

By: Lucio

S.B. No. 1785

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 a 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]

1 SUBCHAPTER B. DISPUTE RESOLUTION BOARD

2 Sec. 160.051. COMPOSITION AND SELECTION OF BOARD. (a) A
3 dispute resolution board consists of three persons selected in
4 accordance with this section.

5 (b) On or before the 15th day after the date a construction
6 contract subject to this chapter is executed, each party to the
7 contract shall select one nominee qualified to serve as a board
8 member under this chapter and communicate the name and
9 qualifications of the nominee to the other party for approval.

10 (c) A party may accept or reject the other party's
11 nomination on or before the seventh day after the date the party
12 receives notice of the nomination.

13 (d) A nominee that is not rejected during the period
14 prescribed by Subsection (c) is considered approved.

15 (e) If a nominee is rejected, the party who nominated the
16 person shall nominate another qualified person.

17 (f) Once two board members nominated by the parties are
18 accepted, those board members shall nominate a third qualified
19 person to be chairperson of the board. Each party may accept or
20 reject the nomination on or before the 15th day after the date the
21 party receives notice of the nomination. If the nominee for
22 chairperson is not rejected by one of the parties in the time
23 prescribed by this subsection, the nominee is considered accepted.
24 If the nominee is rejected by a party, the two approved board
25 members shall make additional nominations for chairperson until a
26 nomination is accepted by the parties.

27 Sec. 160.052. QUALIFICATIONS OF BOARD MEMBERS. (a) A

1 board member selected by a party to the construction contract must
2 have:

3 (1) at least 10 years of technical or managerial
4 experience in engineering, construction, or architecture; and

5 (2) experience in:

6 (A) one or more of the general types of
7 construction involved in the contract;

8 (B) the interpretation of construction contract
9 documents; and

10 (C) the analysis and resolution of construction
11 issues.

12 (b) The chairperson of the board must have:

13 (1) at least 15 years of experience in the person's
14 profession;

15 (2) at least 10 years of experience in:

16 (A) construction dispute resolution;

17 (B) adjudication;

18 (C) arbitration; or

19 (D) service as a judge; and

20 (3) competence in the interpretation of construction
21 contract documents and the analysis and resolution of construction
22 claims.

23 (c) Each person who serves on a board must have:

24 (1) experience serving on a dispute resolution board,
25 on a dispute review board, on a dispute adjudication board, or as an
26 adjudicator or judge; or

27 (2) 40 hours of classroom training in the mechanisms

1 of dispute resolution boards, construction adjudication,
2 construction arbitration, or construction mediation.

3 Sec. 160.053. CONFLICTS OF INTEREST; NEUTRALITY. (a) A
4 member of a dispute resolution board may not have any current or
5 prior involvement in the contract or construction project that is
6 the subject of the dispute that could compromise the person's
7 ability to review the dispute impartially.

8 (b) Except for providing services as a dispute resolution
9 board member, arbitrator, or mediator on a matter involving the
10 owner or contractor, a board member may not, at the time of service
11 on the board or during the two years before the person begins
12 serving on the board, have:

13 (1) employment with, an ownership interest in, or an
14 existing business or financial relationship, including the
15 provision of fee-based consulting services, with:

16 (A) a party to the contract under which the
17 dispute arises;

18 (B) a third-party construction manager for the
19 contractor;

20 (C) any subcontractor or subconsultant to the
21 contractor; or

22 (D) another contractor or construction manager
23 for the owner;

24 (2) a financial interest in the contract;

25 (3) involvement, directly or indirectly, in the
26 preparation of the bid documents for the contract or a bid by any
27 bidder for the invitation to bid for the contract; or

1 (4) involvement in the management or administration of
2 the contract.

3 (c) Except for participation in the board's activities as
4 provided by the construction contract and the board's contract
5 entered into under Section 160.054, the owner or contractor may not
6 solicit advice from or consult with the board or individual members
7 of the board on matters related to the conduct of the work under the
8 construction contract or resolution of problems under the
9 construction contract that might compromise the board's integrity.

10 (d) A board member may not advocate for a party to the
11 construction contract.

