

By: Corte, et al. (Senate Sponsor - Williams) H.B. No. 2397
(In the Senate - Received from the House May 12, 2003;
May 13, 2003, read first time and referred to Committee on State
Affairs; May 23, 2003, reported favorably by the following vote:
Yeas 6, Nays 0; May 23, 2003, sent to printer.)

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
amended by adding Section 2251.004 to read as follows:

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

SECTION 3. Chapter 2251, Government Code, is amended by
adding Subchapter D to read as follows:

SUBCHAPTER D. REMEDY FOR NONPAYMENT

Sec. 2251.051. VENDOR REMEDY FOR NONPAYMENT OF CONTRACT.

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

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

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

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

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

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

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

(b) A subcontractor who suspends performance under Subsection (a) must give the vendor written notice, a copy of which the subcontractor may provide the governmental entity with whom the vendor has a contract:

- (1) informing the vendor that payment has not been received; and
- (2) stating the intent of the subcontractor to suspend performance for nonpayment.

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

- (1) the 10th day after the date the subcontractor gives notice under Subsection (b); or
- (2) the date specified by Section 2251.053(b), if applicable.

(d) A subcontractor who suspends performance under this section is not:

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

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

(e) A notification under Subsection (d)(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 subcontractor are not provided in compliance with the contract, the subcontractor 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. 2251.053. HIGHWAY-RELATED CONTRACTS. (a) This section applies only to a contract entered into by the Texas Department of Transportation for the construction or maintenance of a highway or a related facility.

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

- (1) the vendor gives written notice under Section 2251.051(a); or
- (2) the subcontractor gives written notice under Section 2251.052(a).

(c) A notice required under this subchapter and relating to a contract described by Subsection (a) must be sent by certified mail to:

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

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

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

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

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

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

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

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

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

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

(f) If a notice or other written communication is received by the person designated or entitled to receive the notice or other written communication, the method of delivery of the notice or other written communication is immaterial.

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

SECTION 4. (a) This Act takes effect September 1, 2003.

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

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