

## **BILL ANALYSIS**

C.S.H.B. 974  
By: Madden  
Civil Practices  
Committee Report (Substituted)

### **BACKGROUND AND PURPOSE**

Construction Dispute Boards are a non-binding contractual alternative dispute resolution procedure, which has saved the owners and constructors of projects throughout the world millions of dollars. The purpose of this legislation is to provide statutory support for this proven construction dispute resolution mechanism and make it more readily available for use on private and public works. CSHB 974 defines Dispute Boards and provides a method for their voluntary adoption by the parties to a construction contract. The Bill does not require use of a Dispute Board by government entities or private parties. It educates potential public users about the existence of the Dispute Board processes for public projects, and requires the active consideration of use of a Board before rejection. The Bill does not require the use of a Board and preserves the right of the parties to a construction contract to freely choose whether or not to adopt a Dispute Board for any project, or to create any alternative mechanism that they agree meets their particular needs.

### **RULEMAKING AUTHORITY**

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

### **ANALYSIS**

CSHB 974 amends Title 7 of the Civil Practice and Remedies Code by adding Chapter 160 for Dispute Boards. The legislation states a selection method for the members and Chairman of a Dispute Board, provides time periods for their selection, and two methods for remedying the failure or neglect of a party to appoint members of a Board. It also establishes the qualifications, experience and education requirements for the Board members and the Board Chairman. The legislation adopts the American Bar Association Code of Ethics for Arbitrators standards for the neutrality and independence of the Board members and Chairman, and requirements defining and prohibiting conflicts of interest.

CSHB 974 states the duties of the Board members and Chairman of a Dispute Board, and the duties and responsibilities of the parties to the contract. It requires the Board and its members to fairly and independently assist the parties in resolving their disputes and provides a statement of the contents and effect of a Dispute Board recommendation. It recognizes the quasi-judicial function of a Dispute Board, defines the operation and cost of the Board and provides for the immunity from liability of the Board members for their work.

CSHB 974 requires the Board to base all recommendations and findings on the provisions of the contract. It establishes procedures for the Dispute Board to follow for the informal consideration of issues, the making and effect of an informal recommendation, and the requirement that any informal recommendations be issued within four (4) hours. The bill also defines the procedures for the Dispute Board to follow when considering disputes submitted for formal written recommendations, their effect, and specifies that formal recommendations are to be issued by the Board within twenty one (21) days.

CSHB 974 provides procedures for parties to indicate that they have specifically chosen to adopt and use certain of the newest versions of Dispute Boards based on the International Chamber of Commerce world standard models or the ICC mechanisms and administration. It provides methods to ensure the knowing and informed choice to agree, adopt and use Dispute Adjudication Boards and/or Combined Dispute Boards and specifically excludes public works

from using such Boards. The procedures and effect of these Boards activities are defined with methods for the parties to resort to arbitration or litigation for the final determination of any dispute.

Finally, CSHB 974 recognizes the quasi-judicial nature of the Boards and provides that the records of a Board and the notes, drafts and records made by a Board member are not subject to disclosure.

### **EFFECTIVE DATE**

September 1, 2005.

### **COMPARISON OF ORIGINAL TO SUBSTITUTE**

The major variances of the committee substitute from the original bill are:

Section 160.002 (1) now permits the use of a Dispute Board on commercial properties of 5 or more residential units. Section 160.002(2) now excludes Construction Manager-Agent contracts entered into by a Government Entity as defined under §44.031(7) and §44.037 of the Education Code shall be exempt from this Chapter.

Section 160.003 clearly specifies that the parties have the right to modify any of the provisions of a Dispute Board, while establishing standards of neutrality, qualifications and ethical guidelines for serving as a member of a Board.

Section 160.004 expressly states that the use of a Dispute Board is voluntary, and no government entity is required to use any Dispute Board process. It also now expressly limits the use of Combined Dispute Boards to private works contracts and excludes their use on public works contracts.

Section 160.051 was significantly amended. Section 160.051(a) now provides that Dispute Boards may consist of “one, three or a greater odd number of persons.” This provides parties with greater flexibility to create boards more responsive to their particular needs. Section 160.051(b) is a completely new section, which provides a method for the naming of a “single member board”, establishes a time frame for naming the board member and provides for a “default” to a three (3) person board if the parties can not timely agree on that single board member.

Original Section 160.053 was deleted to accommodate the concerns of certain parts of the construction industry. New Section 160.053 now also expressly recognizes experience as a faculty member teaching architecture, engineering or construction science in an institution of higher education, as an executive officer of a contractor, design professional or project owner or as a Construction Manager – Agent are valid qualifications for service on any Dispute Board.

Section 160.054(b) now reemphasizes the requirement for board members to disclose any existing potential or actual conflict of interest and any that may have existed in the two (2) years prior to consideration for service on a board, and for the parties to waive such conflict and consent to the service of said person. This is consistent with existing Section 160.054(f).

Section 160.055(a)(3) now provides for parties to agree a variety of schedules for the conduct of site visits. Prior Section 160.057 limiting the use of Dispute Adjudication Boards to private works is now included in Section 160.004(b) and expressly limits the use of Dispute Adjudication Boards and Combined Dispute Boards to private works contracts and excludes their use on public works contracts.