No. 12-0772

IN THE SUPREME COURT OF TEXAS

ZACHRY CONSTRUCTION CORPORATION,
***Petitioner*,**

v.

PORT OF HOUSTON AUTHORITY OF HARRIS COUNTY, TEXAS
***Respondent*.**

On appeal from the Fourteenth Court of Appeals, Houston, Texas
Cause No. 14-10-00708-CV

BRIEF OF *AMICUS CURIAE* THE AMERICAN SUBCONTRACTORS ASSOCIATION, INC.

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TO THE HONORABLE TEXAS SUPREME COURT:

Amicus Curiae, The American Subcontractors Association, Inc. ("ASA"), and the American Subcontractors Association of Texas, Inc. ("ASA of Texas") offer this brief in support of Zachry Construction Corporation's Petition for Review ("Petition for Review").

Interest of *Amicus Curiae* and Disclosures Pursuant to Tex. R. App. P. 11

ASA is a national organization representing the interests of approximately 3,000 subcontractor member businesses in the United States, including members of five Texas Chapters: Houston, North Texas, San Antonio, Central Texas and the Rio Grande Valley. The membership of ASA of Texas is comprised of these Texas Chapters of ASA. ASA and ASA of Texas' members include the whole spectrum of businesses including large, midsize and small closely held corporations as well as sole proprietorships. These members provide labor and materials on construction projects throughout the United States of America. Subcontractors commonly perform approximately 80-90% of the work on commercial construction projects like the project at issue in this case. Jimmie Hinze & Andrew Tracey, *The Contractor-Subcontractor Relationship: The Subcontractor's View*, Vol. 120 J. Const. Eng'g & Mgmt. 274 (Issue 2 1994); Keisha Rutledge, *Subcontractors Building Recognition on the Job,* Tampa Bay Bus. J. (Mar. 12, 2001).[1] This has been the

[1] *available at* www.bizjournals.com/tampabay/stories/2001/03/12/focus6.html

case for quite some time. Note, Mechanics' Liens And Surety Bonds in the Building Trades, 68 Yale L.J. 138 (1958).

The primary focus for both ASA and ASA of Texas is the equitable treatment of subcontractors in the construction industry. Both act in the interest of all subcontractors by promoting legislative action and by appearing as amicus curiae in significant legal actions that affect the construction industry at large, such as the Court of Appeals' decision in this case.

The undersigned counsel is being compensated for the preparation and submission of this brief.

Why should this court hear this case?

1. Sanctioning "arbitrary and capricious conduct, active interference, bad faith and/or fraud[ulent]" conduct of a party to a contract is bad policy for Texas (or anywhere else). It encourages unscrupulous, unprincipled, unethical, and immoral conduct in business, and indirectly, in society as a whole. The American commercial system and business in Texas demand that such behavior be discouraged in business. Indeed, it is a challenge for one to make peace with a legal doctrine that allows a person to shield himself from defrauding another, under any circumstances.

2. The lower court's opinion will have devastating effects upon small to mid-sized businesses. The lower court's opinion leaves the very survival of these businesses totally at the mercy of their contracting partner in face of the most egregious circumstances imaginable in a business context. It denies a remedy to small and mid-

sized businesses that suffer severe harm from a delay they never envisioned happening. There needs to be a "safety valve" for courts to use in extremely egregious situations.

Intentional Conduct That Is Arbitrary, Capricious, And Fraudulent Should Not Be Protected By A No Damage For Delay Clause.

After receiving evidence for three months the jury in the instant action found that the owner's conduct was "arbitrary and capricious" and amounted to "active interference, bad faith, and/or fraud." Nevertheless, despite this finding of fact, the lower court held that the "no damage for delay" clause shielded the owner from liability for such reprehensible conduct. This principle should not stand. This court should hear this case.

Hypothetically and taking the principle of the lower court to the extreme, the owner could have employed armed security guards to prevent access by the general contractor to the work site delaying construction for a period of years. At the same time the owner could say to the general contractor: "I am intentionally denying you access to the construction site, but you can not recover your delay damages because of the no damage for delay clause in our contract. You must just stand by and suffer your damages until I change my mind and let you onto the job site." The owner could cite the lower court's ruling as authority that the no damage for delay clause shields the owner from liability for its reprehensible conduct.

Should Texas courts allow that result? Should Texas effectively sanction such conduct? The answer to both of these questions should be "No." How can it be argued that the case at bar is not worthy of the attention of this court? This is why this court should not let stand the lower court's language addressing no damage for delay clauses.

