

## CHANGE IN TEXAS CIVIL LIABILITY RELATED TO CONSTRUCTION LAW

Effective September 1, 2021

### Background

On June 16, 2021, Texas Senate Bill 219/House Bill 1418 was signed in to law by Texas Governor Greg Abbott and will be part of Chapter 59 of the **Texas Business & Commerce Code**. This Bill will have a great impact on industry contractors and subcontractors as it addresses limitations on contractors' liabilities and responsibilities for certain types of defects, and set to be effective on September 1, 2021.

### Title

**S.B. 219** amends current law relating to civil liability and responsibility for the consequences of defects in the plans, specifications, or related documents for the construction or repair of an improvement to real property or of a road or highway.

By: Hughes

S.B. No. 219

#### AN ACT

relating to civil liability and responsibility for the consequences of defects in the plans, specifications, or related documents for the construction or repair of an improvement to real property or of a road or highway.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Title 4, Business & Commerce Code, is amended by adding Chapter 59 to read as follows:

#### CHAPTER 59. RESPONSIBILITY FOR DEFECTS IN PLANS AND SPECIFICATIONS SUBCHAPTER A. GENERAL PROVISIONS

Sec. 59.001. DEFINITIONS. In this chapter:

- (1) "Construction" includes:
  - (A) the initial construction of an improvement to real property;
  - (B) the construction of an addition to an improvement to real property; or
  - (C) the repair, alteration, or remodeling of an improvement to real property.
- (2) "Contractor" means a person engaged in the business of developing, constructing, fabricating, repairing, altering, or remodeling improvements to real property.
- (3) "Critical infrastructure facility" includes:
  - (A) a petroleum or alumina refinery;
  - (B) an electrical power generating facility, substation, switching station, or control center;
  - (C) a chemical, polymer, or rubber manufacturing facility;
  - (D) a water intake structure, water treatment facility, wastewater treatment plant, or pump station;
  - (E) a natural gas compressor station;

- (F) a liquid natural gas terminal or storage facility;
- (G) a telecommunications central switching office or any structure used as part of a system to provide wired or wireless telecommunications services;
- (H) a port, railroad switching yard, trucking terminal, or other freight transportation facility;
- (I) a gas processing plant, including a plant used in the processing, treatment, or fractionation of natural gas;
- (J) a transmission facility used by a federally licensed radio or television station;
- (K) a steelmaking facility that uses an electric arc furnace to make steel;
- (L) a dam that is classified as a high hazard by the Texas Commission on Environmental Quality;
- (M) a concentrated animal feeding operation, as defined by Section 26.048, Water Code;
- (N) any portion of an aboveground oil, gas, or chemical pipeline;
- (O) an oil or gas drilling site;
- (P) a group of tanks used to store crude oil, such as a tank battery;
- (Q) an oil, gas, or chemical production facility;
- (R) an oil or gas wellhead;
- (S) any oil and gas facility that has an active flare;
- (T) pipelines and pipeline appurtenances or facilities, including pipes, valves, meters, pumps, compressors, treating and processing facilities, cathodic protection facilities, and any other equipment, facilities, devices, structures, and buildings used or intended for use in the gathering, transportation, treating, storage, or processing of CO<sub>2</sub>, oil, gas, or other minerals, and the liquefied or gaseous substances, constituents, products, or mixtures derived from those minerals through refining, processing, or other methods;
- (U) utility-scale equipment or facilities to transmit or distribute electricity;
- (V) utility-scale water or wastewater storage, treatment, or transmission facilities;
- (W) facilities used to manufacture or produce transportation fuels and similar products, including gasoline, kerosene, distillate fuel oils, residual fuel oils, lubricants, asphalt, propane, ethanol, biodiesel, and renewable diesel; and
- (X) 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.

(4) "Design" means work that is required under Title 6, Occupations Code, to be performed by or under the supervision of a person licensed or registered under the statute.

(5) "Design-build contract" means a contract in which

a contractor agrees to:

(A) construct, repair, alter, or remodel an improvement to real property; and

(B) be responsible for the development of plans, specifications, or other design documents used by the contractor to construct, repair, alter, or remodel the improvement.

(6) "Engineering, procurement, and construction contract" means a construction contract where the contractor is responsible for all of the engineering, procurement, and construction activities to deliver the completed project.

Sec. 59.002. APPLICABILITY OF CHAPTER. (a) This chapter applies only to a contract for the construction or repair of an improvement to real property.

(b) This chapter does not apply to a contract entered into by a 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 operation of and directly related to the critical infrastructure facility. For purposes of this subsection, "person" has the meaning assigned by Section 311.005, Government Code, and includes a parent, subsidiary, affiliated entity, joint venture partner, or owner of the person.

(c) Except as provided by Section 59.052, this chapter does not apply to the construction, repair, alteration, or remodeling of an improvement to real property if:

(1) the construction, repair, alteration, or remodeling is performed under a design-build 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; or

(2) the construction, repair, alteration, or remodeling 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.

