

NEW LAWS AFFECTING THE CONSTRUCTION INDUSTRY

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NEW LAWS AFFECTING THE CONSTRUCTION INDUSTRY

By: Randall K. Lindley and Amy R. Bolline

Texas Governor Rick Perry recently signed five new laws that will affect the business operations of contractors and suppliers in the construction industry. Each of these laws addresses a specific problem in the industry that was identified by the Texas Legislature. The new laws are aimed at solving these problems.

1. NEW STATUTORY FORMS FOR THE WAIVER AND RELEASE OF LIEN OR PAYMENT BOND CLAIMS

A. THE PROBLEM: Inconsistent and inappropriate release language found in Bills Paid Affidavits

As money flows down the construction chain, contractors routinely require subcontractors to sign a Bill Paid Affidavit stating that the subcontractor has paid each of their suppliers in full prior to receiving payment from the contractor. These affidavits typically include a waiver or release of the subcontractor's lien rights and payment bond rights.

The Texas Legislature determined that the forms utilized in the industry are overbroad and go beyond waiving lien rights, such as waiving personal injury claims. As a result, many subcontractors engage attorneys to review waiver or release provisions to ensure the waivers and releases are not waiving additional rights. This process of engaging attorneys to review standard waivers and releases was driving up the cost of construction for all parties involved.

B. THE SOLUTION: A new law that creates four new waiver and release forms.

Governor Perry signed a new law that creates statutorily approved forms for waivers and releases of lien rights and payment bond claims. Two of the forms relate to progress payments and two of the forms relate to final payments. Specifically, the new law creates four statutory forms as follows:

- (1) Conditional Waiver and Release on Progress Payment
- (2) Unconditional Waiver and Release on Progress Payment
- (3) Conditional Waiver and Release on Final Judgment
- (4) Unconditional Waiver and Release on Final Judgment

A waiver and release that does not comply with new Subchapter L of Chapter 53 of the Texas Property Code is unenforceable. This law takes effect on September 1, 2011, and applies only to contracts that are signed on or after this date.

After September 1, 2011, a waiver and release releases the owner, the owner's property, the contractor, and the surety on a payment bond from claims and liens only if:

- (1) the waiver and release substantially comply with one of the forms prescribed by Section 53.284 of the Texas Property Code;
- (2) the waiver and release is signed by the claimant or the claimant's authorized agent and notarized; and
- (3) in the case of a conditional release, evidence of payment to the claimant exists.

TEX. PROP. CODE § 53.281.

Additionally, a statement purporting to waive or release, or otherwise adversely affect a lien or payment bond claim, is not enforceable unless:

- (1) the statement of waiver or release is in writing and substantially complies with one of the new forms adopted by the Texas Legislature;
- (2) the claimant has actually received payment in good and sufficient funds in full for the lien or payment bond claim; or
- (3) the statement of waiver or release is:
 - a. in a written original contract or subcontract for the construction, remodel, or repair of a single-family house, townhouse, or duplex or for land development related to a single-family house, townhouse, or duplex; and
 - b. made before labor or materials are provided under the original contract or subcontract.

TEX. PROP. CODE § 53.281(b). Subsection (3) above provides that a lien waiver or release in a residential construction contract remains enforceable, despite the new law. *Id.* § 53.281(c). Subsection (3) above does not apply to a person who only supplies material, and not labor. *Id.*

With respect to a residential construction contract, if a subcontractor files a lien affidavit in the face of lien waiver in the contract, such lien does not violate the fraudulent lien statute (Section 12.002) unless:

- (1) An owner or original contractor sends a written explanation of the basis for nonpayment, evidence of the contractual waiver of lien rights, and a notice of request for release of the lien to the claimant at the claimant's address stated in the lien affidavit; and
- (2) The lien claimant does not release the filed lien affidavit on or before the 14th day after the date the owner or the original contractor sends the items required by Subdivision (1).

TEX. PROP. CODE § 53.282.

STATUTORY FORM #1: Conditional Waiver and Release on Progress Payment.

This form is used if a claimant or a potential claimant is required to execute a waiver and release in exchange for, or to induce the payment of, a progress payment. This form makes the receipt of payment a condition precedent to the enforceability of the waiver and release.

