

By: Madden

H.B. No. 3913

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 161 to read as follows:

CHAPTER 161. DISPUTE BOARDS

UNDER CERTAIN CONSTRUCTION CONTRACTS

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 161.001. DEFINITIONS. In this chapter:

(1) "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.

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

(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. 161.002. NONAPPLICABILITY TO CERTAIN RESIDENTIAL
8 CONSTRUCTION AND PUBLIC WORK CONTRACTS. This chapter does not
9 apply to:

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

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

14 Sec. 161.003. METHOD OF ADOPTION. A dispute arising under a
15 construction contract may be submitted to a dispute board in
16 accordance with this chapter if the contract includes language that
17 reflects the intent of the parties to use one of the processes
18 provided by this chapter. The parties may modify any provision of
19 this chapter other than Sections 161.053 and 161.054.

20 Sec. 161.004. USE OF CHAPTER IN PUBLIC CONSTRUCTION
21 CONTRACTS. (a) Each construction contract entered into by a
22 governmental entity that does not provide for submission of
23 disputes arising under the contract to a dispute board under this
24 chapter must contain a provision stating that the use of dispute
25 resolution under this chapter was actively considered. A
26 governmental entity is not required to use this chapter.

27 (b) A public work contract may not provide for disputes to

1 be submitted to a dispute adjudication board under Section 161.157
2 or a combined dispute board under Section 161.158.

3 [Sections 161.005-161.050 reserved for expansion]

4 SUBCHAPTER B. DISPUTE BOARDS

5 Sec. 161.051. COMPOSITION AND SELECTION OF BOARD. (a) A
6 dispute board consists of one, three, or a greater odd number of
7 persons selected in accordance with this section.

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

15 (c) On or before the 15th day after the date a construction
16 contract subject to this chapter is executed, each party to the
17 contract shall select one nominee qualified to serve as a board
18 member under this chapter and provide the name and qualifications
19 of the nominee to the other party for approval.

20 (d) A party may accept or reject the other party's
21 nomination on or before the seventh day after the date the party
22 receives notice of the nomination. If the nominee is not rejected
23 during that period, the nominee is considered accepted.

24 (e) Except as provided by Subsection (g), if a nominee is
25 rejected, the party who nominated the person shall nominate another
26 qualified person.

27 (f) Once two board members nominated by the parties are

1 accepted, those board members shall nominate a third qualified
2 person to be chairperson of the board. Each party may accept or
3 reject the nomination on or before the 15th day after the date the
4 party receives notice of the nomination. If the nominee for
5 chairperson is not rejected by one of the parties in the time
6 prescribed by this subsection, the nominee is considered accepted.
7 Except as provided by Subsection (g), if the nominee is rejected by
8 a party, the two approved board members shall make additional
9 nominations for chairperson until a nomination is accepted by the
10 parties.

11 (g) If a party does not nominate a board member in the time
12 prescribed by Subsection (c) or rejects two nominations for a board
13 member or three nominations for a chairperson, any party may apply
14 to the district court of the district in which the work under the
15 contract will be performed for the appointment by the court of a
16 qualified person as a board member or chairperson, as applicable.

17 Sec. 161.052. DISPUTE BOARD AGREEMENT. Not later than the
18 15th day after the date all parties have received notice of the
19 appointment of the chairperson, each party and each member of the
20 board shall execute and comply with the dispute board agreement.

21 Sec. 161.053. QUALIFICATIONS OF BOARD MEMBERS. (a) A board
22 member selected by a party to the construction contract must have:

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

26 (2) experience in:

27 (A) one or more of the general types of

1 construction involved in the contract;

2 (B) the interpretation of construction contract
3 documents; and

4 (C) the analysis and resolution of construction
5 issues.

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

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

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

10 (A) construction dispute resolution;

11 (B) adjudication;

12 (C) arbitration;

13 (D) service as a judge;

14 (E) service as an executive officer of a
15 contractor, design professional, or project owner;

16 (F) service as a faculty member in an institution
17 of higher education in architecture, engineering, or construction
18 science; or

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

20 (3) competence in the interpretation of construction
21 contract documents and the analysis and resolution of construction
22 claims.

