SUBJECT: Alternative dispute resolution of contract claims against state

COMMITTEE: Civil Practices — committee substitute recommended

VOTE: 6 ayes — Bosse, Janek, Hope, Nixon, Smithee, Zbranek

0 nays

3 absent — Alvarado, Dutton, Goodman

SENATE VOTE: On final passage, May 6 — voice vote

WITNESSES: *(On House companion bill, HB 69:)*
For — George Baldwin and Steve Nelson, Associated General Contractors; Raymond Risk, Texas Construction Association; R.C. Crawford

Against — None

BACKGROUND: The doctrine of sovereign immunity protects the state from the kinds of lawsuits that routinely are brought against private citizens and businesses. It is based on an ancient common-law rule that courts may not hear claims against the sovereign without the sovereign's consent. Texas' sovereign immunity protects the state in two ways. Before the state may be sued, it must consent to be sued. Then, if a plaintiff is granted permission to sue the state and does win a judgment, the state is immune from liability and the plaintiff may not recover a judgment unless the state agrees to pay that judgment.

The Texas Department of Transportation (TxDOT), under Transportation Code, sec. 201.112, provides an administrative process to resolve contract claims. That process allows the resolution of claims without requiring the state to consent to be sued and then to appropriate funds for payment of the claim up to the amount of the contract.

SB 694 by Brown, enacted by the 75th Legislature in 1997, created the Governmental Dispute Resolution Act (Government Code, sec. 2008) to allow state agencies to use alternative dispute resolution (ADR) procedures to resolve disputes.

DIGEST:

Resolution of contract claims against the state. CSSB 629 would provide an ADR process for the resolution of contract claims against the state. This would be an exclusive process and a prerequisite to asking permission to sue the state. All contracts would have to include a contract provision that specified the use of this ADR process to resolve any claims for breach of contract. This process, however, would not waive the sovereign immunity of the state.

The ADR requirement would apply to all written contracts for goods, services, or construction projects but would not apply to projects covered under TxDOT's contract claims provisions. It would apply to all units of state government, including institutions of higher education. The bill would apply only to claims made directly by the general independent contractor, not to claims by a subcontractor, officer, employee, or agent of a contractor. The bill also would not apply to any claims for personal injury or wrongful death arising from a breach of contract.

The bill would allow a contractor to make a claim against a unit of state government for a breach of contract. The total amount of damages that could be recoverable from such a claim would be limited to the balance due and owing on the contract, minus amounts for any work not performed under the contract by the contractor.

Once a contractor decided to make a claim, it would have to deliver written notice to the unit of state government no later than 180 days after the occurrence that gave rise to the breach. The notice would have specify the nature of the breach, the amount of damages sought, and the theory of recovery. The state could assert a counterclaim against the contractor within 90 days of receiving notice of the claim by delivering written notice to the contractor.

The chief administrative officer of the unit of state government, or another person if designated in the contract, would have to negotiate with the contractor who made a claim no later than 60 days after the later of the termination or completion of the contract or the date the claim was received. In any event, the state could delay the start of negotiations until the 180th day after the occurrence giving rise to the claim. All state government units could develop rules for conducting negotiations or else follow rules developed by the attorney general.

If the negotiation resulted in a partial or total resolution of the claim, the issues resolved would be reduced to writing in an agreement or settlement. Partial resolution of claims would not waive the right to assert the remaining claims. A claim resolved could be paid only from funds already appropriated for payment of contract claims or payment of the contract that was the subject of the claim. If that amount were insufficient, any balance could be paid only if the Legislature appropriated money for that purpose. Unless all parties agreed to an extension of time, if claims were not resolved by the 270th day after the claim was filed, the contractor could request a contested case hearing.

Contested case hearings would have to be referred to the State Office of Administrative Hearings (SOAH) if the contractor filed a request for such a hearing stating the factual and legal basis for the claim and requesting that the claim be referred to SOAH. SOAH could set a fee for the hearing to allow the office to recover all or a substantial part of the costs of holding the hearing. SOAH could establish by rule a graduated fee schedule based on the amount in controversy, but the minimum fee would have to be $250. The fee could be assessed against the losing party or could be apportioned equally against all parties at SOAH's discretion.

Hearings would have to be conducted under procedures adopted by the chief administrative law judge of SOAH. A written decision would be required within a reasonable time after the conclusion of the hearing that detailed the judge's findings of fact and conclusions of law and recommendations based on the pleadings and evidence submitted. The decision of the judge would not be appealable.

If the SOAH judge found for the contractor, the unit of state government would have to pay a claim from money appropriated for payment of contract claims or for payment of the contract on which the claim was based. If that amount were insufficient to cover the claim, the balance could be paid only if appropriated by the Legislature. Judgments awarded could include prejudgment interest at a maximum rate of 6 percent. The bill would not authorize execution on state property to satisfy a claim.

The portion of the bill relating to contract claims would take immediate effect if finally passed by a two-thirds record vote of the membership of each house and would apply to any claim pending or arising on or after that date. For

claims pending before the effective date of the act, the contractor would have to provide notice as required no later than 180 days after the effective date. This bill would not apply to any claim for which the 76th Legislature or a previous legislature had enacted a concurrent resolution granting permission to sue the state.

Governmental dispute resolution revisions. CSSB 629 would expand the Governmental Dispute Resolution Act to all governmental bodies. It would specify that final agreements signed by governmental bodies as a result of ADR procedures would be subject to disclosure or excepted from disclosure in accordance with the Public Information Act (Government Code, chapter 552).

The bill also would require impartial third parties to have the qualifications required under Civil Practice and Remedies Code, sec. 154.052, involving certain amounts of classroom hours to qualify as an impartial third party.

The portion of the bill relating to expanding the dispute resolution act would take effect September 1, 1999, and would apply only to an ADR proceeding that began on or after that date.

NOTES:

The House committee substitute for SB 629 is identical to HB 826 by Greenberg, passed by the House on April 29. HB 826 was reported favorably without amendment by the Senate State Affairs Committee on May 14 and has been recommended for the Senate Local and Uncontested Calendar. The House committee substitute for SB 629 would conform the Senate-passed version with HB 826 as passed by the House.

During the 75th Legislature, a related bill, HB 172 by Nixon, passed both houses, but Senate amendments to the bill never were considered by the House. HB 172 would have established a process for resolving contract claims against units of state government.