

1-1 By: Madden, Raymond, Rodriguez H.B. No. 497
1-2 (Senate Sponsor - Ellis)
1-3 (In the Senate - Received from the House May 7, 2007;
1-4 May 8, 2007, read first time and referred to Committee on State
1-5 Affairs; May 19, 2007, reported favorably by the following vote:
1-6 Yeas 6, Nays 0; May 19, 2007, sent to printer.)

1-7 A BILL TO BE ENTITLED
1-8 AN ACT

1-9 relating to resolution of disputes arising under certain
1-10 construction contracts.

1-11 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

1-12 SECTION 1. Title 7, Civil Practice and Remedies Code, is
1-13 amended by adding Chapter 160 to read as follows:

1-14 CHAPTER 160. DISPUTE BOARDS

1-15 UNDER CERTAIN CONSTRUCTION CONTRACTS

1-16 SUBCHAPTER A. GENERAL PROVISIONS

1-17 Sec. 160.001. DEFINITIONS. In this chapter:

1-18 (1) "Construction contract" means a contract between a
1-19 governmental entity or a private real property owner and a
1-20 contractor for the construction, repair, or improvement of real
1-21 property in this state the value of which is at least \$1 million.

1-22 (2) "Contractor" means a person contracting with a
1-23 real property owner directly or through the owner's agent.

1-24 (3) "Dispute board" means a dispute resolution board,
1-25 dispute review board, dispute adjudication board, or combined
1-26 dispute board.

1-27 (4) "Governmental entity" means a governmental or
1-28 quasi-governmental authority authorized by state law to make a
1-29 public work contract, including:

1-30 (A) the state, a county, or a municipality;

1-31 (B) a department, board, or agency of the state,
1-32 a county, or a municipality; and

1-33 (C) a school district or a subdivision of a
1-34 school district.

1-35 (5) "Public work contract" means a contract for
1-36 constructing, altering, or repairing a public building or carrying
1-37 out or completing any public work.

1-38 Sec. 160.002. NONAPPLICABILITY TO CERTAIN RESIDENTIAL
1-39 CONSTRUCTION AND PUBLIC WORK CONTRACTS. This chapter does not
1-40 apply to:

1-41 (1) a contract for the improvement of residential real
1-42 property that consists of four or fewer dwelling units; or

1-43 (2) a construction manager-agent contract entered
1-44 into by a school district under Section 44.037, Education Code.

1-45 Sec. 160.003. METHOD OF ADOPTION. A dispute arising under a
1-46 construction contract may be submitted to a dispute board in
1-47 accordance with this chapter if the contract includes language that
1-48 reflects the intent of the parties to use one of the processes
1-49 provided by this chapter. The parties may modify any provision of
1-50 this chapter other than Sections 160.053 and 160.054.

1-51 Sec. 160.004. USE OF CHAPTER IN PUBLIC CONSTRUCTION
1-52 CONTRACTS. (a) Each construction contract entered into by a
1-53 governmental entity that does not provide for submission of
1-54 disputes arising under the contract to a dispute board under this
1-55 chapter must contain a provision stating that the use of dispute
1-56 resolution under this chapter was actively considered. A
1-57 governmental entity is not required to use this chapter.

1-58 (b) A public work contract may not provide for disputes to
1-59 be submitted to a dispute adjudication board under Section 160.157
1-60 or a combined dispute board under Section 160.158.

1-61 [Sections 160.005-160.050 reserved for expansion]

1-62 SUBCHAPTER B. DISPUTE BOARDS

1-63 Sec. 160.051. COMPOSITION AND SELECTION OF BOARD. (a) A
1-64 dispute board consists of one, three, or a greater odd number of

2-1 persons selected in accordance with this section.

2-2 (b) If the board is to be composed of a single member, that
 2-3 member shall be selected by mutual agreement of the parties on or
 2-4 before the 15th day after the date the contract is executed, unless
 2-5 the deadline is extended by mutual agreement of the parties. If the
 2-6 parties are unable to select a single dispute review board member in
 2-7 the time allotted, the dispute review board shall consist of three
 2-8 members, as provided by this section.

