

The Best-Laid Plans of Mice and Men – Texas Senate Bill 219

BY BRIAN M. STORK

On June 16, 2021, Governor Greg Abbott signed into law Senate Bill 219 bringing Texas in line with the majority of other states limiting the ability of a property owner to hold contractors responsible for design errors. This article explores the history of Texas law on this subject and the changes enacted by Senate Bill 219.

Contractors frequently assume they will have no responsibility for errors in the plans and specifications prepared by design professionals. Understandably, contractors often assume if they build a project per the plans and specifications and later there is a problem resulting from a design error, the owner and/or design professional will bear the risk of loss. However, before the passage of Senate Bill 219, in what is commonly referred to as the *Loneragan* Rule, Texas followed the minority position that a contractor, and not the owner, bears the risk of any design errors when the applicable contract does not specifically address this issue (as is often the case).

To further compound the inequity of this situation, contractors also, generally, do not have a direct cause of action against the design professional whose plans and

specifications contained the applicable error. This is because contractors do not have a direct contractual or other relationship with the design professional. Rather, the design professional is, generally, hired by the owner. Consequently, if the operative construction contract was silent on this issue, a contractor could be held responsible for any construction defects existing merely because the contractor followed the design professional's plans and specifications.

The *Loneragan* Rule was first promulgated by the Texas Supreme Court in *Loneragan v. San Antonio Loan & Trust Co.*, 104 S.W. 1061 (Tex. 1907). The *Loneragan* Rule states a contractor bears the risk of loss arising from any defective plans and specifications unless the construction contract contains express language to the contrary. In 1918, in *United States v. Spearin*, the United States Supreme Court took a contrary position and held, "if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications." 248 U.S. 132, 136 (1918). Since such time, the *Spearin* Doctrine has become the majority rule. Indeed, for a time, some Texas courts expressed approval of the *Spearin* Doctrine. However, in 2012, the Texas Supreme Court reinforced its adoption of the *Loneragan* Rule, and rejected the *Spearin* Doctrine in *El Paso Field Servs. v. MasTec North America, Inc.* Accordingly, the *Loneragan* Rule remained controlling authority in Texas.

Senate Bill 219 represents the Texas Legislature's effort to bring Texas in line with the majority of other jurisdictions by way of adopting the *Spearin* Doctrine, with some modifications/exceptions. Senate Bill 219 is found in the newly created Chapter 59 of the Texas Business and Commerce Code. It will apply to contracts entered into on or after September 1, 2021. Under Senate Bill 219, a contractor is not responsible for the consequences of design defects in plans and specifications provided to the contractor by the owner. TEX. BUS. & COM. CODE § 59.051. A contractor also may not warranty the accuracy, adequacy, sufficiency

or suitability of any such plans and specifications. *Id.* However, if a contractor is aware of a defect, or using ordinary diligence should have discovered a defect, the contractor must notify the owner, in writing, within a reasonable time of discovering the defect, or the contractor may be liable for the consequences resulting from the failure to disclose the defect. TEX. BUS. & COM. CODE §§ 59.051(b) and (c). Any attempted contractual waiver of this issue is deemed void. TEX. BUS. & COM. CODE § 59.03.

Importantly, Senate Bill 219 will not apply to construction contracts related to: (i) critical infrastructure facilities; (ii) design-build contracts; and (iii) engineering, procurement and construction contracts. TEX. BUS. & COM. CODE § 59.02. Practitioners should closely examine the detailed definitions for each of these terms found in Section 59.001 of the Texas Business and Commerce Code, as they are quite broad in scope. Further, construction contracts should be updated to comply with the terms of the new statute, with specific attention to requiring contractors to provide timely written notice of defects.

Senate Bill 219 represents an important update to Texas construction law that brings the state in conformity with almost all other jurisdictions. It should lead to greater predictability regarding which parties on a construction project bear the risk of loss arising out of a design error. With greater predictability of risk of loss comes cost savings and increased efficiencies.

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