

## **BILL ANALYSIS**

Senate Research Center  
80R1213 AJA-F

H.B. 497  
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State Affairs  
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Engrossed

### **AUTHOR'S / SPONSOR'S STATEMENT OF INTENT**

Construction dispute boards are a non-binding contractual alternative dispute resolution procedure which has the potential to save large sums of money related to litigation costs. However, current law makes no mention of such boards and does not provide any regulation for such boards.

H.B. 497 provides statutory support for construction dispute boards by defining "dispute boards" and providing a method for the voluntary adoption of such a board by the parties to a construction project. This bill does not require use of a dispute board by government entities or private parties. This bill provides for the education of 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**

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

### **SECTION BY SECTION ANALYSIS**

SECTION 1. Amends Title 7, Civil Practice and Remedies Code, by adding Chapter 160, as follows:

#### CHAPTER 160. DISPUTE BOARDS UNDER CERTAIN CONSTRUCTION CONTRACTS

##### SUBCHAPTER A. GENERAL PROVISIONS

Sec. 160.001. DEFINITIONS. Defines "construction contract," "contractor," "dispute board," "governmental entity," and "public work contract."

Sec. 160.002. NONAPPLICABILITY TO CERTAIN RESIDENTIAL CONSTRUCTION AND PUBLIC WORK CONTRACTS. Provides that this chapter does not apply to a contract for the improvement of residential real property that consists of four or fewer dwelling units or a construction manager-agent contract entered into by a school district under Section 44.037 (Contracts For Facilities Construction Manager-Agent), Education Code.

Sec. 160.003. METHOD OF ADOPTION. Authorizes the submission of a dispute arising under a construction contract to a dispute board in accordance with this chapter (dispute board) if the contract includes language that reflects the intent of the parties to use one of the processes approved by this chapter. Authorizes the parties to 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) Requires each construction contract entered into by a governmental entity that does not provide for submission of disputes arising under such a contract to a dispute board to contain a provision stating that the use of dispute resolution under this chapter was

actively considered. Provides that a governmental entity is not required to use this chapter.

(b) Prohibits a public work contract from providing for disputes to be submitted to a dispute adjudication board under Section 160.157 or a combined dispute board under Section 160.158.

[Reserves Sections 160.005-160.050 for expansion.]

## SUBCHAPTER B. DISPUTE BOARDS

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

(b) Requires the member of a dispute board that is to be composed of a single member to be selected by mutual agreement of the parties on or before the 15th day after the date the contract is executed, unless the deadline is extended by mutual agreement of the parties. Requires the dispute review board to consist of three members, as provided by this section, rather than one if the parties are unable to select a single dispute board member.

(c) Requires each party to the contract to select one nominee qualified to serve as a dispute board member and to provide the nominee's name and qualifications to the other party for approval on or before the 15th day after the date a construction contract subject to this chapter is executed.

(d) Authorizes a party to accept or reject the other party's nomination on or before the seventh day after the party's receipt of said nomination. Provides that the nominee is considered accepted if not rejected during that period.

(e) Requires the party who nominated a person who was rejected to nominate another qualified person, except as provided by Subsection (g).

(f) Requires the two board members nominated and accepted by the parties to nominate a third qualified person to be the chairperson of the board. Authorizes each party to accept or reject that nomination on or before the 15th day after the date the party receives notice of the nomination. Provides that the nominee for chairperson is considered accepted if the nominee is not rejected during that period. Requires the two approved board members to make additional nominations for chairperson if the nominee is rejected by a party until a nomination is accepted by the parties, except as provided by Subsection (g).

(g) Authorizes any party 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, if a party does not nominate a board member in the time prescribed by Subsection (c), rejects two nominations for a board member, or rejects three nominations for chairperson.

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

Sec. 160.053. QUALIFICATIONS OF BOARD MEMBERS. (a) Sets forth certain required qualifications for board members.

(b) Sets forth certain required qualifications for chairpersons.

