

SUBJECT: Prohibiting indemnification provisions in construction contracts

COMMITTEE: Judiciary and Civil Jurisprudence — committee substitute recommended

VOTE: 9 ayes — Hunter, Branch, Hartnett, Jackson, Leibowitz, Lewis, Madden, Martinez, Woolley

0 nays

2 absent — Hughes, Alonzo

SENATE VOTE: On final passage, March 18 — 30-1 (Nichols)

WITNESSES: (*On House companion bill, HB 818:*)
For — Tom Kader, Associated General Contractors; Allan Korsakov, Baker Concrete Construction, Inc.; Christopher Martin, Richard Thomas, Texas Contractors Association; Robert Parker, Associated Builders and Contractors, Repcon Strickland, Inc.; Cary Roberts, Texas Civil Justice League; Lee Shidlofsky AGC, TCJCL, TCA; (*Registered, but did not testify:* David Bacot, Thomas Bullard, Bud Hurta, TNT Crane & Rigging, Inc.; Dwight Bateman, American Fire Sprinkler Association; Mackie Bounds, Harold Freeman, David Ringenberger, Texas Construction Association; Richard Bruns, Southwest Terrazzo Association; Yvonne Castillo, Texas Society of Architects; Brian Chester, American Subcontractor Association; George Christian, Texas Civil Justice League; Heidi Davis, American Subcontractors Association, San Antonio Chapter; Darlene East, Holes Incorporated, American Subcontractors Association of Greater Houston; Jon Fisher, Associated Builders and Contractors of Texas; William Gellhausen, Alterman, Inc.; Daniel Gonzalez, Texas Association of Realtors; Arthur Hartman, Hartman Fire Protection; Todd Hewitt, Central Texas Subcontractors Association, Texas Fifth Wall Roofing Systems, Inc.; Paul Holden, DFW Drywall & Acoustical Contractors; Nancy Jones, Plumbing, Heating, Cooling Contractors of Texas; Jennifer Junker, John F. Clark Company, Inc.; Chris Lambert, L&O Electric, Inc., National Electrical Contractors Association, Central Texas Subcontractors Association; Chris Lechner, Precast Concrete Manufacturers Association; Clarissa Lewis; Dennis Lewis, Potter Concrete Ltd., Texas Construction Association; Paul McKenna, Western

States Fire Protection, Texas Fire Sprinkler Contractors Association; Eugene Morgan, MDM Scaffolding Services, Inc., Scaffolding Industry Association; Shannon Noble, Texas Air Conditioning Contractors Association; Jim Reaves, Texas Nursery and Landscaping Association; Steven Rians, Texas Construction Association, Texas Fire Protection Contractors Association; Jennifer Rodriguez, Responsible Plumbers and Associates; David Stone, Texas Fire Sprinkler Contractor Association; Tim Thompson, Alamo Insurance Group; C.J. Tredway, Independent Electrical Contractors of Texas; Wendy Wilson, Texas Apartment Association; Allan Woodruff, Scott-Macon Equipment, Texas Crane Owners' Association; Kurt Woody)

Against — Laura Gordon, City of El Paso; Ned Munoz, Texas Association of Builders; Ryan Ringelman, BNSF Railway Co.; Fred Wilson, Union Pacific Railroad Company; (*Registered, but did not testify*: John Cabrales, City of Denton; Sylvia Firth, City of El Paso; Frank Fuentes, U.S. Hispanic Contractors Association, Hispanic Contractors of Texas; Shanna Igo, Texas Municipal League; Sara Kemptner, City of Waco; Ruben Longoria, Texas Association of School Boards; Mark Mendez, Tarrant County)

On — Gordon Bowman, City of Austin; (*Registered, but did not testify*: Marilyn Hamilton, Texas Department of Insurance)

BACKGROUND: Under Civil Practice and Remedies Code, sec. 130.002 (a), a covenant or promise associated with a construction contract is void and unenforceable if the covenant or promise provides for the contractor whose work product is the subject of the construction contract to indemnify or hold harmless a registered architect, licensed engineer, or their agents, servants, or employees from liability for death, personal injury, or property damage caused by or results from defects in plans, designs, or specifications or the negligence of architects or engineers in performance of their professional duties.

Government Code, sec. 2252.902 similarly prohibits contract provisions requiring those entering government construction contracts to indemnify other parties. However, this provision excludes insurance policies from that restriction.