CONDITIONAL WAIVER AND RELEASE ON PROGRESS PAYMENT

Project _____

Job No. _____

On receipt by the signer of this document of a check from _____
(maker of check) in the sum of \$_____ payable to _____ (payee
or payees of check) and when the check has been properly endorsed and has been
paid by the bank on which it is drawn, this document becomes effective to release
any mechanic's lien right, any right arising from a payment bond that complies with
a state or federal statute, any common law payment bond right, any claim for
payment, and any rights under any similar ordinance, rule, or statute related to
claim or payment rights for persons in the signer's position that the signer has on
the property of _____ (owner) located at _____
(location) to the following extent: _____ (job description).

This release covers a progress payment for all labor, services, equipment, or
materials furnished to the property or to _____ (person with whom
signer contracted) as indicated in the attached statement(s) or progress payment
request(s), except for unpaid retention, pending modifications and changes, or other
items furnished.

Before any recipient of this document relies on this document, the recipient
should verify evidence of payment to the signer.

The signer warrants that the signer has already paid or will use the funds received from this progress payment to promptly pay in full all of the signer's laborers, subcontractors, materialmen, and suppliers for all work, materials, equipment, or services provided for or to the above referenced project in regard to the attached statement(s) or progress payment request(s).

Date _____

_____ (Company name)

By _____ (Signature)

_____ (Title)

SUBSCRIBED AND SWORN TO BEFORE ME this the ___ day of _____, 2011.

NOTARY PUBLIC, in and for the
State of Texas

My Commission Expires:_____

STATUTORY FORM #2: Unconditional Waiver and Release on Progress Payment.

This form is used if a progress payment has already been made. A person may not require a claimant or a potential lien claimant to execute an unconditional release for a progress or final payment unless the claimant or potential claimant has received payment in that amount in good or sufficient funds. This waiver and release must contain a bold-face notice at the top that is as large as the largest type used in the document that payment has been made, but no smaller than 10-point type.

NOTICE:

This document waives rights unconditionally and states that you have been paid for giving up those rights. It is prohibited for a person to require you to sign this document if you have not been paid the payment amount set forth below. If you have not been paid, use a conditional release form.

UNCONDITIONAL WAIVER AND RELEASE ON PROGRESS PAYMENT

Project _____

Job No. _____

The signer of this document has been paid and has received a progress payment in the sum of \$_____ for all labor, services, equipment, or materials furnished to the property or to _____ (person with whom signer contracted) on the property of _____ (owner) located at _____ (location) to the following extent: _____

(job description). The signer therefore waives and releases any mechanic's lien right, any right arising from a payment bond that complies with a state or federal statute, any common law payment bond right, any claim for payment, and any rights under any similar ordinance, rule, or statute related to claim or payment rights for persons in the signer's position that the signer has on the above referenced project to the following extent:

This release covers a progress payment for all labor, services, equipment, or materials furnished to the property or to _____ (person with whom signer contracted) as indicated in the attached statement(s) or progress payment

request(s), except for unpaid retention, pending modifications and changes, or other items furnished.

The signer warrants that the signer has already paid or will use the funds received from this progress payment to promptly pay in full all of the signer's laborers, subcontractors, materialmen, and suppliers for all work, materials, equipment, or services provided for or to the above referenced project in regard to the attached statement(s) or progress payment request(s).

Date _____

_____ (Company name)

By _____ (Signature)

_____ (Title)

SUBSCRIBED AND SWORN TO BEFORE ME this the ___ day of _____, 2011.

NOTARY PUBLIC, in and for the
State of Texas

My Commission Expires:_____

STATUTORY FORM #3: Conditional Waiver and Release on Final Payment.

This form is used if a claimant or potential claimant is required to execute a waiver and release in exchange for, or to induce, final payment.

CONDITIONAL WAIVER AND RELEASE ON FINAL PAYMENT

Project _____

Job No. _____

On receipt by the signer of this document of a check from _____
(maker of check) in the sum of \$_____ payable to _____
(payee or payees of check) and when the check has been properly endorsed and has
been paid by the bank on which it is drawn, this document becomes effective to
release any mechanic's lien right, any right arising from a payment bond that
complies with a state or federal statute, any common law payment bond right, any
claim for payment, and any rights under any similar ordinance, rule, or statute
related to claim or payment rights for persons in the signer's position that the
signer has on the property of _____ (owner) located at
_____ (location) to the following extent: _____
(job description).