(c) Sets forth certain additional qualifications for each person who serves on a dispute board.

(d) Prohibits the qualifications prescribed by this section from being 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) Prohibits a board member from having any current or prior involvement in the contract that creates the board or a construction project that is the subject of the contract that could compromise the person's ability to review a dispute under the contract impartially. Requires the board member to comply with certain standards regarding neutrality, independence, and impartiality.

(b) Prohibits a board member, at the time of service on the board or during the two years before the person begins serving on the board, from having certain personal or financial connections related to the dispute under the contract, without disclosure of such information to and consent by all parties, except for providing services as a dispute board member, dispute resolution advisor, arbitrator, or mediator involving the owner or contractor.

(c) Prohibits the owner or contractor from soliciting advice from or consulting with the board or individual board members on matters related to the conduct of the work under the construction contract or resolution of problems under said contract that might compromise the board's integrity, except for participation in the board's activities as provided by said contract and the board's contract entered into under Section 160.055.

(d) Prohibits a board member from advocating for a party to the construction contract.

(e) Provides that a board member has a duty to the public and the parties to be fair, impartial, independent, and neutral. Requires each board member or potential board member to disclose to the parties and other board members certain relationships that may give rise to an appearance of impropriety or a suspicion of partiality. Requires a board member, in continuing to avoid conflicts of interest, to promptly disclose to the parties and other board members any matter that could reasonably give rise to a perception of partiality or the lack of neutrality. Specifies that a board member should refrain from acquiring or entering into any interest or relationship that might reasonably create the appearance that the person was influenced by the anticipation or expectation of the interest or relationship.

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

Sec. 160.055. CONTRACT WITH BOARD. (a) Requires the board members and the parties to the construction contract to execute a standard three-party agreement on certain actions to take during the resolution of the dispute on or before the 15th day after the date the board chairperson is selected.

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

(c) Requires the board to also agree to fairly and impartially consider each dispute referred to the board by a party to the construction contract and to provide written recommendations or decisions to the owner and contractor based on relevant provisions of the construction contract, any applicable law, and the facts and circumstances involved in the dispute.

(d) Requires the board's recommendations or decisions provided under Subsection (c) to clearly and completely express the logic and reasoning in leading the board to said recommendations and decisions in a manner that enables the parties to fully understand and use the recommendations or decisions to assist the negotiation of a resolution of the dispute. Authorizes the board's recommendations or decisions to address issues of entitlement, quantum, or unjust enrichment.

[Reserves Sections 160.056-160.100 for expansion.]

#### SUBCHAPTER C. DUTIES OF PARTIES TO CONSTRUCTION CONTRACT

Sec. 160.101. OWNER DUTIES. Requires the owner to provide each board member with a copy of certain documents relevant to the performance of the contract and necessary to the board's work, and to provide the board with conference facilities at or near the construction site and administrative and copying services.

Sec. 160.102. CONTRACTOR DUTIES. Requires the contractor to provide each board member with relevant documents prepared by the contractor, including progress schedules, to supplement the documents provided by the owner.

[Reserves Sections 160.103-160.150 for expansion.]

#### SUBCHAPTER D. OPERATION OF BOARD

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

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

(c) Requires the board to 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 said contract has been made, unless a party to the construction contract requests that the board continue to operate.

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

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

(c) Requires the owner and contractor to the fullest extent permitted by law to indemnify each board member for certain claims, losses, demands, costs, and damages arising out of or related to the member's carrying out of board functions. Provides that indemnification provided under this subsection is a joint and several obligation of the owner and contractor.

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

(b) Requires each party to provide a written submission not longer than two written pages to the board for the purposes of an informal proceeding under this section.

(c) Authorizes either party to request an opportunity to give an oral presentation to the board on submission of an issue, claim, or dispute to an informal proceeding, and authorizes the board to request such an oral presentation. Requires such an oral presentation to occur during a regularly scheduled board meeting. Requires the board to establish a time limit for oral presentations unless a time limit is agreed to by the parties.

