

BILL ANALYSIS

C.S.H.B. 2116
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Judiciary & Civil Jurisprudence
Committee Report (Substituted)

BACKGROUND AND PURPOSE

Interested parties contend that a duty to defend clause in a construction contract for engineering and architectural services is uninsurable, unreasonable, and unfair. Such a clause would require an engineer or architect to defend and pay the owner's legal bills before any determination of liability or even after a finding of no liability. This is already prohibited in Texas statute for public contracts for engineering or architectural services. Engineers and architects carry professional liability insurance to protect against any action brought against the engineer or architect arising out of their services and work and also carry commercial general liability (CGL) insurance policies to cover any other liability that does not arise from those services and work. Whereas the work of a contractor performing construction is covered under a CGL policy, the work of the engineer or architect is not. Unfortunately, a professional liability insurance policy intended to cover the services and work of the professional engineer or architect does not cover against paying the defense cost for someone other than the engineer or architect. Consequently, if an engineer or architect signs a contract for professional services with a duty to defend clause, they could be required to pay out of pocket for a costly expense and would be faced with severe and potentially bankrupting business consequences. C.S.H.B. 2116 seeks to address this issue by prohibiting design contracts for engineering and architectural services from including unreasonable, uninsurable risk-shifting duty to defend provisions; protecting the rights of owners by providing for recovery of reasonable attorney's fees from engineers or architects upon a final determination of liability; and by requiring contracts for engineering or architectural services to include a reasonable and insurable standard of care for professional services.

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. 2116 amends the Civil Practice and Remedies Code to render void and unenforceable a covenant or promise in, in connection with, or collateral to a construction contract for engineering or architectural services related to an improvement to real property that provides that a licensed engineer or registered architect must defend a party, including a third party, against a claim based wholly or partly on the negligence of, fault of, or breach of contract by the owner or another entity over which the owner exercises control. The bill authorizes a covenant or promise in, in connection with, or collateral to such a contract to provide for the reimbursement of an owner's reasonable attorney's fees in proportion to the engineer's or

architect's liability. These provisions expressly do not apply to a contract for design-build services in which an owner contracts with a single entity to provide both design and construction services.

C.S.H.B. 2116 authorizes an owner that is a party to a contract for engineering or architectural services related to an improvement to real property to require in the contract that the engineer or architect name the owner as an additional insured under the engineer's or architect's commercial general liability insurance policy and provide any defense to the owner provided by the policy to a named insured.

C.S.H.B. 2116 requires 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 such services as a component part to require that the services be performed with the professional skill and care ordinarily provided by competent engineers or architects practicing under the same or similar circumstances and professional license. If such a contract contains a provision that establishes a different standard of care, that provision is void and unenforceable and the standard of care prescribed by the bill applies to the performance of the services. These standard of care requirements apply to an owner of interest in real property or persons employed solely by that owner regardless of the general exemptions for those parties from statutory provisions governing liability provisions in certain construction contracts.

EFFECTIVE DATE

September 1, 2021.

COMPARISON OF ORIGINAL AND SUBSTITUTE

While C.S.H.B. 2116 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 specifies the following:

- the bill's provisions apply with respect to construction contracts; and
- the type of claim against which a licensed engineer or registered architect would be required to defend a party in a covenant or promise rendered void and unenforceable by the bill is a claim based wholly or partly on the negligence of, fault of, or breach of contract by the owner, the owner's agent, the owner's employee, or another entity over which the owner exercises control.

The substitute does the following with respect to the engineer's or architect's standard of care established by the bill:

- clarifies the contracts to which the standard of care applies;
- renders void and unenforceable a provision of a contract that establishes a different standard of care for architectural or engineering services and establishes that the bill's standard of care instead applies to the contract; and
- specifies that the applicability of the standard of care is not limited by a certain exemption for an owner of interest in real property.