

CONSTRUCTION
TRIALS
REAL ESTATE
CORPORATE
ENERGY
EMPLOYMENT
BANKRUPTCY

Texas Legislature 87th Regular Session Update (2021)

Presented by

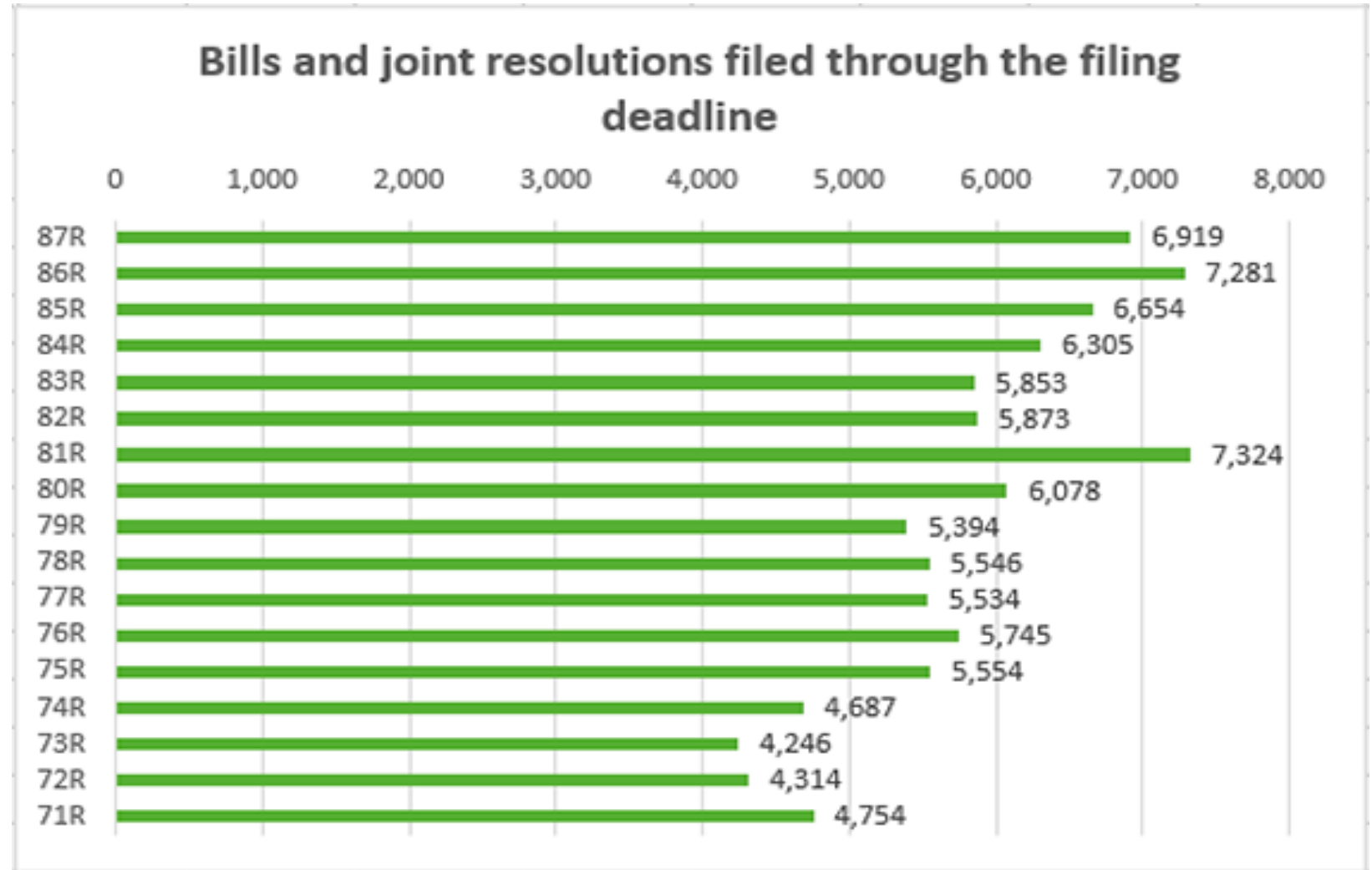
Ben Westcott

Co-Managing Shareholder, Andrews Myers

bwestcott@andrewsmyers.com

Session Stats

- 6,919 bills filed
- 1,168 passed



Three Types of Construction Bills

- (1) Changes for public works projects;
- (2) Increased protections for contractors; and
- (3) Changes to lien laws.