This release covers the final payment to the signer for all labor, services,
equipment, or materials furnished to the property or to _____ (person
with whom signer contracted).

Before any recipient of this document relies on this document, the recipient
should verify evidence of payment to the signer.

The signer warrants that the signer has already paid or will use the funds received from this final payment to promptly pay in full all of the signer's laborers, subcontractors, materialmen, and suppliers for all work, materials, equipment, or services provided for or to the above referenced project up to the date of this waiver and release.

Date _____

_____ (Company name)

By _____ (Signature)

_____ (Title)

SUBSCRIBED AND SWORN TO BEFORE ME this the ___ day of _____, 2011.

NOTARY PUBLIC, in and for the
State of Texas

My Commission Expires:_____

STATUTORY FORM #4: Unconditional Waiver and Release on Final Payment

This form is used if final payment has already been made. It must contain a bold-face notice at the top of the waiver and release that is as large as the largest type used in the document, but no smaller than 10-point type.

NOTICE:

This document waives rights unconditionally and states that you have been paid for giving up those rights. It is prohibited for a person to require you to sign this document if you have not been paid the payment amount set forth below. If you have not been paid, use a conditional release form.

UNCONDITIONAL WAIVER AND RELEASE ON FINAL PAYMENT

Project _____

Job No. _____

The signer of this document has been paid in full for all labor, services, equipment, or materials furnished to the property or to _____ (person with whom signer contracted) on the property of _____ (owner) located at _____ (location) to the following extent: _____ (job description). The signer therefore waives and releases any mechanic's lien right, any right arising from a payment bond that complies with a state or federal statute, any common law payment bond right, any claim for payment, and any rights under any similar ordinance, rule, or statute related to claim or payment rights for persons in the signer's position.

The signer warrants that the signer has already paid or will use the funds received from this final payment to promptly pay in full all of the signer's laborers, subcontractors, materialmen, and suppliers for all work, materials, equipment, or

services provided for or to the above referenced project up to the date of this waiver and release.

Date _____

_____ (Company name)

By _____ (Signature)

_____ (Title)

SUBSCRIBED AND SWORN TO BEFORE ME this the ___ day of _____, 2011.

NOTARY PUBLIC, in and for the
State of Texas

My Commission Expires: _____

C. ATTEMPTED COMPLIANCE PROVISION

Because this new law substantially changes current practices related to waivers and releases, the Texas Legislature adopted Section 53.285. This section provides that a waiver and release will be construed to comply with Subchapter L if the waiver and release was furnished in an attempt to comply with Subchapter L, or evidenced, by its terms, an intent to comply with Subchapter L. TEX. PROP. CODE § 53.285. Additionally, any attempt to expand or restrict the rights or liabilities provided under Subchapter L in the waiver and release will be disregarded and the provisions of Subchapter L will be read into the waiver and release instead.

This attempted compliance provision is effective until August 31, 2012. After August 31, 2012, if a waiver and release does not substantially comply with Subchapter L, it is unenforceable.

D. CERTAIN AGREEMENTS EXEMPT

Subchapter L does not apply to a written agreement to subordinate, release, waive, or satisfy all or part of a lien or bond claim in:

- (1) an accord and satisfaction of an identified dispute;
- (2) an agreement concerning an action pending in any court or arbitration proceeding; or
- (3) an agreement that is executed after an affidavit claiming the lien has been filed or the bond claim has been made.

TEX. PROP. CODE § 53.287.

2. RETAINAGE DEADLINES ARE REVISED

- A. THE PROBLEM: Contractors and Suppliers must notify owners about a retainage clause two and a half months after their work begins. This notice caused

confusion for the owner and unnecessary calls to the general contractor. Additionally, Contractors and Suppliers were routinely failing to assert claims on retainage near the end of the project because they missed the preliminary notice deadline (15th day of 2nd month after first delivery or performance).

B. THE SOLUTION: The deadlines for retainage notices and affidavits have been extended.

C. STATUTORY RETAINAGE: THE PURPOSE OF THE LAW AND REVISIONS

According to Chapter 53, subsection E of the Texas Property Code, the owner is required to withhold ten percent (10%) of the original contract price as “statutory retainage” for thirty (30) days after the project has been completed. TEX. PROP. CODE ANN. § 53.101(a) (Vernon 2007). The retained funds are held by the owner to ensure that subcontractors and suppliers are paid. Specifically, the Property Code states that “[d]uring the progress of work under an original contract for which a mechanic’s lien may be claimed and for 30 days after the work is completed, the owner shall retain:

- (1) 10 percent of the contract price of the work to the owner; or
- (2) 10 percent of the value of the work . . . if there is no contract price”

TEX. PROP. CODE ANN. § 53.101(a). This duty to retain is imposed on the owner with or without notice of a claim, and if the owner fails to retain 10 percent of the contract price, claimants have a lien against the owner’s property to the extent of the statutory retainage amount. TEX. PROP. CODE ANN. § 53.105(a).

