

SUBJECT: Specifying contractor liability for design defects of certain road projects

COMMITTEE: Judiciary and Civil Jurisprudence — favorable, without amendment

VOTE: 6 ayes — Leach, Krause, Meyer, Neave, Smith, White

1 nay — Y. Davis

1 absent — Julie Johnson

1 present not voting — Farrar

WITNESSES: For — Stephen Bolline, Slates Harwell LLP; David Zachry, Zachry Construction Corporation; (*Registered, but did not testify*: Fred Bosse, American Property Casualty Insurance Association and Webber, LLC; Danielle Ross and Terry Tennant, Aon; Steven Albright, Associated General Contractors of Texas, Highway, Heavy, Utilities, and Industrial Branch; Wendy Lambert, Central Texas Subcontractors Association; Jennifer Fagan, Texas Construction Association; Perry Fowler, Texas Water Infrastructure Network; Cody Webb, Zachry Construction Corporation; Sean McChristian; Thomas Parkinson)

Against — (*Registered, but did not testify*: Scott Stewart, American Council of Engineering Companies of Texas; Brie Franco, City of Austin; Priscilla Camacho, Dallas Regional Chamber; Samantha Omev, ExxonMobil; Donna Warndof, Harris County Commissioners Court; David Lancaster, Texas Society of Architects; Will Adams, Texas Trial Lawyers Association; Julie Gilberg; Arthur Simon)

On — Elizabeth Mow, North Texas Tollway Authority; (*Registered, but did not testify*: Samantha Omev, ExxonMobil)

DIGEST: HB 2899 would specify that a person performing work under a contract with a governmental entity for certain transportation projects would not be civilly liable or otherwise responsible for the accuracy, adequacy, sufficiency, suitability, or feasibility of any project specifications.

HB 2899 would apply to a contract for the construction or repair of a road or highway owned or operated by the Texas Department of Transportation (TxDOT), a regional tolling authority, a regional mobility authority, a transportation corporation, or certain counties to extend or expand that road or highway, including:

- an improvement to relieve traffic congestion and promote safety;
- a bridge, tunnel, overpass, underpass, interchange, service road ramp, entrance plaza, approach, or tollhouse; and
- a parking area or structure, rest stop, park, or other improvement.

The contractor would not be liable for any damage caused by a defect in project specifications or the errors, omissions, or negligent acts of a governmental entity or contracted third party entity in the rendition or conduct of professional duties related to the specifications.

A covenant or promise in a contract that conflicted with the bill would be void and unenforceable.

The bill would not apply to a contract entered into before the effective date, regardless of whether an associated purchase order was entered into before or on that date.

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2019.

**SUPPORTERS
SAY:**

HB 2899 would help put Texas in line with the decision of the 1918 Supreme Court case, *United States v. Spearin*, which states that the owner of a project has implied warranty of the adequacy of project plans and specifications. If the contractor is required to build according to those plans and specifications, the contractor would not be responsible for the consequences of any defects. Every other state and the U.S. federal government already follow the *Spearin* doctrine, so this bill would also make it clear that contractors in Texas would not be liable for damages

caused by defective project specifications.

Currently, even if there are not terms in a contract making a contractor liable, the contractor would be responsible for the work of a designer or engineer. Further, a contractor cannot insure against design liability. This bill would correct that fundamentally unfair practice and would ensure that each entity that was party to a contract was responsible for their own work.

HB 2899 would have a narrow focus and apply only to contracts with certain governmental entities, including TxDOT and other transportation-related entities. The bill would not include private entities and would not remove a contractor's responsibility for defects in a design prepared by or under the contractor. While Texans should have the ability to contract freely, preventing contractors from being held liable for a design they did not prepare outweighs this concern.

A construction manager-at-risk should not be exempt since those contractors do not have oversight of the owner's designer and should not be held liable for that work.

**OPPONENTS
SAY:**

HB 2899 could limit the ability of certain governmental entities to write specific contract provisions dealing with liability as they thought appropriate. HB 2899 also effectively could remove the construction manager-at-risk method under Government Code sec. 2269.251. This statute allows a governmental entity to contract separately with a construction manager-at-risk to serve as the general contractor and provide consultation during the design, construction, or other work on a project. A construction manager-at-risk assumes the risk for construction during and after the project design. The bill could negate this law, which authorizes a governmental entity to contract with a vendor who agreed to assume liability.