

UPDATE ON THE

87TH TEXAS LEGISLATIVE SESSION

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January 12, 2021 - May 31, 2021

Bill Statistics

| Status | HB | SB | Total HB & SB |
|--------|------|------|------------------|
| Filed | 4671 | 2256 | 6927 |
| Passed | 587 | 486 | 1073 |
| Vetoed | 12 | 9 | 21 |

Signed by Governor or Allowed to Become Law

- School District UGCs – SB 338
- Extension of Board of Plumbing Examiners – HB 636
- New Statutes of Repose – HB 3069
- Electronic Bids & Proposals – HB 362
- Statewide Building Codes – HB 738
- Vendor Nonpayment Notices – HB 1476
- Hydrofluorocarbon Refrigerant Substitutes – SB 1210
- Amendments to Contingent Fee Contracts – SB 1821
- Info Posted at Commercial Project Sites – SB 291

Signed by Governor or Allowed to Become Law

- Defects in Plans and Specs - SB 219
- Recovery of Attorney's Fees - HB 1578
- Retainage on Public Projects - HB 692
- Lien Law Changes - HB 2237
- Interlocutory Appeals for Certain Claims - HB 2086
- Changes to AE Contract Law - HB 2116
- Attorney's Fees as Compensatory Damages - HB 2416
- Discl. of Scoring/Changes to Weighted Values - HB 2581

- **Concern** – State-building construction contracts use uniform general conditions, which ensures that public funds are used with maximum efficiency during the contracting, planning, and construction of state buildings. Although they are built with public funds under current law, school buildings are not covered by the UGCs.
- **Response** – Allow school districts to utilize UGCs in their construction contracts.

Amended Chapter 44 of the Texas Education Code
and Chapter 2166 of the Texas Government Code

- **New Tex. Educ. Code § 44.035** - After reviewing UGCs adopted by the Texas Facilities Commission, a school district may adopt uniform general conditions to be incorporated in all district building construction contracts.
- **Amend Tex. Gov't Code § 2166.305(b)** – UGC review committee will now include a representative from (1) the Texas Association of School Boards and (2) the Texas Association of School Administrators.
 - Appointments must be made by 12-01-21

Effective Date – June 7, 2021

- **Concern** – Public building owners have 10 years to assert a construction defect claim, plus an additional 2 years to file suit if a written claim was presented within the initial 10-year period.
- **Response** – Shorten the time public building owners can sue for defects.

Amended Chapter 16 of the Texas Civil Practice and Remedies Code

NEW STATUTES OF REPOSE – HB 3069

- Governmental entities must file suit within 8 years of substantial completion of the improvement that gives rise to the suit.

- Possible extension associated with the presentment of a claim during the 8-year period is decreased from 2 years to 1 year.

- Shortened periods do not apply to a claim arising out of:
 - a contract entered into by the Texas Department of Transportation;
 - a project that receives money from the state highway fund or a federal fund designated for highway and mass transit spending; or
 - a civil works project, as that term is defined under Texas Government Code § 2269.351.

- **Effective Date** – June 14, 2021
- **Application** – applies to governmental design and construction contracts that are entered into after June 14, 2021.

- **Concern** – TSBPE underwent sunset review before last session. The Legislature did not pass a bill to continue it, so Governor Abbott temporarily extended TSBPE for two years.
- **Response** – Continue TSBPE in existence as a stand-alone agency while enacting certain statutory changes to streamline plumbing regulation and increase the number of licensed plumbers in Texas.

Amended Chapter 1301 of the Texas Occupations Code

- Texas State Board of Plumbing Examiners will continue in existence until at least 2027.