Statutory retainage is intended to protect all potential claimants, but especially works to protect contractors or suppliers that provide labor or supplies toward the end of a project. Fund trapping is available for claimants to recover more than 10 percent of the contract price when proper notice is given. However, when the project is almost completed the claimant may not have many contract funds to trap by their notice letter since the owner has likely already paid most of the contract price by that time.

Generally, in order to have a claim against statutory retainage, the claimant must send all notices required by Chapter 53 and file a lien affidavit “not later than the 30th day after the earliest of the date: (A) the work is complete; (B) the original contract is terminated; or (C) the original contractor abandons performance under the original contract.” TEX. PROP. CODE ANN. § 53.103. The 2011 Texas Legislature changed the deadline for filing lien affidavits on statutory retainage in some instances, as well as contractual retainage. These changes are explained below.

Texas Property Code § 53.106 provides a method for subcontractors and suppliers to receive notification if the original contract is completed. Section 53.106 allows the owner to file an affidavit of completion with the county clerk of the county in which the property is located. The affidavit of completion must contain the following information:

- (1) the name and address of the owner;
- (2) the name and address of the original contractor;
- (3) a description, legally sufficient for identification, of the real property on which the improvements are located;

- (4) a general description of the improvements furnished under the original contract;
- (5) a statement that the improvements under the original contract have been completed and the date of completion; and
- (6) a conspicuous statement that a claimant may not have a lien on the retained funds unless the claimant files an affidavit claiming a lien not later than the 40th day after the date of the work under the original contract is completed.

TEX. PROP. CODE ANN. § 53.107. Prior to 2011, Section 53.106(b)(6) provided that the lien must be filed not later than the 30th day after the date of completion. Now, if an owner files an Affidavit of Completion, the lien must be filed not later than the 40th day after the date of completion.

Additionally, Texas Property Code § 53.107 provides a method for subcontractors and suppliers to receive notification if the original contract is terminated or abandoned. Section 53.107 requires the owner to provide notice to all subcontractors who have given notice to the owner of an unpaid claim if the original contract is terminated or abandoned after the date the subcontractor's notice is given. A subcontractor can also request, at any time, notice from the owner of termination or abandonment, by sending a request for notice by certified or registered mail to the owner. *Id.*

The owner's notice of termination or abandonment must be sent to each subcontractor that falls into these categories and must contain the following information:

- (1) the name and address of the owner;
- (2) the name and address of the original contractor;

- (3) a description, legally sufficient for identification, of the real property on which the improvements are located;
- (4) a general description of the improvements agreed to be furnished under the original contract;
- (5) a statement that the original contract has been terminated or that performance under the contract has been abandoned;
- (6) the date of the termination or abandonment; and
- (7) a conspicuous statement that a claimant may not have a lien on the retained funds unless the claimant files an affidavit claiming a lien not later than the 40th day after the date of the termination or abandonment.

TEX. PROP. CODE ANN. § 53.107. Prior to 2011, Section 53.107(b)(7) provided that the lien must be filed not later than the 30th day after the date of termination or abandonment. Now, if an owner provides notice of termination or abandonment, the lien must be filed not later than the 40th day after the date of termination or abandonment.

If the owner sends notice in compliance with this section on or before the 10th day after the original contract is terminated or abandoned, it is prima facie evidence of the date the original contract was terminated or abandoned for purposes of filing lien affidavits. TEX. PROP. CODE ANN. § 53.107. If the owner fails to send notice in compliance with this section, however, a subcontractor can perfect a claim for statutory retainage by following the normal notice and lien filing requirements under Chapter 53. *Id.*

D. CONTRACTUAL RETAINAGE: THE REVISED DEADLINES

A subcontractor may also have a retainage agreement as part of its contract with either the original contractor or another subcontractor. Any construction

contract, subcontract or purchase order which contains a payment term that authorizes less than payment in full by the end of the next month is a contractual retainage agreement. TEX. PROP. CODE ANN. § 53.001(11). For example, the contract may extend payment terms to allow the customer 45 or 60 days to pay an invoice, or include a “pay when paid,” or “pay if paid” clause. Another common type of contractual retainage provision will allow the contractor to withhold a certain percentage of the amount due each month until the end of the project.

