

1-1 By: Deuell S.B. No. 324
1-2 (In the Senate - Filed January 25, 2007; February 14, 2007,
1-3 read first time and referred to Committee on Business and Commerce;
1-4 February 21, 2007, reported favorably by the following vote: Yeas 9,
1-5 Nays 0; February 21, 2007, sent to printer.)

1-6 A BILL TO BE ENTITLED
1-7 AN ACT

1-8 relating to contingent payment clauses in certain construction
1-9 contracts.

1-10 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:
1-11 SECTION 1. Subchapter D, Chapter 35, Business & Commerce
1-12 Code, is amended by adding Section 35.521 to read as follows:

1-13 Sec. 35.521. AGREEMENT FOR PAYMENT OF CONSTRUCTION
1-14 SUBCONTRACTOR. (a) In this section:

1-15 (1) "Contingent payee" means a party to a contract
1-16 with a contingent payment clause, other than an architect or
1-17 engineer, whose receipt of payment is conditioned on the contingent
1-18 payor's receipt of payment from another person.

1-19 (2) "Contingent payment clause" means a provision in a
1-20 contract for construction management, or for the construction of
1-21 improvements to real property or the furnishing of materials for
1-22 the construction, that provides that the contingent payor's receipt
1-23 of payment from another is a condition precedent to the obligation
1-24 of the contingent payor to make payment to the contingent payee for
1-25 work performed or materials furnished.

1-26 (3) "Contingent payor" means a party to a contract
1-27 with a contingent payment clause that conditions payment by the
1-28 party on the receipt of payment from another person.

1-29 (4) "Improvement" includes new construction,
1-30 remodeling, or repair.

1-31 (5) "Obligor" means the person obligated to make
1-32 payment to the contingent payor for an improvement.

1-33 (6) "Primary obligor" means the owner of the real
1-34 property to be improved or repaired under the contract, or the
1-35 contracting authority if the contract is for a public project. A
1-36 primary obligor may be an obligor.

1-37 (b) A contingent payor or its surety may not enforce a
1-38 contingent payment clause to the extent that the obligor's
1-39 nonpayment to the contingent payor is the result of the contractual
1-40 obligations of the contingent payor not being met, unless the
1-41 nonpayment is the result of the contingent payee's failure to meet
1-42 the contingent payee's contractual requirements.

1-43 (c) Except as provided by Subsection (f), a contingent payor
1-44 or its surety may not enforce a contingent payment clause as to work
1-45 performed or materials delivered after the contingent payor
1-46 receives written notice from the contingent payee objecting to the
1-47 further enforceability of the contingent payment clause as provided
1-48 by this section and the notice becomes effective as provided by
1-49 Subsection (d). The contingent payee may send written notice only
1-50 after the 45th day after the date the contingent payee submits a
1-51 written request for payment to the contingent payor that is in a
1-52 form substantially in accordance with the contingent payee's
1-53 contract requirements for the contents of a regular progress
1-54 payment request or an invoice.

1-55 (d) For purposes of Subsection (c), the written notice
1-56 becomes effective on the latest of:

1-57 (1) the 10th day after the date the contingent payor
1-58 receives the notice;

1-59 (2) the eighth day after the date interest begins to
1-60 accrue against the obligor under:

1-61 (A) Section 28.004, Property Code, under a
1-62 contract for a private project governed by Chapter 28, Property
1-63 Code; or

1-64 (B) 31 U.S.C. Section 3903(a)(6), under a

2-1 contract for a public project governed by 40 U.S.C. Section 3131; or
 2-2 (3) the 11th day after the date interest begins to
 2-3 accrue against the obligor under Section 2251.025, Government Code,
 2-4 under a contract for a public project governed by Chapter 2251,
 2-5 Government Code.