- Numerous changes to Chapter 1301 – The Plumbing License Law.
 - Allow for contract plumbing examiners
 - Assign priorities and prescribe procedures for conducting background checks
 - Increase access to info re: disciplinary actions
 - Change to certain examination provisions
 - Change certain licensing and insurance provisions
 - Add violations that subject a person to disciplinary action

➤ **Effective Date** – May 26, 2021

➤ **Application**

- Board directed to adopt rules to implement changes as soon as practicable
- Change in violation provision only applies to conduct that occurs on or after May 26, 2021
- Catch-Up Provisions
 - By 9-1-23 – TSBPE must obtain criminal history record using name, DOB, and other alphanumeric identifiers for all license holders as of 9-1-21 that did not previously undergo a check
 - By 9-1-25 – TSBPE must obtain criminal history record using fingerprints for all license holders as of 9-1-21 that did not previously undergo a check

- **Concern** – Tex. Loc. Gov't Code § 262.0225 requires a county to accept hard-copy bids and proposals, while permitting electronic submission. If a county allows submissions in both formats, county staff must convert the hard copies to an electronic format or vice versa, which defeats the purpose of the electronic option.
- **Response** – amend current law relating to the authority of a county to require electronic bids or proposals for competitive bidding.

Amended Chapter 262 of the Texas Local Government Code

ELECTRONIC BIDS & PROPOSALS – HB 362

- Counties no longer required to accept hard-copy bids and proposals if commissioners court issues order requiring electronic transmission.
- County must make available all technology necessary to submit a bid or proposal through electronic transmission to any person who submits a hard-copy bid or proposal in person.

Effective Date – May 15, 2021

- **Concern** – Statewide municipal residential and commercial building codes have not been updated since 2001.
- **Response** – Adopt the 2012 International Residential Code and 2012 International Building Code.

Amended Chapters 214 and 250 of the Texas Local Government Code

STATEWIDE BUILDING CODES – HB 738

- 2012 International Residential Code (instead of 2001) adopted as a municipal residential building code
- 2012 International Building Code (instead of 2003) adopted as a municipal commercial building code
 - Municipalities that have adopted a more stringent commercial building code are not required to repeal that code
- Municipalities may adopt local amendments if they hold a public hearing and adopt the amendment by ordinance

Fire Protection Sprinkler Systems

- Municipalities, counties, and emergency services districts may not require fire protection sprinkler systems in new or existing one- or two-family dwellings.
 - But may adopt rules allowing contractors to install sprinkler systems in new one- or two-family dwellings.

- Prohibition does not apply to:
 - Municipalities that adopted requirement on or before 1-1-09
 - Emergency Services Districts that (1) adopted requirement on or before 2-1-13 and (2) is adjacent to a municipality with less than 4,000 people served by a water control and improvement district and in a county with more than 1 million people and adjacent to a county with more than 420k people.

- **Effective Date** – January 1, 2022, but requirement that municipalities establish implementation rules takes effect September 1, 2021.
- **Application** – 2012 codes apply to residential or commercial construction, remodeling, or repair projects that begin under an agreement made on or after January 1, 2022, or that begin, in the absence of an agreement, on or after that date.

- **Concern** – Governmental entities required to notify a vendor of errors in invoices, but no requirement to provide specifics of alleged error. Governmental entities also allowed to withhold all payments until dispute resolved.
- **Response** – amend current law relating to a vendor's remedies for nonpayment of a contract with the state or a political subdivision of the state

Amended Chapter 2251 of the Texas Government Code

- Governmental entities must notify a vendor of an error or a disputed amount in an invoice not later than 21 days after receiving the invoice.
- Notice must include detailed statement of the amount of the invoice which is disputed.
- Governmental entities may withhold no more than 110% of the disputed amount.
- **Effective Date** – September 1, 2021
- **Application** – Amendments only apply to contracts entered into after September 1, 2021.

DEFECTS IN PLANS AND SPECS – SB 219

- **Concern** – Current law allows for a contractor to be held liable for construction defects that were the result of flaws in design documents procured by the owner and provided to the contractor.
- **Response** – Amend current law to ensure that the construction team is not liable for construction that is defective due to flawed design documents furnished by the owner.

