

SUBJECT: Statutory guidelines for rules and policies for design errors or omissions

COMMITTEE: Government Reform — committee substitute recommended

VOTE: 7 ayes — Callegari, Pitts, Berman, Leibowitz, Miles, Rodriguez,  
W. Smith

0 nays

SENATE VOTE: On final passage, April 12 — 31-0, on Local and Uncontested Calendar

WITNESSES: *(On House companion bill, HB 1963 by Solomons:)*  
For — Steve Stagner, Texas Council of Engineering Companies;  
*(Registered, but did not testify: David Lancaster, Texas Society of Architects)*  
  
Against — Jeri L.S. Morey  
  
On — *(Registered, but did not testify: Steve Simmons, Texas Department of Transportation)*

DIGEST: CSSB 924 would add Government Code, sec. 2252.904 to set standards for rules or policies a state agency could adopt to recover costs from architectural errors or omissions a design professional made while working on a project completed for the agency. Any rules or policies adopted to recover costs from such errors and omissions would have to:

- require that the private design professional be notified at the time a problem with project plans or specifications was identified and allow for the professional to be involved in resolving the problem;
- develop guidelines for distinguishing an error or omission from other reasons for the submission of a change order and for ascertaining the cost of rectifying any errors;
- require an evaluation of the totality of project services provided by private design professionals, including the level of quality, performance, and value delivered over the term of the entire project;

- designate a process for tracking the cost of errors or omissions and establish a process by which cost estimates could be reviewed internally prior to initiating collection; and
- recognize that some errors, omissions, or changes are likely to occur during a design and construction project.

“Private design professional” would be defined as a state-registered architect or engineer.

The bill would take effect September 1, 2007.

**SUPPORTERS  
SAY:**

CSSB 924 is necessary to ensure consistent policies and rules among state agencies for recovering costs incurred from architectural or engineering errors and omissions on agency contracts. The bill would respond to a cost recovery policy adopted in 2006 by the Texas Department of Transportation (TxDOT) that provides for the issuance of notice to a contractor judged responsible for an error or omission, stipulating that the receiving party must pay the specified compensation prior to filing a dispute. The process implemented at TxDOT does not provide ample opportunity to challenge whether the consultant was negligent or whether a change order was requested due to issues beyond the consultant’s control, such as unpredictable site conditions. The lack of clear standards regarding due diligence is doubly problematic for consultants whose insurance carriers do not cover claims that are not determined to be negligent. Policies and rules allowing an agency to collect costs associated with consultant errors should be carefully crafted to provide accountability while not injuring consultants who performed work competently and in good faith.

CSSB 924 would put reasonable constraints on the terms state agencies could include in cost recovery policies for architectural and engineering errors and omissions while explicitly authorizing the promulgation of such terms. The bill would require that any policies or rules sanctioning cost recovery for errors or omissions contain provisions for distinguishing professional from circumstantial oversights. Such guidelines would have to establish a process for gauging the cost of any errors or omissions in light of the totality of design project services offered by a consultant. A consultant subject to a claim would be entitled to an internal review prior to being required to make any payments. CSSB 924 would provide agencies the license to tailor policies to suit their needs so long as such

policies addressed key issues that were critical for protecting the rights of consultants who contracted with those agencies.

**OPPONENTS  
SAY:**

CSSB 924 would take an important step forward in regulating state recovery policies for architectural and engineering errors and omissions but would not address important aspects relevant to the determination of due diligence. The bill would not provide any guidance to agencies about adopting policies to address issues of “standards of care,” which refer to standards that courts and others apply to determine whether work was completed with reasonable and ordinary care. State agencies should be required to draft rules and policies specifying the standards that would be used to judge negligence, which can be defined on the basis of whether work completed was done in a reasonable and appropriate manner or the extent to which contracted work conformed to relevant building and engineering codes.

**NOTES:**

Unlike the House committee substitute, the Senate-passed version would require policies and rules adopted to be consistent with the doctrine of negligence and generally accepted standards of care required of similar private design professionals. The Senate-passed version also contains guidelines requiring any rules or policies adopted to provide the option of a hearing before the State Office of Administrative Hearings.

The companion bill, HB 1963 by Solomons, was left pending in the Government Reform Committee.