(d) Except as provided by Section 59.052, this chapter does not apply to 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:

(1) the contractor's input and guidance are provided as the signed and sealed work product of a person licensed or registered under Title 6, Occupations Code; and

(2) the work product is incorporated into the plans, specifications, or other design documents used in construction.

Sec. 59.003. WAIVER PROHIBITED. This chapter may not be waived. A purported waiver of this chapter in violation of this section is void.

**SUBCHAPTER B. CONTRACTOR RESPONSIBILITY**

Sec. 59.051. LIMITATION ON CONTRACTOR'S LIABILITY AND RESPONSIBILITY FOR CERTAIN DEFECTS. (a) A contractor is not responsible for the consequences of design defects in and may not warrant 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.

(b) 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 under Title 6, Occupations Code, or any other person with specialized skills. A disclosure under this subsection is made in the contractor's capacity as contractor and not as a licensed professional under Title 6, Occupations Code.

(c) A contractor who fails to disclose a defect as required by Subsection (b) may be liable for the consequences of defects that result from the failure to disclose.

Sec. 59.052. STANDARD OF CARE FOR CERTAIN DESIGNS. Design services provided under a contract described by Section 59.002(c) or (d) are subject to the same standard of care requirements provided in Section 130.0021, Civil Practice and Remedies Code.

SECTION 2. The heading to Chapter 130, Civil Practice and Remedies Code, is amended to read as follows:

**CHAPTER 130. LIABILITY PROVISIONS [~~INDEMNIFICATION~~] IN CERTAIN CONSTRUCTION CONTRACTS**

SECTION 3. Chapter 130, Civil Practice and Remedies Code, is amended by adding Section 130.0021 to read as follows:

Sec. 130.0021. ARCHITECT'S OR ENGINEER'S STANDARD OF CARE.

(a) 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 must 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.

(b) If a contract described by Subsection (a) contains a provision establishing a different standard of care than the

standard described by Subsection (a):

(1) the provision is void and unenforceable; and

(2) the standard of care described by Subsection (a) applies to the performance of the architectural or engineering services.

(c) Section 130.004 does not limit the applicability of this section.

SECTION 4. Section 130.004, Civil Practice and Remedies Code, is amended to read as follows:

Sec. 130.004. OWNER OF INTEREST IN REAL PROPERTY. (a) Except as provided by Section 130.002(b) or 130.0021, this chapter does not apply to an owner of an interest in real property or persons employed solely by that owner.

(b) Except as provided by Section 130.002(b) or 130.0021, this chapter does not prohibit or make void or unenforceable a covenant or promise to:

(1) indemnify or hold harmless an owner of an interest in real property and persons employed solely by that owner; or

(2) allocate, release, liquidate, limit, or exclude liability in connection with a construction contract between an owner or other person for whom a construction contract is being performed and a registered architect or licensed engineer.

SECTION 5. Section 473.003, Transportation Code, as added by Chapter 382 (H.B. 2899), Acts of the 86th Legislature, Regular Session, 2019, is amended by adding Subsection (c-1) to read as follows:

(c-1) This section does not apply to a design-build contract.

SECTION 6. (a) Except as provided by Subsection (c) of this section, the changes in law made by this Act apply only to a contract entered into on or after the effective date of this Act. A contract entered into before the effective date of this Act is governed by the law in effect when the contract was entered into, and the former law is continued in effect for that purpose.

(b) An original contract for the construction or repair of an improvement to real property with the owner of an interest in real property that is entered into before the effective date of this Act, and a subcontract or purchase order for providing labor or materials associated with that original contract, whether the subcontract or purchase order is entered into before, on, or after the effective date of this Act, is governed by the law in effect when the original contract was entered into, and the former law is continued in effect for that purpose.

(c) The changes in law made by this Act to Section 473.003, Transportation Code, as added by Chapter 382 (H.B. 2899), Acts of the 86th Legislature, Regular Session, 2019, are intended to clarify existing law and apply to a contract entered into before, on, or after the effective date of this Act.

SECTION 7. This Act takes effect September 1, 2021.

## Summary

Subject to other qualifying language in this statute, 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. A contractor would be required to disclose in writing the existence of any known defect in the plans, specifications, or other design documents discovered by the contractor before or during construction.

Ellen G. Tagtmeier's construction litigation experience includes representing of sureties, owners, general contractors, subcontractors, manufacturers, suppliers, architects and engineers in contract formation and in lawsuits. Her legal practice includes prosecuting insurance defense claims, and litigating commercial, real estate, products and transportation claims.

Ellen is a native Houstonian and has been practicing law since 1989. She has extensive trial, appellate case, mediation and arbitration experience in state and federal courts. Ellen served as a briefing attorney for Justice Franklin Spears on the Texas Supreme Court and has extensive experience handling civil appeals in Texas both state and federal courts in Texas.

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