

BILL ANALYSIS

C.S.H.B. 2265
By: Leach
State Affairs
Committee Report (Substituted)

BACKGROUND AND PURPOSE

For governmental construction projects, contractual clauses dictating which party is responsible for delays are often nonnegotiable, meaning contractors must accept these clauses as is. Sometimes governmental entities—who often enjoy sovereign immunity protections and benefit from bureaucratic hurdles in the claims process—are shifting the risk, costs, and consequences of delays solely caused by them to private sector contractors who are accordingly not responsible. In other words, the governmental entity can unilaterally delay the project and the contractor must suffer the financial consequences of that delay without reimbursement or fair compensation. C.S.H.B. 2265 seeks to prohibit a governmental entity from utilizing contractual clauses in construction contracts to shift the consequences for delays it solely caused onto private sector contractors. This would help restore fairness and mutual enforceability of contractual clauses on government construction projects.

CRIMINAL JUSTICE IMPACT

It is the committee's opinion that this bill does not expressly create a criminal offense, increase the punishment for an existing criminal offense or category of offenses, or change the eligibility of a person for community supervision, parole, or mandatory supervision.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

ANALYSIS

C.S.H.B. 2265 amends the Government Code to prohibit a provision of a construction contract between a governmental entity and a contractor that is entered into on or after the bill's effective date from prohibiting the award of compensatory damages to the contractor for a delay to the extent that the delay is caused solely by the governmental entity or by a party for which the governmental entity is responsible. The bill establishes that this prohibition does not restrict, limit, or prohibit the inclusion of a contract provision prescribing requirements or conditions that must be met by a contractor to seek recovery of compensatory damages, including requirements or conditions relating to notice, justification, or a duty to mitigate or for demonstrating or proving the actual cost or schedule impact of a delay.

C.S.H.B. 2265 does not apply to a construction contract for services related to recovery or relief from a natural disaster involving the repair or renovation of a residence or for the construction or repair of a critical infrastructure facility, as defined by Business & Commerce Code provisions regarding responsibility for defects in plans and specifications, that is owned or operated by the governmental entity or any building, structure, improvement, appurtenance, or other facility owned by the governmental entity that is necessary to the operation of and directly related to the critical infrastructure facility.

C.S.H.B. 2265 defines the following terms:

- "compensatory damages" means the costs actually incurred by a contractor as a result of delay in the schedule that could not be reasonably mitigated by the contractor, excluding the following:
 - special damages;
 - consequential damages;
 - home office overhead, except overhead costs for labor as defined in the applicable construction contract;
 - profit or markup on indirect costs; or
 - the costs of performing additional work that are separately agreed to by the governmental entity and contractor in a construction contract;
- "contractor" means a person engaged in the business of developing, constructing, fabricating, repairing, altering, or remodeling improvements to real property; and
- "governmental entity" means any of the following:
 - the state;
 - a municipality, county, public school district, or special-purpose district or authority;
 - a district, county, or justice of the peace court;
 - an executive branch agency, including a public institution of higher education;
 - the legislature or a legislative agency; and
 - a judicial agency having statewide jurisdiction.

C.S.H.B. 2265 prohibits the bill's provisions from being waived and voids any purported waiver.

EFFECTIVE DATE

September 1, 2023.

COMPARISON OF INTRODUCED AND SUBSTITUTE

While C.S.H.B. 2265 may differ from the introduced in minor or nonsubstantive ways, the following summarizes the substantial differences between the introduced and committee substitute versions of the bill.

The substitute revises the provision in the introduced prohibiting a construction contract between a governmental entity and a contractor from prohibiting or limiting the awarding of compensatory damages for a delay caused solely by the governmental entity as follows:

- includes a specification absent from the introduced that the prohibition applies with respect to any provision of the contract;
- omits the introduced version's prohibition against the contract limiting the awarding of compensatory damages while retaining only the prohibition against the contract prohibiting the awarding of those damages outright;
- expands delays for which awarding compensatory damages may not be prohibited to include a delay caused by a party for which the governmental entity is responsible, whereas the introduced included only a delay caused solely by the governmental entity itself; and
- includes a specification absent from the introduced that the prohibition applies only to the extent that the delay is caused solely by the governmental entity or by such a party.

The substitute includes provisions that were not in the introduced establishing that the bill's prohibition does not restrict, limit, or prohibit the inclusion of a contract provision in a construction contract prescribing requirements or conditions that must be met by a contractor to seek recovery of compensatory damages.

The substitute includes provisions that were not in the introduced exempting certain construction contracts from the bill's provisions.

The substitute specifies what constitutes compensatory damages for purposes of the bill's provisions, whereas the introduced did not.