



Last year, the 86th Texas Legislature passed House Bill 2899, which limits contractor liability for project specifications in connection with certain public transportation projects. House Bill 2899 amends the Texas Transportation Code and protects contractors from liability 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. This is a departure from the general rule in Texas that contractors bear the risk of defective design work.

Loneragan, Spearin, and Contractor Liability in Texas

House Bill 2899 implicates the liability issues raised in the seminal Texas case from 1907—*Loneragan v. San Antonio Loan & Trust Co.* The *Loneragan* case established the general rule that, in Texas, contractors bear the risk and liability of damage caused by defective design documents. Unless contract language provided otherwise, contractors in Texas could be liable to the owner for design defects.

Over ten years after *Loneragan*, in a case called *United States v. Spearin*, the Supreme Court of the United States came to the opposite conclusion of *Loneragan* and ruled that a contractor should not be liable for the defects in plans and specifications, and further recognized that the project owner impliedly warrants the accuracy and completeness of the contract documents. The “*Spearin* Doctrine” is the law in the vast majority of other states.

Since *Loneragan* and *Spearin*, most Texas courts cited to *Loneragan* when issues arose with respect to the errors in contract documents, but, at least one Texas appellate court cited to *Spearin*. This created some confusion regarding the extent to which contractors may be held liable for defective design work. Then, in 2012, the Supreme Court of Texas reaffirmed its position on *Loneragan* in another case called *El Paso Field Servs. v. MasTec North America, Inc.* In that case, the Supreme Court of Texas stated, “for an owner to be liable to a contractor for a breach of contract based on faulty construction specifications, the contract must contain terms that could fairly imply the owner’s guaranty of the sufficiency of the specifications.” The *MasTec* case effectively resolved any split of authority and confirmed that Contractors would bear the risk of defective design work unless express contract terms allocate those risks to another party.

In 2014, the Supreme Court of Texas took another step towards limiting a contractor’s remedies for poor design. In *LAN/STV v. Martin K. Eby Constr. Co.*, the Supreme Court of Texas held that a contractor could not recover delay damages from a project architect for design defects unless the contractor and architect had a contract.

House Bill 2899

House Bill 2899 establishes additional protections for contractors on certain public transportation projects by rejecting the notion that the highway contractor is responsible for “the accuracy, adequacy, sufficiency, suitability, of feasibility” of the Contract

(continued on next page)

PAVING THE WAY TOWARD *SPEARIN*: A DEVELOPMENT IN CONTRACTOR LIABILITY IN TEXAS PUBLIC TRANSPORTATION PROJECTS

by Tim Fandrey and Trevor Lawhorn
January 22, 2020

Documents. However, the express terms of HB 2899 do not go as far as the *Spearin* doctrine. While *Spearin* can be, and has been, used as both a shield protecting the contractor from liability, and a sword entitling the contractor to additional time and compensation arising from errors in the contract documents, HB 2899 provides only a shield. It remains to be seen whether Texas courts will interpret HB 2899 to incorporate the “sword” aspects of *Spearin* doctrine – recognizing, by implication, that if the contractor is not responsible for errors in the contract documents, then the owner must be.

The codified version of House Bill 2899 can be found in Title 6, Subtitle Z, Chapter 473 of the Texas Transportation Code. It is important to note that parties cannot enter into a construction contract that conflicts with the liability limitation provision in Section 473.003 of the Transportation Code. In other words, parties cannot shift liability to a contractor for work that is covered by Chapter 473. This differs from the general rule that parties may contract for liability. Highway contractors also remain liable for design prepared by or under the direction of the contractor.

Ultimately, Chapter 473 is the latest development impacting contractor liability for design defects in Texas. It is limited in scope to apply only to public transportation projects – but it could signal an under-current in the Texas legislature that may give way to a broader application to other public, and even private, construction projects across Texas. Contractors should enjoy the increased, albeit narrow, protections that Chapter 473 affords. Whether Chapter 473 signals the beginning of a more widespread shift away from *Lonegran* and towards *Spearin* remains to be seen.

ABOUT THE AUTHORS



Tim Fandrey, Associate - tfandrey@grayreed.com

Tim Fandrey understands construction and the business of construction. He represents contractors and subcontractors on a wide variety of construction matters including construction claims and litigation, lien and bond claims, giving of real time project advice and contract negotiation. Prior to law school at St. Louis University, Tim worked as a civil engineer for more than four years, gaining experience in both the private and public sector. Tim designed dozens of bridges and roadways for the Missouri Department of Transportation. While working in the private sector, Tim developed project management skills by managing bridge and roadway design projects.



Trevor Lawhorn, Associate - tlawhorn@grayreed.com

Trevor Lawhorn is a commercial litigator and a member of Gray Reed's construction industry team. He currently serves on the Young Constructors Council for TEXO. Trevor earned his J.D., cum laude, from Southern Methodist University Dedman School of Law in 2017 where he served as Alternative Dispute Resolution Symposium Editor for the SMU Law Review Association.