

By: Deuell, Fraser

S.B. No. 324

A BILL TO BE ENTITLED

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AN ACT

relating to contingent payment clauses in certain construction contracts.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subchapter D, Chapter 35, Business & Commerce Code, is amended by adding Section 35.521 to read as follows:

Sec. 35.521. AGREEMENT FOR PAYMENT OF CONSTRUCTION SUBCONTRACTOR. (a) In this section:

(1) "Contingent payee" means a party to a contract with a contingent payment clause, other than an architect or engineer, whose receipt of payment is conditioned on the contingent payor's receipt of payment from another person.

(2) "Contingent payment clause" means a provision in a contract for construction management, or for the construction of improvements to real property or the furnishing of materials for the construction, that provides that the contingent payor's receipt of payment from another is a condition precedent to the obligation of the contingent payor to make payment to the contingent payee for work performed or materials furnished.

(3) "Contingent payor" means a party to a contract with a contingent payment clause that conditions payment by the party on the receipt of payment from another person.

(4) "Improvement" includes new construction, remodeling, or repair.

1           (5) "Obligor" means the person obligated to make  
2 payment to the contingent payor for an improvement.

3           (6) "Primary obligor" means the owner of the real  
4 property to be improved or repaired under the contract, or the  
5 contracting authority if the contract is for a public project. A  
6 primary obligor may be an obligor.

7           (b) A contingent payor or its surety may not enforce a  
8 contingent payment clause to the extent that the obligor's  
9 nonpayment to the contingent payor is the result of the contractual  
10 obligations of the contingent payor not being met, unless the  
11 nonpayment is the result of the contingent payee's failure to meet  
12 the contingent payee's contractual requirements.

13           (c) Except as provided by Subsection (f), a contingent payor  
14 or its surety may not enforce a contingent payment clause as to work  
15 performed or materials delivered after the contingent payor  
16 receives written notice from the contingent payee objecting to the  
17 further enforceability of the contingent payment clause as provided  
18 by this section and the notice becomes effective as provided by  
19 Subsection (d). The contingent payee may send written notice only  
20 after the 45th day after the date the contingent payee submits a  
21 written request for payment to the contingent payor that is in a  
22 form substantially in accordance with the contingent payee's  
23 contract requirements for the contents of a regular progress  
24 payment request or an invoice.

25           (d) For purposes of Subsection (c), the written notice  
26 becomes effective on the latest of:

27           (1) the 10th day after the date the contingent payor

1 receives the notice;

2 (2) the eighth day after the date interest begins to  
3 accrue against the obligor under:

4 (A) Section 28.004, Property Code, under a  
5 contract for a private project governed by Chapter 28, Property  
6 Code; or

7 (B) 31 U.S.C. Section 3903(a)(6), under a  
8 contract for a public project governed by 40 U.S.C. Section 3131; or

9 (3) the 11th day after the date interest begins to  
10 accrue against the obligor under Section 2251.025, Government Code,  
11 under a contract for a public project governed by Chapter 2251,  
12 Government Code.

13 (e) A notice given by a contingent payee under Subsection  
14 (c) does not prevent enforcement of a contingent payment clause if:

15 (1) the obligor has a dispute under Chapter 28,  
16 Property Code, Chapter 2251, Government Code, or 31 U.S.C. Chapter  
17 39 as a result of the contingent payee's failure to meet the  
18 contingent payee's contractual requirements; and

19 (2) the contingent payor gives notice in writing to  
20 the contingent payee that the written notice given under Subsection  
21 (c) does not prevent enforcement of the contingent payment clause  
22 under this subsection and the contingent payee receives the notice  
23 under this subdivision not later than the later of:

24 (A) the fifth day before the date the written  
25 notice from the contingent payee under Subsection (c) becomes  
26 effective under Subsection (d); or

27 (B) the fifth day after the date the contingent

1 payor receives the written notice from the contingent payee under  
2 Subsection (c).

3 (f) A written notice given by a contingent payee under  
4 Subsection (c) does not prevent the enforcement of a contingent  
5 payment clause to the extent that the funds are not collectible as a  
6 result of a primary obligor's successful assertion of a defense of  
7 sovereign immunity, if the contingent payor has exhausted all of  
8 its rights and remedies under its contract with the primary obligor  
9 and under Chapter 2251, Government Code. This subsection does not:

10 (1) create or validate a defense of sovereign  
11 immunity; or

12 (2) extend to a primary obligor a defense or right that  
13 did not exist before the effective date of this section.

14 (g) On receipt of payment by the contingent payee of the  
15 unpaid indebtedness giving rise to the written notice provided by  
16 the contingent payee under Subsection (c), the contingent payment  
17 clause is reinstated as to work performed or materials furnished  
18 after the receipt of the payment, subject to the provisions of this  
19 section.

20 (h) A contingent payor or its surety may not enforce a  
21 contingent payment clause if, under Section 53.026, Property Code,  
22 the contingent payee is considered to be in direct contractual  
23 relationship with the obligor.

24 (i) A contingent payment clause may not be used as a basis  
25 for invalidation of the enforceability or perfection of a  
26 mechanic's lien under Chapter 53, Property Code.

27 (j) A contingent payor or its surety may not enforce a

1 contingent payment clause if the enforcement would be  
2 unconscionable. The party asserting that a contingent payment  
3 clause is unconscionable has the burden of proving that the clause  
4 is unconscionable.