Added new Chapter 59 to Business and Commerce Code and amended Chapter 130 of Civil Practice and Remedies Code

Limitation on Liability

Sec. 59.0051. LIMITATION ON CONTRACTOR'S LIABILITY AND RESPONSIBILITY FOR CERTAIN DEFECTS.

(a) A contractor is not responsible for the consequences of design defects in and may not warranty the accuracy, adequacy, sufficiency, or suitability of plans, specifications, or other design documents provided to the contractor by a person other than the contractor's agents, contractors, fabricators, or suppliers, or its consultants, of any tier.

Duty to Disclose

- Within a reasonable time of learning of a defect in the design documents, a contractor must disclose the existence of the defect to the person with whom they entered into a contract.
- Must disclose defects that are discovered by the contractor or that reasonably should have been discovered by the contractor using ordinary diligence, before or during construction.
- A contractor who fails to disclose a defect may be liable for the consequences of defects that result from the failure to disclose.

Exclusions

- Does not apply to a contract for the construction or repair of a critical infrastructure facility, which is an expansively defined term.
- Does not apply to design build projects when the defect is in the design documents provided by the design build contractor.
- Does not apply to EPC projects when the defect is in the design documents provided by the EPC contractor.
- Does not apply when the contractor agrees to provide input and guidance on design documents to the extent that: (1) the contractor's input and guidance are provided as the signed and sealed work product of an engineer or architect; and (2) the work product is incorporated into the design documents used in construction.

Design Standard of Care

- New Tex. Civ. Prac. & Rem. Code § 130.0021
 - Architectural and engineering contracts must require that services be performed with the professional skill and care ordinarily provided by competent architects or engineers practicing under the same or similar circumstances and professional license.
 - Contractual provisions with a different standard are void and unenforceable.

- New Tex. Bus. & Com. Code § 59.052
 - Design services provided under design build or EPC contracts subject to same standard of care requirements.

➤ **Effective Date** – September 1, 2021

➤ **Application**

- Applies to contracts entered into on or after September 1, 2021
- Applicability to subcontracts or purchase orders turns on the date that the prime contractor entered into the original contract with the owner.

Sec. 38.001. RECOVERY OF ATTORNEY'S FEES.

(a) In this section, "organization" has the meaning assigned by Section 1.002, Business Organizations Code.

(b) A person may recover reasonable attorney's fees from an individual or organization other than a quasi-governmental entity authorized to perform a function by state law, a religious organization, a charitable organization, or a charitable trust...

- **Effective Date** – September 1, 2021
- **Application** – applies to an award of attorney's fees in an action commenced on or after September 1, 2021.

- **Concern** – Current law does not specify the amount of retainage allowed on certain public works contracts or terms for its release, and varying practices across the state have resulted in protracted disputes.
- **Response** – establish limits on retainage for certain public work projects and provisions governing when retainage could be withheld and how it would be handled in cases of disputes.

Amend Subchapter B, Chapter 2252 of Texas Government Code

Governmental Entity Requirements

- (a) A governmental entity shall:
 - (1) include in each public works contract a provision that establishes the circumstances under which:
 - (A) the public works project that is the subject of the contract is considered substantially complete; and
 - (B) the governmental entity may release all or a portion of the retainage for:
 - (i) substantially completed portions of the project; or
 - (ii) fully completed and accepted portions of the project;

Governmental Entity Requirements

(a) A governmental entity shall:

...

(2) maintain an accurate record of accounting for:

(A) the retainage withheld on periodic contract payments; and

(B) the retainage released to the prime contractor for a public works contract; and

(3) for a public works contract described by Subsection (c), pay any remaining retainage described by Subdivision (2)(A) and the interest earned on the retainage to the prime contractor on completion of the work required to be performed under the contract.