DIGEST: CSSB 555 would amend the Civil Practice and Remedies Code to add ch. 502, which would prohibit contract clauses or insurance requirements to indemnify third parties, with some exceptions.

The bill would define “claim” as a loss or liability for a claim, damage, expense or governmentally imposed fine, penalty, administrative action, or other action. It also would define “construction contract,” and define an “indemnitor” as the party to a construction contract that was required to provide indemnification or additional insured status to another party in the construction contract or to a third party.

CSSB 555 would declare void and unenforceable, with the exception of an employee claim, any provision in a construction contract that would require any who signed the contract to indemnify, hold harmless, or defend a third party for any claim caused by the negligence or fault, breach or violation of a statute, ordinance, or governmental regulation, standard, or rule. It also would declare void and unenforceable any provision that would require the indemnitor to provide these protections in cases of breach of contract by other parties, except in cases of breach of contract by the indemnitor, its agents, employees, or subcontractor.

The provision would not apply to a contract provision that would require the indemnitor to indemnify, hold harmless, or defend another party against a claim for bodily injury or death of an employee of the indemnitor, its agent, or its subcontractors.

CSSB 555 also would prohibit a contract provision requiring purchase of additional insurance to cover a third party.

The bill would not affect contract provisions dealing with:

- insurance policies, including either owner- or contractor-controlled or sponsored consolidated insurance;
- lawsuits for a breach of contract or warranty that existed independently of an indemnity obligation;
- contract provisions requiring insurance for acts or omissions of the indemnitor;
- indemnity provisions in loan and financing documents;
- general agreements of indemnity required by sureties as a condition for bonds for construction contracts;
- workers compensation benefits and protections;

- governmental immunity benefits and protections;
- indemnities for mineral production under Civil Practice and Remedies Code, ch. 127; or
- railroad company license agreements allowing contractors to do work on railroad property that would not primarily benefit the railroad.

CSSB 555 also would not affect construction contract provisions requiring purchase of:

- owners and contractors protective liability insurance;
- railroad protective liability insurance;
- contractors all-risk insurance; or
- builders all-risk insurance.

CSSB 555 would prohibit waiver of these provisions through a contractual agreement and would require that these provisions apply to all construction contracts on property in Texas.

The bill also would repeal Government Code, sec. 2252.902, which includes similar prohibitions on indemnity clauses in contracts for government construction contracts.

The bill would apply to construction contracts entered into on or after it took effect on September 1, 2009.

**SUPPORTERS
SAY:**

CSSB 555 would restore a sense of fairness in the construction industry and would make every party responsible for their own mistakes. The bill would end a century-long evolution from simple agreements to complex commercial transactions designed primarily to shift responsibility and potential liabilities. After more than six sessions, the legislation itself is a product of agreement among diverse stakeholders, including an unprecedented effort to resolve many points of contention by mediation during the interim.

CSSB 555 would help remedy problems with unequal bargaining power among general contractors and subcontractors by prohibiting what amount to unfair contract demands. A subcontractor no longer would have to choose between indemnifying the general contractor or foregoing a contract entirely. The bill also would end the problem of lack of insurance available to subcontractors subject to liability for mistakes by the general

contractor or the owners. Generally, the bill would restore the concept of strict liability and end the “broad form” indemnity clauses that require the types of policies that insurance companies are reluctant to underwrite.

The bill includes reasonable exceptions when indemnity clauses should be permitted in construction contracts. Railroad companies would be allowed to provide for liability protection when employees of contractors or third parties were injured while working on a railroad right-of-way. The bill would not interfere with owner-controlled comprehensive insurance policies, nor with workers’ compensation. It also would not eliminate the governmental immunity that state agencies and local governments already have in law.

**OPPONENTS
SAY:**

CSSB 555 could increase the liability of local governments for construction projects and ultimately could lead to higher costs and possible tax hikes. Local governments tend to be drawn into disputes arising out of construction contracts or accidents on job sites because they are parties with deep pockets. Current law allows contractors to add local governments to their insurance policies and to provide legal representation in lawsuits. Under the bill, local governments likely would still be dismissed from any legal action under governmental immunity, but they would have to spend taxpayer money — which would be better used for other priorities — for legal representation.

NOTES:

The House companion bill, HB 818 by Eiland, was heard and left pending by the Judiciary and Civil Jurisprudence Committee on April 6.

During the 2007 regular session, the Senate by 21-8-1 passed a similar bill, SB 346 by Duncan, which died in the House Civil Practices Committee.