

SENATE BILL REPORT

SB 5333

As of February 18, 2021

Title: An act relating to void and unenforceable clauses in construction contracts related to delays caused by the COVID-19 pandemic emergency proclamations.

Brief Description: Concerning void and unenforceable clauses in construction contracts related to delays caused by the COVID-19 pandemic emergency proclamations. [**Revised for 1st Substitute:** Concerning void and unenforceable clauses in public works contracts related to delays caused by the COVID-19 pandemic emergency proclamations.]

Sponsors: Senators Holy and Wilson, L..

Brief History:

Committee Activity: Labor, Commerce & Tribal Affairs: 1/28/21, 2/11/21 [DPS-WM, w/oRec].

Ways & Means: 2/18/21.

Brief Summary of First Substitute Bill

- Prohibits clauses in a public works contract from waiving, releasing, or extinguishing the rights of a contractor to damages or an equitable adjustment arising out of a delay in performance caused by the COVID-19 pandemic emergency proclamations.

SENATE COMMITTEE ON LABOR, COMMERCE & TRIBAL AFFAIRS

Majority Report: That Substitute Senate Bill No. 5333 be substituted therefor, and the substitute bill do pass and be referred to Committee on Ways & Means.

Signed by Senators Keiser, Chair; King, Ranking Member; Braun, Honeyford, Robinson and Schoesler.

Minority Report: That it be referred without recommendation.

Signed by Senators Conway, Vice Chair, Labor; Stanford, Vice Chair, Commerce &

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not part of the legislation nor does it constitute a statement of legislative intent.

Tribal Affairs; Saldaña.

Staff: Jarrett Sacks (786-7448)

SENATE COMMITTEE ON WAYS & MEANS

Staff: Sarian Scott (786-7729)

Background: In general, contract terms are enforceable under law. However, a contract term may be unenforceable if it contravenes public policy. State law provides that certain types of contracts or contract terms are against public policy and are unenforceable. For example, a provision in a public works contract with a county that requires actions arising out of the contract to be commenced in superior court of the county is against public policy and is void and unenforceable.

Under current law, any clause in a construction contract that waives, releases, or extinguishes the rights of a contractor, subcontractor, or supplier to damages or equitable adjustment arising out of unreasonable delay in performance caused by acts or omissions of the contractee is against public policy and is void and unenforceable.

A construction contract is any contract or agreement for construction, alteration, repair, addition to, subtraction from, improvement to, or maintenance of, any building, highway, road, railroad, excavation, or other structure, project, development, or improvement attached to real estate, including moving and demolition.

Summary of Bill (First Substitute): Any clause in a public works contract that waives, releases, or extinguishes the rights of a contractor, subcontractor, or supplier to damages or an equitable adjustment arising out of a delay in performance caused by the COVID-19 pandemic emergency proclamations is against public policy and void and unenforceable.

The bill does not void any provision or contract where the parties have already agreed to contract modifications or have agreed to terms in which the COVID-19 pandemic emergency proclamations impact existing contract language.

EFFECT OF CHANGES MADE BY LABOR, COMMERCE & TRIBAL AFFAIRS COMMITTEE (First Substitute):

The bill is limited to only public works contracts. A provision is added that provides that the bill does not void any provision or contract where the parties have already agreed to contract modifications or have agreed to terms in which the COVID-19 pandemic emergency proclamations impact existing contract language.

Appropriation: None.

Fiscal Note: Available.

Creates Committee/Commission/Task Force that includes Legislative members: No.

Effective Date: The bill contains an emergency clause and takes effect immediately.

Staff Summary of Public Testimony on Original Bill (Labor, Commerce & Tribal Affairs): *The committee recommended a different version of the bill than what was heard.*

PRO: The conditions under which many contracts were agreed to have changed dramatically due to the pandemic. The mandates requiring social distancing, additional cleaning, hand washing, and personal protection equipment have slowed down projects and increased costs. Contractors are responsible for many of these increased costs. The bill gives contractors a chance to make their case but does not require reimbursement. If a public owner mandates changes, the public owner should shoulder the costs. The bill will help compensate essential workers. Government boilerplate contracts have hurt contractor's ability to recover any costs.

OTHER: In the private sector, many adjustments were made cooperatively by both parties and there should be a compelling reason for the state to intervene in a private contract. The bill should be limited to only public works. Both sides have risk and assume costs of that risk, including the owner of the project. Owners have treated contractors fairly and negotiated cost-sharing when they were not obligated to. Washington State Department of Transportation compensated for direct costs and for implementing the safety plan. There are still many ongoing negotiations and change orders and it is unclear how bill impacts them. Force majeure provisions are already in contracts and are built into the costs of the contract.

Persons Testifying (Labor, Commerce & Tribal Affairs): PRO: Senator Jeff Holy, Prime Sponsor; Brent Ludeman, National Electrical Contractors Association; Jerry VanderWood, Associated General Contractors of Washington; John Ahlers, Ahlers Cressman & Sleight; John Salinas, Salinas Construction Inc.; Grant Jansen, Jansen Inc..

OTHER: Colm Nelson, Stoel Rives; Greg Hanon, National Association of Industrial and Office Properties; Bill Frare, Department of Enterprise Services; Chris Christopher, Washington State Department of Transportation; Jon Deffenbacher, Washington State Department of Transportation.

Persons Signed In To Testify But Not Testifying (Labor, Commerce & Tribal Affairs): No one.

Staff Summary of Public Testimony on First Substitute (Ways & Means): PRO: Contractors are invested to keep projects open safely. In many, not all cases, settlements have been reached. Construction industry and the labor industry support this bill. During COVID, we had impacted contracts that had large impacts. We suffered financial

consequences. This will allow the contractors to recover some impacts. It does not eliminate the causation requirement the contractor has to prove.

CON: The Governor shut down contracts to protect public lives. We anticipate costs to have been an estimated \$45 million to date. This will cost as much as \$100 million in costs, in addition to the \$45 million. This bill shifts risks and costs from the contractor to the state and the taxpayer. Both parties are aware of the risks at the time of the bid. Each party is responsible for their assigned risk. Risks are spelled out in the contracts signed.

Persons Testifying (Ways & Means): PRO: Jerry VanderWood, Associated General Contractors of Washington; John Ahlers, Ahlers Cressman & Sleight PLLC; John Salinas, Salinas Construction Inc.; Grant Jansen, Jansen, Inc..

CON: Chris Christopher, Washington State Department of Transportation; Bill Frare, Washington State Department of Enterprise Services.

Persons Signed In To Testify But Not Testifying (Ways & Means): No one.