

Regular Session, 2012

SENATE BILL NO. 693

BY SENATOR MORRELL

CONTRACTS. Provides relative to motor carrier transportation contracts and construction contracts. (gov sig)

1 AN ACT

2 To amend and reenact R.S. 9:2780.1(A)(2)(a), (A)(5), (B), (C), and (D), to enact R.S.  
3 9:2780.1(G), and to repeal Section 2 of Act No. 492 of the 2010 Regular Session of  
4 the Legislature, relative to construction contracts; to provide relative to definitions;  
5 to exclude certain contracts; to provide relative to the enforcement of certain clauses  
6 in construction contracts; to repeal a provision excluding certain contracts; and to  
7 provide for related matters.

8 Be it enacted by the Legislature of Louisiana:

9 Section 1. R.S. 9:2780.1(A)(2)(a), (A)(5), (B), (C), and (D) are hereby amended and  
10 reenacted and R.S. 9:2780.1(G) is hereby enacted to read as follows:

11 §2780.1. Certain contract provisions invalid; motor carrier transportation contracts;  
12 construction contracts

13 A. For purposes of this Section, the following terms have the meanings  
14 ascribed to them by this Subsection, except where the context clearly indicates  
15 otherwise:

16 \* \* \*

17 (2)(a) "Construction contract" shall mean any agreement for the ~~design,~~

1 construction, alteration, or renovation, ~~repair, or maintenance~~ of a building,  
2 structure, highway, road, bridge, water line, sewer line, oil line, gas line,  
3 appurtenance, or other improvement to real property, **, or repair or maintenance of**  
4 **a highway, road, or bridge**, including any moving, demolition, or excavation,  
5 except that no deed, lease, easement, license, or other instrument granting an interest  
6 in or the right to possess property will be deemed to be a construction contract even  
7 if the instrument includes the right to design, construct, alter, renovate, repair, or  
8 maintain improvements on such real property.

9 \* \* \*

10 (5) "Third party" means any party not subject to the contractual obligations  
11 between the indemnities indemnitee and indemnitor; **excluding, however, any**  
12 **party who has otherwise contracted with the indemnitor or is at the**  
13 **indemnitee's facility at the invitation or direction of the indemnitor.**

14 B. Notwithstanding any provision of law to the contrary **and except as**  
15 **otherwise provided in this Section**, any provision, clause, covenant, or agreement  
16 contained in, collateral to, or affecting a motor carrier transportation contract or  
17 construction contract which purports to indemnify, defend, or hold harmless, or has  
18 the effect of indemnifying, defending, or holding harmless, the indemnities  
19 indemnitee from or against any liability for loss or damage resulting from the  
20 negligence or intentional acts or omissions of the indemnities indemnitee, an agent  
21 or employee of the indemnities indemnitee, or a third party over which the  
22 indemnitor has no control is contrary to the public policy of this state and is null,  
23 void, and unenforceable.

24 C. Notwithstanding any provision of law to the contrary **and except as**  
25 **otherwise provided in this Section**, any provision, clause, covenant, or agreement  
26 contained in, collateral to, or affecting a motor carrier transportation contract or  
27 construction contract which purports to require an indemnitor to procure liability  
28 insurance covering the acts or omissions or both of the indemnities indemnitee, its  
29 employees or agents, or the acts or omissions of a third party over whom the

1 indemnitor has no control is null, void, and unenforceable. However, nothing in this  
2 Section shall be construed to prevent the ~~indemnities~~ indemnitee from requiring the  
3 indemnitor to provide proof of insurance for obligations covered by the contract.

4 D. Notwithstanding any contractual provision to the contrary, ~~the laws of the~~  
5 ~~state of Louisiana~~ this Section shall apply to and govern any construction contract  
6 to be performed in this state and any motor carrier transportation contract relative to  
7 loading or unloading activities, or any services incidental thereto, which occur in this  
8 state. Any provision, covenant, or clause in such contracts which conflicts with the  
9 provisions of this Section shall be null, void, and unenforceable.

