

## **BILL ANALYSIS**

C.S.S.B. 219  
By: Hughes  
Judiciary & Civil Jurisprudence  
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.S.B. 219 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.S.B. 219 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 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. The bill provides the following:

- a contractor, within a reasonable time of learning of a defect, inaccuracy, inadequacy, or insufficiency in the plans, specifications, or other design documents, must make a written disclosure to the other contracting party of 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; and
- a contractor who fails to disclose such a defect 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 and "design" as work that is required to be performed by or under the supervision of a person licensed or registered in engineering, architecture, land surveying, or a related practice. The bill provides that 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 and that ordinary diligence does not require that the contractor engage a person licensed or registered in engineering, architecture, land surveying, or a related practice or any other person with specialized skills. A disclosure is considered to be made in the contractor's capacity as contractor and not as a licensed professional.

C.S.S.B. 219 prohibits its provisions regarding contractor responsibility for defects from being waived and establishes that a purported waiver in violation of this prohibition is void. Those bill 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, as specified by the bill, that is 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 facility;
- 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, as defined by the bill, 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
  - the construction, repair, alteration, or remodeling is performed under an engineering, procurement, and construction contract, as defined by the bill, 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
- 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 the contractor's input and guidance are provided as the signed and sealed work product of a person licensed or registered in engineering, architecture, land surveying, or a related practice and the work product is incorporated into the plans, specifications, or other design documents used in construction.

The bill subjects design services provided under an excepted contract, other than a contract relating to a critical infrastructure facility, to the same standard of care requirements for architectural or engineering services under the bill's provisions.

C.S.S.B. 219 amends the Civil Practice and Remedies Code to require 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, to 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. 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 SENATE ENGROSSED AND SUBSTITUTE**

While C.S.S.B. 219 may differ from the engrossed in minor or nonsubstantive ways, the following summarizes the substantial differences between the engrossed and committee substitute versions of the bill.

The substitute revises the provisions of the engrossed regarding the responsibility of a contractor for defects in plans and specifications in the following ways:

- replaces the prohibition against those bill provisions being waived by a contractor, subcontractor, or owner with a general prohibition against those bill provisions being waived;
- with respect to the established exceptions to those bill provisions:
  - includes an exception not in the engrossed establishing that those bill provisions do not apply to the construction, repair, alteration, or remodeling of an improvement to real property if that service 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;
  - omits the provision in the engrossed establishing an exception for a contract between a person and a contractor under which the contractor agrees only to review plans, specifications, or other design or bid documents but is not responsible for any portion of the construction, repair, alteration, or remodeling of the improvement to the real property; and
  - replaces that omitted exception with a provision excepting 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 the contractor's input and guidance are provided as the signed and sealed work product of an applicably licensed or registered person and the work product is incorporated into the plans, specifications, or other design documents used in construction;
- revises the applicability of the provision establishing standard of care requirements for design services provided under certain excepted contracts to include the new exceptions established by the substitute;
- limits the defects to which the bill's liability and responsibility limitation applies to only those in design documents, rather than design and bid documents as in the engrossed;
- changes the persons whose documents a contractor is not liable and responsible for from the person with whom the contractor entered into the contract or another person on behalf of the person with whom the contractor entered into the contract to any person other than the contractor's agents, contractors, fabricators, or suppliers, or its consultants, of any tier;
- provides that a contractor must disclose certain inaccuracies, inadequacies, and other insufficiencies, in addition to defects, whereas the engrossed required disclosure only of an applicable defect;
- includes provisions not in the engrossed establishing the meaning of ordinary diligence and establishing that a disclosure by a contractor is made in the contractor's capacity as a contractor and not as a licensed professional;
- expands the definition of "critical infrastructure facility" to include the following:
  - equipment, facilities, devices, structures, and buildings used or intended for use in the storage of certain natural resources;
  - equipment, facilities, devices, structures, and buildings used or intended for use in the gathering, transportation, treating, storage, or processing of CO<sub>2</sub>; and
  - commercial airport facilities used for the landing, parking, refueling, shelter, or takeoff of aircraft, maintenance or servicing of aircraft, aircraft equipment storage, or navigation of aircraft;
- replaces references to the term "involved contractor contract," which was used in the engrossed, with references to "design-build contract"; and
- includes definitions not in the engrossed of "design" and "engineering, procurement, and construction contract."