If, in the above hypothetical example, courts would not allow a no damage for delay clause to shield the owner from liability, it must be concluded that there are limits to the extent that such a clause is enforceable. If there are limits to the clause's enforceability, what are they?

This has been answered by many courts. The limits are the traditionally recognized exceptions to the enforceability of a "no damage for delay" clause. The exceptions are stated in a number of ways, but they are all quite similar. One way to list these traditional exceptions are found in *Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 387 *(Tex. 1997)*. Those exceptions are when the delay:

> (1) was not intended or contemplated by the parties to be within the purview of the provision; (2) resulted from fraud, misrepresentation, or other bad faith on the part of one seeking the benefit of the provision; (3) has extended for such an unreasonable length of time that the party delayed would have been justified in abandoning the contract; or (4) is not within the specifically enumerated delays to which the clause applies.

Another way to state the traditionally accepted exceptions to the enforcement of a no damage for delay clause is in *Corinno Civetta Construction Corp. v. City of New York*, 493 N.E. 2d 905, 910 (N.Y. 1986) where it was stated:

> Generally, even with such a [no damage for delay] clause, damages may be recovered for: (1) delays caused by the contractee's bad faith or its willful, malicious, or grossly negligent conduct, (2) uncontemplated delays, (3) delays so unreasonable that they constitute an intentional abandonment of the contract by the contractee, and (4) delays resulting from the contractee's breach of a fundamental obligation of the contract.

Id.

See generally, Phillip Lane Bruner & Patrick J. O'Connor, Jr., *Bruner And O'Connor on Construction Law*, Vol. 5, §§ 15:75 – 15:80 (West Group 2002); 2 Steven G. M. Stein, *Construction Law* ¶6.11[2][a], 6-72 - - 6-77 (2012). Regardless how they are expressed, the exceptions are commercially reasonable, good policy, and consistent with general contract law.

Courts throughout the nation have recognized that commercially reasonable contracting certainty can co-exist with widely reported and understood exceptions to the "no damage for delay" clause. These well-understood exceptions are so venerable that it is inaccurate to interpret the "no damage for delay" clause in Zachry's contract as if the long history of these exceptions did not exist at the time of contracting. *See* Maurice T. Brunner, *Validity and Construction of "No Damage" Clause with Respect to Delay in Building or Construction Contract*, 74 A.L.R.3d 187 (1976) (citing numerous cases from the early 1900's); *see e.g., W. L. Waples Co. v. State*, 178 A.D. 357, 361, 164 N.Y.S. 797, 800 (N.Y. App. Div. 1917); *First Sav. & Trust Co. v. Milwaukee Cnty.*, 158 Wis. 207, 240, 148 N.W. 22, 51-52 (Wis. 1914); *Sheehan v. Pittsburg*, 213 Pa. 133, 134, 62 A. 642 (Pa. 1905). It follows that the tradition and heritage of these exceptions are, in a general way, in the minds of members of the construction industry when they accept a no damage for delay clause in their contracts. Accordingly, the traditional exceptions are a part of the parties' intent.

One of the traditional exceptions to enforcement of the "no damage for delay" clause is active interference by the owner. *Bruner And O'Connor on Construction Law, Supra,* §15:77, 222; *Construction Law*, *Supra,* at ¶6.11[2][a], 6-77. The hypothetical

example above presents a classic case of the owner actively interfering with the general contractors contractual performance. That exception should preclude the enforceability of the no damage for delay clause in that instance.

A real case example of active interference is the situation encountered in *Johnson v. State*, 5 A.D.2d 919, 172 N.Y.S.2d 41 (1958) where the owner of a road construction project on which the contractor was working opened a portion of the roadway to traffic for the use of the owner as well as other contractors. Of course, building a road with traffic takes longer than when the roadway is free of competing traffic. The contractor suffered extreme delay and damages. It was the owner's intentional actions that prevented the contractor from having access to and performing the very work the owner hired the contractor to perform. As a result the contractor recovered damages despite the existence of a "no damage for delay" clause. This was the proper result because the owner controlled whether or not a delay would occur.

An upstream party should not be allowed to actively obstruct a downstream party from having access to the project and then hide behind a "no damage for delay" clause for protection, no matter how skillfully the clause is drafted. It is common sense to not tolerate the active interference by one contracting party with the performance of its contracting partner.