The 2011 Legislature amended Section 53.057 to alleviate problems associated with asserting a claim on retainage prior to the end of a project. Previously, the Property Code required a claimant to provide to the owner or reputed owner “notice of the retainage agreement not later than the 15th day of the second month following the delivery of materials or the performance of labor by the claimant that first occurs after the claimant has agreed to the contractual retainage.” TEX. PROP. CODE ANN. § 53.057(b) (Vernon 2007). The amendments allow subcontractors to claim a mechanic’s lien on retainage for a reasonable period of time after completion, termination, or abandonment of a project. The claimant must now give the owner notice of contractual retainage not later than the earlier of:

- (1) the 30th day after the date the claimant’s agreement providing for retainage is completed, terminated, or abandoned; or
- (2) the 30th day after the date the original contract is terminated or abandoned.

TEX. PROP. CODE § 53.057(b). Additionally, if the agreement for contractual retainage is with a subcontractor, the claimant must also give the notice of contractual retainage to the original contractor within the period described above. *Id.* This notice must “generally state the existence of a requirement for retainage and contain the name and address of the claimant, and if the agreement is with a subcontractor, the name and address of the subcontractor.” TEX. PROP. CODE ANN. § 53.057(c). Notice of the contractual retainage agreement must be sent to the last known business or residence address of the owner or reputed owner and to the original contractor, if applicable. TEX. PROP. CODE ANN. § 53.057(d). Previous law required that this notice be sent by registered or certified mail. This requirement was removed in the 2011 legislative session.

Previously, a subcontractor or supplier claiming a lien on contractual funds was required to file their affidavit not later than 30 days after the earlier of the date the work is completed, the original contract is terminated, or the original contractor abandons performance under the original contract. Section 53.057 now provides new and different deadlines for filing an affidavit on contractually retained funds. If a claimant properly sent its notice of contractual retainage, then the claimant has until the 15th day of the 4th month after labor was performed or material furnished under its contract to file its lien affidavit on contractually retained funds. This period, however, may be cut short as follows:

- (1) if an owner files an affidavit of completion for the original contract and the owner sent a copy of the affidavit of completion to the claimant within the time and manner described above,

the claimant must file its lien affidavit within 40 days after the date of completion stated in the affidavit;

- (2) if an owner sends notice related to termination or abandonment of the original contract to the claimant within the time and in the manner described above, the claimant must file its lien affidavit within 40 days after the date of termination or abandonment stated in the notice; and
- (3) if an owner sends a written notice of demand for the claimant to file its lien affidavit, the claimant must file its lien affidavit within 30 days after the owner sent the notice to the claimant.

TEX. PROP. CODE § 53.057. The claimant must also give the notice of a filed affidavit as required by Chapter 53. *Id.*

Practically speaking the deadline to file the lien affidavit for contractual retainage is the 15th day of the 4th month after labor and materials were supplied, unless one of the three events above occurs, in which case, the deadline changes. The written demand in subsection (3) above must contain the owner's name and address and a legal description of the real property on which the improvement is located. TEX. PROP. CODE § 53.057(g). Additionally, the demand must state that the claimant must file the lien affidavit not later than the 30th day after the date the demand is sent, and is effective only for the amount of contractual retainage earned by the claimant as of the date the demand is sent. *Id.*

Based on these amendments to Chapter 53 of the Texas Property Code, in order to perfect a lien on contractual retainage, subcontractors and suppliers must follow two steps:

- (1) Send notice of contractual retainage to the owner and/or general contractor not later than the earlier of the 30th day after the date the claimant's agreement providing for retainage is

completed, terminated or abandoned or the 30th day after the date the original contract is terminated or abandoned; and

- (2) File a lien affidavit by the 15th day of the 4th month after the claimant provided material or labor unless the owner gives notice of completion, abandonment, or termination of the original contract — in which case the claimant has 40 days to file the lien affidavit — or the owner sends a letter demanding the affidavit be filed within 30 days.

