

BUSINESS AND COMMERCE CODE

TITLE 4. BUSINESS OPPORTUNITIES AND AGREEMENTS

CHAPTER 56. AGREEMENT FOR PAYMENT OF CONSTRUCTION SUBCONTRACTOR

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 56.001. DEFINITIONS. In this chapter:

(1) "Contingent payee" means a party to a contract with a contingent payment clause, other than an architect or engineer, whose receipt of payment is conditioned on the contingent payor's receipt of payment from another person.

(2) "Contingent payment clause" means a provision in a contract for construction management, or for the construction of improvements to real property or the furnishing of materials for the construction, that provides that the contingent payor's receipt of payment from another is a condition precedent to the obligation of the contingent payor to make payment to the contingent payee for work performed or materials furnished.

(3) "Contingent payor" means a party to a contract with a contingent payment clause that conditions payment by the party on the receipt of payment from another person.

(4) "Improvement" includes new construction, remodeling, or repair.

(5) "Obligor" means the person obligated to make payment to the contingent payor for an improvement.

(6) "Primary obligor" means the owner of the real property to be improved or repaired under the contract, or the contracting authority if the contract is for a public project. A primary obligor may be an obligor.

Added by Acts 2009, 81st Leg., R.S., Ch. 87 (S.B. 1969), Sec. 4.001(a), eff. September 1, 2009.

Sec. 56.002. INAPPLICABILITY OF CHAPTER TO CERTAIN CONTRACTS. This chapter does not apply to a contract that is solely for:

- (1) design services;
- (2) the construction or maintenance of a road,

highway, street, bridge, utility, water supply project, water plant, wastewater plant, water and wastewater distribution or conveyance facility, wharf, dock, airport runway or taxiway, drainage project, or related type of project associated with civil engineering construction; or

(3) improvements to or the construction of a structure that is a:

(A) detached single-family residence;

(B) duplex;

(C) triplex; or

(D) quadruplex.

Added by Acts 2009, 81st Leg., R.S., Ch. 87 (S.B. 1969), Sec. 4.001(a), eff. September 1, 2009.

Sec. 56.003. EFFECT OF CHAPTER ON TIMING OF PAYMENT PROVISIONS. This chapter does not affect a provision that affects the timing of a payment in a contract for construction management or for the construction of improvements to real property if the payment is to be made within a reasonable period.

Added by Acts 2009, 81st Leg., R.S., Ch. 87 (S.B. 1969), Sec. 4.001(a), eff. September 1, 2009.

Sec. 56.004. WAIVER OF CHAPTER PROHIBITED. A person may not waive this chapter by contract or other means. A purported waiver of this chapter is void.

Added by Acts 2009, 81st Leg., R.S., Ch. 87 (S.B. 1969), Sec. 4.001(a), eff. September 1, 2009.

SUBCHAPTER B. CONTINGENT PAYMENT CLAUSE

Sec. 56.051. ENFORCEMENT OF CLAUSE PROHIBITED TO EXTENT CERTAIN CONTRACTUAL OBLIGATIONS NOT MET. A contingent payor or its surety may not enforce a contingent payment clause to the extent that the obligor's nonpayment to the contingent payor is the result of the contractual obligations of the contingent payor not being met, unless the nonpayment is the result of the contingent payee's failure to meet the contingent payee's contractual requirements.

Added by Acts 2009, 81st Leg., R.S., Ch. 87 (S.B. 1969), Sec. 4.001(a), eff. September 1, 2009.

Sec. 56.052. ENFORCEMENT OF CLAUSE PROHIBITED FOLLOWING NOTICE FROM CONTINGENT PAYEE. (a) Except as provided by Subsection (d), a contingent payor or its surety may not enforce a contingent payment clause as to work performed or materials delivered after the contingent payor receives written notice from the contingent payee objecting to the further enforceability of the contingent payment clause as provided by this chapter and the notice becomes effective as provided by Subsection (b). The contingent payee may send written notice only after the 45th day after the date the contingent payee submits a written request for payment to the contingent payor that is in a form substantially in accordance with the contingent payee's contract requirements for the contents of a regular progress payment request or an invoice.

