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The New Rules: Liability Limitations for Construction Design Defects in Texas

Update

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Through Senate Bill 219, now codified in Chapter 59 of the Texas Business & Commerce Code, the Texas legislature has reallocated the risks for construction design defect liability in Texas by joining a majority of jurisdictions following the United States Supreme Court's decision in *U.S. v. Spearin*, which holds that contractors who are "bound to build according to plans and specifications prepared by the owner . . . will not be responsible for the consequences of defects in the plans and specifications." 248 U.S. 132, 136 (1918). This is a reversal from the minority position followed in Texas since before World War I under the *Lonergan* doctrine, which allows parties to place the risk of loss for defective construction plans or specifications on contractors unless contractual language clearly and explicitly indicates otherwise. While the new statute includes several exceptions and a reporting requirement for contractors, it reflects a clear limitation of liability for contractors relative to unknown construction design defects. The statute went into effect on September 1, 2021 and, with exceptions, applies to construction contracts entered into on or after September 1, 2021 for repairs and improvements to real property. *See* Tex. Bus. & Com. Code Ann. § 59.002(a).

Limitations on Liability

Chapter 59 of the Texas Business & Commerce Code shields contractors from liability for defects arising from construction plans, specifications, or design documents given to the contractor by third-parties with no contractual or agency-type relationship to the contractor. *Id.* § 59.051(a). Unless a contractor (or someone acting on behalf of the contractor or its agents) provides the defective design information, the contractor is not legally responsible for the consequences arising from defective construction plans or

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designs. *Id.* Additionally, any contractual provisions attempting to waive the protections in the statute are void. *Id.* § 59.003.

Contractor Reporting Requirements and Exceptions

Chapter 59 does not shield contractors from design defect liability under all circumstances. Contractors have an obligation to provide timely written disclosure to their contractual counter-part (typically the owner) if the contractor discovers defects or inaccuracies in design documents. *Id.* § 59.051(b). This disclosure requirement also extends to defects or inaccuracies that a contractor using "ordinary diligence" would have reasonably discovered before or during a construction project. *Id.* Ordinary diligence is defined as "the observation 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." *Id.* Thus, if a contractor fails to disclose a known defect or a defect it reasonably should have discovered, it may incur liability for the consequences of the defect. *Id.* § 59.051(c).

Chapter 59 does not apply to construction contracts for the repair or construction of (1) critical infrastructure facilities or (2) facilities directly related to and necessary to the operation of critical infrastructure facilities. *Id.* § 59.002(b). Section 59.001(3)'s definition of "critical infrastructure facility" is broad and involves over twenty different types of facilities across many industries, including oil and gas and chemical refineries and pipelines, oil storage tanks, oil or gas wellheads and drilling sites, airports, and certain facilities involving LNG, natural gas compressors, telecommunications, railroads, transportation fuel, steelmaking, and utility-scale water.

Chapter 59 also does not apply to construction projects where the contractor is responsible for providing some, if not all, of the design documents used in the project. This includes projects performed under design-build contracts or engineering, procurement, and construction contracts. *Id.* § 59.002(c). The same is true where a contractor agrees to provide input and guidance on design documents through signed and sealed work product under Title 6, Occupations Code, and the contractor's work product is incorporated into the design documents. *Id.*§ 59.002(d).

Standard of Care for Design-Build and EPC Contracts

Chapter 59 sets a specific standard of care for design services provided under the design-build and EPC arrangements referenced in Section 59.002(c). The standard of care is the same standard required for architectural or engineering

services under Tex. Civ. Prac. & Rem. Code. Ann. § 130.0021: the design services must 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."

At first glance, it may appear that the changes made by the legislature are more favorable for contractors and professionals, at the expense of owners that only occasionally negotiate construction contracts. However, eliminating these legal gray areas allows owners and their counsel to have a better understanding of their rights and obligations so they can focus on compliance before a project begins. Aside from indemnity provisions, responsibility for design defects and the standard of care for architects and engineers are two of the more hotly negotiated provisions in modern construction contracts. This is likely the reason why the legislature decided to clarify these issues, to make it easier for all parties involved to negotiate construction contracts and have a clearer understanding of their rights and responsibilities.