

SUBJECT: Requiring notice be given to a governmental entity in a payment bond suit

COMMITTEE: State Affairs — favorable, without amendment

VOTE: 7 ayes — Marchant, Madden, J. Davis, B. Cook, Elkins, Gattis, Goodman

0 nays

2 absent — Lewis, Villarreal

WITNESSES: For — George Grimes, Texas Association of School Boards and Council of School Attorneys

Against — None

BACKGROUND: Section 2253.021 of the Government Code, known as the McGregor Act, states that a governmental entity must require a contractor for a public works project to execute a payment bond if the contract value exceeds \$25,000. The purpose of the bond is to protect subcontractors, laborers, and material suppliers who work under the prime contractor by assuring that the prime contractor will pay them.

Section 2253.027 of the Government Code further provides that if a governmental entity fails to obtain the required bond, it bears the same liability as a surety — a company that issues and backs payment bonds. The section also states that a subcontractor, laborer, or material supplier (payment bond beneficiary) is entitled to a lien on money the governmental entity owes the prime contractor.

Subchapter C, sec. 2253.041 of the Government Code requires that a payment bond beneficiary who wishes to recover payment from a payment bond must give notice to the prime contractor and the surety. Notice must be mailed by the 15th day of the third month after the work was performed. However, the 2nd Court of Appeals ruled in *Texas Department of Mental Health and Mental Retardation v. Newbasis Central, L.P.*, 58 S.W.3d 278 (Tex. App. - Fort Worth 2001) that current law does not require the payment bond beneficiary to give similar notice if the beneficiary seeks to recover payment from a governmental entity.

DIGEST: HB 1171 would amend Government Code, sec. 2253.027, to require that, in a suit to recover against a governmental entity, a payment bond beneficiary must provide notice to that entity in the same manner and within the same time frame as required by Government Code Subchapter C for notice given to a surety. This would apply only to a governmental entity that had not obtained the required payment bond from the prime contractor on a public works project.

The bill would take effect September 1, 2003. Suits filed before that date would be governed by the law in effect when the suit was filed.

SUPPORTERS SAY: Current law, as interpreted by the 2nd Court of Appeals, is unfair to governmental entities. In cases where the governmental entity has not obtained the payment bond, it is required to bear the liability of a surety but is not given the right to be served notice of claims against it. HB 1171 would rectify this situation by making legal notice requirements commensurate with liabilities. It also would clarify the Legislature's intention to the courts.

The bill addresses an issue that has been a particular problem for school districts which, following the court of appeals opinion, are left open to lawsuits and payment to subcontractors long after they have paid prime contractors in full. By establishing a deadline by which subcontractors must file suit, this legislation would help protect school districts from having to pay twice for the same work, thus promoting fiscal soundness and good governance for school districts.

OPPONENTS SAY: Subcontractors, labor, and material suppliers would be put at risk by HB 1883 because it would shorten the time frame within which they must make claims to recover payment. These parties deserve to be paid for work they have completed and should not be burdened by overly complex notice requirements.