(b) For purposes of Subsection (a), the written notice becomes effective on the latest of:

(1) the 10th day after the date the contingent payor receives the notice;

(2) the eighth day after the date interest begins to accrue against the obligor under:

(A) Section 28.004, Property Code, under a contract for a private project governed by Chapter 28, Property Code; or

(B) 31 U.S.C. Section 3903(a)(6), under a contract for a public project governed by 40 U.S.C. Section 3131; or

(3) the 11th day after the date interest begins to accrue against the obligor under Section 2251.025, Government Code, under a contract for a public project governed by Chapter 2251, Government Code.

(c) A notice given by a contingent payee under Subsection (a) does not prevent enforcement of a contingent payment clause if:

(1) the obligor has a dispute under Chapter 28, Property Code, Chapter 2251, Government Code, or 31 U.S.C. Chapter 39 as a result of the contingent payee's failure to meet the contingent payee's contractual requirements; and

(2) the contingent payor gives notice in writing to the contingent payee that the written notice given under Subsection (a) does not prevent enforcement of the contingent payment clause under this subsection and the contingent payee receives the notice under this subdivision not later than the later of:

(A) the fifth day before the date the written notice from the contingent payee under Subsection (a) becomes effective under Subsection (b); or

(B) the fifth day after the date the contingent payor receives the written notice from the contingent payee under Subsection (a).

(d) A written notice given by a contingent payee under Subsection (a) does not prevent the enforcement of a contingent payment clause to the extent that the funds are not collectible as a result of a primary obligor's successful assertion of a defense of sovereign immunity, if the contingent payor has exhausted all of its rights and remedies under its contract with the primary obligor and under Chapter [2251](#), Government Code. This subsection does not:

(1) create or validate a defense of sovereign immunity; or

(2) extend to a primary obligor a defense or right that did not exist before September 1, 2007.

(e) On receipt of payment by the contingent payee of the unpaid indebtedness giving rise to the written notice provided by the contingent payee under Subsection (a), the contingent payment clause is reinstated as to work performed or materials furnished after the receipt of the payment, subject to the provisions of this chapter.

Added by Acts 2009, 81st Leg., R.S., Ch. 87 (S.B. [1969](#)), Sec. 4.001(a), eff. September 1, 2009.

Sec. 56.053. ENFORCEMENT OF CLAUSE PROHIBITED IF EXISTENCE OF SHAM RELATIONSHIP. A contingent payor or its surety may not enforce a contingent payment clause if the contingent payor is in a sham relationship with the obligor, as described by the sham relationships in Section [53.026](#), Property Code.

Added by Acts 2009, 81st Leg., R.S., Ch. 87 (S.B. [1969](#)), Sec.

4.001(a), eff. September 1, 2009.

Sec. 56.054. ENFORCEMENT OF CLAUSE PROHIBITED IF UNCONSCIONABLE. (a) A contingent payor or its surety may not enforce a contingent payment clause if the enforcement would be unconscionable. The party asserting that a contingent payment clause is unconscionable has the burden of proving that the clause is unconscionable.

(b) The enforcement of a contingent payment clause is not unconscionable if the contingent payor:

(1) proves that the contingent payor has exercised diligence in ascertaining and communicating in writing to the contingent payee, before the contract in which the contingent payment clause has been asserted becomes enforceable against the contingent payee, the financial viability of the primary obligor and the existence of adequate financial arrangements to pay for the improvements; and

(2) has done the following:

(A) made reasonable efforts to collect the amount owed to the contingent payor; or

(B) made or offered to make, at a reasonable time, an assignment by the contingent payor to the contingent payee of a cause of action against the obligor for the amounts owed to the contingent payee by the contingent payor and offered reasonable cooperation to the contingent payee's collection efforts, if the assigned cause of action is not subject to defenses caused by the contingent payor's action or failure to act.

