



# Shop Around: Purchasing and Procurement for Construction

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# Purchasing and Procurement for Construction

- 87<sup>th</sup> Legislature – Significant Public Construction Bills
- Pandemic / Post-Pandemic Considerations

# 87<sup>th</sup> Legislature – Update

- Significant Public Construction Bills
  - HB 692 – Retainage
  - HB 2581 – Competition & Transparency
  - HB 3069 – Statute of Repose
  - HB 3583 – Energy Savings Contracts



# Retainage Bill – HB 692

- Effective immediately
- Requires Contract Language to
  - 1) Define Substantial Completion
  - 2) Provide conditions for release of retainage at substantial or final completion
- Governmental Entity must maintain accurate records of accounting for
  - retainage withheld;
  - retainage released to prime; and
  - remaining retainage and interest earned.

# Retainage Bill – HB 692

- Disallows retainage exceeding 10% for contracts < \$5M
  - Includes 10% of contract price, any item on bid schedule or schedule of values, including materials & equipment on site
- Caps retainage at 5% for contracts  $\geq$  \$5M
- Dam projects regardless of value are capped at 10%
- Permits interest on retainage by agreement for
  - competitively bid contracts  $\geq$  \$10M
  - contracts awarded using procurement method other than competitive bidding (any amount)

# Retainage Bill – HB 692

## Changes for Contractors & Subcontractors:

- Prohibits prime contractor from withholding greater % of retainage from subcontractors
- Prohibits subcontractors from withholding greater % of retainage from sub-subcontractors

# Retainage Bill – HB 692

- Bill attempts to address perception Owners hold retainage too long and use it to leverage warranty repairs or extra work
  - Owner may not withhold retainage after completion of work
- Exception: Allows Owner to withhold retainage if a bona fide dispute exists – with written notice
  - Permits Contractor to cure noncompliant work
  - Or offer Owner reasonable compensation instead of correction
  - No obligation by Owner to accept offer
- Codified Gov't Code chapter 2252 – Effective June 1, 2021

# Competition & Transparency

- HB 2581 – Amends Tex. Gov't Code ch. 2269
  - Permits Contractor to request documents related to the evaluation of the offeror's submission
  - Within 30 days of written request
    - Owner must provide to requestor all evaluative documents and ranking information



# Competition & Transparency - HB 2581



- CSP – Price must be  $\geq 50\%$ 
  - Unless governing body determines public interest requires lower value – Not less than **36.9%**
  - 7 days after award, Owner must provide evaluations and any scores to offerors and make publicly available
- Changes Sec. 2269.452(a) timeline from 10 days to 15 days for injunctive/declaratory relief to enforce statute
- Effective September 1, 2021

# Statute of Repose

- HB 3069
  - New law lowers repose period from 10 years to **8 years** from substantial completion for governmental entity
  - But provides extension of the period if notice given prior to expiration
    - If “person,” 2-year extension from date claim presented
    - If governmental entity, 1-year extension from date claim presented

# Statute of Repose - HB 3069

Exceptions for claims arising out of:

- TxDOT contract
- Highway funding from state or feds
- Civil works projects (Gov't Code 2269.351)
  - Roads, streets, bridges, utilities, water/wastewater, docks, airport runways/taxiways, storm drainage, flood control, transit projects

# Statute of Repose - HB 3069

## Note:

- Tex. Civ. Prac. & Rem. Code §16.061 limits applicability of chapter 16 to the state and political subdivisions
- But repose not exempt – 16.008 & 16.009
- Effective September 1, 2021

