

By: Madden

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

(2) "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.

(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,

1 a county, or a municipality; and

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

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

7 Sec. 160.002. NONAPPLICABILITY TO RESIDENTIAL CONSTRUCTION
8 CONTRACTS. This chapter does not apply to a contract for the
9 improvement of residential real property.

10 Sec. 160.003. METHOD OF ADOPTION. A dispute arising under a
11 construction contract may be submitted to a dispute board in
12 accordance with this chapter if the contract includes language that
13 reflects the intent of the parties to use one of the processes
14 provided by this chapter.

15 Sec. 160.004. PUBLIC CONSTRUCTION CONTRACTS. Each
16 construction contract entered into by a governmental entity that
17 does not provide for submission of disputes arising under the
18 contract to a dispute board under this chapter must contain a
19 provision stating that the use of dispute resolution under this
20 chapter was actively considered and rejected.

21 [Sections 160.005-160.050 reserved for expansion]

22 SUBCHAPTER B. DISPUTE BOARDS

23 Sec. 160.051. COMPOSITION AND SELECTION OF BOARD. (a) A
24 dispute board consists of three persons selected in accordance with
25 this section.

26 (b) On or before the 15th day after the date a construction
27 contract subject to this chapter is executed, each party to the

1 contract shall select one nominee qualified to serve as a board
2 member under this chapter and communicate the name and
3 qualifications of the nominee to the other party for approval.

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

8 (d) Except as provided by Subsection (f), if a nominee is
9 rejected, the party who nominated the person shall nominate another
10 qualified person.

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

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

1 Sec. 160.052. DISPUTE BOARD AGREEMENT. Not later than the
2 15th day after the date all parties have received notice of the
3 appointment of the chairperson, each party and each member of the
4 board shall execute and comply with the dispute board agreement.

5 Sec. 160.053. FAILURE OF CONTRACTOR TO NOMINATE OR APPROVE
6 MEMBER. (a) If the general contractor does not nominate a board
7 member in the period prescribed by Section 160.051(b) or fails or
8 refuses to approve a board member in the period prescribed by
9 Section 160.051(c), the property owner may retain 20 percent of the
10 estimated value of the work performed under the contract after that
11 period expires and before the general contractor nominates or
12 approves a board member, as applicable, or a court appoints a board
13 member to the relevant position.

14 (b) The property owner shall pay money retained under this
15 section at the same time the owner makes the first scheduled partial
16 payment after the retention period prescribed by this section ends.
17 Interest does not accrue and may not be paid on money retained under
18 this section.

19 Sec. 160.054. QUALIFICATIONS OF BOARD MEMBERS. (a) A board
20 member selected by a party to the construction contract must have:

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

24 (2) experience in:

25 (A) one or more of the general types of
26 construction involved in the contract;

27 (B) the interpretation of construction contract

1 documents; and

2 (C) the analysis and resolution of construction
3 issues.

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

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

7 (2) at least five years of experience in:

8 (A) construction dispute resolution;

9 (B) adjudication;

10 (C) arbitration; or

11 (D) service as a judge; and

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

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

16 (1) experience serving on a dispute board or as a
17 construction arbitrator, adjudicator, construction mediator, or
18 judge; or

19 (2) 40 hours of classroom training in the mechanisms
20 of dispute boards, construction adjudication, construction
21 arbitration, or construction mediation in courses conducted by an
22 alternative dispute resolution training organization accepted by
23 the parties or by the court that appoints the board member, as
24 applicable.

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

1 Sec. 160.055. CONFLICTS OF INTEREST; NEUTRALITY. (a) A
2 member of a dispute board may not have any current or prior
3 involvement in the contract or construction project that is the
4 subject of the dispute that could compromise the person's ability
5 to review the dispute impartially. The board member shall comply
6 with the American Bar Association Code of Ethics for Arbitrators in
7 Commercial Disputes standards regarding board member neutrality,
8 independence, and impartiality.

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

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

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

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

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

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

25 (2) a financial interest in the contract;

26 (3) direct involvement in the preparation of the
27 successful bid documents for the contract or a successful bid by any

1 bidder for the invitation to bid for the contract; or

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

4 (c) Except for participation in the board's activities as
5 provided by the construction contract and the board's contract
6 entered into under Section 160.056, the owner or contractor may not
7 solicit advice from or consult with the board or individual members
8 of the board on matters related to the conduct of the work under the
9 construction contract or resolution of problems under the
10 construction contract that might compromise the board's integrity.

