By: Madden, Raymond H.B. No. 974

Substitute the following for H.B. No. 974:

By: Nixon C.S.H.B. No. 974

A BILL TO BE ENTITLED

AN ACT

relating to resolution of disputes arising under certain 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 BOARDS

UNDER CERTAIN CONSTRUCTION CONTRACTS

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 160.001. DEFINITIONS. In this chapter:

(1) "Construction contract" means a contract between a governmental entity or a private real property owner and a contractor for the construction, repair, or improvement of real property in this state the value of which is at least $1 million.

(2) "Contractor" means a person contracting with a real property owner directly or through the owner's agent.

(3) "Dispute board" means a dispute resolution board, dispute review board, dispute adjudication board, or combined dispute board.

(4) "Governmental entity" means a governmental or quasi-governmental authority authorized by state law to make a public work contract, including:

(A) the state, a county, or a municipality;

(B) a department, board, or agency of the state,

a county, or a municipality; and

(C) a school district or a subdivision of a school district.

(5) "Public work contract" means a contract for constructing, altering, or repairing a public building or carrying out or completing any public work.

Sec. 160.002. NONAPPLICABILITY TO CERTAIN RESIDENTIAL CONSTRUCTION AND PUBLIC WORK CONTRACTS. This chapter does not apply to:

(1) a contract for the improvement of residential real property that consists of four or fewer dwelling units; or

(2) a construction manager-agent contract entered into by a school district under Section 44.037, Education Code.

Sec. 160.003. METHOD OF ADOPTION. A dispute arising under a construction contract may be submitted to a dispute board in accordance with this chapter if the contract includes language that reflects the intent of the parties to use one of the processes provided by this chapter. The parties may modify any provision of this chapter other than Sections 160.053 and 160.054.

Sec. 160.004. USE OF CHAPTER IN PUBLIC CONSTRUCTION CONTRACTS. (a) Each construction contract entered into by a governmental entity that does not provide for submission of disputes arising under the contract to a dispute board under this chapter must contain a provision stating that the use of dispute resolution under this chapter was actively considered. A governmental entity is not required to use this chapter.

(b) A public work contract may not provide for disputes to

be submitted to a dispute adjudication board under Section 160.157 or a combined dispute board under Section 160.158.

[Sections 160.005-160.050 reserved for expansion]

SUBCHAPTER B. DISPUTE BOARDS

Sec. 160.051. COMPOSITION AND SELECTION OF BOARD. (a) A dispute board consists of one, three, or a greater odd number of persons selected in accordance with this section.

(b) If the board is to be composed of a single member, that member shall be selected by mutual agreement of the parties within 15 days of the date of execution of the contract, unless such deadline is extended by mutual agreement of the parties. If the parties are unable to select a single dispute review board member in the time allotted, the dispute review board shall consist of three members, as hereinafter set forth.

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

(d) A party may accept or reject the other party's nomination on or before the seventh day after the date the party receives notice of the nomination. If the nominee is not rejected during that period, the nominee is considered accepted.

(e) Except as provided by Subsection (g), if a nominee is rejected, the party who nominated the person shall nominate another qualified person.

(f) Once two board members nominated by the parties are

accepted, those board members shall nominate a third qualified person to be chairperson of the board. Each party may accept or reject the nomination on or before the 15th day after the date the party receives notice of the nomination. If the nominee for chairperson is not rejected by one of the parties in the time prescribed by this subsection, the nominee is considered accepted. Except as provided by Subsection (g), if the nominee is rejected by a party, the two approved board members shall make additional nominations for chairperson until a nomination is accepted by the parties.

(g) If a party does not nominate a board member in the time prescribed by Subsection (c) or rejects two nominations for board member or three nominations for chairperson, any party may apply to the district court of the district in which the work under the contract will be performed for the appointment by the court of a qualified person as a board member or chairperson, as applicable.

Sec. 160.052. DISPUTE BOARD AGREEMENT. Not later than the 15th day after the date all parties have received notice of the appointment of the chairperson, each party and each member of the board shall execute and comply with the dispute board agreement.

Sec. 160.053. QUALIFICATIONS OF BOARD MEMBERS. (a) A board member selected by a party to the construction contract must have:

(1) at least three years of professional, technical, academic, or managerial experience in engineering, construction, architecture, or law; and

(2) experience in:

(A) one or more of the general types of

construction involved in the contract;

(B) the interpretation of construction contract documents; and

(C) the analysis and resolution of construction issues.