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

24 (1) experience serving on a dispute board or as a
25 construction arbitrator, adjudicator, construction mediator,
26 judge, or construction manager-agent; or

27 (2) 40 hours of classroom training in the mechanisms

1 of dispute boards, construction adjudication, construction
2 arbitration, or construction mediation in courses conducted by an
3 alternative dispute resolution training organization accepted by
4 the parties or by the court that appoints the board member, as
5 applicable.

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

9 Sec. 161.054. CONFLICTS OF INTEREST; NEUTRALITY. (a) A
10 member of a dispute board may not have any current or prior
11 involvement in the contract that creates the board or a
12 construction project that is the subject of the contract that could
13 compromise the person's ability to review a dispute under the
14 contract impartially. The board member shall comply with the
15 American Bar Association Code of Ethics for Arbitrators in
16 Commercial Disputes standards regarding board member neutrality,
17 independence, and impartiality.

18 (b) Except for providing services as a dispute board member,
19 dispute resolution advisor, arbitrator, or mediator on a matter
20 involving the owner or contractor, a board member may not, at the
21 time of service on the board or during the two years before the
22 person begins serving on the board, without disclosure to, and
23 consent by, all parties, have:

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

27 (A) a party to the contract under which the board

1 is created;

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

4 (C) any subcontractor or subconsultant to the
5 contractor; or

6 (D) another contractor or construction manager
7 for the owner;

8 (2) a financial interest in the contract;

9 (3) direct involvement in the preparation of the
10 successful bid documents for the contract or a successful bid by any
11 bidder for the invitation to bid for the contract; or

12 (4) involvement in the management or administration of
13 the contract.

14 (c) Except for participation in the board's activities as
15 provided by the construction contract and the board's contract
16 entered into under Section 161.055, the owner or contractor may not
17 solicit advice from or consult with the board or individual board
18 members on matters related to the conduct of the work under the
19 construction contract or resolution of problems under the
20 construction contract that might compromise the board's integrity.

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

23 (e) A board member has a duty to the public and the parties
24 to be fair, impartial, independent, and neutral. Each board member
25 or potential board member shall disclose to the parties and the
26 other board members any business, professional, social, or
27 financial relationship that may give rise to an appearance of

1 impropriety or a suspicion of partiality. A board member has a
2 continuing duty to avoid conflicts of interest and shall promptly
3 disclose to the parties and the other board members any matter that
4 could reasonably give rise to a perception of partiality or the lack
5 of neutrality. A board member should refrain from acquiring or
6 entering into any interest or relationship that might reasonably
7 create the appearance that the person was influenced by the
8 anticipation or expectation of the interest or relationship.

9 (f) After an otherwise qualified board member or potential
10 board member discloses all matters that could reasonably give rise
11 to a perception of partiality or of possible conflict of interest,
12 the parties may waive objection to the matter disclosed and permit
13 the person to serve as a board member.

14 Sec. 161.055. CONTRACT WITH BOARD. (a) On or before the
15 15th day after the date the board chairperson is selected, the board
16 members and the parties to the construction contract shall execute
17 a standard three-party agreement in which the board members agree
18 to:

19 (1) assist the parties in preventing and resolving
20 disputes during the term of the construction contract;

21 (2) read and become familiar with all the contract
22 documents, including the specifications, plans, addenda, progress
23 schedule and updates, weekly progress reports, minutes of progress
24 meetings, change orders, and other documents relevant to the
25 performance of the contract and necessary to the board's work;

26 (3) visit the construction site as soon as practicable
27 after selection of the board;

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

5 (5) keep informed regarding the construction
6 activities and the work in progress.

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

11 (c) The board shall also agree to:

12 (1) consider, fairly and impartially, each dispute
13 referred to the board by a party to the construction contract; and

14 (2) provide written recommendations or decisions to
15 the owner and contractor based on:

16 (A) the relevant provisions of the construction
17 contract;

18 (B) any applicable law; and

19 (C) the facts and circumstances involved in the
20 dispute.

21 (d) The board's recommendations or decisions provided under
22 Subsection (c) shall express, clearly and completely, the logic and
23 reasoning leading the board to the recommendations or decisions in
24 a manner that enables the parties to fully understand and use the
25 recommendations or decisions to assist the negotiation of a
26 resolution of the dispute. The board's recommendations or decisions
27 may address issues of entitlement, quantum, or unjust enrichment.