12 (e) A board member has a continuing duty to avoid conflicts
13 of interest and shall promptly disclose to the other board members
14 and the parties any matter that could reasonably give rise to a
15 perception of partiality or non-neutrality.

16 Sec. 160.054. CONTRACT WITH BOARD. (a) On or before the
17 15th day after the date the chairperson of the board is selected,
18 the board members and parties to the construction contract shall
19 execute a standard three-party agreement in which the board members
20 agree to:

21 (1) endeavor to assist the parties in preventing and
22 resolving disputes during the term of the construction contract;

23 (2) read and become familiar with all the contract
24 documents, including the specifications, plans, addenda, progress
25 schedule and updates, weekly progress reports, minutes of progress
26 meetings, change orders, and other documents relevant to the
27 performance of the contract and necessary to the board's work;

1 (3) visit the construction site as soon as practicable
2 after selection of the board and reserve at least one day each month
3 for project site visits and visit the site at least bimonthly, or
4 more frequently if beneficial; and

5 (4) keep abreast of the construction activities and
6 become familiar with the work in progress.

7 (b) The frequency, time, and duration of visits required
8 under the board's contract shall be mutually agreed on by the board,
9 owner, and contractor, or if the parties and the board do not agree,
10 scheduled by the board.

11 (c) The board shall also agree to consider, fairly and
12 impartially, each dispute referred to the board by a party to the
13 construction contract and provide written recommendations to the
14 owner and contractor based on the relevant provisions of the
15 construction contract, any applicable law, and the facts and
16 circumstances involved in the dispute. The board's recommendations
17 shall express, clearly and completely, the logic and reasoning
18 leading the board to the recommendations so that all the parties
19 fully understand and can use the recommendations to assist them in
20 negotiating a resolution of the dispute. The board's
21 recommendations may address issues of entitlement, unjust
22 enrichment, or both.

23 [Sections 160.055-160.100 reserved for expansion]

24 SUBCHAPTER C. DUTIES OF PARTIES TO CONSTRUCTION CONTRACT

25 Sec. 160.101. OWNER DUTIES. The owner shall:

26 (1) provide each board member with a copy of all
27 contract documents, including the specifications, plans, addenda,

1 progress schedule and updates, weekly progress reports, minutes of
2 progress meetings, change orders, and any other documents relevant
3 to the performance of the contract and necessary to the board's
4 work; and

5 (2) provide the board with:

6 (A) conference facilities at or near the
7 construction site; and

8 (B) secretarial and copying services.

9 Sec. 160.102. CONTRACTOR DUTIES. The contractor shall
10 furnish each board member with relevant documents prepared by the
11 contractor, such as progress schedules, to supplement the documents
12 provided by the owner.

13 [Sections 160.103-160.150 reserved for expansion]

14 SUBCHAPTER D. OPERATION OF BOARD

15 Sec. 160.151. BOARD ACTIVITY AND EXPENSES. (a) The board
16 shall be active throughout the term of the construction contract.
17 The cost of the board's activity must be included as a capital
18 expense of the project.

19 (b) The total cost of a qualified minority or historically
20 underutilized dispute resolution board administrative
21 organization, including the expense of the board members, counts
22 toward meeting all minority set-aside goals or provisions required
23 by law.

24 (c) The board shall begin operation on the written
25 authorization of the owner received after the board's contract
26 under Section 160.054 is executed and end operation at the end of
27 the term of the construction contract after the final payment due

1 under the construction contract has been made.

2 Sec. 160.152. IMMUNITY. (a) Each board member, in the
3 performance of the member's duties on the board, acts in the
4 capacity of an independent agent intended to facilitate the
5 resolution of disputes and not as an employee of the owner or the
6 contractor.

7 (b) To the fullest extent permitted by law, each board
8 member is entitled to quasi-judicial immunity for an action or
9 decision associated with the consideration, hearing, and
10 recommendation of a resolution for a dispute referred to the board.
11 Each board member shall be held harmless for any personal or
12 professional liability arising from or related to board activities.

