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Not Off the Hook – New Legislation Leaves Some Risk on Contractors for Design Defects

Most states have long followed the *Spearin* doctrine, which prohibits a project owner from shifting design liability to a contractor for defects resulting from an owner-provided design. Texas, by contrast, has long adhered to the *Lonergan* doctrine, which holds contractors liable for defects in an owner-provided design *unless* the contract between the owner and contractor specifically shifts the design risk to the owner. Whether or not Texas contractors knew the doctrine by name, they often felt the practical effects of *Lonergan* when asked to accept owners' design disclaimers and take on design liability by warranting that plans provided to them were suitable for construction.

The tide on contractor design liability changed with the passing of Senate Bill 219 this legislative session. Specifically, for construction contracts entered into after September 1, 2021, the Legislature enacted the following limitation on a contractors' liability for design:

> 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. TEX. BUS. & COMM. CODE § 59.051(a).

The new statute expressly states that its protections may not be waived and makes any attempted waivers void. As a result—no matter the contractual language—a contractor cannot contractually warrant the designs provided to it by an upstream party. While the days of contractors warranting designs are drawing to an end, contractors may still be on the hook for some design-related liability relating to their duty to report design defects.

Construction contracts consistently require contractors to report known design defects up the chain of command. The Legislature has now codified this reporting requirement to impose a duty to report design defects which are discovered, or reasonably should have been discovered, by the contractor before or during construction:

> A contractor must, within a reasonable time of learning of a defect, inaccuracy, inadequacy, or insufficiency in the plans, specifications, or other design documents, 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. 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. Ordinary diligence does not require that the contractor engage a person licensed or registered [design professional], or any other person with specialized skills. . . .
> *Id.* § 59.051(b).

If a contractor fails to disclose a defect as required, the statute specifically states that the contractor "may be liable for the consequences of the defects that result from the failure to disclose." *Id.* § 59.051(c). This portion of the statute necessitates that contractors remain vigilant when it comes to negotiating and fulfilling their duty to report design defects. In particular, contractors should pay close attention to the contractually specified period for reporting defects and the manner in which defects must be reported.

For more information, please contact Lauren Scroggs.