

CONSTRUCTION
TRIALS
REAL ESTATE
CORPORATE
ENERGY
EMPLOYMENT
BANKRUPTCY

HCA MID-YEAR MEETING LEGISLATIVE UPATE

**By
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Texas 86th Legislature

Key Dates:

- Last day of session was **May 27th**
- Last day the governor can sign/veto bills passed during the regular session, **June 16th**
- Effective dates are **September 1st**, unless otherwise noted



Legislative Agenda

- Five Emergency Items:
 - School Finance Reform
 - Increase in Teacher Pay
 - Property Tax Reform
 - School Safety
 - Disaster Relief - Harvey

Bills that passed



School Construction Defects

- **HB 1734** (Rep Holland/Sen Lucio)
- School districts are required to notify the commissioner of education and the attorney general that it is bringing an action for the recovery of construction defects.
 - Notice must be given no later than 30 days after the action is filed.
- School district's case is subject to dismissal without prejudice if the notice requirement is not met.

School Construction Defects Cont.

- Must use the net proceeds of the lawsuit for repair or replacement
 - Or otherwise get written approval of the commissioner
- Attorney General may (after 2 weeks notice) seek to
 - enjoin the district for violations and
 - seek cost of investigation and
 - Penalties of up to \$20k

Right to Repair

HB 1999 (Chairman Leach/Sen Creighton)

Issues

- Lack of notice of possible defects
- Inadequate inspection time
- No absolute right to correct
- 9+ year old schools



Only applies to public projects (2272 Government Code)

Excludes RCLA, DOT, FHA, and Civil Works (roads, bridges, utilities, water, wastewater wharfs, docks, airport runways, storm drainage, flood control)

Right to Repair

- Requires written report that identifies: construction defect, design defect, current condition and proposed repairs.
- Requires 30 days notice to contractor and known subs to inspect
- Provides 120 days to repair/correct (optional to contractor)
- Not required if terminated for cause, unable to bond, no insurance or felony conviction

Right to Repair

- Not required if previously attempted repair and made worse
- Tolling of limitations in last year for one year from date of report
- Dismissal without prejudice for 1st failure to comply
- Dismissal with prejudice for 2nd failure to comply
- Owner may recover report costs
- Allows for emergency repairs (health, safety, welfare of occupant or public)
- Fixes loophole for insurer denial b/c suit not filed

Contingent Fee Attorney Approval

- **HB 2826** (Bonnen/Sen Huffman) outlines new procedure and requirements for entering into a contingent-fee agreement with a political subdivision.

Contingent Fee Attorney Approval (Continued)

- Award must be based on competence, qualification and experience and fair and reasonable price
- Select the most qualified attorney, then negotiate price, if no agreement, then next most qualified, until deal reached
- Allows for attorney indemnity for attorney negligence

Contingent Fee Attorney Approval (Continued)

- Must make public statement setting forth:
 - Reason for hiring and result to be achieved by pursuing the matter;
 - The qualifications of the attorney;
 - The nature of the relationship/genesis;
 - Why the owner can't pursue the matter with in-house attorneys;
 - Why not hourly fees instead;
 - Why contingency is in the best interest of the people.

Contingent Fee Attorney Approval (Continued)

- Approves the contract in an open meeting reviewing the report.
- On approval, Owner must state:
 - Substantial need for legal services
 - Cannot be performed in-house
 - Cannot be reasonably obtained at hourly rates
 - Relationship b/w any member and attorney does not appear improper

Contingent Fee Attorney Approval (Continued)

- Before owner signs contract, Attorney General must review and approve
 - 90 days to review
 - May deny if usurps attorney general's obligations
 - May take over and handle in lieu of the owner
 - May deny if reporting and approval requirements above not met
- Expenses must be actually incurred and reasonable and necessary
- Fees can't be paid until time records verified and reasonable and necessary

Design Defects for Transportation Work

HB 2899 (Rep Leach/Sen Hinojosa)

a highway/bridge contractor is not civilly liable or otherwise responsible for:

(a) the accuracy, adequacy, sufficiency, or suitability of plans, reports, designs or specifications ("SPECS"); or

(b) errors or omissions of the owner or its consultants in the rendition of professional services relating to SPECS....

and

Voids conflicting contract language

Third-Party Certificate of Merit

- **SB 1928** (Sen Fallon/Rep Krause)
- Extends certificate of merit requirements to all claimants – includes third-party claims
- Requires affiant to “practice” in the defendant’s area of practice

State Construction Audit

- Significant changes to the oversight of and requirements applicable to state agency contracting and procurement.
- **SB 65** (Sen Nelson/Sen Geren) modifies this process.



State Construction Audit (Continued)

- 1) Before accepting a bid, a state agency must certify in writing that the agency assessed each vendor's response to solicitation and the final scoring of each vendor was accurate.
- 2) If a state agency awards a contract to a vendor who did not have the highest score, it must explain the reason in writing.

State Construction Audit (Continued)

- 3) Before July 1st of each year, the state auditor is required to assign a good/bad ranking to the procurement processes of each of the 25 largest state agencies.
- 4) Each state agency must maintain a checklist in its contract file, ensuring compliance with state laws and rules.

State Construction Audit (Continued)

- 5) must include in contract file written explanation for why:
 - Id's were included/not included in the contract
 - Limitations of liability were given to the contractor

Limitations on Local Code Changes

- **HB 2439** (Rep Phelan/Sen Buckingham)
- Gov't may not adopt an ordinance that varies from the last 3 cycles of the national model code
 - Prohibits use or apply more stringent standard for items previously approved
- Exceptions for
 - Federal funding program
 - Windstorm/hailstorm coverage
 - Light pollution
 - Historical preservation

Municipal Disaster Recovery Immunity

- **SB 1575** (Sen Alvarado/Rep Krause)
 - Extends sovereign immunity to municipal disaster recovery contracts
 - **Vetoed June 15, 2019**

Neutrality in State Gov't Contracting

- **HB 985** (Rep Parker/Sen Hancock)
- State may not require or prohibit the use of collective bargaining agreement;
- All projects using state money/credit – includes universities, school districts, but excludes TXDOT
- Can't discriminate against any contractor or subcontractor on that basis
- Signed by Governor – June 2

Self-Directed State Procurement

- **SB 646** (Sen Birdwell/Rep Thompson)
- Agencies like Texas Real Estate Commission, Texas Department of Banking, and Texas Board of Professional Engineers
 - Must obtain written authorization from the governor before spending money on land purchase or a construction project

Fees for Motion to Dismiss

- **HB 3300**
- TRCP 91(a) – allows for a defendant to file a motion to dismiss a lawsuit or claim that “has no basis in law of fact”
- Previously said court “must” award attorneys fees and cost.
- Created more risk for movants
- Now says court “may” award attorney’s fees and costs.

Public Information Act

- **SB 943** – Sen Watson/Rep Capriglione et al. (Effective 1/1/20)
- Requires disclosure of “contracting information”
 - Funds paid
 - Bid docs, including evaluations/negotiations
 - Communications related to performance
 - Deadlines, remedial actions, Id’s or breach

Public Information Act

- Limited objections
 - Gov't demonstrates harm to competition
 - Pending solicitation or repeated process
 - Vender demonstrates trade secrets
 - Must take reasonable steps to protect
 - Vendor demonstrates confidential information
 - Reveals individual approach to:
 - Work, org structure, staffing, processes, pricing methodology;
 - And gives advantage to competitor

Regulation of Plumbers

- **SB 621** (Rep Lambert/Sen West/Rep Sherman) – Bill Failed -
- **Update** – Gov. Greg Abbott cited Hurricane Harvey recovery efforts as his rationale for signing an executive order on June 13 that extended the State Board of Plumbing Examiners until May 31, 2021.



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