3. GOVERNMENT CODE BONDS REQUIRED ON PROJECTS FUNDED BY PUBLIC/PRIVATE PARTNERSHIP

- A. **THE PROBLEM:** How to protect subcontractor and suppliers hired on private funded and/or owned government projects.
- B. **THE SOLUTION:** Extend the applicability of Chapter 2253 of the Texas Government Code.

Governor Perry also recently signed a law that adds two entirely new chapters to the Texas Government Code. These new laws establish a structure as well as clear permissive authority regarding the delivery of public projects in conjunction with private investment. These laws will allow for the flexible joining of private sector creativity and capital with public need. These laws become effective September 1, 2011.

New Chapter 2267 allows governmental entities to enter into comprehensive agreements with private parties to construct qualifying projects, including buildings, hospitals, schools, public works, recreational facilities, and other public projects. Among other things, it provides a process for private parties to submit unsolicited proposals to governmental entities. The proposals are then reviewed by qualified financial experts, who provide recommendations.

New Chapter 2268 creates a partnership advisory commission that will have the opportunity to review transactions and provide recommendations before the governmental entity enters into an agreement with the private entity.

New Section 2267.0605 affects subcontractors and suppliers because it requires performance and payment bonds on projects funded by public-private partnerships under Chapter 2267. Section 2267.0605 provides that “[t]he construction, remodel, or repair of a qualifying project may be performed only after performance and payments bonds for the construction, remodel, or repair have been executed in compliance with Chapter 2253 [of the Texas Government Code] regardless of whether the qualifying project is on a public or private property or is publically or privately owned.” TEX. GOV’T CODE § 2267.0605(a). A “qualifying project” for purposes of Section 2267.0605 is considered a public work under Chapter 2253. TEX. GOV’T CODE § 2267.0605(b). Extending the applicability of the the Texas Government Code payment bond requirements to these public-private partnership projects protects subcontractors and suppliers from the confusion created by the possibility of filing a lien on public projects, which is normally prohibited.

4. LAW BANNING THE USE OF BROAD-FORM INDEMNIFICATION CLAUSES IN CONSTRUCTION CONTRACTS

- A. THE PROBLEM: Owners and contractors commonly required sub-contractors and suppliers to sign broad indemnity agreements before making payment on construction projects in Texas. Such indemnification agreements have previously been permitted as long they were “unambiguously stated.” *XL Specialty Ins. Co. v.*

Kiewitt Offshore Svcs., LTD, 513 F.3d 146 (5th Cir. 2008).

B: THE SOLUTION: The new law bans broad form indemnity clauses in Texas construction contracts.

Specifically, this new law makes certain indemnity provisions in Texas construction contracts void and unenforceable if they require the indemnitor to indemnify, defend, or hold harmless another party for a claim caused by: (1) that party's sole or concurrent negligence or fault; (2) the breach or violation of a statute, ordinance, governmental regulation, standard or rule, or (3) breach of a contract of the indemnitee. TEX. GOV'T CODE § 151.102.

For purposes of analyzing and understanding the new law, here are some:

Key Definitions:

Indemnity payment: payment for loss suffered

Indemnity agreement: an agreement entered into between an indemnitee and indemnitor that requires the indemnitor to indemnify the indemnitee against anticipated losses, claims, or lawsuits

Indemnitee: the recipient of the indemnity payment (in this context, the upstream contractor that requires the downstream contractor or supplier to indemnify its losses)

Indemnitor: the provider of the indemnity payment (in this context, the downstream contractor or supplier)

The law further prohibits similar provisions in a construction contract which require the downstream party to purchase additional insured coverage if the scope

of such coverage would be prohibited when contained in an indemnification agreement. TEX. GOV'T CODE § 151.104.

These new changes mean that owners and general contractors can no longer require subcontractors or suppliers to: (1) indemnify them for the owner's or general contractor's own or concurrent negligence or fault; or (2) provide additional insurance coverage for the owner's or general contractor's own or concurrent negligence or fault.

Some types of indemnity provisions are excluded from the law and remain enforceable, including provisions:

- (1) for on-site injury or death claims by employees of the indemnitor, its agent, or its subcontractor of any tier; and
- (2) for indemnification claims on contracts for single family dwellings, duplexes and townhomes, and public works projects.

TEX. GOV'T CODE §§ 151.103, 151.105(10).

