

By: Corte

H.B. No. 2397

Substitute the following for H.B. No. 2397:

By: Madden

C.S.H.B. No. 2397

A BILL TO BE ENTITLED

AN ACT

relating to a vendor's or subcontractor's remedy for nonpayment of certain contracts.

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

SECTION 1. Section 2251.002(a), Government Code, is amended to read as follows:

(a) Except as provided by Subchapter D, Subchapter B [~~This chapter~~] does not apply to a payment made by a governmental entity, vendor, or subcontractor if:

(1) there is a bona fide dispute between the political subdivision and a vendor, contractor, subcontractor, or supplier about the goods delivered or the service performed that causes the payment to be late;

(2) there is a bona fide dispute between a vendor and a subcontractor or between a subcontractor and its supplier about the goods delivered or the service performed that causes the payment to be late;

(3) the terms of a federal contract, grant, regulation, or statute prevent the governmental entity from making a timely payment with federal funds; or

(4) the invoice is not mailed to the person to whom it is addressed in strict accordance with any instruction on the purchase order relating to the payment.

SECTION 2. Subchapter A, Chapter 2251, Government Code, is

1 amended by adding Section 2251.004 to read as follows:

2 Sec. 2251.004. WAIVER. A person may not waive any right or
3 remedy granted by this chapter. A purported waiver of any right or
4 remedy granted by this chapter is void.

5 SECTION 3. Section 2251.043, Government Code, is amended to
6 read as follows:

7 Sec. 2251.043. ATTORNEY FEES. In an arbitration or a formal
8 administrative or judicial action to collect an invoice payment or
9 interest due under this chapter, the opposing party, which may be
10 the governmental entity, ~~or~~ the vendor, or the subcontractor,
11 shall pay the reasonable attorney fees of the prevailing party.

12 SECTION 4. Chapter 2251, Government Code, is amended by
13 adding Subchapter D to read as follows:

14 SUBCHAPTER D. REMEDY FOR NONPAYMENT

15 Sec. 2251.051. VENDOR REMEDY FOR NONPAYMENT OF CONTRACT.

16 (a) A vendor may suspend performance required under a contract with
17 a governmental entity if:

18 (1) the governmental entity does not pay the vendor an
19 undisputed amount within the time limits provided by Subchapter B;
20 and

21 (2) the vendor gives the governmental entity written
22 notice:

23 (A) informing the governmental entity that
24 payment has not been received; and

25 (B) stating the intent of the vendor to suspend
26 performance for nonpayment.

27 (b) The vendor may not suspend performance under this

section before the later of:

(1) the 10th day after the date the vendor gives notice under Subsection (a); or

(2) the day specified by Section 2251.053(b).

(c) A vendor who suspends performance under this section is not:

(1) required to supply further labor, services, or materials until the vendor is paid the amount provided for under this chapter, plus costs for demobilization and remobilization; or

(2) responsible for damages resulting from suspending work if the governmental entity with which the vendor has the contract has not notified the vendor in writing before performance is suspended that payment has been made or that a bona fide dispute for payment exists.

(d) A notification under Subsection (c)(2) that a bona fide dispute for payment exists must include a list of the specific reasons for nonpayment. If a reason specified is that labor, services, or materials provided by the vendor or the vendor's subcontractor are not provided in compliance with the contract, the vendor is entitled to a reasonable opportunity to:

(1) cure the noncompliance of the listed items; or

(2) offer a reasonable amount to compensate for listed items for which noncompliance cannot be promptly cured.

Sec. 2251.052. SUBCONTRACTOR REMEDY FOR VENDOR'S NONPAYMENT OF CONTRACT. (a) A subcontractor of a vendor under a contract with a governmental entity may suspend performance required under the contract with the vendor if:

1 (1) the governmental entity with whom the
2 subcontractor's vendor has a contract does not pay the vendor an
3 undisputed amount within the time limits provided by Subchapter B;

4 (2) the vendor does not pay the subcontractor an
5 undisputed amount within the time provided under the contract
6 between the vendor and subcontractor; and

7 (3) the subcontractor gives the vendor written notice
8 a copy of which the subcontractor may provide the governmental
9 entity with which the vendor has a contract:

10 (A) informing the vendor that payment has not
11 been received; and

12 (B) stating the intent of the subcontractor to
13 suspend performance for nonpayment.