Limits on Retainage

- Total Value less than \$5 million = 10% max
- Total Value greater than \$5 million = 5% max
- Dam Construction or Maintenance (regardless of \$) = 10% max

- Cap applies to overall contract value
- Cap may not be exceeded “for any item in a bid schedule or schedule of values for the project, including materials and equipment delivered on site to be installed”

Limits on Retainage

- Limits do not apply to:
 - a public works contract executed before August 31, 1981;
 - a public works contract in which the total contract price estimate at the time of execution of the contract is less than \$400,000; or
 - a public works contract made by the Texas Department of Transportation under Chapter 223, Transportation Code.

Limits on Retainage

- Limits do not apply to:
 - Governmental entity that receives financial assistance under Section 15.432 or 15.472, Water Code, for a project that is formally approved before September 1, 2019 by the Texas Water Development Board or
 - Governmental entity that is a wholesale water supplier that supplies water to customers in 10 or more counties and is governed by Chapter 49, Water Code.

- Above governmental entities must deposit any retainage withheld under a public works contract that provides for retainage that exceeds 5% of the periodic contract payments in an interest-bearing account.

Limits Aligned

(d) If, for the purpose of fulfilling an obligation of a prime contractor under a contract described by Subsection (b), the prime contractor enters into a subcontract:

(1) the prime contractor may not withhold from a subcontractor a greater percentage of retainage than the percentage that may be withheld from the prime contractor by the governmental entity under Subsection (b); and

(2) a subcontractor who enters into a contract with another subcontractor to provide labor or materials under the contract may not withhold from that subcontractor a greater percentage of retainage than the percentage that may be withheld from the subcontractor as determined under Subdivision (1).

Releasing Retainage

- (e) A governmental entity may not withhold retainage:
 - (1) after completion of the work required to be performed under the contract by the prime contractor, including during the warranty period; or
 - (2) for the purpose of requiring the prime contractor, after completion of the work required to be performed under the contract, to perform work on manufactured goods or systems that were:
 - (A) specified by the designer of record; and
 - (B) properly installed by the contractor.

Withholding Retainage

- Governmental entity may withhold retainage if there is a bona fide dispute between the governmental entity and the prime contractor and the reason for the dispute is that:
 - labor, services, or materials provided by the prime contractor, or by a person under the direction or control of the prime contractor, failed to comply with the express terms of the contract or
 - if the surety on any outstanding surety bond executed for the contract does not agree to the release of retainage.

- The governmental entity must provide to the prime contractor written notice of the basis on which the governmental entity is withholding retainage.

Withholding Retainage

- If there is no bona fide dispute between the governmental entity and the prime contractor and neither party is in default under the contract, the prime contractor is entitled to:
 - cure any noncompliant labor, services, or materials; or
 - offer the governmental entity a reasonable amount of money as compensation for any noncompliant labor, services, or materials that cannot be promptly cured.

- Governmental entity is not required to accept a prime contractor's offer of compensation.

- **Effective Date** – June 15, 2021
- **Application** – Applies to contracts entered into on or after the effective date.

- **Concern** – Chapter 53 is confusing and difficult to understand.
- **Response** – streamline Chapter 53, remove redundant provisions, address various ambiguities, and provide for specific statutory forms for notice.

Amend Chapter 53 of Texas Property Code

- Changes definitions of:
 - Improvement
 - Labor
 - Material
 - Residence
 - Retainage
 - Subcontractor
 - Work

- Adds new defined term – “Purported Original Contractor”

- Notices may be delivered in person, by certified mail, or by any other form of traceable, private delivery or mailing service that can confirm proof of receipt.

➤ Rewrites:

- 53.021 – Persons Entitled to Lien
- 53.022 – Property to Which Lien Extends
- 53.023 – Payment Secured by Lien
- 53.026 – Sham Contract
- 53.052 – Filing of Affidavit
- 53.082 – Time for Which Funds Withheld
- 53.084 – Owner's Liability
- 53.101, 53.102, 53.103, 53.104 – Retainage Provisions
- 53.106 – Affidavit of Completion
- 53.107 – Notice of Termination or Abandonment
- And others

- Amends 53.055(a) – notice of filed lien affidavit does not have to be sent by registered or certified mail

Substantial changes to 53.056 – Derivative Claimant Notices, including New Statutory Form

NOTICE OF CLAIM FOR UNPAID LABOR OR MATERIALS

WARNING: This notice is provided to preserve lien rights.