2-6 (e) A notice given by a contingent payee under Subsection
 2-7 (c) does not prevent enforcement of a contingent payment clause if:

2-8 (1) the obligor has a dispute under Chapter 28,
 2-9 Property Code, Chapter 2251, Government Code, or 31 U.S.C. Chapter
 2-10 39 as a result of the contingent payee's failure to meet the
 2-11 contingent payee's contractual requirements; and

2-12 (2) the contingent payor gives notice in writing to
 2-13 the contingent payee that the written notice given under Subsection
 2-14 (c) does not prevent enforcement of the contingent payment clause
 2-15 under this subsection and the contingent payee receives the notice
 2-16 under this subdivision not later than the later of:

2-17 (A) the fifth day before the date the written
 2-18 notice from the contingent payee under Subsection (c) becomes
 2-19 effective under Subsection (d); or

2-20 (B) the fifth day after the date the contingent
 2-21 payor receives the written notice from the contingent payee under
 2-22 Subsection (c).

2-23 (f) A written notice given by a contingent payee under
 2-24 Subsection (c) does not prevent the enforcement of a contingent
 2-25 payment clause to the extent that the funds are not collectible as a
 2-26 result of a primary obligor's successful assertion of a defense of
 2-27 sovereign immunity, if the contingent payor has exhausted all of
 2-28 its rights and remedies under its contract with the primary obligor
 2-29 and under Chapter 2251, Government Code. This subsection does not:

2-30 (1) create or validate a defense of sovereign
 2-31 immunity; or

2-32 (2) extend to a primary obligor a defense or right that
 2-33 did not exist before the effective date of this section.

2-34 (g) On receipt of payment by the contingent payee of the
 2-35 unpaid indebtedness giving rise to the written notice provided by
 2-36 the contingent payee under Subsection (c), the contingent payment
 2-37 clause is reinstated as to work performed or materials furnished
 2-38 after the receipt of the payment, subject to the provisions of this
 2-39 section.

2-40 (h) A contingent payor or its surety may not enforce a
 2-41 contingent payment clause if, under Section 53.026, Property Code,
 2-42 the contingent payee is considered to be in direct contractual
 2-43 relationship with the obligor.

2-44 (i) A contingent payment clause may not be used as a basis
 2-45 for invalidation of the enforceability or perfection of a
 2-46 mechanic's lien under Chapter 53, Property Code.

2-47 (j) A contingent payor or its surety may not enforce a
 2-48 contingent payment clause if the enforcement would be
 2-49 unconscionable. The party asserting that a contingent payment
 2-50 clause is unconscionable has the burden of proving that the clause
 2-51 is unconscionable.

2-52 (k) The enforcement of a contingent payment clause is not
 2-53 unconscionable if the contingent payor:

2-54 (1) proves that the contingent payor has exercised
 2-55 diligence in ascertaining and communicating in writing to the
 2-56 contingent payee, before the contract in which the contingent
 2-57 payment clause has been asserted becomes enforceable against the
 2-58 contingent payee, the financial viability of the primary obligor
 2-59 and the existence of adequate financial arrangements to pay for the
 2-60 improvements; and

2-61 (2) has done the following:

2-62 (A) made reasonable efforts to collect the amount
 2-63 owed to the contingent payor; or

2-64 (B) made or offered to make, at a reasonable
 2-65 time, an assignment by the contingent payor to the contingent payee
 2-66 of a cause of action against the obligor for the amounts owed to the
 2-67 contingent payee by the contingent payor and offered reasonable
 2-68 cooperation to the contingent payee's collection efforts, if the
 2-69 assigned cause of action is not subject to defenses caused by the

3-1 contingent payor's action or failure to act.

3-2 (l) A cause of action brought on an assignment made under
3-3 Subsection (k)(2)(B) is enforceable by a contingent payee against
3-4 an obligor or a primary obligor.