2-9 (c) On or before the 15th day after the date a construction
 2-10 contract subject to this chapter is executed, each party to the
 2-11 contract shall select one nominee qualified to serve as a board
 2-12 member under this chapter and provide the name and qualifications
 2-13 of the nominee to the other party for approval.

2-14 (d) A party may accept or reject the other party's
 2-15 nomination on or before the seventh day after the date the party
 2-16 receives notice of the nomination. If the nominee is not rejected
 2-17 during that period, the nominee is considered accepted.

2-18 (e) Except as provided by Subsection (g), if a nominee is
 2-19 rejected, the party who nominated the person shall nominate another
 2-20 qualified person.

2-21 (f) Once two board members nominated by the parties are
 2-22 accepted, those board members shall nominate a third qualified
 2-23 person to be chairperson of the board. Each party may accept or
 2-24 reject the nomination on or before the 15th day after the date the
 2-25 party receives notice of the nomination. If the nominee for
 2-26 chairperson is not rejected by one of the parties in the time
 2-27 prescribed by this subsection, the nominee is considered accepted.
 2-28 Except as provided by Subsection (g), if the nominee is rejected by
 2-29 a party, the two approved board members shall make additional
 2-30 nominations for chairperson until a nomination is accepted by the
 2-31 parties.

2-32 (g) If a party does not nominate a board member in the time
 2-33 prescribed by Subsection (c) or rejects two nominations for a board
 2-34 member or three nominations for a chairperson, any party may apply
 2-35 to the district court of the district in which the work under the
 2-36 contract will be performed for the appointment by the court of a
 2-37 qualified person as a board member or chairperson, as applicable.

2-38 Sec. 160.052. DISPUTE BOARD AGREEMENT. Not later than the
 2-39 15th day after the date all parties have received notice of the
 2-40 appointment of the chairperson, each party and each member of the
 2-41 board shall execute and comply with the dispute board agreement.

2-42 Sec. 160.053. QUALIFICATIONS OF BOARD MEMBERS. (a) A board
 2-43 member selected by a party to the construction contract must have:

2-44 (1) at least three years of professional, technical,
 2-45 academic, or managerial experience in engineering, construction,
 2-46 architecture, or law; and

2-47 (2) experience in:

2-48 (A) one or more of the general types of
 2-49 construction involved in the contract;

2-50 (B) the interpretation of construction contract
 2-51 documents; and

2-52 (C) the analysis and resolution of construction
 2-53 issues.

2-54 (b) The chairperson of the board must have:

2-55 (1) at least five years of experience in the person's
 2-56 profession;

2-57 (2) at least five years of experience in:

2-58 (A) construction dispute resolution;

2-59 (B) adjudication;

2-60 (C) arbitration;

2-61 (D) service as a judge;

2-62 (E) service as an executive officer of a
 2-63 contractor, design professional, or project owner;

2-64 (F) service as a faculty member in an institution
 2-65 of higher education in architecture, engineering, or construction
 2-66 science; or

2-67 (G) work as a construction manager-agent; and

2-68 (3) competence in the interpretation of construction
 2-69 contract documents and the analysis and resolution of construction

3-1 claims.

3-2 (c) Each person who serves on a board must have:

3-3 (1) experience serving on a dispute board or as a
3-4 construction arbitrator, adjudicator, construction mediator,
3-5 judge, or construction manager-agent; or

3-6 (2) 40 hours of classroom training in the mechanisms
3-7 of dispute boards, construction adjudication, construction
3-8 arbitration, or construction mediation in courses conducted by an
3-9 alternative dispute resolution training organization accepted by
3-10 the parties or by the court that appoints the board member, as
3-11 applicable.

3-12 (d) The qualifications prescribed by this section may not be
3-13 waived for a board member or board chairperson who serves on a board
3-14 under a public work contract.

