

BILL ANALYSIS

Senate Research Center

S.B. 219
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State Affairs
6/2/2021
Enrolled

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

In the 1907 Texas Supreme Court case, *Loneragan v. San Antonio Loan & Trust*, the court held that it was the responsibility of Loneragan, the builder, to reconstruct a collapsed building even though the collapse was due to a fatal defect in the design plans and specifications prepared by the architect of the owner and provided to Loneragan by the owner, San Antonio Loan & Trust. In the 2012 Texas Supreme Court case, *El Paso Field Services v. Mastec*, the court reaffirmed its decision in *Loneragan*.

In 1918, the United States Supreme Court ruled on a question similar to the *Loneragan* case in *United States v. Spearin* and came to a different conclusion, holding that it is not the builder's responsibility to determine the sufficiency of plans and specifications provided to it by the project owner. Since that ruling, 36 states and the District of Columbia follow the *Spearin* decision, not holding the builder liable for defective plans and specifications provided to the builder by someone else.

In Texas, while it seems reasonable for a builder to rely on plans, specifications, and other documents provided to the builder, if the work is defective due to an error in the plans and specifications, the builder bears the risk of liability for the defective plans.

S.B. 219 provides that a builder is not responsible for the consequences of defects in design or bid documents provided to the builder by the person with whom the builder has entered into a construction contract. It also prevents an owner from requiring a builder to waive this protection by contract.

(Original Author's/Sponsor's Statement of Intent)

S.B. 219 amends current law relating to civil liability and responsibility for the consequences of defects in the plans, specifications, or related documents for the construction or repair of an improvement to real property or of a road or highway.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Title 4, Business & Commerce Code, by adding Chapter 59, as follows:

CHAPTER 59. RESPONSIBILITY FOR DEFECTS IN PLANS AND SPECIFICATIONS

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 59.001. DEFINITIONS. Defines "construction," "contractor," "critical infrastructure facility," "design," "design-build contract," and "engineering, procurement, and construction contract."

Sec. 59.002. APPLICABILITY OF CHAPTER. (a) Provides that this chapter applies only to a contract for the construction or repair of an improvement to real property.

(b) Provides that this chapter does not apply to a contract entered into by a person for the construction or repair of a critical infrastructure facility owned or operated by the person or any building, structure, improvement, appurtenance, or other facility owned by the person that is necessary to the operation of and directly related to the critical infrastructure facility. Defines "person" for purposes of this subsection.

(c) Provides that, except as provided by Section 59.052, this chapter does not apply to the construction, repair, alteration, or remodeling of an improvement to real property if:

(1) the construction, repair, alteration, or remodeling is performed under a design-build contract and the part of the plans, specifications, or other design documents for which the contractor is responsible under the contract is the part alleged to be defective; or

(2) the construction, repair, alteration, or remodeling is performed under an engineering, procurement, and construction contract and the part of the plans, specifications, or other design documents for which the contractor is responsible under the contract is the part alleged to be defective.

(d) Provides that, except as provided by Section 59.052, this chapter does not apply to the portion of a contract between a person and a contractor under which the contractor agrees to provide input and guidance on plans, specifications, or other design documents to the extent that:

(1) the contractor's input and guidance are provided as the signed and sealed work product of a person licensed or registered under Title 6 (Regulation of Engineering, Architecture, Land Surveying, and Related Practices), Occupations Code; and

(2) the work product is incorporated into the plans, specifications, or other design documents used in construction.

Sec. 59.003. WAIVER PROHIBITED. Prohibits this chapter from being waived. Provides that a purported waiver of this chapter in violation of this section is void.

SUBCHAPTER B. CONTRACTOR RESPONSIBILITY

Sec. 59.051. LIMITATION ON CONTRACTOR'S LIABILITY AND RESPONSIBILITY FOR CERTAIN DEFECTS. (a) Provides that a contractor is not responsible for the consequences of design defects in and may not warranty the accuracy, adequacy, sufficiency, or suitability of plans, specifications, or other design documents provided to the contractor by a person other than the contractor's agents, contractors, fabricators, or suppliers, or its consultants, of any tier.

