SUBJECT: Prohibiting certain covenants in architectural and engineering contracts

COMMITTEE: Judiciary and Civil Jurisprudence — committee substitute recommended

VOTE: 6 ayes — Leach, Julie Johnson, Krause, Middleton, Schofield, Smith

0 nays

3 absent — Davis, Dutton, Moody

WITNESSES: For — Peyton McKnight, American Council of Engineering Companies of Texas; (*Registered, but did not testify*: John T. Montford, Jacobs Global Engineering; Richard Lawson, Structural Engineers Association of Texas; Becky Walker, Texas Society of Architects)

Against — Shannon Ratliff, Texas Association of Manufacturers and Texas Oil & Gas Association; (*Registered, but did not testify*: Jamaal Smith, City of Houston Office of the Mayor Sylvester Turner; Daniel Collins, County of El Paso; Daniel Womack, Dow, Inc.; Thamara Narvaez, Harris County Commissioners Court; Blaire Parker, San Antonio Water System (SAWS); Hector Rivero, Texas Chemical Council; Jay Brown, Valero Energy Corporation)

BACKGROUND: Civil Practice and Remedies Code sec. 130.002(b) makes a covenant or promise in a construction contract void and unenforceable if the covenant or promise provides for a registered architect or licensed engineer whose services are the subject of the contract to indemnify or hold harmless an owner or owner's agent or employee from liability from damage that is caused by or results from the negligence of an owner or an owner's agent or employee. Sec. 130.004 provides general exemptions for owners of an interest in real property or persons employed solely by that owner from statutory provisions related to liability provisions in certain construction contracts, except as provided by sec. 130.002(b).

DIGEST: CSHB 2116 would impose restrictions on the covenants that could be included in, connected to, or collateral to construction contracts for

engineering or architectural services related to the improvement of real property, and would establish a required standard of care for the architectural or engineering services provided in relation to such contracts.

Covenants. A covenant in connection with such contracts would be void and unenforceable if it required a licensed engineer or registered architect to defend any party, including a third party, against a claim based wholly or in part on the negligence of, fault of, or breach of contract by the owner or an entity over which the owner exercised control. A covenant could provide for the reimbursement of an owner's reasonable attorney's fees in proportion to the engineer's or architect's liability. These provisions related to covenants would not apply to a contract for design-build services in which an owner contracted with a single entity to provide both design and construction services.

An owner that was a party to a contract under the bill could require that the owner be named as an additional insured under the engineer's or architect's commercial general liability insurance policy and be provided with any defense available to a named insured under the policy.

Standard of care. Construction contracts for architectural or engineering services or contracts related to the construction or repair of an improvement to real property that contained such services as a component part would have to require that the 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. A provision in a contract that established a different standard of care would be void and unenforceable, and the standard of care provided in the bill would apply to the performance of the architectural or engineering services.

Other provisions. The restrictions on covenants and the standard of care required by the bill would apply to an owner of interest in real property or a person employed solely by that owner regardless of the general exemptions for those parties from statutory provisions related to liability provisions in certain construction contracts.

The bill would take effect September 1, 2021, and would apply only to a covenant or contract entered into on or after that date.

SUPPORTERS SAY:

CSHB 2116 would protect design professionals from uninsurable risk by prohibiting duty-to-defend provisions in design contracts and by requiring a realistic, insurable standard of care for design professionals.

Many architectural and engineering contracts contain duty-to-defend provisions that require the design professional to defend against third-party claims of the owner's alleged liability. These provisions can sometimes be triggered even if the design professional was not at fault and the claim was based solely on the owner's negligence. Defending such claims gives rise to costs that may not be covered by professional liability insurance policies, leading to design professionals paying out of pocket for the owner's legal bills before a determination of liability is made. CSHB 2116 would help prevent this by rendering duty-to-defend provisions void and unenforceable in construction contracts for engineering or architectural services.

Design contracts also would be prohibited from requiring design professionals to provide services at an uninsurable and unreasonable standard of care exceeding that ordinarily provided by competent architects or engineers practicing under the same or similar circumstances and professional license. Insurable standards of care and contract specifications are beneficial to both the design professionals and the owner, as litigation surrounding construction contracts is often complex, involving multiple parties and interests.

The bill would preserve the rights of parties to negotiate the terms of design contracts while balancing the bargaining positions of the parties so that design professionals were not required to assume most of the risk associated with a project, ensuring fair and reasonable construction contracts.

CRITICS

CSHB 2116 would apply a one-size-fits-all approach to construction

SAY: contracts with architects and engineers, which could negatively impact owners in complex projects.

The bill could undermine owners' ability to maintain a coordinated defense in litigation involving construction and design defects in complex projects by depriving companies of the right to include a duty-to-defend provision in contracts with architects and engineers. Such provisions are essential to making sure that all of the parties to the contract for a complex project are on the same page in the event of such litigation.

Design has become a collaborative enterprise, usually involving multiple parties working on complex projects together. While duty-to-defend provisions may be unfair in contracts involving smaller architectural or engineering firms with less bargaining power, more complex projects usually involve bigger firms that are capable of negotiating for themselves.