10 \* \* \*

11 **G. Nothing in this Section shall invalidate or prohibit the enforcement**  
12 **of any of the following:**

13 **(1) Any clause in a construction contract in which each party assumes**  
14 **responsibility for its own personnel and property and agrees to indemnify,**  
15 **defend, or hold harmless the other party and the other party's contractors,**  
16 **employees, and invitees against loss, liability, or damages in connection with**  
17 **bodily injury, death, or damage to the indemnitor's personnel or property**  
18 **arising out of, related to, or resulting from the performance of the contract.**  
19 **The provisions of this Paragraph shall not apply to the intentional acts of any**  
20 **party, or any party's contractors, employees, and invitees.**

21 **(2) Any clause in a construction contract containing the indemnitor's**  
22 **promise to indemnify, defend, or hold harmless the indemnitee or an agent or**  
23 **employee of the indemnitee if the contract also requires the indemnitor to**  
24 **obtain insurance to insure the obligation to indemnify, defend, or hold harmless**  
25 **and there is evidence that the indemnitor recovered the cost of the required**  
26 **insurance in the contract price. However, the indemnitor's liability under such**  
27 **clause shall be limited to the amount of the proceeds that were payable under**  
28 **the insurance policy or policies that the indemnitor was required to obtain.**

29 **(3) Any clause in a construction contract that requires the indemnitor**

1 to procure insurance or name the indemnitee as an additional insured on the  
 2 indemnitor's policy of insurance, but only to the extent that such additional  
 3 insurance coverage provides coverage for liability due to any of the following:

4 (a) An obligation to indemnify, defend, or hold harmless authorized  
 5 pursuant to Paragraph (1) of this Subsection; provided that such insurance  
 6 coverage is provided only when the indemnitor is at least partially at fault or  
 7 otherwise liable for damages ex delicto or quasi ex delicto.

8 (b) An obligation to indemnify, defend, or hold harmless authorized  
 9 pursuant to Paragraph (2) of this Subsection; provided that such insurance  
 10 coverage is provided only when the indemnitor is at least partially at fault or  
 11 otherwise liable for damages ex delicto or quasi ex delicto.

12 Section 2. Section 2 of Act No. 492 of the 2010 Regular Session of the Legislature  
 13 is hereby repealed.

14 Section 3. This Act shall become effective upon signature by the governor or, if not  
 15 signed by the governor, upon expiration of the time for bills to become law without signature  
 16 by the governor, as provided by Article III, Section 18 of the Constitution of Louisiana. If  
 17 vetoed by the governor and subsequently approved by the legislature, this Act shall become  
 18 effective on the day following such approval.

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The original instrument was prepared by Sharon F. Lyles. The following digest, which does not constitute a part of the legislative instrument, was prepared by Alan Miller.

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#### DIGEST

Morrell (SB 693)

Present law prohibits as null and void any provision, clause, covenant, or agreement contained in, collateral to, or affecting a "motor carrier transportation contract" as defined in present law or a "construction contract" as defined in present law which:

1. Purports to indemnify, defend, or hold harmless, or has the effect of indemnifying, defending, or holding harmless, the indemnitee from or against any liability for loss or damage resulting from the negligence or intentional acts or omissions of the indemnitee, an agent or employee of the indemnitee, or a "third party" over which the indemnitor has no control.
2. Requires an indemnitor to procure liability insurance covering the acts or omissions or both of the indemnitee, its employees or agents, or the acts or omissions of a "third party" over whom the indemnitor has no control.

Present law among other definitions, includes in the definition of "construction contract" an agreement for the design of, or the repair or maintenance of, a building, structure, highway, road, bridge, water line, sewer line, oil line, gas line, appurtenance, or other improvement to real property.

Proposed law excludes from such definition of "construction contract" the design of the items above, and limits the repair and maintenance agreements in such definition to agreements for the repair or maintenance of a highway, road, or bridge.

Present law defines a "third party" as any party not subject to the contractual obligations between the indemnitee and the indemnitor.

Proposed law excludes from such definition any party who has otherwise contracted with the indemnitor or is at the indemnitee's facility at the invitation or direction of the indemnitor.