13 (c) To the fullest extent permitted by law, the owner and
14 contractor shall indemnify each board member for claims, losses,
15 demands, costs, and damages, including reasonable attorney's fees,
16 for bodily injury, property damage, or economic loss arising out of
17 or related to the member's carrying out of board functions.
18 Indemnification provided under this subsection is a joint and
19 several obligation of the owner and the contractor.

20 Sec. 160.153. INFORMAL PROCEEDINGS AND RECOMMENDATIONS.

21 (a) The owner and contractor may agree, with respect to any issue,
22 claim, or dispute, to request that the board act in an advisory
23 capacity to assist in resolution of the issue, claim, or dispute at
24 a formal hearing before the board.

25 (b) For the purposes of an informal proceeding under this
26 section, each party shall submit a written submission not longer
27 than two written pages to the board. To the extent possible, the

1 parties shall also submit to the board written questions for the
2 board agreed to by the parties.

3 (c) On submission of an informal proceeding to the board
4 under this section, either party may request an opportunity to give
5 an oral presentation to the board, and the board may request an oral
6 presentation by the parties. An oral presentation under this
7 subsection must take place during a regularly scheduled meeting of
8 the board. Unless a time limit for oral presentations is agreed to
9 by the parties, the board shall establish a time limit for oral
10 presentations.

11 (d) The board shall present its advisory recommendation to
12 the parties orally not later than four hours after the conclusion of
13 any oral presentation by the parties.

14 (e) The parties and the board are not bound in any way by the
15 advisory recommendation, and the same matter may be heard again in a
16 formal hearing before the board.

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

21 Sec. 160.154. FORMAL FINDINGS AND RECOMMENDATIONS. (a) On
22 the request of either party, the board shall conduct a formal
23 hearing in accordance with this section.

24 (b) The hearing shall be conducted by the board chairperson
25 in accordance with any dispute resolution board rules and hearing
26 procedures established by the board and with all members of the
27 board present and participating.

1 (c) The board shall allow each party to present the party's
2 position on the dispute, with the contractor presenting first.

3 (d) The board may ask any questions of the parties that the
4 board considers appropriate.

5 (e) The board may schedule continuations of the hearing from
6 time to time. The board may not accept any further submissions or
7 evidence from a party after the conclusion of the hearing unless the
8 submission or evidence is expressly requested by the board.

9 Sec. 160.155. FINDINGS AND RECOMMENDATIONS. (a) After the
10 hearing under Section 160.154 concludes, the board shall meet to
11 formulate its findings and recommendations for resolution of the
12 dispute. The board's deliberations shall be conducted in private
13 and are confidential.

14 (b) The board shall base its findings and recommendations on
15 the contract provisions and the facts and circumstances of the
16 dispute.

17 (c) The board shall make a concerted effort to reach a
18 unanimous decision but may issue its findings and recommendations
19 with the agreement of two members. The findings and
20 recommendations must be signed by all board members.

21 (d) A dissenting member shall clearly indicate the member's
22 dissent on the findings and recommendations and provide clearly
23 identified separate dissenting findings and recommendations, which
24 shall be included as part of the board's findings and
25 recommendations.

26 Sec. 160.156. TIME FOR ISSUING FINDINGS AND
27 RECOMMENDATIONS. The board shall issue its findings and

1 recommendations to the owner and the contractor on or before the
2 21st day after the date the hearing concludes or as otherwise
3 determined by the board and agreed to by the parties.

4 Sec. 160.157. EFFECT OF FINDINGS AND RECOMMENDATIONS.

5 (a) Although the purpose of the board findings and recommendations
6 is to assist the parties in negotiating a resolution of their
7 disputes, the written findings and recommendations shall be
8 admitted, unless otherwise agreed by the parties, into evidence in
9 any subsequent judicial, arbitral, or administrative proceeding.

10 (b) A board member or other participant in a board hearing
11 may not be required to testify as to what was said or presented at a
12 board meeting or any hearing, conference, or other proceeding of
13 the board.

14 Sec. 160.158. DISCLOSURE OF RECORDS. The records of a
15 dispute resolution board are not records of any government agency
16 and any records, notes, or drafts taken or made by a board member
17 are not subject to disclosure under any freedom of information law.

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