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

(e) Provides that the parties and the board are not bound by the advisory recommendation, and authorizes the hearing of the same matter again in a formal hearing before the board.

(f) Requires the parties to agree that an advisory recommendation is not admissible in any administrative, arbitral, or judicial proceeding for any reason and prohibits the offering or moving for admission of such a recommendation.

Sec. 160.154. FORMAL FINDINGS AND RECOMMENDATIONS. (a) Requires the board to conduct a formal hearing in accordance with this section at the request of the parties.

(b) Requires the formal hearing to 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) Requires the board to allow each party to present the party's position on the dispute, with the contractor presenting first.

(d) Authorizes the board to ask any questions of the parties that the board considers appropriate.

(e) Authorizes the board to schedule a continuation of the hearing from time to time. Prohibits the board from accepting 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) Requires the board to meet to formulate its findings and recommendations for resolution of the dispute after the hearing concludes. Requires the board's deliberations to be conducted in private and to be confidential.

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

(h) Requires the board to make a concerted effort to reach a unanimous decision but authorizes the board to issue its findings and recommendations with the agreement of a majority of the board members. Requires the findings and recommendations to be signed by all board members.

(i) Requires a dissenting member to clearly indicate the member's dissent on the findings and recommendations and provide clearly identified separate dissenting findings and recommendations. Requires said findings and recommendations to be included as part of the board's findings and recommendations.

Sec. 160.155. TIME FOR ISSUING FORMAL FINDINGS AND RECOMMENDATIONS. Requires the board to 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) Requires written findings and recommendations to be admitted into evidence in any subsequent judicial, arbitral, or administrative proceeding, unless otherwise agreed by the parties, despite the purpose of the findings and recommendations to assist the parties in negotiating a resolution.

(b) Prohibits a board member or other participant in a board hearing from being required to testify regarding oral testimony or presentation made at a board meeting or other proceeding of the board.

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

(b) Requires a board to act as a dispute adjudication board only if the construction contract that creates the board specifically states that the board is a dispute adjudication board, adopts a certain clause of the International Chamber of Commerce (ICC) under which the parties to the contract agree to the administration of the board by the ICC, or provides that the board has the authority to issue a decision or determination that the parties are required to comply with on receipt.

(c) Requires the dispute adjudication board to follow the procedures in Section 160.154 for formal findings and recommendations.

(d) Requires the parties to comply with the board's decision without delay after receipt of the determination, unless a party notifies the board of the party's dissatisfaction with the decision on or before the 30th day after the date the party receives the decision. Provides that the parties are bound by the decision, waiver 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 if a notice of dissatisfaction is not submitted during that period.

(e) Requires the dispute to be finally settled by arbitration, if the parties agree, or by a court 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, unless otherwise agreed.

Sec. 160.158. OPERATION AS COMBINED DISPUTE BOARD. (a) Provides that a combined dispute board issues a recommendation under Sections 160.154-160.156, unless, for a particular dispute, the parties jointly request a decision under Section 160.157 and the combined dispute board decides to issue a decision under this section except as provided by Subsection (d).

(b) Requires a dispute board to act as a combined dispute board only if the construction contract that creates the board specifically states that the board is a combined dispute board, adopts a certain clause of the International Chamber of Commerce (ICC) under which the parties to the contract agree to the administration of the board by the ICC, or provides that the board has the authority to issue a recommendation or decision.

(c) Requires the combined dispute board to follow the procedures in Section 160.154 for making and issuing formal findings and recommendations.

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

(e) Requires the combined dispute board to determine whether the board will issue a recommendation or decision if a party requests a decision and one or more parties object to the request. Requires the board to consider certain relevant factors in making that determination.

(f) Authorizes a party referring a dispute to the board to request a decision by the board only if the request is made in writing in the notice to the parties and the board referring the dispute. Authorizes another party to 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. Provides that the records of a 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. Effective date: September 1, 2007.