Public Works Projects

- **Public Works Retainage (HB 692)/2252 Gov't Code – effective 6/15/21 – applies to contracts entered into after effective date**
 - Max retainage
 - 10% for jobs under \$5 million
 - 5% for jobs over \$5 million
 - 10% for dam construction or maintenance jobs
 - Interest bearing account
 - Negotiated work or hard bid of \$10 million or more

Public Works Projects

- **Public Works Retainage (cont'd)**
- **Substantial Completion** defined –
 - Must contain a provision stating when the contract is considered substantially completed
 - When Owner may release all or a portion of retainage

Public Works Projects

- **Public Works Retainage (cont'd)**
- **Flow down restriction**
 - Prohibits contractors/subcontractors from withholding in excess of the rate of retainage withheld upstream
- **No warranty withholding**
 - Prohibits withholding of retainage after completion, including during the warranty period
- **No design defect withholding**
 - Prohibits withholding of retainage on manufactured goods or systems that were specified by the designer and properly installed

Public Works Projects

- **Public Works Retainage (cont'd)**
- **Notice and Cure** – Owner may withhold retainage if there is a bona fide dispute
 - Owner must specify in writing why retainage is being withheld and give the contractor a chance to cure
 - Bona fide dispute –
 - Must be tied to an express contract requirement or
 - GC's surety does not consent
 - Contractor can cure or offer credit
 - Owner's sole discretion to accept credit

Public Works Projects

- **Procurement Clarity and Objectivity (HB 2581)/2269 Gov't Code – effective September 1, 2021 – applies to advertisements or solicitations after effective date**
 - Mandatory disclosure of scoring methodologies and bid evaluations
 - Owner must provide documents related to how an unsuccessful offeror was ranked or scored upon request without requiring “open records” or public information requests 30 days after request from the contractor

Public Works Projects

- **Procurement Clarity and Objectivity (cont'd)**
- Request for CSP's for civil works projects must assign a 50% weight to price, but may assign a lower price weighting (no less than 36.9%) with the formal approval of its governing body
- CSP scores/evaluations must be made public and provided to all offerors within 7 days of award
- Increases the time that a contractor may seek injunctive relief from 10 calendar days to 15 calendar days after award

Public Works Projects

- **Limiting Energy Saving Performance Contracting (ESPC) (HB 3583)/Local Gov't Code 302 – effective June 14, 2021**
 - ESPC is a method of finance that allows a facility to complete energy-saving improvements within an existing budget by paying for them with money saved through reduced utility expenditures
 - Prohibits the use of ESPC for public works and civil works projects that are subject to well established contracting and procurement statutes
 - Limits change orders to the scope of the original ESPC contract

Public Works Projects

- **Uniform general conditions for K-12 building construction (SB 338)/44 Education Code – effective June 7, 2021**
 - Allows school districts to adopt uniform general conditions to be incorporated in all district building construction contracts after review by the Texas Facilities Commission
 - Tom Vaughn and Ben Westcott currently serve on the TFC contract language committee

Public Works Projects

- **Shorten statute of repose for public works to 8 yrs (+1) (HB 3069)/16.008 CPRC – effective June 14, 2021 – applies to contracts signed after effective date**
 - Shortens the time public building owners can sue for defects from 10 years to 8 years for public projects
 - Building owners have an additional year (instead of an additional two years) to sue for defects discovered in year 8, if the proper written notice is sent
 - Excludes TXDOT, Highways and Civil Works

Public Works Projects

- **Contingency attorneys for construction defect lawsuits**
(SB 1821) 2254 Gov't Code - effective June 7, 2021
 - 2019 law requires attorney general approval for contingency fee contracts for suit by governmental entities
 - New law closes loopholes for
 - Amending existing pre-2019 attorney's fees contracts; or
 - Amending pre-2019 lawsuits

Public Works Projects

- **Prompt Pay Act Disputed Invoices (HB 1476)/2251 Gov't Code - effective September 1, 2021 – applies to contracts signed after that date**
 - Requires the Owner to provide detailed written notice of the disputed amount; and
 - Owner may only withhold 110% of the disputed amount

Increased Protections for Contractors

- **Contractors not liable for design defects (SB 219)/59 Bus & Comm Code – effective September 1, 2021**
 - **Not Responsible/No Warranty** - Contractor is not responsible for the consequences of design defects in, and may not warrant the sufficiency of plans, specifications, or other design documents provided to the Contractor
 - **Prompt Notice of Defects** - Contractor, within a reasonable time of learning of a defect must make a written disclosure to the other contracting party of the existence of any known or discoverable defect

Increased Protections for Contractors

- **Contractors not liable for design defects (cont'd)**
 - Excludes design-build, including partial design build (for that part)
 - Excludes EPC
 - Excludes critical infrastructure – oil and gas, power, water, airports, ports and railroads
 - Prohibits waiver by contract

Increased Protections for Contractors

- **Contractors not liable for design defects (cont'd)**
 - Design Advice/Value Engineering? – must be tied to provision of licensed professional services and incorporated into the final design
 - Beef up RFI process to meet disclosure requirement
 - Not required to fix the design, just provide notice
 - Balance being a good project participant with providing design services which requires a license – constructability vs. sufficiency of design

Increased Protections for Contractors

- **Omnibus pandemic bill, business liability/insurance protections for contractor (SB 6) – effective June 14, 2021**
 - Liability protections for business owners and contractors
 - Raises the requirements for an individual to sue a company, or another individual, for exposure to COVID