14 (b) The subcontractor may not suspend performance under
15 this section before the later of:

16 (1) the 10th day after the date the subcontractor
17 gives notice under Subsection (a); or

18 (2) the date specified by Section 2251.053(b).

19 (c) A subcontractor who suspends performance under this
20 section is not:

21 (1) required to supply further labor, services, or
22 materials until the subcontractor is paid the amount provided for
23 under the contract, plus costs for demobilization and
24 remobilization; or

25 (2) responsible for damages resulting from suspending
26 work if the vendor has not notified the subcontractor in writing
27 before performance is suspended that payment has been made or that a

1 bona fide dispute for payment exists.

2 (d) A notification under Subsection (c)(2) that a bona fide
3 dispute for payment exists must include a list of the specific
4 reasons for nonpayment. If a reason specified is that labor,
5 services, or materials provided by the subcontractor are not
6 provided in compliance with the contract, the subcontractor is
7 entitled to a reasonable opportunity to:

8 (1) cure the noncompliance of the listed items; or

9 (2) offer a reasonable amount to compensate for listed
10 items for which noncompliance cannot be promptly cured.

11 Sec. 2251.053. HIGHWAY CONTRACTS. (a) This section applies
12 only to a contract entered into by the Texas Department of
13 Transportation for the construction of a highway.

14 (b) A vendor or subcontractor may not suspend performance
15 under Section 2251.051 or 2251.052 before the 20th day after the
16 date:

17 (1) the vendor gives written notice under Section
18 2251.051(a); or

19 (2) the subcontractor gives written notice under
20 Section 2251.052(a).

21 (c) A notice required under this subchapter and relating to
22 a contract described by Subsection (a) must be sent by certified
23 mail or personally delivered to:

24 (1) the executive director of the Texas Department of
25 Transportation;

26 (2) the director of construction of the Texas
27 Department of Transportation; or

1 (3) the person designated in the contract as the
2 person to whom notices must be sent.

3 Sec. 2251.054. NOTICES. (a) This section applies only to a
4 notice or other written communication required by this subchapter.

5 (b) A notice or other written communication to a
6 governmental entity must be delivered to:

7 (1) the person designated in the contract as the
8 person to whom a notice or other written communication must be sent;
9 or

10 (2) if the contract does not designate a person to whom
11 a notice or other written communication must be sent, the executive
12 director or chief administrative officer of the governmental
13 entity.

14 (c) Any notice or other written communication may be
15 personally delivered to a person described by Subsection (b) or the
16 person's agent, regardless of any other manner of delivery
17 prescribed by law.

18 (d) If a notice or other written communication is sent by
19 certified mail, the notice is effective on the date the notice or
20 other written communication is deposited in the United States mail.

21 (e) If a notice or other written communication is sent by
22 electronic means, the notice or other written communication is
23 effective on the date the person designated or entitled to receive
24 the notice or other written communication receives the notice or
25 other written communication.

26 (f) If a notice or other written communication is received
27 by the person designated or entitled to receive the notice or other

1 written communication, the method of delivery of the notice or
2 other written communication is immaterial.

3 Sec. 2251.055. RIGHTS AND REMEDIES NOT EXCLUSIVE. The
4 rights and remedies provided by this subchapter are in addition to
5 rights and remedies provided by this chapter or other law.

6 SECTION 5. (a) This Act takes effect September 1, 2003.

7 (b) This Act applies only to a contract executed on or after
8 September 1, 2003. A contract executed before September 1, 2003, is
9 governed by the law as it existed on the date the contract is
10 executed, and the former law is continued in effect for that
11 purpose.