

## **BILL ANALYSIS**

C.S.H.B. 1418  
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Committee Report (Substituted)

### **BACKGROUND AND PURPOSE**

Current law allows for a contractor to be held liable for construction defects that were the result of flaws in design documents procured by the owner and provided to the contractor. This stems from the Texas Supreme Court case *Lonergan v. San Antonio Loan & Trust* (1907), which was affirmed in 2012. Texas is one of two states in the country that allows for contractors to be held liable for design defects. All other states follow the U.S. Supreme Court decision in *United States v. Spearin* (1918). Statutory changes are necessary to ensure that the construction team is not liable for construction that is defective due to flawed design documents furnished by the owner. C.S.H.B. 1418 seeks to clarify liability in statute and bring Texas in line with 48 other states.

### **CRIMINAL JUSTICE IMPACT**

It is the committee's opinion that this bill does not expressly create a criminal offense, increase the punishment for an existing criminal offense or category of offenses, or change the eligibility of a person for community supervision, parole, or mandatory supervision.

### **RULEMAKING AUTHORITY**

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

### **ANALYSIS**

C.S.H.B. 1418 amends the Business & Commerce Code to establish that a contractor who is a party to a contract for the construction or repair of an improvement to real property is not responsible for the consequences of defects in and may not warranty the accuracy, adequacy, sufficiency, or suitability of plans, specifications, or other design or bid documents provided to the contractor by the person with whom the contractor entered into the contract or another on that person's behalf. The bill provides the following:

- a contractor, within a reasonable time of learning of the defect, must make a written disclosure to the other contracting party of the existence of any known defect in the plans, specifications, or other design or bid documents discovered by the contractor before or during construction; and
- a contractor who fails to disclose such a condition may be liable for the consequences of defects that result from the failure to disclose.

The bill defines, among other terms, "contractor" as a person engaged in the business of developing, constructing, fabricating, repairing, altering, or remodeling improvements to real property.

C.S.H.B. 1418 prohibits its provisions regarding contractor responsibility from being waived by a contractor, subcontractor, or owner and establishes that a purported waiver in violation of this prohibition is void. The bill's provisions do not apply to the following:

- a contract entered into by a person, including a parent, subsidiary, affiliated entity, joint venture partner, or owner of the 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 business operations associated with the facility; or
- the construction, repair, alteration, or remodeling of an improvement to real property if the construction, repair, alteration, or remodeling is performed under a design-build contract and the part of the plans, specifications, or other design or bid documents for which the contractor is responsible under the contract is the part alleged to be defective.

The bill subjects design services provided under a design-build contract to the same standard of care requirements for architectural or engineering services under the bill's provisions.

C.S.H.B. 1418 amends the Civil Practice and Remedies Code to require a contract for architectural or engineering services related to the construction or repair of an improvement to real property, 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, to 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. If such a contract contains a provision establishing a different standard of care, the provision is void and unenforceable and the standard of care established by the bill applies to the performance of the architectural or engineering services. The bill establishes that statutory provisions permitting indemnification of an owner of an interest in real property do not limit the applicability of these provisions.

### **EFFECTIVE DATE**

September 1, 2021.

### **COMPARISON OF ORIGINAL AND SUBSTITUTE**

While C.S.H.B. 1418 may differ from the original in minor or nonsubstantive ways, the following summarizes the substantial differences between the introduced and committee substitute versions of the bill.

The substitute includes provisions that:

- define "design-build contract";
- revise the bill's definition of "critical infrastructure facility" as follows:
  - to include pipelines, related appurtenances or facilities, utility-scale equipment or facilities to transmit or distribute electricity, and utility-scale water storage facilities; and
  - to provide that the absence of fencing or signage described in the Government Code definition, as referenced by the bill, does not disqualify an item listed in that Government Code definition from being classified or treated as a critical infrastructure facility for the bill's purposes;
- exempt construction, repair, alteration, or remodeling of an improvement to real property performed under a design-build contract from the bill's provisions if the part of the plans, specifications, or other design or bid documents for which the contractor is responsible under the contract is the part alleged to be defective; and
- establish that design services provided under a design-build contract are subject to the standard of care for contracts for architectural and engineering services under the bill's provisions.

The substitute specifies that the duty for a contractor to disclose the existence of any known defect in the plans, specifications, or other design or bid documents applies within a reasonable time of the contractor learning of the defect.

With respect to the bill's provisions relating to the standard of care in certain contracts for architectural or engineering services, the substitute:

- does not include:
  - the prohibition against a governmental entity from requiring that the services be performed with the level of professional skill and care beyond that which would be provided by an ordinarily prudent architect or engineer with the same professional license under the same or similar circumstances; and
  - the provision establishing that nothing in the prohibition prevents a party to a contract for architectural or engineering services from enforcing specific obligations in the contract that are separate from the standard of care; and
- instead includes:
  - a requirement that any such contract 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;
  - a provision making void and unenforceable any provision in a contract that establishes a different standard of care than as described by the bill; and
  - a provision establishing that statutory provisions relating to indemnification of an owner of an interest in real property do not limit the applicability of the bill's provisions.