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

13 (e) A board member has a duty to the public and the parties
14 to be fair, impartial, independent, and neutral. Each board member
15 or potential board member shall disclose to the parties and the
16 other board members any business, professional, social, or
17 financial relationship that may give rise to an appearance of
18 impropriety or a suspicion of partiality. A board member has a
19 continuing duty to avoid conflicts of interest and shall promptly
20 disclose to the parties and the other board members any matter that
21 could reasonably give rise to a perception of partiality or
22 non-neutrality. A board member should refrain from later acquiring
23 or entering into any interest or relationship that might reasonably
24 create the appearance that the person had been influenced by the
25 anticipation or expectation of the interest or relationship.

26 (f) After an otherwise qualified board member or potential
27 board member discloses all matters that could reasonably give rise

1 to a perception of partiality or of possible conflict of interest,
2 the parties may waive objection to the matter disclosed and permit
3 the person to serve as a board member.

4 Sec. 160.056. CONTRACT WITH BOARD. (a) On or before the
5 15th day after the date the board chairperson is selected, the board
6 members and the parties to the construction contract shall execute
7 a standard three-party agreement in which the board members agree
8 to:

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

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

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

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

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

26 (c) The board shall also agree to consider, fairly and
27 impartially, each dispute referred to the board by a party to the

1 construction contract and provide written recommendations or
2 decisions to the owner and contractor based on the relevant
3 provisions of the construction contract, any applicable law, and
4 the facts and circumstances involved in the dispute. The board's
5 recommendations or decisions shall express, clearly and
6 completely, the logic and reasoning leading the board to the
7 recommendations or decisions so that all the parties fully
8 understand and can use the recommendations or decisions to assist
9 them in negotiating a resolution of the dispute. The board's
10 recommendations or decisions may address issues of entitlement,
11 quantum, or unjust enrichment.

12 [Sections 160.057-160.100 reserved for expansion]

13 SUBCHAPTER C. DUTIES OF PARTIES TO CONSTRUCTION CONTRACT

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

15 (1) provide each board member with a copy of all
16 contract documents, including the specifications, plans, addenda,
17 progress schedule and updates, weekly progress reports, minutes of
18 progress meetings, change orders, and any other documents relevant
19 to the performance of the contract and necessary to the board's
20 work; and

21 (2) provide the board with:

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

24 (B) secretarial and copying services.

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

1 provided by the owner.

2 [Sections 160.103-160.150 reserved for expansion]

3 SUBCHAPTER D. OPERATION OF BOARD

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

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

12 (c) The board shall begin operation on the written
13 authorization of the owner received after the board's contract
14 under Section 160.056 is executed and may end operation at the end
15 of the term of the construction contract after the final payment due
16 under the construction contract has been made, unless a party to the
17 contract requests that the board continue to operate.

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

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

1 activities.

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

9 Sec. 160.153. INFORMAL PROCEEDINGS AND RECOMMENDATIONS.

10 (a) The owner and contractor may agree, with respect to any issue,
11 claim, or dispute, to request that the board act in an advisory
12 capacity to assist in resolution of the issue, claim, or dispute at
13 an informal hearing before the board.

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

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

27 (d) The board shall present its advisory recommendation to

1 the parties orally not later than four hours after the conclusion of
2 any oral presentation by the parties.

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

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

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

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

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

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

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

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

1 and are confidential.

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

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

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

14 Sec. 160.155. TIME FOR ISSUING FORMAL FINDINGS AND
15 RECOMMENDATIONS. The board shall issue its findings and
16 recommendations to the owner and the contractor on or before the
17 21st day after the date the hearing concludes or as otherwise
18 determined by the board and agreed to by the parties.

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

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

1 the board.

2 Sec. 160.157. OPERATION AS DISPUTE ADJUDICATION BOARD. (a)

3 A dispute adjudication board issues decisions.

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

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

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

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

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

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

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

8 Sec. 160.158. OPERATION AS COMBINED DISPUTE BOARD. (a) A
9 combined dispute board issues a recommendation under Sections
10 160.154-160.156, unless, for a particular dispute:

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

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

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

17 (1) specifically states that the board is a combined
18 dispute board;

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

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

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

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

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

14 (f) A party referring a dispute to the board may request a
15 decision by the board only if the request is made in writing in the
16 notice to the other parties and the board of referral of the
17 dispute. Another party may request a decision by the board only if
18 the request is made in writing before or at the same time the party
19 submits a written response to the request for board action.

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

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