



## Construction Law Update: Texas Legislature 87<sup>th</sup> Regular Session (2021)

This year was a busy session in Austin, with the Legislature taking up a variety of bills impacting the construction industry. Bills that made their way to Governor Greg Abbott's desk include: (1) changes to requirements for public jobs; (2) increased protections and relief for contractors; and (3) changes to lien laws.

A special session has been called, however, bills impacting the construction industry have taken a backseat to bills dealing with election law and the cash bail system. Below is a summary of the bills that have become law:

### 1. Changes on Public Works Jobs

From retainage requirements, to disclosure on scoring methodologies, to adopting more uniform general conditions, there are big changes in store for public works jobs.

- **Additional retainage requirements for certain public works construction projects (HB 692) – effective June 15, 2021.**
  - This bill sets the maximum amount for retainage at 10% for jobs under \$5 million, and 5% for jobs over \$5 million.
  - It also allows for retainage to be placed in an interest-bearing account for projects that are negotiated, and for competitively bid projects of \$10 million or more.
  - Public works contracts are required to contain a provision stating when the contract is considered substantially completed and when the Owner may release all or a portion of retainage.
  - The Owner also must specify in writing why retainage is being withheld and give the contractor a chance to cure.
  - Additionally, it prohibits (1) subcontractors from withholding in excess of the rate of retainage withheld by the general or prime contractor, (2) the withholding of retainage after completion, including during the warranty period, and (3) withholding of retainage on manufactured goods or systems that were specified by the designer and properly installed.
- **Contracting on public works (HB 2581) – effective September 1, 2021.**
  - This bill requires mandatory disclosure of scoring methodologies and bid evaluations.
  - The 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.
  - CSP scores and evaluations must be made public and provided to all offerors within 7 days of award.
  - The time that a contractor may seek injunctive relief is increased from 10 calendar days to 15 calendar days after the contract has been awarded.
- **Limiting the use of Energy Saving Performance Contracting (ESPC) contracts (HB 3583) – 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.
- This bill prohibits the use of ESPC for public works and civil works projects that are subject to well established contracting and procurement statutes.
- Now, change orders are limited to the scope of the original ESPC contract.
- **Uniform general conditions (UGCs) for K-12 building construction (SB 338) – 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.
  - Ben Westcott currently serves on the TFC Contract Language Committee.
- **Shorten statute of repose for public works to 8 yrs (+1) (HB 3069) – effective June 14, 2021.**
  - Shortens the time public building owners can sue for defects from 10 years to 8 years for public projects.
  - However, building owners now 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 projects.
- **Fix from last session’s contingency lawyers bill on construction defects (SB 1821) – effective June 7, 2021.**
  - This bill closes loopholes in a 2019 law that requires the approval of the Texas Office of the Attorney General for contingency fee contracts for lawsuits brought by governmental entities for construction defects.
  - Can no longer “amend” way around review of AG.
- **Prompt Pay Act disputed invoices (HB 1476) – effective September 1, 2021.**
  - Now, the Owner is required to provide detailed written notice of the disputed amount and may only withhold 110% of the disputed amount.

## 2. Protections and Relief for Contractors

In the wake of COVID, along with an omnibus pandemic bill, the Legislature passed a series of bills giving contractors more protections and relief, including limiting contractor liability for design defects, designating construction as an essential industry, and making it harder to file baseless lawsuits against commercial truck drivers.

- **Contractors not liable for design defects (SB 219) – effective September 1, 2021.**
  - Now, contractors are not responsible for the consequences of design defects in, and may not warrant the sufficiency of, plans, specifications, or other design documents that are provided to the contractor.
  - However, a contractor, within a reasonable time of learning of a defect, must make a written disclosure of the existence of any known or discoverable defect to the other contracting party.
  - This bill excludes design-builds, EPCs, and critical infrastructure, and prohibits waiver by contract.
- **Omnibus pandemic bill, business liability/insurance protections for businesses (SB 6) – effective June 14, 2021.**
  - The omnibus bill is geared towards liability protections for business owners and contractors.

- Specifically, the bill raises the requirements for an individual to sue a company, or another individual, for exposure to COVID.
- Businesses are 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 that the conduct caused the individual to contract the disease.
- **Reform litigation abuse over commercial vehicular accidents (HB 19) – effective September 1, 2021.**
  - Intended to help protect the commercial trucking industry from frivolous lawsuits, this bill raises the requirements for bringing a lawsuit and applies to all commercial vehicles.
  - Specifically, bifurcation of a trial can be requested. First, the company driver must be found negligent. Then, the plaintiff would 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.
- **Can recover attorneys' fees as compensatory damages for breach of a construction contract (HB 2416) – effective September 1, 2021.**
  - In closing a gap in general liability insurance policies, this bill allows for the recovery of reasonable attorney's fees from an individual, corporation, or other entity as compensatory damages for breach of a construction contract.
  - This will help in cases where a plaintiff's pre-trial demand is too high, and the insurance company wants to go to trial to lower damages.
- **Construction as essential business (SB 968) – effective June 16, 2021.**
  - Reacting to Dallas and Travis County pandemic regulations, this bill prohibits local government officials from limiting or prohibiting residential or commercial construction activities during a state of disaster or pandemic.

### 3. Changes to Lien Laws

Lastly, the Legislature attempted to modernize and streamline current mechanic's, contractor's, and materialman's lien laws by passing HB 2237.

- **Modernizing/simplifying lien laws (HB 2237) – effective January 1, 2021.**
  - This bill includes several large-scale changes to the way contractors perfect liens.
  - First, the bill eliminates the second month subcontractor notice requirement to general contractors. This reduces the total amount of notices that subcontractors have to send.
  - Second, lien deadlines are extended to the next business day. If the last day for the lien/notice falls on a Saturday, Sunday, or legal holiday, the period is extended to include the next business day.
  - Third, it shortens the statute of limitations for filing suit to foreclose on a lien to one year from when the lien could be filed.
  - Fourth, design services and equipment rental are now lienable.

- Fifth, certified mail is no longer required (it's optional).
- Lastly, it provides for expedited discovery for information relating to the validity and removal of the lien.

**For more information, please contact [Ben Westcott](#) and [Patrick Kelly](#).**