(c) A cause of action brought on an assignment made under Subsection (b)(2)(B) is enforceable by a contingent payee against an obligor or a primary obligor.

(d) A contingent payor is considered to have exercised diligence for purposes of Subsection (b)(1) under a contract for a private project governed by Chapter 53, Property Code, if the contingent payee receives in writing from the contingent payor:

(1) the name, address, and business telephone number of the primary obligor;

(2) a description, legally sufficient for

identification, of the property on which the improvements are being constructed;

(3) the name and address of the surety on any payment bond provided under Subchapter I, Chapter 53, Property Code, to which any notice of claim should be sent;

(4) if a loan has been obtained for the construction of improvements:

(A) a statement, furnished by the primary obligor and supported by reasonable and credible evidence from all applicable lenders, of the amount of the loan;

(B) a summary of the terms of the loan;

(C) a statement of whether there is foreseeable default of the primary obligor; and

(D) the name, address, and business telephone number of the borrowers and lenders; and

(5) a statement, furnished by the primary obligor and supported by reasonable and credible evidence from all applicable banks or other depository institutions, of the amount, source, and location of funds available to pay the balance of the contract amount if there is no loan or the loan is not sufficient to pay for all of the construction of the improvements.

(e) A contingent payor is considered to have exercised diligence for purposes of Subsection (b)(1) under a contract for a public project governed by Chapter 2253, Government Code, if the contingent payee receives in writing from the contingent payor:

(1) the name, address, and primary business telephone number of the primary obligor;

(2) the name and address of the surety on the payment bond provided to the primary obligor to which any notice of claim should be sent; and

(3) a statement from the primary obligor that funds are available and have been authorized for the full contract amount for the construction of the improvements.

(f) A contingent payor is considered to have exercised diligence for purposes of Subsection (b)(1) under a contract for a public project governed by 40 U.S.C. Section 3131 if the contingent payee receives in writing from the contingent payor:

(1) the name, address, and primary business telephone number of the primary obligor;

(2) the name and address of the surety on the payment bond provided to the primary obligor; and

(3) the name of the contracting officer, if known at the time of the execution of the contract.

(g) A primary obligor shall furnish the information described by Subsection (d) or (e), as applicable, to the contingent payor not later than the 30th day after the date the primary obligor receives a written request for the information. If the primary obligor fails to provide the information under the written request, the contingent payor, the contingent payee, and their sureties are relieved of the obligation to initiate or continue performance of the construction contracts of the contingent payor and contingent payee.

Added by Acts 2009, 81st Leg., R.S., Ch. 87 (S.B. 1969), Sec. 4.001(a), eff. September 1, 2009.

Sec. 56.055. USE OF CLAUSE TO INVALIDATE ENFORCEABILITY OR PERFECTION OF MECHANIC'S LIEN PROHIBITED. A contingent payment clause may not be used as a basis for invalidation of the enforceability or perfection of a mechanic's lien under Chapter 53, Property Code.

Added by Acts 2009, 81st Leg., R.S., Ch. 87 (S.B. 1969), Sec. 4.001(a), eff. September 1, 2009.

Sec. 56.056. ASSERTION OF CLAUSE AS AFFIRMATIVE DEFENSE. The assertion of a contingent payment clause is an affirmative defense to a civil action for payment under a contract.

Added by Acts 2009, 81st Leg., R.S., Ch. 87 (S.B. 1969), Sec. 4.001(a), eff. September 1, 2009.

Sec. 56.057. ALLOCATION OF RISK PERMITTED. An obligor or a primary obligor may not prohibit a contingent payor from allocating risk by means of a contingent payment clause.

Added by Acts 2009, 81st Leg., R.S., Ch. 87 (S.B. 1969), Sec. 4.001(a), eff. September 1, 2009.