CLIENT ALERT

PAULO FLORES

TIMOTHY D. MATHENY

JACKSON MABRY

For More Information Please Contact

Paulo Flores
pflores@pecklaw.com
214.523.5100

Timothy D. Matheny
tmatheny@pecklaw.com
214.523.5100

Jackson Mabry
jmabry@pecklaw.com
214.523.5100

Texas Legislature Puts a Spear in Doctrine Making Contractor Warrantor of Owner Furnished Plans and Specifications

The Texas Legislature has just sent Senate Bill 219 ("S.B. 219") to the Governor for signature; if this legislation is signed by the Governor, it will further erode the Texas legal doctrine that makes the contractor the warrantor of owner-furnished plans and specifications unless the prime contract specifically places this burden on the owner.

Background:

49 states follow what is known as the *Spearin* doctrine (named after the U.S. Supreme Court case of *United States v. Spearin*) in which owners warrant the accuracy and sufficiency of owner-furnished plans and specifications. Texas, on the other hand, follows the Texas Supreme Court created *Lonergan* doctrine, which has been an unfortunate presence in Texas construction law since 1907. In its "purest form," as stated by the Texas Supreme Court, the *Lonergan* doctrine prevents a contractor from successfully asserting a claim for "breach of contract based on defective plans and specifications" unless the contract contains language that "shows an intent to shift the burden of risk to the owner." Essentially, this then translates into the contractor warranting the sufficiency and accuracy of owner-furnished plans and specifications, unless the contract between them expressly places this burden on the owner. Over the years some Texas courts of appeal had ameliorated this harsh doctrine, but in 2012, the Texas Supreme Court indicated *Lonergan* was still the law in Texas, in the case of *El Paso v. Mastec*. In 2019, the Texas Legislature took the first step toward hopefully abrogating the *Lonergan* doctrine by implementing a new Chapter 473 to the Texas Transportation Code with respect to certain projects undertaken by the Texas Department of Transportation, and Texas political subdivisions acting under the authority of Chapters 284, 366, 370 or 431 of the Transportation Code, adopting, as it were, the *Spearin* Doctrine in these limited, transportation projects. Now, the legislature has further chipped away at the *Lonergan* doctrine with the passage of S.B. 219.

S.B. 219 Further Constrains the Lonergan Doctrine:

Today, S.B. 219 cleared its final legislative hurdle, and is now headed to the Governor for signature. The bill, if signed by the Governor, will add a new Chapter 59 to the TEXAS BUSINESS AND COMMERCE CODE, which will—*with some notable exceptions*—further limit the applicability of the *Lonergan* doctrine. S.B. 219 expressly states that, "A contractor is not responsible for the consequences of design defects in and may not warranty the accuracy, adequacy, sufficiency, or insufficiency in the 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." Thus, a contractor would now be shielded (except as discussed below) from any claims based on liability

for design defects in those plans, specifications, and other design documents. As a practical matter, contractors would no longer be required to include in construction contracts language that allocates such responsibility to the owner, since that would now be the law by statute.

A New Statutory Obligation:

In crafting S.B. 219, the legislature seems to have been aware of the old adage that, "With much privilege comes much responsibility." Thus, in chipping away at *Lonergan*, S.B. 219 imposes a new requirement on contractors to disclose any, "defect, in accuracy, inadequacy, or insufficiency in the plans, specifications, or other design documents" that the contractor actually discovers or that the contractor *should* discover by, "ordinary diligence." The new statute defines "ordinary diligence" as the type of "observations" of the design documents that the contractor would make in its, "reasonable preparation of a bid or fulfillment of its scope of work under normal circumstances." In doing so, a contractor is required to act only, "in the contractor's capacity as contractor," and not as a licensed design professional, nor is a contractor required to engage a licensed design professional to review the design documents. Importantly though, a contractor who fails to identify a defect it should have caught may be held responsible for the consequences of that defect. As this requirement is frequently found in Project contracts, it likely does not mean a significant practical change for a contractor in reviewing owner provided plans and specifications. However, assuming the Governor signs S.B. 219, this obligation to identify a defect would now be statutory.

Application and Exceptions:

S.B. 219 applies to contracts, "for the construction or repair of an improvement to real property." As the bill does not distinguish between public or private owners, the bill should be interpreted to apply to both private and public works projects.

However, S.B. 219 does not apply to a project that is *either* a, "critical infrastructure facility" itself, or that is, "necessary to the operation of and directly related [to a] critical infrastructure facility." The term, "critical infrastructure facility" is defined in the statute and covers projects that would service a wide range of industries. (Note that this definition is different from, and does *not* incorporate the, CISA guidelines promulgated by the U.S. Department of Homeland Security.) Generally, the statute will exempt projects in the following industries: petrochemical (such as refineries, pipelines, chemical plants, natural gas compressor stations, etc.); water-treatment and distribution; telecommunications; and transportation and cargo (including ports, trucking terminals, and airports). However, stakeholders should examine the statute closely and consult an attorney to determine if a project may be classified under one of the twenty-four types of "critical infrastructure facilities" exempted from the statute.

In addition, and apart from the type of facility being constructed, the statute does not apply to three specific situations (generally, where the contractor acts in the capacity of a design professional): (1) designs provided by a contractor under a design-build contract; (2) designs provided by a contractor under an, "engineering, procurement, and construction contract;" and (3) portions of a construction contract where the contractor has agreed to provide, "input and guidance" on design documents, and that, "input and guidance" are provided in the form of, "signed and sealed work product" of someone licensed as an architect, engineer, or registered land surveyor *and* that work product is actually incorporated into the design documents used in construction.

Architect/Engineer's Standard of Care to a *Contractor* is Limited:

S.B. 219 contains another provision, that is not directly related to *Lonergan*, that provides for a non-waivable, statutory standard of care in 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." The statutory standard of care for such a contract is: "the professional skill and care ordinarily provided by competent architects or engineers practicing under the same or similar circumstances and professional license."

Conclusion

If the Governor signs S.B. 219 into law, it will become effective for contracts entered into (signed) on or after September 1, 2021. S.B. 219's changes to the *Lonergan* doctrine are a sensible, long-awaited, and welcome development in Texas construction law. We urge all contractors to notify Governor Abbott of their support of S.B. 219 and encourage its signing. The Governor's office may be contacted here. If S.B. 219 is enacted, Texas construction law will take another step toward the sensible and logical allocation of design risk, in line with that followed by the United States Supreme Court and the other 49 states.