Not only is this the common sense approach, it is also consistent with a fundamental principle that underlies all contracts whenever or wherever made – that one contracting party should never be allowed to prevent its contracting partner from performing its contract. *Levine v. Bayne, Snell & Krause, Ltd.*, 40 S.W.3d 92, 99 (Tex.

2001) (*Owen, J.,* concurring); *Dorsett v. Cross,* 106 S.W.3d 213, 217 (Tex. App.—Houston [1st Dist.] 2003, writ den.); *O'Shea v. International Business Machine Corp.*, 578 S.W.2d 844, 846 (Tex. App.—Houston [1st Dist.] 1979, writ ref'd n.r.e.); *Atomic Fuel Extraction Corp. v. Est. of Slick*, 386 S.W.2d 180, 186 (Tex. Civ. App.—San Antonio 1964, writ ref'd n.r.e.). This has also been referred to as an implied duty to cooperate. *Leasehold Expense Recovery, Inc. v. Mothers Work, Inc.*, 331 F.3d 452, 461 (5th Cir. 2003).

One court in reviewing a lower court's application of the active interference exception to deny enforcement of a "no damage for delay" clause stated: "Regardless of the no-damage-for-delay theory, this cause should be affirmed under bedrock contract law." *Harry Pepper & Assoc., Inc. v. Hardrives Co.,* 528 So.2d 72, 74 (Fla. 4th DCA 1988). In explanation, the *Hardrives* court quoted another court:

> It is one of the most basic premises of contract law that where a party contracts for another to do a certain thing, he thereby impliedly promises that he will himself do nothing which will hinder or obstruct that other in doing the agreed thing. Indeed, if the situation is such that the co-operation of one party is a prerequisite to performance by the other, there is not only a condition implied in fact qualifying the promise of the latter, but also an implied promise by the former to give the necessary cooperation.

*Id., [*quoting *Casale v. Carrigan and Boland, Inc.,* 288 So.2d 299 (Fla. 4th DCA), *cert. dismissed*, 301 So.2d 100 (Fla. 1974)].

The traditional exceptions provide courts with a "safety valve" to handle the egregious situations by invoking the exceptions for policy reasons in the interest of commerce and what is good for society in general. It is the more extreme situations when the exceptions are invoked. One must be reminded that no damage for delay clauses are

effective in precluding claims arising in the vast majority of delays occurring on construction projects. It is only the more egregious and extreme situations where the traditional exceptions preclude their enforceability.

The instant case is indeed a situation where the clause should not be enforced. Sanctioning active interference with the performance of a contract, and arbitrary, capricious, and fraudulent conduct of one party that harms another party to a contract is not only poor, but terrible, policy for Texas (or anywhere else). No matter how well a contract is drafted, the court should not allow a contracting party to be rewarded for intentional, willful, arbitrary, capricious, or fraudulent conduct. This court should grant Zachry's Petition For Review and reverse the lower court. The lower court's opinion concerning no damage for delay clauses should specifically be overruled.

Applying Exceptions to the Enforceability of a No Damage For Delay Clause Is Consistent With Established Contract Law Doctrines

The lower court's opinion leaves one with the impression that limitations of the common law are not to be imposed upon the plain meaning of contract language. To the contrary, the common law is regularly used to limit the effect of contract language to effectuate policy for Texas. For example, a liquidated damage clause in a contract is limited by the common law. Liquidated damage clauses are unenforceable if they amount to a penalty, even though the contract does not mention anything about a penalty. *Stewart v. Basey*, 150 Tex. 666, 245 S.W.2d 484, 486 (1952). As the Court stated in that case:

> The universal rule for measuring damages for the breach of a contract is just compensation for the loss or damage actually sustained. By the operation of that rule a party generally should be awarded neither less or more than his actual damages. A party has no right to have a court enforce

> a stipulation which violates the principle underlying that rule. In those cases in which courts enforce stipulations of the parties as a measure of damages for the breach of covenants, the principle of just compensation is not abandoned and another principle substituted therefore. What courts really do in those cases is to permit the parties to estimate in advance the amount of damages, provided they adhere to the principle of just compensation.

A contractor that signed a liquidated damages clause that provides for $5 million damages per day on a $1 million dollar contract should not, as a matter of policy, be subjected to such damages no matter what the contract provision says. The sanctity of contract does not suffer whatsoever with such a limitation because that is the policy in Texas. Any other interpretation would be bad policy.

