 and contingent payee.

25           (e) For purposes of Subsection (d), an unpaid indebtedness  
26 to a contingent payee accrues only if a written request for payment  
27 of the unpaid indebtedness is submitted by the contingent payee in a

1 form substantially in accordance with the contingent payee's  
2 contract requirements for the contents of a regular progress  
3 payment request or an invoice. The unpaid indebtedness accrues on:

4 (1) the last day of the month in which the work for  
5 which payment is sought was performed or the materials for which  
6 payment is sought were furnished, if the written request for  
7 payment was submitted in that month; or

8 (2) the date on which the written request for payment  
9 is submitted, if that date is after the end of the month in which the  
10 work was performed or materials were furnished.

11 (f) A notice given by a contingent payee under Subsection  
12 (d) does not prevent the enforcement of a contingent payment clause  
13 if:

14 (1) the obligor disputes the amount owed to the  
15 contingent payor due to the contingent payee's failure to meet its  
16 contract requirements; and

17 (2) the contingent payor:

18 (A) substantially prevails in the dispute;

19 (B) gives written notice to the contingent payee  
20 stating the nature of the dispute and specifically listing bona  
21 fide reasons for the dispute, not later than the 10th day after the  
22 date on which the contingent payor receives written notice from the  
23 contingent payee objecting to further enforceability of the  
24 contingent payment clause; and

25 (C) timely pays the contingent payee all amounts  
26 owed to the contingent payee that are received from the obligor for  
27 the contingent payee's performance.

1       (g) A notice given by a contingent payee under Subsection  
2 (d) does not prevent the enforcement of a contingent payment clause  
3 to the extent that the funds are not collectible as a result of a  
4 primary obligor's successful assertion of a defense of sovereign  
5 immunity, if the contingent payor has exhausted all of its rights  
6 and remedies under its contract with the primary obligor and under  
7 Chapter 2251, Government Code. This subsection does not:

8               (1) create or validate a defense of sovereign  
9 immunity; or

10              (2) extend to a primary obligor a defense or right that  
11 did not exist before the effective date of this section.

12       (h) On receipt of payment by the contingent payee of the  
13 unpaid indebtedness giving rise to the written notice provided by  
14 the contingent payee under Subsection (d), the contingent payment  
15 clause is reinstated as to work performed or materials furnished  
16 after the receipt of the payment, subject to the provisions of this  
17 section.

18       (i) A contingent payor or its surety may not enforce a  
19 contingent payment clause if, under Section 53.026, Property Code,  
20 the contingent payee is considered to be in direct contractual  
21 relationship with the obligor.

22       (j) A contingent payment clause may not be used as a basis  
23 for invalidation of the enforceability or perfection of a  
24 mechanic's lien under Chapter 53, Property Code.

25       (k) A contingent payor or its surety may not enforce a  
26 contingent payment clause if the enforcement would be  
27 unconscionable. The party asserting that a contingent payment

1 clause is unconscionable has the burden of pleading and proving  
2 that the clause is unconscionable.

3 (1) The enforcement of a contingent payment clause is not  
4 unconscionable if the contingent payor pleads and proves that the  
5 contingent payor has:

6 (1) exercised diligence in ascertaining and  
7 communicating in writing to the contingent payee, before the  
8 contract in which the contingent payment clause has been asserted  
9 becomes enforceable against the contingent payee, the financial  
10 viability of the primary obligor and the existence of adequate  
11 financial arrangements to pay for the improvements; and

12 (2) done the following:

13 (A) made reasonable efforts to collect the amount  
14 owed to the contingent payor; or

15 (B) made or offered to make, at a reasonable  
16 time, an assignment by the contingent payor to the contingent payee  
17 of a cause of action against the obligor for the amounts owed to the  
18 contingent payee by the contingent payor and offered reasonable  
19 cooperation to the contingent payee's collection efforts, if the  
20 assigned cause of action:

21 (i) is enforceable by the contingent payee  
22 against the obligor or primary obligor; and

23 (ii) is not subject to defenses caused by  
24 the contingent payor's action or failure to act.

25 (m) A contingent payor is considered to have exercised  
26 diligence for purposes of Subsection (1)(1) under a contract for a  
27 private project governed by Chapter 53, Property Code, if the

1 contingent payee receives in writing from the contingent payor:

2 (1) the name, address, and business telephone number  
3 of the primary obligor;

4 (2) a description, legally sufficient for  
5 identification, of the property on which the improvements are being  
6 constructed;

7 (3) the name and address of the surety on any payment  
8 bond provided under Subchapter I, Chapter 53, Property Code, to  
9 which any notice of claim should be sent;

10 (4) a statement furnished by the primary obligor of  
11 the amount of the loan, a summary of the terms of the loan, and the  
12 name, address, and business telephone number of the borrowers and  
13 lenders, if a loan has been obtained for the construction of  
14 improvements; and

15 (5) a statement furnished by the primary obligor of  
16 the amount, source, and location of funds available to pay the  
17 balance of the contract amount if there is no loan or the loan is not  
18 sufficient to pay for all of the construction of the improvements.

19 (n) A contingent payor is considered to have exercised  
20 diligence for purposes of Subsection (1)(1) under a contract for a  
21 public project governed by Chapter 2253, Government Code, if the  
22 contingent payee receives in writing from the contingent payor:

23 (1) the name, address, and primary business telephone  
24 number of the primary obligor;

25 (2) the name and address of the surety on the payment  
26 bond provided to the primary obligor to which any notice of claim  
27 should be sent; and

1           (3) a statement from the primary obligor that funds  
2 are available and have been authorized for the full contract amount  
3 for the construction of the improvements.

4           (o) A contingent payor is considered to have exercised  
5 diligence for purposes of Subsection (l)(1) under a contract for a  
6 public project governed by 40 U.S.C. Section 3131, if the  
7 contingent payee receives in writing from the contingent payor:

8           (1) the name, address, and primary business telephone  
9 number of the primary obligor;

10           (2) the name and address of the surety on the payment  
11 bond provided to the primary obligor; and

12           (3) the name of the contracting officer, if known at  
13 the time of the execution of the contract.

14           (p) A primary obligor shall furnish the information  
15 described by Subsection (m), (n), or (o), as applicable, to the  
16 contingent payor on written request.

17           (q) The assertion of a contingent payment clause is an  
18 affirmative defense to a civil action for payment under a contract.

19           (r) This section does not affect a provision that affects  
20 the timing of a payment in a contract for construction management or  
21 for the construction of improvements to real property if the  
22 payment is to be made within a time period that is reasonable.

23           (s) A person may not waive this section by contract or other  
24 means. A purported waiver of this section is void.

25           (t) An obligor or a primary obligor may not prohibit a  
26 contingent payor from allocating risk by means of a contingent  
27 payment clause.

1           SECTION 2. (a) Section 35.521, Business & Commerce Code, as  
2 added by this Act, applies only to a contingent payment clause under  
3 which payment is contingent on the receipt of payment under a  
4 contract or other agreement entered into on or after September 1,  
5 2003.

6           (b) This Act takes effect September 1, 2003.