Proposed law provides that provisions of present law shall not invalidate or prohibit the enforcement of any of the following:

1. Any clause in such a "construction contract" in which each party assumes responsibility for its own personnel and property and agrees to indemnify, defend, or hold harmless the other party and the other party's contractors, employees, and invitees against loss, liability, or damages in connection with bodily injury, death, or damage to the indemnitor's personnel or property arising out of, related to, or resulting from the performance of the contract. However, proposed law provides that this provision does not apply to the intentional acts of any party, or any party's contractors, employees, and invitees.
2. Any clause in a construction contract containing the indemnitor's promise to indemnify, defend, or hold harmless the indemnitee or an agent or employee of the indemnitee if the contract also requires the indemnitor to obtain insurance to insure the obligation to indemnify, defend, or hold harmless and there is evidence that the indemnitor recovered the cost of the required insurance in the contract price, but the indemnitor's liability under such a clause is limited to the amount of the proceeds that were payable under the insurance policy or policies that the indemnitor was required to obtain.
3. Any clause in a construction contract that requires the indemnitor to procure insurance or name the indemnitee as an additional insured on the indemnitor's policy of insurance, but only to the extent that such additional insurance coverage provides coverage for liability due to an obligation to indemnify, defend, or hold harmless authorized by proposed law in Paragraphs (1) and (2) above and if such insurance coverage is only provided where the indemnitor is at least partially at fault or otherwise liable for damages ex delicto or quasi ex delicto.

Present law provides that "Louisiana law" applies to such "construction contracts" performed in this state or such "motor carrier transportation contracts" relative to loading or unloading activities, or any services incidental thereto, which occur in this state.

Proposed law changes the application of law to such contracts from "Louisiana law" to the provisions of present law in R.S. 9:2780.1.

Present law provides that it does not apply to prohibited clauses in any "motor carrier transportation contract" or "construction contract" entered into prior to January 1, 2011, but also does not apply to a contract providing indemnity when the contract was executed before the effective date of the proposed law (August 15, 2010) if the contract governs a specific terminable performance of a specific job or activity.

Proposed law repeals the provision providing that the present law does not apply to a contract executed before August 15, 2010, if the contract governs a specific terminable performance of a specific job or activity.

Effective upon signature of the governor or lapse of time for gubernatorial action.

(Amends R.S. 9:2780.1(A)(2)(a), (A)(5), (B), (C), and (D); adds R.S. 9:2780.1(G))

Summary of Amendments Adopted by Senate

Committee Amendments Proposed by Senate Committee on Transportation, Highways, and Public Works to the original bill

1. Limits the repair and maintenance agreements in the definition of "construction contract" subject to the present law above to agreements for the repair or maintenance of a highway, road, or bridge.
2. Removes the adjective "major" in the definition of "construction contract" limiting the application of present law to contracts for the "major" alteration, renovation, or improvements to real property projects.
3. Removes a limitation on the prohibition of any contract provision which requires an indemnitor to procure liability insurance, that such provision cover "negligent or intentional" acts or omissions.
4. Removes an exemption from the law for any contract to which the state of Louisiana or any of its political subdivisions is a party.
5. Provides that the provision in proposed law allowing any clause in "construction contracts" in which each party assumes responsibility for its own personnel and property and agrees to indemnify, the other party against loss in connection with bodily injury, death, or damage to the indemnitor's personnel or property arising out of, related to, or resulting from the performance of the contract, does not apply to the intentional acts of any party, or any party's contractors, employees, and invitees.
6. Limits the provision in proposed law allowing any clause in "construction contracts" that requires the indemnitor to procure insurance or name the indemnitee as an additional insured on the indemnitor's policy of insurance to the extent that the additional insurance coverage provides coverage for liability permitted by the proposed law, by requiring that such insurance coverage is only provided where the indemnitor is at least partially at fault or otherwise liable for damages ex delicto or quasi ex delicto.

Summary of Amendments Adopted by Senate

Senate Floor Amendments to engrossed bill

1. Makes technical changes recommended by the Legislative Bureau.