Another example of common law limiting enforceability of contract language for policy reasons is the "prevention doctrine." Under that doctrine, a party to a contract that prevents a condition precedent in a contract from occurring cannot rely on that condition to avoid liability to the other party. *II Deerfield Lt. Pshp. v. Henry Bldg., Inc., 41 S.W.3d 259, 265* (Tex. App. - San Antonio 2001, pet. denied*)*. The doctrine effectively renders the condition precedent from being enforceable. This is comparable to the way no damage for delay clauses become unenforceable through application of the traditional exceptions discussed above.

Furthermore, the prevention doctrine has been a part of Texas jurisprudence for many years. *See, eg., Honaker v. Guffey Petroleum Co.*, 294 S.W. 259, 263 (Tex. Civ. App. - - Amarillo 1927, no writ); *Ebberts v. Carpenter Production Co.,* 256 S.W.2d 601, 618-619 (Tex. Civ. App. - - Beaumont 1953, writ ref'd r.n.r.e.). This is a widely recognized principle not unique to Texas law. *Moore Bros. Co. v. Brown & Root, Inc.,*

207 F. 3d 717, 725 (4th Cir. 2000). Also see, Bradford Dyeing Associates v. J. Stog Tech. Gmbh, 765 A.2d 1226, 1238 (R. I. 2001) holding: ["It is . . . both elementary as well as fundamental contract law that if one party to the contract prevents the happening or performance of a condition precedent that is part of the contract, that action eliminates the condition precedent."] Thus, the prevention doctrine renders a condition precedent unenforceable in much the same way as the traditional exceptions render no damage for delay clauses unenforceable. This court should hear this case and overrule the lower court's holding pertaining to the no damage for delay clause.

Other examples where public policy reasons dictate contracts to be unenforceable are: illegal contracts, *TCA Bldg. Co. v. Northwestern Resources*, 922 S.W.2d 629, 635 (Tex. App. - - Waco 1996, writ den.); and mutual mistake *Barker v.* Roelke, 105 S.W3d 75, 84 (Tex. App. - - Eastland 2003, pet. denied); *Williams v. Glash*, 789 S.W.2d 261, 264 (Tex. 1990). Indeed, Texas courts place limitations upon contracts through the common law for policy reasons. There is no reason why common law should not do so in its treatment of no damage for delay clauses.

The Effect of This Case On the Small Businesses In the Construction Industry

If the opinion of the lower court is not reversed, small construction businesses will also pay the price. Most of those small businesses will be subcontractors. Make no mistake, if the lower court's ruling regarding the no damage for delay clause goes undisturbed, that clause will almost certainly find its way into the preponderance of future prime contracts for commercial construction in Texas. To avoid this from

happening, this court should specifically address the no damage for delay ruling of the lower court.

The construction industry is a significant part of the Texas economy. Commercial construction starts in Texas totaled $25.1 billion dollars in 2010 and $26.3 billion dollars in 2011. Ken Simonson, *Associated General Contractors of America The Economic Impact in Construction in the United States and Texas*, available at http://www.agc.org/galleries/econ/txstim.pdf (April 11, 2012) (Apx. Tab 1.). It should be noted that these years were during a severe economic *downturn*.

By far, the vast majority of this economic activity is represented by written construction contracts. This means there are a lot of construction contracts representing many dollars. A large number of those construction contracts use no damage for delay clauses. This is why the lower court's ruling has the attention of construction industry in Texas.

No damage for delay clauses in prime contracts are incorporated into and become part of subcontracts. This is accomplished by "flow-through," clauses, sometimes called "flow-down", "pass-through," or "incorporation by reference" clauses found in subcontracts. This is a clause used in almost every subcontract where all provisions of the prime contract between the general contractor and owner are incorporated into the subcontract and obligate the subcontractor to assume toward the contractor all of the obligations in the prime contract that the contractor assumes in that document toward the owner. Philip Lane Bruner & Patrick J. O'Connor, Jr., *Bruner And O'Connor on*

Construction Law, Vol. 1 §3:32, 443 (2002).[2] No damage for delay clauses are frequently used in prime contracts between the owner and general contractor for commercial construction. That very clause then gets incorporated into the subcontracts. Accordingly, the no damage for delay clause in the prime contract directly applies to the general contractor – subcontractor relationship.

