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Texas Legislative Update

The marquee fight between Lt. Governor Patrick and Speaker Straus, otherwise known as the 85th Regular Legislative Session, concluded on May 29, 2017. While the political clash over the controversial “bathroom bill” will continue during the special legislative session, this article is intended to provide a brief summary of the construction-related bills that passed during the regular session and a few notable ones that did not pass. A special session has been called by Governor Abbott, but no construction-related bills were included on the agenda.

What Passed?

HB 2121 – Attorney’s fees for state breach of contract claims. A contractor who prevails on a state breach of contract claim pursuant to Chapter 2260 of the Government Code, that is also valued at less than \$250,000.00, may recover attorney’s fees. By using the word “may”, the bill implies that the award of attorney’s fees will be at the discretion of the administrative law judge. This bill became law on June 15, 2017.

HB 1463 – Right to cure ADA violations. A person with a disability may assert a claim for discrimination based on a violation of the building and architectural standards established in Chapter 469 of the Government Code. However, this bill requires the claimant to provide the respondent written notice at least sixty (60) days before filing an action for the violation and further gives the respondent an opportunity to cure the alleged violation within the sixty (60) day period. The obvious benefit of this bill is that it allows the respondent, e.g., the owner or potentially the contractor, an opportunity to remediate the violation without incurring litigation costs. This bill becomes effective law on September 1, 2017.

HB 2994 – Workforce continuing education courses. This bill allows public junior colleges to enter into an agreement with a school district, organization, or other person operating a high school to offer workforce continuing education for high school students at least 16 years old. This bill, which will help grow the construction industry’s skilled workforce, becomes effective law on September 1, 2017.

HB 3021 – Limitation on indemnity provisions in architectural and engineering contracts. This bill prohibits broad and intermediate form indemnity provisions in contracts between architects or engineers and a state agency as defined by section 2052.101 of the Government Code. Section 2052.101 defines a state agency as “a department, commission, board, office, or other agency that is in the executive or legislative branch of state government and that was created by the constitution or statute, including an institution of higher education” or an agency “in the judicial branch of state government.” This bill becomes effective law on September 1, 2017.

HB 3270 – School Background Checks. This bill clarifies when the mandatory background check applies to school construction projects. Persons who meet certain qualifications set out in the bill are not required to undergo background checks. This bill, which becomes effective on September 1, 2017, clarifies what is expected of contractors on school construction projects.

HB 3349 – Industrial workforce training. This bill requires the State Board for Educator Certification to create both probationary and standard trade and industrial workforce training certificates. This is a step toward providing individuals with the necessary training and education to enter certain trades in the construction industry. This bill takes effect immediately, so long as a specific appropriation for the implementation of the bill is provided in a general appropriations act of the 85th Legislature.

SB 807 – Choice of law and venue selection clauses. Chapter 272 of the Texas Business and Commerce Code currently states that certain choice of law and venue provisions are voidable if the provisions are in a contract “principally for the construction or repair of an improvement to real property located in [Texas].” This wording was the subject of much debate for construction law practitioners, therefore, in an effort to create more clarity and predictability, this bill strikes “principally for construction or repair” and broadly defines the term “construction contract”. Unless expressly stated otherwise in the statute, the reach of this bill also extends to agreements collateral to or affecting the construction contract. This bill becomes effective on September 1, 2017.

SB1877 – Email notifications from TxDOT. Section 223.003 of the Texas Transportation Code allows a person to apply to have their name placed on a list to receive notice of any proposed TxDOT contracts. This bill simply allows TxDOT to send out notices of proposed contracts by mail or e-mail. This bill becomes effective law immediately.

What did not pass?

HB 2343 – Right to cure construction defect. This bill would have allowed a contractor an opportunity to investigate and cure alleged construction defects before a property owner could assert a claim for a construction defect. Curt Martin, Co-Managing Partner of P&A’s Texas offices, worked closely with the AGC Texas Building Branch in drafting the proposed legislation. Unfortunately, the bill did not make it out of the House.

SB 1215 – Interim committee for construction issues. This bill originally dealt with contractor liability for design defects. After unanimously passing the Senate, the bill faced opposition in the House in the 11th hour that would have caused the bill to die on the House floor. Instead, several representatives completely amended the bill to provide for an interim study of a broad range of issues concerning the construction industry. The issues included the following:

- Allocation of liability among persons involved in a construction project;
- Relationships among parties to construction contracts;
- Mechanic’s and materialman’s liens;
- Indemnification and insurance issues;
- Warranties;
- Standards of care; and
- Dispute resolution arising from construction defects and remedies.

Governor Abbott vetoed this bill on June 15, 2017, but it is anticipated that the House will authorize an exhaustive study of the above issues.

HB 744 and HB 2457 – Chapter 38 attorney’s fees. Section 38.001 of the Texas Civil Practice and Remedies Code allows a party prevailing on a breach of contract claim against an individual or corporation to recover attorney’s fees in addition to the claim amount. Recent state court decisions ruled that limited liability companies, limited partnerships, and limited liability partnerships are not corporations or individuals. Therefore, no one may collect attorney’s fees from a LLC, LP, or LLP under Section 38.001 for a breach of contract claim. These bills would have addressed those state court decisions by replacing “corporation” with “organization” and defined an organization to include LLCs, LPs, and LLPs. Since these bills did not pass, it is advisable for contracting parties to include in their contracts a right to recover attorney’s fees by the prevailing party to any litigation or arbitration arising under the contract.

HB 2668 and SB 2073 – Retained funds, mechanic’s liens, and bond claims. Both bills sought to amend Chapter 53 of the Texas Property Code to include additional language related to the treatment of mechanic’s liens on retained funds. These bills did not gain traction and both died in their respective chambers.

HB 3065 and SB 1506 – Revisions to mechanic’s lien laws. These two bills were identical. The proposed language was a wholesale revision of the mechanic’s lien laws found in Chapter 53 of the Texas Property Code. Most notably, the bills would have established a website maintained by the Secretary of State for filing notices and communications required by Chapter 53. There are several other comprehensive revisions to Chapter 53 in these bills. The bills did not survive, which is not surprising as a group of industry shareholders have been attempting to draft mutually agreeable revisions for Chapter 53 for several years now and have not been able to reach a consensus.

And on a completely unrelated note:

HB 3535 – Hunting from a Hot Air Balloon. We thought you might like to know that it is now possible to obtain a permit to shoot depredating feral hogs and coyotes from a hot air balloon.

The information provided in this Bulletin does not, nor is it intended to, constitute legal advice. Readers should not take or refrain from taking any action based on any information contained in this Bulletin without first seeking legal advice.