

CONSTRUCTION AND THE LAW IN TEXAS

Legislative Update: Bills Affecting the Construction Industry

The 85th Regular Session of the Texas Legislature ended on May 29th. Many commentators state this legislative session was less productive than usual, as only 17 percent of filed bills passed both chambers and await the Governor's signature. Historically, around 22 percent of filed bills are sent to the Governor. However, a number of important bills passed that directly affect the construction industry. Below are important pieces of legislation this readership should be aware of and understand.

Senate Bill 1289

Senate Bill 1289 is known as the "Buy American" expansion bill. It requires all iron or steel products used to construct, remodel, or alter a building, structure, or infrastructure to be made in America. Exceptions exist if insufficient quantities of the material exist, if the use of American made iron or steel would increase the total project cost by more than 20 percent, or if compliance with the statute is inconsistent with the public interest.

Note this "Buy American" standard does not affect state highway system improvement projects governed by Chapter 223 of the Texas Transportation Code. However, the bill did alter Chapter 223's language to require state highway projects to include federal preference provisions for iron and steel products. Previously, only steel was included in Chapter 223. The Governor signed Senate Bill 1289 on June 9 and it goes into effect on September 1, 2017.

Senate Bill 1215

The original version of this bill sought to protect contractors from liability for defects contained in plans, specifications, or other bid documents not created by the contractor. The bill was amended multiple times in both chambers and faced significant criticism along the way, primarily from design professionals. When it became clear this bill would not pass without significant changes, the bill was stripped and amended to create a committee comprised of House and Senate members to study "issues related to construction contracts" during the interim and issue a report on or before December 1, 2018 with its findings. The bill tasked the interim committee with specifically studying, among other things: allocations of risk and liability on a construction project, relationships between parties to construction contracts, liens, indemnification, insurance, warranties,

standards of care for construction participants, and civil action and other dispute resolution related to construction defects.

Senate Bill 1215 was approved by the House and Senate and sent to the Governor on May 28, but Governor Abbott vetoed the bill on June 15. Although the bill was vetoed, the Governor stated, "The Legislature is free to study construction contracts with or without this bill." It is not clear whether an interim committee will be created at this point. These construction issues have percolated for two sessions now, and we expect to see them arise again in 2019.

House Bill 2121

House Bill 2121 expands the construction industry's ability to recover attorneys' fees in a lawsuit. Now, recovery of attorney's fees is permitted against the State of Texas in a successful breach of contract action related to engineering, architectural, or construction services (or materials related to such services). Note this only applies if the breach of contract claim is for less than \$250,000. Previously, parties could not recover attorneys' fees against a governmental entity in a breach of contract claim with a value under \$250,000.

House Bill 2121 was approved by the House and Senate and sent to the Governor on May 27. Governor Abbott has not yet signed it.

Senate Bill 312

This is the TxDOT "Sunset" legislation that reauthorized TxDOT's operation for the next 12 years. The bill also included an important provision requiring contractors and subcontractors to use the E-Verify system under contracts for the construction, maintenance, or improvement of a Texas highway. Notably, proposed provisions such as "one strike you're out" rule that would implement harsh penalties for clerical errors in the E-Verify process were rejected and did not make it in the final bill.

Senate Bill 312 was signed by the Governor on June 9, and the portion of the law regarding E-Verify goes into effect on September 1, 2017.

Senate Bill 533

Senate Bill 533 alters a variety of statutes related to state contracting, procurement, and ethics. One portion modifies Chapter 2269 of the Government Code related to the Design-Build alternative delivery



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method. This bill does not change the Design-Build process. Instead, it clarifies that the deadline to respond to RFQs cannot be longer than 180 days. Specifically, the new language states RFQ responses must be submitted on or before the time for submission requested by the governmental entity or 180 days, whatever is earlier.

Another portion of the bill modifies Chapter 2269 of the Government Code related to a state agency's issuance of Requests for Qualifications. In issuing an RFQ, a state agency now must include a detailed methodology for scoring each selection criteria. Previously, only the selection criteria and weighted value for each criterion were required inclusions. Note this change does not apply to all governmental entities; it only applies to state agencies.

Senate Bill 553 was signed by the Governor on June 9, and goes into effect on September 1, 2017.

Senate Bill 807

Senate Bill 807 expands the scope of parties who can void a contract provision subjecting a contract to another state's law or requiring dispute resolution in another state. In the past, only parties who performed the construction or repair under the contract could void such a provision. Now, any party who performs work under or related to a construction contract can void such a provision. This expansion includes architects, engineers, suppliers, and equipment rental companies.



A Balanced Approach to Construction Law.

Senate Bill 807 was signed by the Governor on June 9, and goes into effect on September 1, 2017.

On June 6, Governor Abbott announced a special legislative session to tackle a 20-item agenda, set to begin sometime in mid-July. Of the 20 items listed on Governor Abbott's agenda, two items potentially affect the construction industry: Preventing local governments from changing rules midway through construction projects; and speeding up local government permitting processes. Stay tuned for further developments at the close of the special legislation session.