

By: Duncan

S.B. No. 361

A BILL TO BE ENTITLED

AN ACT

relating to indemnification provisions in construction contracts.

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

SECTION 1. Section 130.002(a), Civil Practice and Remedies Code, is amended to read as follows:

(a) A covenant or promise in, in connection with, or collateral to a construction contract is void and unenforceable if the covenant or promise provides for a person [~~contractor~~] who is to perform the work that is the subject of the construction contract to indemnify or hold harmless a registered architect, licensed engineer or an agent, servant, or employee of a registered architect or licensed engineer from liability for damage that:

(1) is caused by or results from:

(A) defects in plans, designs, or specifications prepared, approved, or used by the architect or engineer; or

(B) negligence of the architect or engineer in the rendition or conduct of professional duties called for or arising out of the construction contract and the plans, designs, or specifications that are a part of the construction contract; and

(2) arises from:

(A) personal injury or death;

(B) property injury; or

(C) any other expense that arises from personal injury, death, or property injury.

1 SECTION 2. The Civil Practice and Remedies Code is amended
2 by adding Title 10 to read as follows:

3 TITLE 10. ADDITIONAL MISCELLANEOUS PROVISIONS

4 CHAPTER 502. INDEMNITY PROVISIONS IN CONSTRUCTION CONTRACTS

5 Sec. 502.001. DEFINITIONS. In this chapter:

6 (1) "Claim" includes a loss or liability for a claim,
7 damage, expense, or governmentally imposed fine, penalty,
8 administrative action, or other action.

9 (2) "Construction contract" means a contract,
10 subcontract, or agreement, or a performance bond assuring the
11 performance of any of the foregoing, entered into or made by an
12 owner, architect, engineer, contractor, construction manager,
13 subcontractor, supplier, or material or equipment lessor for the
14 design, construction, alteration, renovation, remodeling, repair,
15 or maintenance of, or for the furnishing of material or equipment
16 for, a building, structure, appurtenance, or other improvement to
17 or on public or private real property, including moving,
18 demolition, and excavation connected with the real property. The
19 term includes an agreement to which an architect, engineer, or
20 contractor and an owner's lender are parties regarding an
21 assignment of the construction contract or other modifications
22 thereto.

23 (3) "Indemnitor" means a party to a construction
24 contract that is required to provide indemnification or additional
25 insured status to another party to the construction contract or to a
26 third party.

27 Sec. 502.002. PERMISSIBLE CONTRACT PROVISION. Parties may

1 agree in a construction contract upon an indemnity or additional
2 insured provision that is not prohibited by this chapter.

3 Sec. 502.003. AGREEMENT VOID AND UNENFORCEABLE. Except as
4 provided by Section 502.004, a provision in a construction
5 contract, or in an agreement collateral to or affecting a
6 construction contract, is void and unenforceable as against public
7 policy to the extent that it requires an indemnitor to indemnify,
8 hold harmless, or defend another party to the construction contract
9 or a third party against a claim caused by the negligence or fault,
10 the breach or violation of a statute, ordinance, governmental
11 regulation, standard, or rule, or the breach of contract of the
12 indemnatee, its agent or employee, or any third party under the
13 control or supervision of the indemnatee, other than the indemnitor
14 or its agent, employee, or subcontractor of any tier.

15 Sec. 502.004. EXCEPTION FOR EMPLOYEE CLAIM. Section
16 502.003 does not apply to a provision in a construction contract
17 that requires a person to indemnify, hold harmless, or defend
18 another party to the construction contract or a third party against
19 a claim for the bodily injury or death of an employee of the
20 indemnitor, its agent, or its subcontractor of any tier.

21 Sec. 502.005. UNENFORCEABLE ADDITIONAL INSURANCE
22 PROVISION. A provision in a construction contract that requires
23 the purchase of additional insured coverage, or any coverage
24 endorsement or provision within an insurance policy providing
25 additional insured coverage, is void and unenforceable to the
26 extent that it requires or provides coverage the scope of which is
27 prohibited under this chapter for an agreement to indemnify, hold

1 harmless, or defend.

2 Sec. 502.006. EXCLUSIONS. This chapter does not affect:

3 (1) an insurance policy, including a policy issued
4 under an owner-controlled or owner-sponsored consolidated
5 insurance program or a contractor-controlled or
6 contractor-sponsored consolidated insurance program, except as
7 provided by Section 502.005;

8 (2) a cause of action for breach of contract or
9 warranty that exists independently of an indemnity obligation;

10 (3) a provision in a construction contract that
11 requires the indemnitor to purchase or maintain insurance covering
12 the acts or omissions of the indemnitor;

13 (4) indemnity provisions contained in loan and
14 financing documents, other than construction contracts to which the
15 contractor and owner's lender are parties as provided under Section
16 502.001(2);

17 (5) general agreements of indemnity required by
18 sureties as a condition of execution of bonds for construction
19 contracts;

20 (6) the benefits and protections under the workers'
21 compensation laws of this state;

22 (7) the benefits or protections under the governmental
23 immunity laws of this state;

24 (8) agreements subject to Chapter 127; or

25 (9) a license agreement between a railroad company and
26 a person that permits the person to enter the railroad company's
27 property as an accommodation to the person for work under a

1 construction contract that does not primarily benefit the railroad
2 company.

3 Sec. 502.007. OTHER INSURANCE. This chapter does not
4 otherwise affect a construction contract provision that requires a
5 party to the contract to purchase:

6 (1) owners and contractors protective liability
7 insurance;

8 (2) railroad protective liability insurance;

9 (3) contractors all-risk insurance; or

10 (4) builders all-risk or named perils property
11 insurance.

12 Sec. 502.008. PROHIBITION OF WAIVER. The provisions of
13 this chapter may not be waived by contract or otherwise. Any
14 purported waiver is void and unenforceable.

15 Sec. 502.009. APPLICABILITY OF TEXAS LAW. Under this
16 chapter, the law of this state, exclusive of this state's
17 choice-of-law rules that would apply the laws of another
18 jurisdiction, shall apply to every construction contract agreement
19 affecting improvements to real property within this state.

20 SECTION 3. Section 2252.902, Government Code, is repealed.

21 SECTION 4. The changes in law made by this Act apply only to
22 an original construction contract with an owner of an improvement
23 or contemplated improvement that is entered into on or after the
24 effective date of this Act. If an original construction contract
25 with an owner of an improvement or contemplated improvement is
26 entered into on or after the effective date of this Act, the changes
27 in law made by this Act apply to a related subcontract, purchase

1 order contract, personal property lease agreement, and insurance
2 policy. If an original construction contract with an owner of an
3 improvement or contemplated improvement is entered into before the
4 effective date of this Act, that original construction contract and
5 a related subcontract, purchase order contract, personal property
6 lease agreement, and insurance policy are governed by the law in
7 effect immediately before the effective date of this Act, and that
8 law is continued in effect for that purpose.

9 SECTION 5. This Act takes effect September 1, 2011.