

## BILL ANALYSIS

Senate Research Center  
78R3631 ATP-F

S.B. 256  
By: Harris  
Business & Commerce  
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As Filed

### DIGEST AND PURPOSE

Currently, construction contracts generally contain contingent payment clauses, which provide that a general contractor's payment to a subcontractor during construction is contingent upon the general contractor being paid by the owner. As proposed, S.B. 256 establishes new requirements for implementing contingent payments, including when a contingent payment is enforceable and a justifiable defense in a civil suit, and when enforcement of a contingent payment is prohibited.

### RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

### SECTION BY SECTION ANALYSIS

SECTION 1. Amends Chapter 35D, Business & Commerce Code, by adding Section 35.521, as follows:

**Sec. 35.521. AGREEMENT FOR PAYMENT OF CONSTRUCTION**

**SUBCONTRACTOR.** (a) Defines "contingent payment clause," "contingent payor," "contingent payee," and "improvement."

(b) Prohibits a contingent payor or its surety from enforcing a contingent payment clause to the point of nonpayment by reason of an individual other than the contingent payee.

(c) Prohibits a contingent payor or its surety from enforcing a contingent payment clause, for work performed or materials delivered, past the fifth day after the receipt of a letter objecting to nonpayment. Provides that the objection letter must be sent only after the 30th day after accrual of unpaid indebtedness, other than retainage.

(d) Provides submission of a written request for payment as a prerequisite for accrual of unpaid indebtedness and establishes the guidelines governing accrual.

(e) Provides for the reinstatement of the contingent clause, after payment is made, for work performed and materials provided after receipt of payment, subject to the provisions of this section.

(f) Prohibits a contingent payor or its surety from enforcing a contingent payment clause if, under Section 53.026, Property Code, the contingent payee has a direct relationship with the person paying the contingent payor.

(g) Prohibits using a contingent payment clause as the basis for invalidating the enforceability or perfection of a mechanic's lien under Chapter 53, Property Code.

(h) Prohibits a contingent payor or its surety from enforcing a contingent payment clause if doing so would be unconscionable, the burden of proof of which lies with the party asserting that enforcement would be unconscionable. Sets forth

circumstances authorized to be considered in determination of whether enforcement of a payment clause would be unconscionable.

(i) Establishes that a contingent payor, who has not initiated legal proceedings, has made a reasonable effort, as required by Subsection (h)(1), if a reasonable business person would consider the action futile or cost prohibitive.

(j) Establishes that the assertion of a contingent payment clause is a justifiable defense to a civil action for payment under contract and that the burden of proof falls to the defendant.

(k) Exempts from this section a provision addressing timing of payment for certain services if the timing is reasonable.

(l) Prohibits waiving this section by any means and provides that a purported waiver is void.

SECTION 2. (a) Makes application of this Act prospective.

(b) Effective date: September 1, 2003.