1 [Sections 161.056-161.100 reserved for expansion]

2 SUBCHAPTER C. DUTIES OF PARTIES TO CONSTRUCTION CONTRACT

3 Sec. 161.101. OWNER DUTIES. The owner shall:

4 (1) provide each board member with a copy of all
5 contract documents, including the specifications, plans, addenda,
6 progress schedule and updates, weekly progress reports, minutes of
7 progress meetings, change orders, and any other documents relevant
8 to the performance of the contract and necessary to the board's
9 work; and

10 (2) provide the board with:

11 (A) conference facilities at or near the
12 construction site; and

13 (B) administrative and copying services.

14 Sec. 161.102. CONTRACTOR DUTIES. The contractor shall
15 provide each board member with relevant documents prepared by the
16 contractor, including progress schedules, to supplement the
17 documents provided by the owner.

18 [Sections 161.103-161.150 reserved for expansion]

19 SUBCHAPTER D. OPERATION OF BOARD

20 Sec. 161.151. BOARD ACTIVITY AND EXPENSES. (a) The board
21 shall be active and available throughout the term of the
22 construction contract. The cost of the board's activity must be
23 included as a capital expense of the project.

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

1 (c) The board shall begin operation on the written
2 authorization of the owner received after the board's contract
3 under Section 161.055 is executed and may end operation at the end
4 of the term of the construction contract after the final payment due
5 under the construction contract has been made, unless a party to the
6 contract requests that the board continue to operate.

7 Sec. 161.152. IMMUNITY. (a) Each board member, in the
8 performance of the member's duties on the board, acts in the
9 capacity of an independent agent intended to facilitate the
10 resolution of disputes and not as an employee of the owner or the
11 contractor.

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

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

25 Sec. 161.153. INFORMAL PROCEEDINGS AND RECOMMENDATIONS.

26 (a) The owner and contractor may agree, with respect to any issue,
27 claim, or dispute, to request that the board act in an advisory

1 capacity to assist in resolving the issue, claim, or dispute at an
2 informal hearing before the board.

3 (b) For the purposes of an informal proceeding under this
4 section, each party shall provide a written submission not longer
5 than two written pages to the board. To the extent possible, the
6 parties shall also provide to the board written questions for the
7 board agreed to by the parties.

8 (c) On submission of an issue, claim, or dispute to an
9 informal proceeding under this section, either party may request an
10 opportunity to give an oral presentation to the board, and the board
11 may request an oral presentation by the parties. An oral
12 presentation under this subsection must occur during a regularly
13 scheduled meeting of the board. Unless a time limit for oral
14 presentations is agreed to by the parties, the board shall
15 establish a time limit for oral presentations.

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

19 (e) The parties and the board are not bound by the advisory
20 recommendation, and the same matter may be heard again in a formal
21 hearing before the board.

22 (f) The parties shall agree that an advisory recommendation
23 is not admissible in any administrative, arbitral, or judicial
24 proceeding for any reason and may not offer or move for admission of
25 an advisory recommendation.

26 Sec. 161.154. FORMAL FINDINGS AND RECOMMENDATIONS. (a) On
27 the request of either party, the board shall conduct a formal

1 hearing in accordance with this section.

2 (b) The hearing shall be conducted:

3 (1) by the board chairperson;

4 (2) in accordance with any dispute board rules and
5 hearing procedures established by the board; and

6 (3) with all members of the board present and
7 participating.

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

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

12 (e) The board may schedule a continuation of the hearing
13 from time to time. The board may not accept any further submissions
14 or evidence from a party after the conclusion of the hearing unless
15 the submission or evidence is expressly requested by the board.

16 (f) After the hearing concludes, the board shall meet to
17 formulate its findings and recommendations for resolution of the
18 dispute. The board's deliberations shall be conducted in private
19 and are confidential.

20 (g) The board shall base its findings and recommendations on
21 the contract provisions and the facts and circumstances of the
22 dispute.