3-15 Sec. 160.054. CONFLICTS OF INTEREST; NEUTRALITY. (a) A
3-16 member of a dispute board may not have any current or prior
3-17 involvement in the contract that creates the board or a
3-18 construction project that is the subject of the contract that could
3-19 compromise the person's ability to review a dispute under the
3-20 contract impartially. The board member shall comply with the
3-21 American Bar Association Code of Ethics for Arbitrators in
3-22 Commercial Disputes standards regarding board member neutrality,
3-23 independence, and impartiality.

3-24 (b) Except for providing services as a dispute board member,
3-25 dispute resolution advisor, arbitrator, or mediator on a matter
3-26 involving the owner or contractor, a board member may not, at the
3-27 time of service on the board or during the two years before the
3-28 person begins serving on the board, without disclosure to, and
3-29 consent by, all parties, have:

3-30 (1) employment with, an ownership interest in, or an
3-31 existing business or financial relationship, including the
3-32 provision of fee-based consulting services, with:

3-33 (A) a party to the contract under which the board
3-34 is created;

3-35 (B) a third-party construction manager for the
3-36 contractor;

3-37 (C) any subcontractor or subconsultant to the
3-38 contractor; or

3-39 (D) another contractor or construction manager
3-40 for the owner;

3-41 (2) a financial interest in the contract;

3-42 (3) direct involvement in the preparation of the
3-43 successful bid documents for the contract or a successful bid by any
3-44 bidder for the invitation to bid for the contract; or

3-45 (4) involvement in the management or administration of
3-46 the contract.

3-47 (c) Except for participation in the board's activities as
3-48 provided by the construction contract and the board's contract
3-49 entered into under Section 160.055, the owner or contractor may not
3-50 solicit advice from or consult with the board or individual board
3-51 members on matters related to the conduct of the work under the
3-52 construction contract or resolution of problems under the
3-53 construction contract that might compromise the board's integrity.

3-54 (d) A board member may not advocate for a party to the
3-55 construction contract.

3-56 (e) A board member has a duty to the public and the parties
3-57 to be fair, impartial, independent, and neutral. Each board member
3-58 or potential board member shall disclose to the parties and the
3-59 other board members any business, professional, social, or
3-60 financial relationship that may give rise to an appearance of
3-61 impropriety or a suspicion of partiality. A board member has a
3-62 continuing duty to avoid conflicts of interest and shall promptly
3-63 disclose to the parties and the other board members any matter that
3-64 could reasonably give rise to a perception of partiality or the lack
3-65 of neutrality. A board member should refrain from acquiring or
3-66 entering into any interest or relationship that might reasonably
3-67 create the appearance that the person was influenced by the
3-68 anticipation or expectation of the interest or relationship.

3-69 (f) After an otherwise qualified board member or potential

4-1 board member discloses all matters that could reasonably give rise
 4-2 to a perception of partiality or of possible conflict of interest,
 4-3 the parties may waive objection to the matter disclosed and permit
 4-4 the person to serve as a board member.

4-5 Sec. 160.055. CONTRACT WITH BOARD. (a) On or before the
 4-6 15th day after the date the board chairperson is selected, the board
 4-7 members and the parties to the construction contract shall execute
 4-8 a standard three-party agreement in which the board members agree
 4-9 to:

4-10 (1) assist the parties in preventing and resolving
 4-11 disputes during the term of the construction contract;

4-12 (2) read and become familiar with all the contract
 4-13 documents, including the specifications, plans, addenda, progress
 4-14 schedule and updates, weekly progress reports, minutes of progress
 4-15 meetings, change orders, and other documents relevant to the
 4-16 performance of the contract and necessary to the board's work;

4-17 (3) visit the construction site as soon as practicable
 4-18 after selection of the board;

4-19 (4) reserve at least one day each month for project
 4-20 site visits and visit the site at least bimonthly, or more
 4-21 frequently if beneficial, or at such other interval as the parties
 4-22 may agree on; and

4-23 (5) keep informed regarding the construction
 4-24 activities and the work in progress.

4-25 (b) The frequency, time, and duration of visits required
 4-26 under the board's contract must be mutually agreed on by the board,
 4-27 owner, and contractor, or if the parties and the board do not agree,
 4-28 scheduled by the board.