5 (k) The enforcement of a contingent payment clause is not  
6 unconscionable if the contingent payor:

7 (1) proves that the contingent payor has exercised  
8 diligence in ascertaining and communicating in writing to the  
9 contingent payee, before the contract in which the contingent  
10 payment clause has been asserted becomes enforceable against the  
11 contingent payee, the financial viability of the primary obligor  
12 and the existence of adequate financial arrangements to pay for the  
13 improvements; and

14 (2) has done the following:

15 (A) made reasonable efforts to collect the amount  
16 owed to the contingent payor; or

17 (B) made or offered to make, at a reasonable  
18 time, an assignment by the contingent payor to the contingent payee  
19 of a cause of action against the obligor for the amounts owed to the  
20 contingent payee by the contingent payor and offered reasonable  
21 cooperation to the contingent payee's collection efforts, if the  
22 assigned cause of action is not subject to defenses caused by the  
23 contingent payor's action or failure to act.

24 (l) A cause of action brought on an assignment made under  
25 Subsection (k)(2)(B) is enforceable by a contingent payee against  
26 an obligor or a primary obligor.

27 (m) A contingent payor is considered to have exercised

1 diligence for purposes of Subsection (k)(1) under a contract for a  
2 private project governed by Chapter 53, Property Code, if the  
3 contingent payee receives in writing from the contingent payor:

4 (1) the name, address, and business telephone number  
5 of the primary obligor;

6 (2) a description, legally sufficient for  
7 identification, of the property on which the improvements are being  
8 constructed;

9 (3) the name and address of the surety on any payment  
10 bond provided under Subchapter I, Chapter 53, Property Code, to  
11 which any notice of claim should be sent;

12 (4) if a loan has been obtained for the construction of  
13 improvements:

14 (A) a statement, furnished by the primary obligor  
15 and supported by reasonable and credible evidence from all  
16 applicable lenders, of the amount of the loan;

17 (B) a summary of the terms of the loan;

18 (C) a statement of whether there is foreseeable  
19 default of the primary obligor; and

20 (D) the name, address, and business telephone  
21 number of the borrowers and lenders; and

22 (5) a statement, furnished by the primary obligor and  
23 supported by reasonable and credible evidence from all applicable  
24 banks or other depository institutions, of the amount, source, and  
25 location of funds available to pay the balance of the contract  
26 amount if there is no loan or the loan is not sufficient to pay for  
27 all of the construction of the improvements.

1       (n) A contingent payor is considered to have exercised  
2 diligence for purposes of Subsection (k)(1) under a contract for a  
3 public project governed by Chapter 2253, Government Code, if the  
4 contingent payee receives in writing from the contingent payor:

5           (1) the name, address, and primary business telephone  
6 number of the primary obligor;

7           (2) the name and address of the surety on the payment  
8 bond provided to the primary obligor to which any notice of claim  
9 should be sent; and

10          (3) a statement from the primary obligor that funds  
11 are available and have been authorized for the full contract amount  
12 for the construction of the improvements.

13       (o) A contingent payor is considered to have exercised  
14 diligence for purposes of Subsection (k)(1) under a contract for a  
15 public project governed by 40 U.S.C. Section 3131 if the contingent  
16 payee receives in writing from the contingent payor:

17           (1) the name, address, and primary business telephone  
18 number of the primary obligor;

19           (2) the name and address of the surety on the payment  
20 bond provided to the primary obligor; and

21           (3) the name of the contracting officer, if known at  
22 the time of the execution of the contract.

23       (p) A primary obligor shall furnish the information  
24 described by Subsection (m) or (n), as applicable, to the  
25 contingent payor not later than the 30th day after the date the  
26 primary obligor receives a written request for the information. If  
27 the primary obligor fails to provide the information under the

1 written request, the contingent payor, the contingent payee, and  
2 their sureties are relieved of the obligation to initiate or  
3 continue performance of the construction contracts of the  
4 contingent payor and contingent payee.

5 (q) The assertion of a contingent payment clause is an  
6 affirmative defense to a civil action for payment under a contract.

7 (r) This section does not affect a provision that affects  
8 the timing of a payment in a contract for construction management or  
9 for the construction of improvements to real property if the  
10 payment is to be made within a reasonable period.

11 (s) A person may not waive this section by contract or other  
12 means. A purported waiver of this section is void.

13 (t) An obligor or a primary obligor may not prohibit a  
14 contingent payor from allocating risk by means of a contingent  
15 payment clause.

16 (u) This section does not apply to a contract that is solely  
17 for:

18 (1) design services;

19 (2) the construction or maintenance of a road,  
20 highway, street, bridge, utility, water supply project, water  
21 plant, wastewater plant, water and wastewater distribution or  
22 conveyance facility, wharf, dock, airport runway or taxiway,  
23 drainage project, or related type of project associated with civil  
24 engineering construction; or

25 (3) improvements to or the construction of a structure  
26 that is a:

27 (A) detached single-family residence;



- 1                   (B) duplex;
- 2                   (C) triplex; or
- 3                   (D) quadruplex.

4           SECTION 2. Section 35.521, Business & Commerce Code, as  
5 added by this Act, applies only to a contingent payment clause under  
6 which payment is contingent on the receipt of payment under a  
7 contract or other agreement entered into on or after September 1,  
8 2007.

9           SECTION 3. This Act takes effect September 1, 2007.

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COMMITTEE AMENDMENT NO. 1

Amend S.B. 324 as follows:

On page 9, between lines 3 and 4, insert a new subsection (v)  
to read as follows:

"(v) This section does not apply to a subcontract under a  
prime contract that is in excess of \$10 million."

Solomons