(b) The chairperson of the board must have:

(1) at least five years of experience in the person's profession;

(2) at least five years of experience in:

(A) construction dispute resolution;

(B) adjudication;

(C) arbitration;

(D) service as a judge;

(E) service as an executive officer of a contractor, design professional, or project owner;

(F) service as a faculty member in an institution of higher education in architecture, engineering, or construction science; or

(G) work as a construction manager-agent; and

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

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

(1) experience serving on a dispute board or as a construction arbitrator, adjudicator, construction mediator, judge, or construction manager-agent; or

(2) 40 hours of classroom training in the mechanisms

of dispute boards, construction adjudication, construction arbitration, or construction mediation in courses conducted by an alternative dispute resolution training organization accepted by the parties or by the court that appoints the board member, as applicable.

(d) The qualifications prescribed by this section may not be waived for a board member or board chairperson who serves on a board under a public work contract.

Sec. 160.054. CONFLICTS OF INTEREST; NEUTRALITY. (a) A member of a dispute board may not have any current or prior involvement in the contract or construction project that is the subject of the dispute that could compromise the person's ability to review the dispute impartially. The board member shall comply with the American Bar Association Code of Ethics for Arbitrators in Commercial Disputes standards regarding board member neutrality, independence, and impartiality.

(b) Except for providing services as a dispute board member, dispute resolution advisor, arbitrator, or mediator on a matter involving the owner or contractor, a board member may not, at the time of service on the board or during the two years before the person begins serving on the board, without disclosure to, and consent by, all parties, have:

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

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

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

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

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

(2) a financial interest in the contract;

(3) direct involvement in the preparation of the successful bid documents for the contract or a successful bid by any bidder for the invitation to bid for the contract; or

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

(c) Except for participation in the board's activities as provided by the construction contract and the board's contract entered into under Section 160.055, the owner or contractor may not solicit advice from or consult with the board or individual members of the board on matters related to the conduct of the work under the construction contract or resolution of problems under the construction contract that might compromise the board's integrity.

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

(e) A board member has a duty to the public and the parties to be fair, impartial, independent, and neutral. Each board member or potential board member shall disclose to the parties and the other board members any business, professional, social, or financial relationship that may give rise to an appearance of impropriety or a suspicion of partiality. A board member has a

continuing duty to avoid conflicts of interest and shall promptly disclose to the parties and the other board members any matter that could reasonably give rise to a perception of partiality or non-neutrality. A board member should refrain from later acquiring or entering into any interest or relationship that might reasonably create the appearance that the person had been influenced by the anticipation or expectation of the interest or relationship.

(f) After an otherwise qualified board member or potential board member discloses all matters that could reasonably give rise to a perception of partiality or of possible conflict of interest, the parties may waive objection to the matter disclosed and permit the person to serve as a board member.

Sec. 160.055. CONTRACT WITH BOARD. (a) On or before the 15th day after the date the board chairperson is selected, the board members and the parties to the construction contract shall execute a standard three-party agreement in which the board members agree to:

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

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

(3) visit the construction site as soon as practicable after selection of the board and reserve at least one day each month for project site visits and visit the site at least bimonthly, or

more frequently if beneficial, or at such other interval as the parties may agree on; and

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

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

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

[Sections 160.056-160.100 reserved for expansion]

SUBCHAPTER C. DUTIES OF PARTIES TO CONSTRUCTION CONTRACT

Sec. 160.101. OWNER DUTIES. The owner shall:

(1) provide each board member with a copy of all contract documents, including the specifications, plans, addenda, progress schedule and updates, weekly progress reports, minutes of

progress meetings, change orders, and any other documents relevant to the performance of the contract and necessary to the board's work; and

(2) provide the board with:

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

(B) secretarial and copying services.

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

[Sections 160.103-160.150 reserved for expansion]

SUBCHAPTER D. OPERATION OF BOARD

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

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

(c) The board shall begin operation on the written authorization of the owner received after the board's contract under Section 160.055 is executed and may end operation at the end of the term of the construction contract after the final payment due under the construction contract has been made, unless a party to the contract requests that the board continue to operate.

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

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

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

Sec. 160.153. INFORMAL PROCEEDINGS AND RECOMMENDATIONS. (a) The owner and contractor may agree, with respect to any issue, claim, or dispute, to request that the board act in an advisory capacity to assist in resolution of the issue, claim, or dispute at an informal hearing before the board.

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

board agreed to by the parties.