4-29 (c) The board shall also agree to:

4-30 (1) consider, fairly and impartially, each dispute
 4-31 referred to the board by a party to the construction contract; and

4-32 (2) provide written recommendations or decisions to
 4-33 the owner and contractor based on:

4-34 (A) the relevant provisions of the construction
 4-35 contract;

4-36 (B) any applicable law; and

4-37 (C) the facts and circumstances involved in the
 4-38 dispute.

4-39 (d) The board's recommendations or decisions provided under
 4-40 Subsection (c) shall express, clearly and completely, the logic and
 4-41 reasoning leading the board to the recommendations or decisions in
 4-42 a manner that enables the parties to fully understand and use the
 4-43 recommendations or decisions to assist the negotiation of a
 4-44 resolution of the dispute. The board's recommendations or decisions
 4-45 may address issues of entitlement, quantum, or unjust enrichment.

4-46 [Sections 160.056-160.100 reserved for expansion]

4-47 SUBCHAPTER C. DUTIES OF PARTIES TO CONSTRUCTION CONTRACT

4-48 Sec. 160.101. OWNER DUTIES. The owner shall:

4-49 (1) provide each board member with a copy of all
 4-50 contract documents, including the specifications, plans, addenda,
 4-51 progress schedule and updates, weekly progress reports, minutes of
 4-52 progress meetings, change orders, and any other documents relevant
 4-53 to the performance of the contract and necessary to the board's
 4-54 work; and

4-55 (2) provide the board with:

4-56 (A) conference facilities at or near the
 4-57 construction site; and

4-58 (B) administrative and copying services.

4-59 Sec. 160.102. CONTRACTOR DUTIES. The contractor shall
 4-60 provide each board member with relevant documents prepared by the
 4-61 contractor, including progress schedules, to supplement the
 4-62 documents provided by the owner.

4-63 [Sections 160.103-160.150 reserved for expansion]

4-64 SUBCHAPTER D. OPERATION OF BOARD

4-65 Sec. 160.151. BOARD ACTIVITY AND EXPENSES. (a) The board
 4-66 shall be active and available throughout the term of the
 4-67 construction contract. The cost of the board's activity must be
 4-68 included as a capital expense of the project.

4-69 (b) The total cost of a qualified minority or historically

5-1 underutilized dispute board administrative organization, including
5-2 the expense of the board members, is included in meeting all
5-3 minority set-aside goals or provisions required by law.

5-4 (c) The board shall begin operation on the written
5-5 authorization of the owner received after the board's contract
5-6 under Section 160.055 is executed and may end operation at the end
5-7 of the term of the construction contract after the final payment due
5-8 under the construction contract has been made, unless a party to the
5-9 contract requests that the board continue to operate.

5-10 Sec. 160.152. IMMUNITY. (a) Each board member, in the
5-11 performance of the member's duties on the board, acts in the
5-12 capacity of an independent agent intended to facilitate the
5-13 resolution of disputes and not as an employee of the owner or the
5-14 contractor.

5-15 (b) To the fullest extent permitted by law, each board
5-16 member is entitled to judicial immunity for an action, decision, or
5-17 recommendation associated with the resolution of a dispute referred
5-18 to the board. Each board member shall be held harmless for any
5-19 personal or professional liability arising from or related to board
5-20 activities.

5-21 (c) To the fullest extent permitted by law, the owner and
5-22 contractor shall indemnify each board member for claims, losses,
5-23 demands, costs, and damages, including reasonable attorney's fees,
5-24 for bodily injury, property damage, or economic loss arising out of
5-25 or related to the member's carrying out of board functions.
5-26 Indemnification provided under this subsection is a joint and
5-27 several obligation of the owner and the contractor.

5-28 Sec. 160.153. INFORMAL PROCEEDINGS AND RECOMMENDATIONS.
5-29 (a) The owner and contractor may agree, with respect to any issue,
5-30 claim, or dispute, to request that the board act in an advisory
5-31 capacity to assist in resolving the issue, claim, or dispute at an
5-32 informal hearing before the board.