This law also requires consolidated insurance programs, which are programs under which a principal provides general liability insurance coverage, workers' compensation insurance coverage, or both that are incorporated into an insurance program for a single construction project or multiple construction projects, to provide "completed operations" insurance coverage for a policy period of not less than three years. "Completed operations" coverage is coverage for a contractor's liability for injuries or property damage suffered by third parties as the result of the contractor completing an operation.

This law is effective on January 1, 2012, and applies to contracts entered into on or after January 1, 2012. TEX. GOV'T CODE § 151.151. These laws may not be waived by contract or otherwise. *Id.*

5. LAW REORGANIZES AND REVISES PUBLIC WORKS CONTRACT PROCUREMENT

A. **THE PROBLEM:** Multiple laws governed contract procurement for school districts, cities, counties, state agencies, and other governmental entities which authorized the award of government contracts using several methods. Over the years, these separate laws had been amended and this created inconsistency among them.

B. **THE SOLUTION:** The new law consolidates and streamlines the existing law regarding procurement for public works construction projects for most government entities.

Summarized below are some of the highlights of the expansive new law regarding the procurement of government contracts.

Applicability: Chapter 2267 applies to most government entities, state or local, authorized to make a public works contract. It also includes other special districts and authorities such as hospital districts and port authorities. TEX. GOV'T CODE § 2267.002. It does not apply to institutions of higher education or TxDOT. *Id.* §§ 2267.004, 2267.005.

Notice requirements: An entity procuring a contract under this chapter must post notice of the time/place the bid or proposals will be received and opened.

Methods of contract procurement: Chapter 2267 provides that an entity can award a contract using the following methods:

- Competitive bidding;
- Competitive sealed proposal method;
- Construction manager-agent method;
- Design-build method;
- Construction manager-at-risk method; and
- Job order contracts method.

TEX. GOV'T CODE §§ 2267.101, 2267.151, 2267.201, 2267.301, 2267.251, 2267.401.

Criteria to consider: In making a decision amongst bidders to award a contract, government entities may consider the following criteria (entities are not limited to awarding contracts to the lowest bidder, nor are entities required to apply each of these criteria):

- The price;
- The offeror's experience and reputation;
- The quality of the offeror's goods/services;
- The impact on the ability of the entity to comply with rules relating to historically underutilized businesses;
- The offeror's safety record;
- The offeror's proposed personnel;
- Whether the offer's financial capability is appropriate to the size/scope of the project; and
- Any other relevant factor specifically listed in the request for bids, proposals, or qualifications

TEX. GOV'T CODE § 2267.055. If the entity considers other criteria, the entity must notify the public and disclose the criteria in the request for proposals. *Id.* § 2267.056.

Job order contracts: Job order contracts are typically used for repairs of government facilities. Government entities can still award contracts under the job order contracts method but only if the work is: (1) of a reoccurring nature but the delivery times are indefinite, and (2) if the order was awarded substantially on the basis of pre-described and pre-priced tasks. The entity must approve each job, task, or purchase order that exceeded \$500,000.00. TEX. GOV'T CODE § 2267.403.

Reverse auctions: In a reverse auction, which is typically Internet-based, sellers compete to obtain business, and prices typically decrease over time. This law prohibits entities from offering public work contracts through a reverse auction procedure for which a bond was required. TEX. GOV'T CODE § 2253.021. This prohibition was enacted from a legislative concern that when procuring government works contracts, reverse auctions put an improper emphasis on price alone, potentially to the detriment of quality.

Change orders: Government entities are authorized to approve change orders if a change in plans or specifications is necessary after the performance of a contract is begun, or if it is necessary to decrease or increase the quantity of work to be performed or materials/equipment to be furnished. However, the new law places a restriction on increases in the total contract price resulting from such change

orders. A contract with an original price of \$1 million or more cannot be changed through a change order by more than 25%. TEX. GOV'T CODE §§ 44.041, 271.060.

Assumption of risk: The law requires the entity to assume all risks and costs associated with scope changes and modifications requested by the entity, and unknown or differing site conditions or natural disasters, unless otherwise provided in the request for proposals and final contract. TEX. GOV'T CODE § 2267.363.

Delegation of authority: The law further permits the governing body of a governmental entity to delegate its authority under Chapter 2267 to a designated representative committee, or other person. TEX. GOV'T CODE § 2267.053.

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