

## **BILL ANALYSIS**

C.S.H.B. 2657  
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Business & Industry  
Committee Report (Substituted)

### **BACKGROUND AND PURPOSE**

Construction contracts often incorporate other documents by reference. However, this is sometimes done without providing a copy of the incorporated documents with the contract. On a large commercial project, it may not be uncommon for there to be third-, fourth-, or even fifth-tiered subcontractors that are all bound by contractual provisions that have flowed down from the owner and general contractor. Therefore, contractors often do not know what they are being asked to agree to because an owner or other contractor fails, or refuses, to furnish the documents incorporated into their subcontract. To be fully informed, a contractor or subcontractor must be provided copies of each document that is incorporated by reference into their contract. C.S.H.B. 2657 seeks to address this issue by making a provision in a construction contract that incorporates terms and conditions of another document by reference voidable by the contractor unless the owner provides a copy of the incorporated document as requested by a certain deadline.

### **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. 2657 amends the Business & Commerce Code to establish that a provision in certain construction contracts that incorporates another document that contains terms and conditions, by reference or otherwise, is voidable if on written request the applicable contracting party does not provide a copy of the incorporated document to the other party on or before the 10th day before the date the contract is executed, for the following contracts:

- a construction contract between an original contractor and owner, with respect to the owner providing the copy of the document to the original contractor;
- a construction contract between a subcontractor and an original contractor, with respect to the original contractor providing the document to the subcontractor; and
- a construction contract between a subcontractor and another subcontractor who is to furnish labor or materials to fulfill an obligation to that subcontractor, with respect to the subcontractor to whom the other subcontractor is obligated providing the document.

These provisions expressly do not preclude an original contractor, owner, or subcontractor, as applicable, from redacting information from a document to be incorporated into the contract, provided that any redacted information may not be incorporated into the contract by reference or otherwise. An original contractor, owner, or subcontractor may request the contractor, subcontractor, or other subcontractor, as applicable, to sign, date, and submit to the applicable

other party a written statement provided separately from the construction contract acknowledging receipt of the copy of the incorporated document.

C.S.H.B. 2657 authorizes an owner, original contractor, or subcontractor to provide a copy of an incorporated document to the other party to the construction contract by providing a link to the document on a website or file hosting service that may be accessed by the other party free of charge for the duration of the term of the contract. The bill establishes that the version of the incorporated document that is accessible on the date the party receives the information necessary to access the document is the version of the document that is incorporated into the contract.

C.S.H.B. 2657 establishes that a provision in a construction contract made void by a party under the bill's provisions is void only to the extent of the provision's applicability to the incorporated document or a portion of the incorporated document that was not provided to the party. The bill's provisions do not apply to the incorporation of a publicly available document.

C.S.H.B. 2657 prohibits a person from waiving state law provisions applicable to certain construction contracts, including the bill's provisions, by contract or other means and makes void as against public policy a purported waiver of such state law provisions. The bill defines the following terms:

- "copy" as an accurate reproduction of an original document reproduced in paper form or in an electronic format that a person can access, download, save, and print for the person's own records;
- "original contractor" as a person contracting with an owner directly or through the owner's agent;
- "owner" as a person who owns any interest in real property or an authorized agent, trustee, or receiver of the person;
- "subcontractor" as a person who furnishes labor or materials to fulfill an obligation to an original contractor or to a subcontractor of any tier to perform all or part of the work required by an original contract; and
- "original contract" as an agreement to which an owner is a party either directly or by implication of law.

C.S.H.B. 2657 applies only to a contract that is entered into or renewed on or after the bill's effective date.

### **EFFECTIVE DATE**

September 1, 2023.

### **COMPARISON OF INTRODUCED AND SUBSTITUTE**

While C.S.H.B. 2657 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.

Both the substitute and introduced establish that a provision in a construction contract by a party made void under the bill's provisions is void only to the extent of the provision's applicability to the incorporated document that was not provided to the party. However, the substitute further specifies that such a provision made void is void also to the extent of the provision's applicability to a portion of an incorporated document that was not provided to the party.

While both the substitute and introduced make void a purported waiver of state law provisions applicable to certain construction contracts, the substitute specifies that the waiver is void as against public policy.