23 (h) The board shall make a concerted effort to reach a
24 unanimous decision but may issue its findings and recommendations
25 with the agreement of a majority of the members. The findings and
26 recommendations must be signed by all board members.

27 (i) A dissenting member shall clearly indicate the member's

1 dissent on the findings and recommendations and provide clearly
2 identified separate dissenting findings and recommendations. The
3 separate dissenting findings and recommendations must be included
4 as part of the board's findings and recommendations.

5 Sec. 161.155. TIME FOR ISSUING FORMAL FINDINGS AND
6 RECOMMENDATIONS. The board shall issue its findings and
7 recommendations to the owner and the contractor on or before the
8 21st day after the date the hearing concludes or as otherwise
9 determined by the board and agreed to by the parties.

10 Sec. 161.156. EFFECT OF FINDINGS AND RECOMMENDATIONS. (a)
11 Although the purpose of the board findings and recommendations is
12 to assist the parties in negotiating a resolution of the dispute,
13 the written findings and recommendations shall be admitted into
14 evidence in any subsequent judicial, arbitral, or administrative
15 proceeding, unless otherwise agreed by the parties.

16 (b) A board member or other participant in a board hearing
17 may not be required to testify regarding oral testimony or
18 presentations made at a board meeting or any hearing, conference,
19 or other proceeding of the board.

20 Sec. 161.157. OPERATION AS DISPUTE ADJUDICATION BOARD. (a)
21 A dispute adjudication board issues decisions.

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

24 (1) specifically states that the board is a dispute
25 adjudication board;

26 (2) adopts an International Chamber of Commerce
27 Dispute Adjudication Board Clause under which the parties to the

1 contract agree to the administration of the board by the
2 International Chamber of Commerce; or

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

6 (c) In making and issuing a decision, the board shall follow
7 the procedures in Section 161.154 for formal findings and
8 recommendations.

9 (d) After receiving the determination, the parties must
10 comply with the board's decision without delay, unless on or before
11 the 30th day after the date a party receives the decision, the party
12 notifies the board and the other party in writing of the reasons for
13 the party's dissatisfaction with the decision. If a notice of
14 dissatisfaction is not submitted during that time, the parties are
15 bound by the decision, waive any right of recourse they may have
16 against the decision, and consent to the summary enforcement of the
17 decision by a court as if the decision is a partial final
18 arbitration award.

19 (e) Unless otherwise agreed, if a party submits a written
20 notice of dissatisfaction that complies with Subsection (d), or if
21 the board does not issue the board's decision on or before the 30th
22 day after the date the hearing on the dispute concludes, the dispute
23 shall be finally settled by arbitration, if the parties agree, or by
24 a court. Until the dispute is finally settled, the parties are
25 bound to comply with the decision.

26 Sec. 161.158. OPERATION AS COMBINED DISPUTE BOARD. (a) A
27 combined dispute board issues a recommendation under Sections

1 161.154-161.156, unless, for a particular dispute:

2 (1) the parties jointly request a decision under
3 Section 161.157; and

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

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

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

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

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

16 (c) In making a recommendation or decision, the combined
17 dispute board shall follow the procedures in Section 161.154 for
18 making and issuing formal findings and recommendations.

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

22 (e) If a party requests a decision and one or more parties
23 objects to the request, the combined dispute board shall determine
24 whether the board will issue a recommendation or decision. In
25 making that determination, the board shall consider whether, due to
26 the urgency of the situation or other relevant considerations, a
27 decision would facilitate the performance of the contract or

1 prevent irreparable loss or damage to any party, whether a decision
2 would prevent disruption of the contract, whether a decision is
3 necessary to preserve evidence, and any other factors the board
4 considers relevant.

5 (f) A party referring a dispute to the board may request a
6 decision by the board only if the request is made in writing in the
7 notice to the other parties and the board referring the dispute.
8 Another party may request a decision by the board only if the
9 request is made in writing before or at the same time the party
10 submits a written response to the request for board action.

11 Sec. 161.159. DISCLOSURE OF RECORDS. The records of a
12 dispute board are not records of any government agency, and any
13 records, notes, or drafts taken or made by a board member are not
14 subject to disclosure under any freedom of information law.

15 SECTION 2. This Act takes effect September 1, 2009.