Moreover, subcontractors perform the great majority of the work on commercial construction projects. Subcontractors perform 80-90% of the actual work on such projects. Hinze & Tracey, *The Contractor-Subcontractor Relationship, supra;* Rutledge, *Subcontractors Building Recognition on the Job, supra*. Subcontractors furnish the majority of the materials, provide most of the skilled trade workers and payroll, and bear the primary responsibility of meeting scheduled completion deadlines on a project. Rutledge, *id*. Therefore, it could be said that the subcontractors have the most capital at risk in the construction process. Delays frequently result in substantial increases in labor, material and overhead costs on projects. The subcontractors will likely feel the brunt of these losses. These unanticipated expenses can be substantial, and threaten the survival of small to mid-sized subcontractors. It follows that subcontractors are most vulnerable to financial losses caused by delays.

When subcontractors suffer these potentially crippling losses when the owner causes delays, it has two choices. First, the subcontractor can sue the general contractor for delay damages, who, in turn, sues the owner. A second option is that the

[2] *See, e.g.*, AIA Document A401-1997: Standard Form of Agreement Between Contractor and Subcontractor, arts. 1.1 and 2.1.; *see also*, aia.org

subcontractor and general contractor may "join forces" where the general contractor asserts the subcontractor's damages through a "pass-through claim" as authorized by *Interstate Contracting Corp. v. City of Dallas*, 135 S.W.3d 605 (Tex 2004). In that way, the general contractor pursues the subcontractor's delay damages caused by the owner. In either event, it is the subcontractor that suffers the effect of the no damage for delay clause in the prime contract.

For sure, there are large construction companies in the industry, including subcontractors. There are, however, approximately "40,500 construction firms in Texas, of which 87% are small ([less than] 20 employees)." Simonson, *The Economic Impact in Construction in the United States and Texas*, *supra* (Apx. Tab 1.). Small family-owned or closely held companies comprise the large majority of the subcontracting industry. Many of them are small sole proprietorships. These are the companies that will feel the effects of the lower court's opinion.

Subcontractors ability to recover delay damage caused by the owner are limited by the interpretation of the no damage for delay clause in the prime contract whether that clause is incorporated directly into the subcontract, or if the subcontractor's claim is asserted using a "pass-through" agreement. These small businesses, therefore, are the companies that will disproportionately absorb the injustice that occurs when an upstream party to the contract is allowed to shield themselves from the extreme delays caused by their own intentional, willful, arbitrary, capricious or fraudulent actions. Small business subcontractors will end up paying the price for the owner's or general contractor's bad deeds. This is why this court should hear this case.

The result of the opinion of the Court of Appeals in this case will be that the risk of catastrophic delays caused by the intentional, willful, arbitrary, capricious or even fraudulent actions of an upstream party will be shifted on billions of dollars of construction work to tens of thousands of Texas subcontractors.

Small businesses are the backbone of this nation's and Texas' economy. There is no justification to leave them at the mercy of the owner's willful, arbitrary, capricious, and fraudulent conduct that is also active interference.

CONCLUSION

This court should not let the lower court's opinion stand. This court should prevent the lower court's ruling from being used as authority in a way that would leave small businesses at the mercy of their upstream parties. Reversing the lower court's opinion concerning no damage for delay clauses accomplishes this purpose. This court should grant Zachry's Petition For Review and hear this case.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing instrument was served upon the following counsel Via E-mail, and Certified Mail, Return Receipt Requested, on this 24th day of October, 2012.

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APPENDIX

1. The Economic Impact of Construction in the United States and Texas. Tab 1

AGC of America
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
Quality People. Quality Projects.

The Economic Impact of Construction in the United States and Texas

Economic Impact of Investment in Nonresidential Construction:

- An additional $1 billion invested in nonresidential construction would add $3.4 billion to Gross Domestic Product (GDP), $1.1 billion to personal earnings and create or sustain 28,500 jobs.
  - About one-third (9,700) of these jobs would be on-site construction jobs.
  - About one-sixth (4,600) of the jobs would be indirect jobs from supplying construction materials and services. Most jobs would be in-state, depending on the project and the mix of in-state suppliers.
  - About half (14,300) of the jobs would be induced jobs created when the construction and supplier workers and owners spend their additional incomes. These jobs would be a mix of in-state and out-of-state jobs. Conversely, investments elsewhere would support some indirect and induced jobs in the state.

Nonresidential Construction Spending:

- Nonresidential spending in the U.S. in 2011 totaled $533 billion ($283 billion public, $258 billion private).
- Private nonresidential spending in Texas totaled $14.3 billion in 2011. (Public spending is not available by state.)
- Nonresidential starts in Texas totaled $25.1 billion in 2010 and $26.3 billion in 2011, according to Reed Construction Data.