5-33 (b) For the purposes of an informal proceeding under this
5-34 section, each party shall provide a written submission not longer
5-35 than two written pages to the board. To the extent possible, the
5-36 parties shall also provide to the board written questions for the
5-37 board agreed to by the parties.

5-38 (c) On submission of an issue, claim, or dispute to an
5-39 informal proceeding under this section, either party may request an
5-40 opportunity to give an oral presentation to the board, and the board
5-41 may request an oral presentation by the parties. An oral
5-42 presentation under this subsection must occur during a regularly
5-43 scheduled meeting of the board. Unless a time limit for oral
5-44 presentations is agreed to by the parties, the board shall
5-45 establish a time limit for oral presentations.

5-46 (d) The board shall present its advisory recommendation to
5-47 the parties orally not later than four hours after the conclusion of
5-48 any oral presentation by the parties.

5-49 (e) The parties and the board are not bound by the advisory
5-50 recommendation, and the same matter may be heard again in a formal
5-51 hearing before the board.

5-52 (f) The parties shall agree that an advisory recommendation
5-53 is not admissible in any administrative, arbitral, or judicial
5-54 proceeding for any reason and may not offer or move for admission of
5-55 an advisory recommendation.

5-56 Sec. 160.154. FORMAL FINDINGS AND RECOMMENDATIONS. (a) On
5-57 the request of either party, the board shall conduct a formal
5-58 hearing in accordance with this section.

5-59 (b) The hearing shall be conducted:

5-60 (1) by the board chairperson;
5-61 (2) in accordance with any dispute board rules and
5-62 hearing procedures established by the board; and
5-63 (3) with all members of the board present and
5-64 participating.

5-65 (c) The board shall allow each party to present the party's
5-66 position on the dispute, with the contractor presenting first.

5-67 (d) The board may ask any questions of the parties that the
5-68 board considers appropriate.

5-69 (e) The board may schedule a continuation of the hearing

6-1 from time to time. The board may not accept any further submissions
 6-2 or evidence from a party after the conclusion of the hearing unless
 6-3 the submission or evidence is expressly requested by the board.

6-4 (f) After the hearing concludes, the board shall meet to
 6-5 formulate its findings and recommendations for resolution of the
 6-6 dispute. The board's deliberations shall be conducted in private
 6-7 and are confidential.

6-8 (g) The board shall base its findings and recommendations on
 6-9 the contract provisions and the facts and circumstances of the
 6-10 dispute.

6-11 (h) The board shall make a concerted effort to reach a
 6-12 unanimous decision but may issue its findings and recommendations
 6-13 with the agreement of a majority of the members. The findings and
 6-14 recommendations must be signed by all board members.

6-15 (i) A dissenting member shall clearly indicate the member's
 6-16 dissent on the findings and recommendations and provide clearly
 6-17 identified separate dissenting findings and recommendations. The
 6-18 separate dissenting findings and recommendations must be included
 6-19 as part of the board's findings and recommendations.

6-20 Sec. 160.155. TIME FOR ISSUING FORMAL FINDINGS AND
 6-21 RECOMMENDATIONS. The board shall issue its findings and
 6-22 recommendations to the owner and the contractor on or before the
 6-23 21st day after the date the hearing concludes or as otherwise
 6-24 determined by the board and agreed to by the parties.

6-25 Sec. 160.156. EFFECT OF FINDINGS AND RECOMMENDATIONS. (a)
 6-26 Although the purpose of the board findings and recommendations is
 6-27 to assist the parties in negotiating a resolution of the dispute,
 6-28 the written findings and recommendations shall be admitted into
 6-29 evidence in any subsequent judicial, arbitral, or administrative
 6-30 proceeding, unless otherwise agreed by the parties.

6-31 (b) A board member or other participant in a board hearing
 6-32 may not be required to testify regarding oral testimony or
 6-33 presentations made at a board meeting or any hearing, conference,
 6-34 or other proceeding of the board.

6-35 Sec. 160.157. OPERATION AS DISPUTE ADJUDICATION BOARD. (a)
 6-36 A dispute adjudication board issues decisions.