Increased Protections for Contractors

- **Omnibus pandemic bill (cont'd)**
 - Exempt from liability for injury or death caused by exposing an individual to COVID unless it is shown that:
 - (1) they knowingly failed to warn the individual of, or remediate a condition, that the person knew was likely to result in the exposure of an individual to the disease
 - (2) they knowingly failed to implement or comply with applicable government standards; and
 - (3) reliable scientific evidence shows conduct was the cause of the individual contracting the disease

Increased Protections for Contractors

- **Reform commercial vehicle accident lawsuits (HB 19) – effective September 1, 2021**
 - It applies to all commercial vehicles.
 - Bifurcation of trial may be requested
 - If company driver is found negligent, the plaintiff would then be able to bring evidence against the company of a policy or environment that contributed to the negligence and seek exemplary damages in the trial's second phase

Increased Protections for Contractors

- **Attorney's fees as damages in insurance cases (HB 2416) – effective September 1, 2021**
 - Makes attorney's recoverable as "compensatory" damages for insurance coverage
 - Will help with cases where plaintiff's pre-trial demand is too high, and insurance company wants to go to trial to lower the damages
 - \$5mm demand/\$2mm verdict/\$1.5 mm in fees
 - Previously, insurance company would have to pay the damages but not the attorneys' fees – contractor would have to pay
 - Now, insurance company must pay the fees

Increased Protections for Contractors

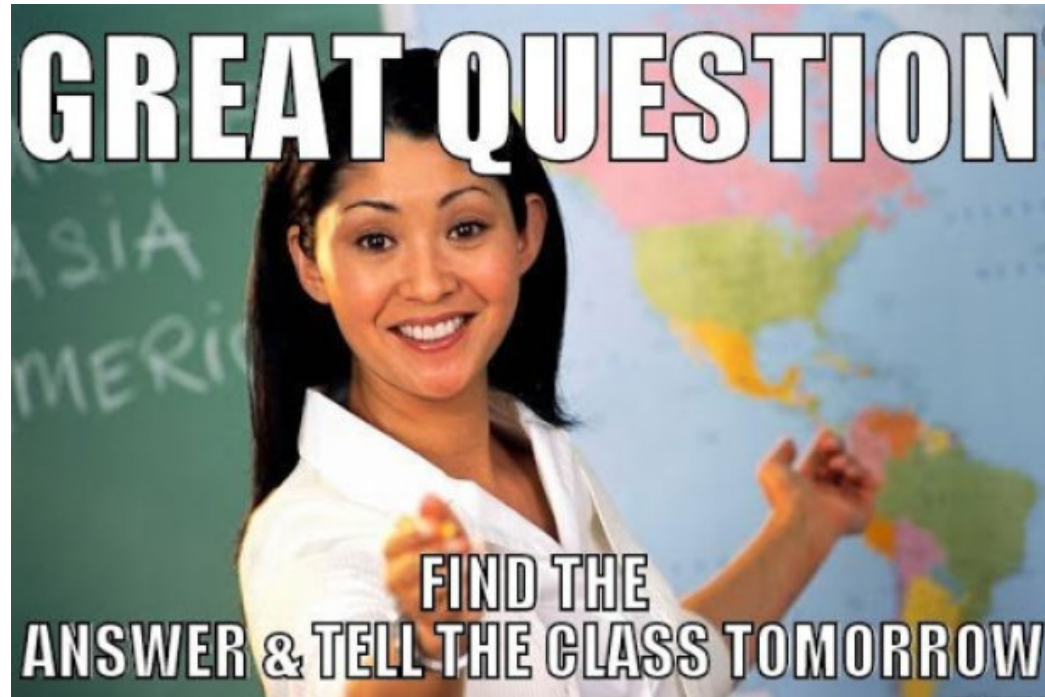
- **Construction as essential business (SB 968) – effective June 16, 2021**
 - Local government officials may not limit or prohibit residential or commercial construction activities during a state of disaster or pandemic
 - In response to Dallas and Travis County pandemic regulations

Changes to Lien Laws

- **Modernizing/simplifying lien laws (HB 2237)/53 Property Code – effective January 1, 2022**
 - Eliminates the second month subcontractor notice requirement to general contractors. Remains optional
 - Non-GC retainage lien due by 15th of 3rd month of prime contract completion
 - Lien deadlines are extended to the next business day
 - Shortens the statute of limitations to foreclose on a lien to one year from when the lien could be filed
 - Provides for expedited discovery for information relating to the validity and removal of the lien
 - Makes design services and equipment rental lienable
 - Certified mail no longer required (optional)
 - 53.083 claims removed

Special Session

- Gov. [Abbott](#) followed through Friday June 18 on a threat to veto a section of the state budget that funds the Texas Legislature, its staffers and legislative agencies.
- Special Session includes:
 - Voting Measures
 - Bail Reform
- Additional Special Session expected for redistricting and Federal Coronavirus Aid Distribution



Questions?

bwestcott@andrewsmyers.com

Andrews Myers, PC

1885 Saint James Place, 15th Floor, Houston, TX 77056

919 Congress Avenue, Suite 1050, Austin, Texas 78701

www.andrewsmyers.com