3-5 (m) A contingent payor is considered to have exercised
3-6 diligence for purposes of Subsection (k)(1) under a contract for a
3-7 private project governed by Chapter 53, Property Code, if the
3-8 contingent payee receives in writing from the contingent payor:

3-9 (1) the name, address, and business telephone number
3-10 of the primary obligor;

3-11 (2) a description, legally sufficient for
3-12 identification, of the property on which the improvements are being
3-13 constructed;

3-14 (3) the name and address of the surety on any payment
3-15 bond provided under Subchapter I, Chapter 53, Property Code, to
3-16 which any notice of claim should be sent;

3-17 (4) if a loan has been obtained for the construction of
3-18 improvements:

3-19 (A) a statement, furnished by the primary obligor
3-20 and supported by reasonable and credible evidence from all
3-21 applicable lenders, of the amount of the loan;

3-22 (B) a summary of the terms of the loan;

3-23 (C) a statement of whether there is foreseeable
3-24 default of the primary obligor; and

3-25 (D) the name, address, and business telephone
3-26 number of the borrowers and lenders; and

3-27 (5) a statement, furnished by the primary obligor and
3-28 supported by reasonable and credible evidence from all applicable
3-29 banks or other depository institutions, of the amount, source, and
3-30 location of funds available to pay the balance of the contract
3-31 amount if there is no loan or the loan is not sufficient to pay for
3-32 all of the construction of the improvements.

3-33 (n) A contingent payor is considered to have exercised
3-34 diligence for purposes of Subsection (k)(1) under a contract for a
3-35 public project governed by Chapter 2253, Government Code, if the
3-36 contingent payee receives in writing from the contingent payor:

3-37 (1) the name, address, and primary business telephone
3-38 number of the primary obligor;

3-39 (2) the name and address of the surety on the payment
3-40 bond provided to the primary obligor to which any notice of claim
3-41 should be sent; and

3-42 (3) a statement from the primary obligor that funds
3-43 are available and have been authorized for the full contract amount
3-44 for the construction of the improvements.

3-45 (o) A contingent payor is considered to have exercised
3-46 diligence for purposes of Subsection (k)(1) under a contract for a
3-47 public project governed by 40 U.S.C. Section 3131 if the contingent
3-48 payee receives in writing from the contingent payor:

3-49 (1) the name, address, and primary business telephone
3-50 number of the primary obligor;

3-51 (2) the name and address of the surety on the payment
3-52 bond provided to the primary obligor; and

3-53 (3) the name of the contracting officer, if known at
3-54 the time of the execution of the contract.

3-55 (p) A primary obligor shall furnish the information
3-56 described by Subsection (m) or (n), as applicable, to the
3-57 contingent payor not later than the 30th day after the date the
3-58 primary obligor receives a written request for the information. If
3-59 the primary obligor fails to provide the information under the
3-60 written request, the contingent payor, the contingent payee, and
3-61 their sureties are relieved of the obligation to initiate or
3-62 continue performance of the construction contracts of the
3-63 contingent payor and contingent payee.

3-64 (q) The assertion of a contingent payment clause is an
3-65 affirmative defense to a civil action for payment under a contract.

3-66 (r) This section does not affect a provision that affects
3-67 the timing of a payment in a contract for construction management or
3-68 for the construction of improvements to real property if the
3-69 payment is to be made within a reasonable period.

4-1 (s) A person may not waive this section by contract or other
4-2 means. A purported waiver of this section is void.

4-3 (t) An obligor or a primary obligor may not prohibit a
4-4 contingent payor from allocating risk by means of a contingent
4-5 payment clause.

4-6 (u) This section does not apply to a contract that is solely
4-7 for:

4-8 (1) design services;

4-9 (2) the construction or maintenance of a road,
4-10 highway, street, bridge, utility, water supply project, water
4-11 plant, wastewater plant, water and wastewater distribution or
4-12 conveyance facility, wharf, dock, airport runway or taxiway,
4-13 drainage project, or related type of project associated with civil
4-14 engineering construction; or

4-15 (3) improvements to or the construction of a structure
4-16 that is a:

4-17 (A) detached single-family residence;

4-18 (B) duplex;

4-19 (C) triplex; or

4-20 (D) quadruplex.

4-21 SECTION 2. Section 35.521, Business & Commerce Code, as
4-22 added by this Act, applies only to a contingent payment clause under
4-23 which payment is contingent on the receipt of payment under a
4-24 contract or other agreement entered into on or after September 1,
4-25 2007.

4-26 SECTION 3. This Act takes effect September 1, 2007.

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