Construction Employment (Seasonally Adjusted):

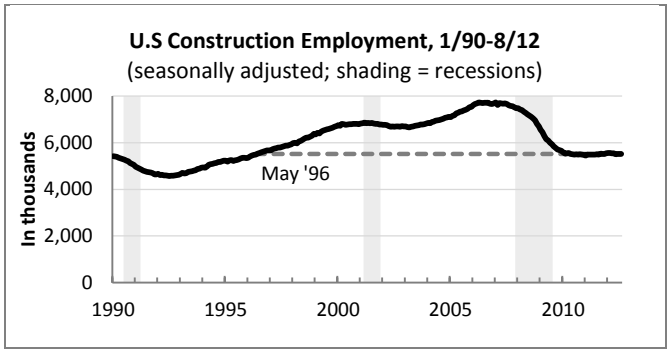
- Construction (residential + nonresidential) employed 5.5 million workers in August 2012, an increase of 17,000 (0.3%) from August 2011 and a decrease of 2.2 million (29%) from April 2006 when U.S. construction employment peaked.
- Construction employment in Texas in August totaled 597,200, an increase of 6.8% from August 2011 and a decrease of 12% from the state's peak in April 2008.

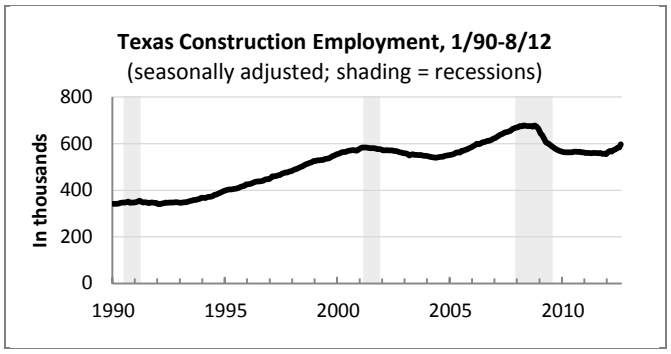
Construction Industry Pay:

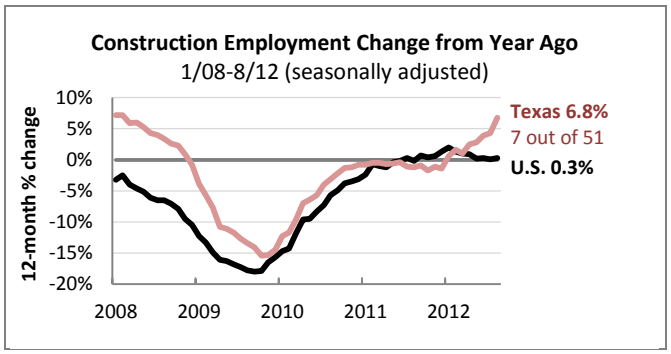
- In 2011, annual pay of all construction workers in the United States averaged $50,700, 6% more than the average for all private sector employees.
- Construction workers' pay in Texas averaged $50,900, 3% more than all private sector employees in the state.

Small Business:

- The United States had 682,700 construction firms in 2010, of which 92% employed fewer than 20 workers.
- Texas had 39,300 construction firms in 2010, of which 88% were small (<20 employees).







Empl. Change by Metro (not seasonally adjusted)		Rank
Metro area or division	8/11-8/12	(out of 337)
Statewide (Construction only)	6%	
Statewide* (Const/mining/logging)	7%	
Austin-Round Rock-San Marcos*	7%	36
Beaumont-Port Arthur*	7%	36
Corpus Christi*	6%	50
Dallas-Plano-Irving, Div.*	4%	73
El Paso*	4%	73
Fort Worth-Arlington, Div.*	9%	19
Houston-Sugar Land-Baytown	4%	73
Longview*	7%	36
McAllen-Edinburg-Mission*	5%	64
Midland*	7%	36
Odessa*	7%	36
San Antonio-New Braunfels	6%	50

**The Bureau of Labor Statistics reports employment for construction, mining and logging combined for metro areas in which mining and logging have few employers. To allow comparisons between states and their metros, the table shows combined employment change for these metros. Not seasonally adjusted statewide data is shown for both construction-only and combined employment change.*

Source: Ken Simonson, Chief Economist, AGC of America, simonsonk@agc.org, from Prof. Stephen Fuller, George Mason University (investment); Census Bureau (spending); Reed Construction Data (starts); Bureau of Labor Statistics (jobs, pay); Small Business Administration (small business)

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