Owner's property may be subject to a lien if sufficient funds are not withheld from future payments to the original contractor to cover this debt.

Date: _____

Project description and/or address: _____

Claimant's name: _____

Type of labor or materials provided: _____

Original contractor's name: _____

Party with whom claimant contracted if different from original contractor: _____

Claim amount: _____

_____ (Claimant's contact person)

_____ (Claimant's address)

Substantial changes to 53.057 – Derivative Claimant Notice for Unpaid Retainage, including New Statutory Form

NOTICE OF CLAIM FOR UNPAID RETAINAGE

WARNING: This notice is provided to preserve lien rights.

Owner's property may be subject to a lien if sufficient funds are not withheld from future payments to the original contractor to cover this debt.

Date: _____

Project description and/or address: _____

Claimant's name: _____

Type of labor or materials provided: _____

Original contractor's name: _____

Party with whom claimant contracted if different from original contractor: _____

Total retainage unpaid: _____

_____ (Claimant's contact person)

_____ (Claimant's address)

Note – 40th day after / 30th day after filing deadlines struck

New Limitations Periods

- Suit must be filed within 1 year of the last day a claimant may file a lien affidavit under Section 53.052.
- Filing suit solely to discharge lien because limitations have expired does not revive claimants right to file suit.
- Extension to file to 2 years if claimant signs written agreement with owner to extend before expiration of 1 year period and agreement is recorded in real property records.

➤ Provisions Repealed:

- Section 53.003(a)
- Section 53.026(b)
- Section 53.053 – Accrual of Indebtedness
- Sections 53.056(b), (c), (d), (e), and (f)
- Sections 53.057(b), (b-1), (c), (d), (e), and (g)
- Section 53.058 – Notice for Specially Fabricated Items
- Section 53.081(d)
- Section 53.083 – Payment to Claimant on Demand
- Section 53.158(b)
- Sections 53.252 and 53.253 – Residential Derivative Claimant Notices

- **Effective** – January 1, 2022
- **Application** – changes will apply to original contracts entered into on or after effective date

- **SB 1210 – Hydrofluorocarbon Refrigerant Substitutes**
 - Subchapter L added to Chapter 382, Texas Health and Safety Code
 - Building codes may not prohibit the use of a substitute refrigerant authorized pursuant to 42 U.S.C. Section 7671k.
 - **Effective Date** – January 2, 2023

- **SB 1821 – Amendments to Contingent Fee Contracts**
 - Amends definition of “contingent fee contract” in Tex. Gov’t Code § 2254.101(2).
 - Now includes an amendment to an existing contract if the amendment (1) changes the scope of the representation or (2) may result in the filing of an action or the amending of a petition in an existing action.
 - **Effective Date** – June 7, 2021
 - **Application** – contracts or amendments entered into after June 7, 2021

- **SB 291 – Info Posted at Commercial Project Sites**
 - Developers of commercial projects must post at entrance to commercial project site: (1) name and contact info of developer and (2) brief description of project.
 - **Effective Date** – September 1, 2021

- **HB 2086** – allows an appeal from an interlocutory order that grants or denies a motion for summary judgment filed by a contractor based on Tex. Civ. Prac. & Rem. Code § 97.002.
- **HB 2116** – amends Chapter 130 to bar certain duty to defend provisions in AE contracts and define statutory standard of care.
- **HB 2416** – authorizes the recovery of attorney's fees as compensatory damages for breach of a construction contract in an effort to make them covered by a CGL policy.
- **HB 2581** - requires the disclosure of scoring methodologies and bid evaluations for civil works and other construction projects and requires the weighted value assigned to price for certain projects to be at least 50 percent of the total weighted value of all selection criteria.

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