(b) Requires a contractor, within a reasonable time of learning of a defect, inaccuracy, inadequacy, or insufficiency in the plans, specifications, or other design documents, to disclose in writing to the person with whom the contractor enters into a contract the existence of any known defect in the plans, specifications, or other design documents that is discovered by the contractor, or that reasonably should have been discovered by the contractor using ordinary diligence, before or during construction. Provides that, in this subsection, ordinary diligence means the observations of the plans, specifications, or other design documents or the improvement to real property that a contractor would make in the reasonable preparation of a bid or fulfillment of its scope of work under normal circumstances. Provides that ordinary diligence does not require that the

contractor engage a person licensed or registered under Title 6, Occupations Code, or any other person with specialized skills. Provides that a disclosure under this subsection is made in the contractor's capacity as contractor and not as a licensed professional under Title 6, Occupations Code.

(c) Provides that a contractor who fails to disclose a defect as required by Subsection (b) may be liable for the consequences of defects that result from the failure to disclose.

Sec. 59.052. STANDARD OF CARE FOR CERTAIN DESIGNS. Provides that design services provided under a contract described by Section 59.002(c) or (d) are subject to the same standard of care requirements provided in Section 130.0021, Civil Practice and Remedies Code.

SECTION 2. Amends the heading to Chapter 130, Civil Practice and Remedies Code, to read as follows:

CHAPTER 130. LIABILITY PROVISIONS IN CERTAIN CONSTRUCTION CONTRACTS

SECTION 3. Amends Chapter 130, Civil Practice and Remedies Code, by adding Section 130.0021, as follows:

Sec. 130.0021. ARCHITECT'S OR ENGINEER'S STANDARD OF CARE. (a) Requires that a construction contract for architectural or engineering services or a contract related to the construction or repair of an improvement to real property that contains architectural or engineering services as a component part require that the architectural or engineering services be performed with the professional skill and care ordinarily provided by competent architects or engineers practicing under the same or similar circumstances and professional license.

(b) Provides that if a contract described by Subsection (a) contains a provision establishing a different standard of care than the standard described by Subsection (a) the provision is void and unenforceable, and the standard of care described by Subsection (a) applies to the performance of the architectural or engineering services.

(c) Provides that Section 130.004 (Owner of Interest in Real Property) does not limit the applicability of this section.

SECTION 4. Amends Section 130.004, Civil Practice and Remedies Code, as follows:

Sec. 130.004. OWNER OF INTEREST IN REAL PROPERTY. (a) Provides that, except as provided by Section 130.002(b) (relating to certain contracts for a single family or multifamily residence being void and unenforceable under certain conditions including damage caused by negligence) or 130.0021, rather than except as provided by Section 130.002(b), this chapter does not apply to an owner of an interest in real property or persons employed solely by that owner.

(b) Provides that, except as provided by Section 130.002(b) or 130.0021, rather than except as provided by Section 130.002(b), this chapter does not prohibit or make void or unenforceable a covenant or promise to:

(1) indemnify or hold harmless an owner of an interest in real property and persons employed solely by that owner; or

(2) allocate, release, liquidate, limit, or exclude liability in connection with a construction contract between an owner or other person for whom a construction contract is being performed and a registered architect or licensed engineer.

SECTION 5. Amends Section 473.003, Transportation Code, as added by Chapter 382 (H.B. 2899), Acts of the 86th Legislature, Regular Session, 2019, by adding Subsection (c-1), to provide that Section 473.003 (Limitation on Contractor's Responsibility for Certain Defects) does not apply to a design-build contract.

SECTION 6. (a) Makes application of this Act, except as provided by Subsection (c) of this section, prospective.

(b) Provides that an original contract for the construction or repair of an improvement to real property with the owner of an interest in real property that is entered into before the effective date of this Act, and a subcontract or purchase order for providing labor or materials associated with that original contract, whether the subcontract or purchase order is entered into before, on, or after the effective date of this Act, is governed by the law in effect when the original contract was entered into, and the former law is continued in effect for that purpose.

(c) Provides that the changes in law made by this Act to Section 473.003, Transportation Code, as added by Chapter 382 (H.B. 2899), Acts of the 86th Legislature, Regular Session, 2019, are intended to clarify existing law and apply to a contract entered into before, on, or after the effective date of this Act.

SECTION 7. Effective date: September 1, 2021.