6-37 (b) A dispute board shall act as a dispute adjudication
 6-38 board only if the construction contract that creates the board:

6-39 (1) specifically states that the board is a dispute
 6-40 adjudication board;

6-41 (2) adopts an International Chamber of Commerce
 6-42 Dispute Adjudication Board Clause under which the parties to the
 6-43 contract agree to the administration of the board by the
 6-44 International Chamber of Commerce; or

6-45 (3) provides that the board has the authority to issue
 6-46 a decision or determination that the parties are required to comply
 6-47 with on receipt.

6-48 (c) In making and issuing a decision, the board shall follow
 6-49 the procedures in Section 160.154 for formal findings and
 6-50 recommendations.

6-51 (d) After receiving the determination, the parties must
 6-52 comply with the board's decision without delay, unless on or before
 6-53 the 30th day after the date a party receives the decision, the party
 6-54 notifies the board and the other party in writing of the reasons for
 6-55 the party's dissatisfaction with the decision. If a notice of
 6-56 dissatisfaction is not submitted during that time, the parties are
 6-57 bound by the decision, waive any right of recourse they may have
 6-58 against the decision, and consent to the summary enforcement of the
 6-59 decision by a court as if the decision is a partial final
 6-60 arbitration award.

6-61 (e) Unless otherwise agreed, if a party submits a written
 6-62 notice of dissatisfaction that complies with Subsection (d), or if
 6-63 the board does not issue the board's decision on or before the 30th
 6-64 day after the date the hearing on the dispute concludes, the dispute
 6-65 shall be finally settled by arbitration, if the parties agree, or by
 6-66 a court. Until the dispute is finally settled, the parties are
 6-67 bound to comply with the decision.

6-68 Sec. 160.158. OPERATION AS COMBINED DISPUTE BOARD. (a) A
 6-69 combined dispute board issues a recommendation under Sections

7-1 160.154-160.156, unless, for a particular dispute:

7-2 (1) the parties jointly request a decision under
7-3 Section 160.157; and

7-4 (2) except as provided by Subsection (d), the combined
7-5 dispute board decides to issue a decision under this section.

7-6 (b) A dispute board shall act as a combined dispute board
7-7 only if the construction contract that creates the board:

7-8 (1) specifically states that the board is a combined
7-9 dispute board;

7-10 (2) adopts an International Chamber of Commerce
7-11 Combined Dispute Board Clause under which the parties to the
7-12 contract agree to the administration of the board by the
7-13 International Chamber of Commerce; or

7-14 (3) provides that the board has the authority to issue
7-15 either a recommendation or a decision.

7-16 (c) In making a recommendation or decision, the combined
7-17 dispute board shall follow the procedures in Section 160.154 for
7-18 making and issuing formal findings and recommendations.

7-19 (d) If a party requests a decision with respect to a given
7-20 dispute and no other party objects, the combined dispute board
7-21 shall issue a decision.

7-22 (e) If a party requests a decision and one or more parties
7-23 objects to the request, the combined dispute board shall determine
7-24 whether the board will issue a recommendation or decision. In
7-25 making that determination, the board shall consider whether, due to
7-26 the urgency of the situation or other relevant considerations, a
7-27 decision would facilitate the performance of the contract or
7-28 prevent irreparable loss or damage to any party, whether a decision
7-29 would prevent disruption of the contract, whether a decision is
7-30 necessary to preserve evidence, and any other factors the board
7-31 considers relevant.

7-32 (f) A party referring a dispute to the board may request a
7-33 decision by the board only if the request is made in writing in the
7-34 notice to the other parties and the board referring the dispute.
7-35 Another party may request a decision by the board only if the
7-36 request is made in writing before or at the same time the party
7-37 submits a written response to the request for board action.

7-38 Sec. 160.159. DISCLOSURE OF RECORDS. The records of a
7-39 dispute board are not records of any government agency, and any
7-40 records, notes, or drafts taken or made by a board member are not
7-41 subject to disclosure under any freedom of information law.

7-42 SECTION 2. This Act takes effect September 1, 2007.

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