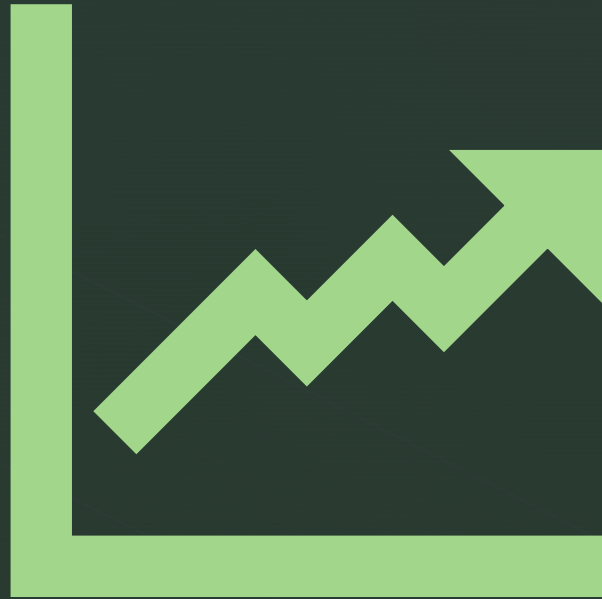
# Competitive Procurement Compliance

- HB 3583 – Amends Loc. Gov't Code ch. 302
  - Energy Savings Performance Contract
    - Intended to promote energy efficiency projects and exempts them from procurement
  - Certain abuses –Bill aims to eliminate that
  - Excludes water/wastewater projects from chapter 302



# Procurement Considerations in a Pandemic / Post-Pandemic World

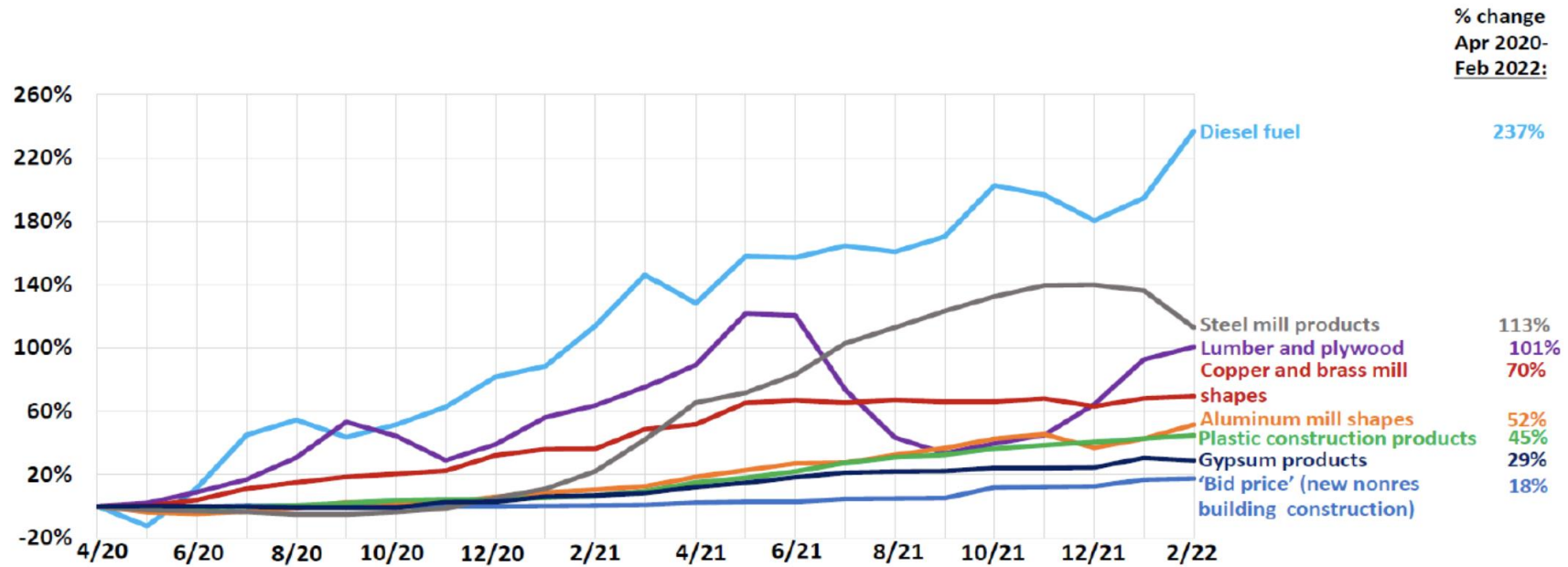




Price Escalation

# PPIs for Construction Bid Prices and Selected Inputs

Cumulative Change in PPIs, April 2020 – February 2022



## Texas Water Infrastructure Network

TxWIN Recommendations for Public Owners to Mitigate Price and Schedule Uncertainty Due to Current Market Conditions Driven by Inflation and Supply Chain Uncertainty



# Delay & Disruption Clauses & Claims

## Clauses

- Force Majeure
- Emergency
- Suspension of Work
- Changes and Extra Work
- Differing Site Conditions/Concealed or Unknown Conditions

## Claims

- Time NOT Money
- Damages for Delay
  - Direct Damages
  - Consequential Damages

Thank you.

Questions?



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