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

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

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

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

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

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

(c) The board shall allow each party to present the party's

position on the dispute, with the contractor presenting first.

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

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

(f) After the hearing concludes, the board shall meet to formulate its findings and recommendations for resolution of the dispute. The board's deliberations shall be conducted in private and are confidential.

(g) The board shall base its findings and recommendations on the contract provisions and the facts and circumstances of the dispute.

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

(i) A dissenting member shall clearly indicate the member's dissent on the findings and recommendations and provide clearly identified separate dissenting findings and recommendations, which must be included as part of the board's findings and recommendations.

Sec. 160.155. TIME FOR ISSUING FORMAL FINDINGS AND RECOMMENDATIONS. The board shall issue its findings and recommendations to the owner and the contractor on or before the 21st day after the date the hearing concludes or as otherwise

determined by the board and agreed to by the parties.

Sec. 160.156. EFFECT OF FINDINGS AND RECOMMENDATIONS. (a) Although the purpose of the board findings and recommendations is to assist the parties in negotiating a resolution of their disputes, the written findings and recommendations shall be admitted into evidence in any subsequent judicial, arbitral, or administrative proceeding, unless otherwise agreed by the parties.

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

Sec. 160.157. OPERATION AS DISPUTE ADJUDICATION BOARD. (a) A dispute adjudication board issues decisions.

(b) A dispute board shall act as a dispute adjudication board only if the construction contract that creates the board:

(1) specifically states that the board is a dispute adjudication board;

(2) adopts an International Chamber of Commerce Dispute Adjudication Board Clause under which the parties to the contract agree to the administration of the board by the International Chamber of Commerce; or

(3) provides that the board has the authority to issue a decision or determination that the parties are required to comply with on receipt.

(c) In making and issuing a decision, the board shall follow the procedures in Section 160.154 for formal findings and recommendations.

(d) After receiving the determination, the parties must comply with the board's decision without delay, unless on or before the 30th day after the date a party receives the decision, the party notifies the board and the other party in writing of the reasons for the party's dissatisfaction with the decision. If a notice of dissatisfaction is not submitted during that time, the parties are bound by the decision, waive any right of recourse they may have against the decision, and consent to the summary enforcement of the decision by a court as if the decision is a partial final arbitration award.

(e) Unless otherwise agreed, if a party submits a written notice of dissatisfaction that complies with Subsection (d), or if the board does not issue the board's decision on or before the 30th day after the date the hearing on the dispute concludes, the dispute shall be finally settled by arbitration, if the parties agree, or by a court. Until the dispute is finally settled, the parties are bound to comply with the decision.

Sec. 160.158. OPERATION AS COMBINED DISPUTE BOARD. (a) A combined dispute board issues a recommendation under Sections 160.154-160.156, unless, for a particular dispute:

(1) the parties jointly request a decision under Section 160.157; and

(2) except as provided by Subsection (d), the combined dispute board decides to issue a decision under this section.

(b) A dispute board shall act as a combined dispute board only if the construction contract that creates the board:

(1) specifically states that the board is a combined

dispute board;

(2) adopts an International Chamber of Commerce Combined Dispute Board Clause under which the parties to the contract agree to the administration of the board by the International Chamber of Commerce; or

(3) provides that the board has the authority to issue either a recommendation or a decision.

(c) In making a recommendation or decision, the combined dispute board shall follow the procedures in Section 160.154 for making and issuing formal findings and recommendations.

(d) If a party requests a decision with respect to a given dispute and no other party objects, the combined dispute board shall issue a decision.

(e) If a party requests a decision and one or more parties objects to the request, the combined dispute board shall determine whether the board will issue a recommendation or decision. In making that determination, the board shall consider whether, due to the urgency of the situation or other relevant considerations, a decision would facilitate the performance of the contract or prevent irreparable loss or damage to any party, whether a decision would prevent disruption of the contract, whether a decision is necessary to preserve evidence, and any other factors the board considers relevant.

(f) A party referring a dispute to the board may request a decision by the board only if the request is made in writing in the notice to the other parties and the board of referral of the dispute. Another party may request a decision by the board only if

the request is made in writing before or at the same time the party submits a written response to the request for board action.

Sec. 160.159. DISCLOSURE OF RECORDS. The records of a dispute board are not records of any government agency and any records, notes, or drafts taken or made by a board member are not subject to disclosure under any freedom of information law.

SECTION 2. This Act takes effect September 1, 2005.