

LEGISLATIVE UPDATE

86TH TEXAS LEGISLATIVE SESSION

Sean M. McChristian
SMcChristian@porterhedges.com
713-226-6632

86th Texas Legislature – in session from January 8, 2019 to
May 27, 2019

House and Senate Bills	
Filed	7,324
Sent to the Governor	1,429
Signed by the Governor	1,229
Vetoed by the Governor	56
Not Signed / Allowed to Pass	144

- Contractor Liability for Defects in Plans and Specs
- Lien Law Modernization
- Commercial Construction Right to Repair
- Statute of Repose – shortening the period
- Attorney's Fees under Chapter 38
- Uniform Conditions for Public School Projects
- Reining in School District Construction Defect Claims



So what passed?

Committee Report

- **Concern** – lack of restrictions on public school district use of proceeds from a verdict or settlement for alleged construction defects encourages unreasonable lawsuits against design professionals and construction contractors involved in school facility projects.
- **Response** – restrict the purposes for which districts may spend such proceeds and broaden the applicability of certain accountability requirements.

Amended Chapter 44 of the Texas Education Code

New Notice Requirement

- A school district that brings an action for recovery of damages for the defective design, construction, renovation, or improvement of a district facility financed by bonds must provide the Commissioner of Education with written notice of the action by registered or certified mail, return receipt requested, not later than the 30th day after the date the action is filed.
 - Notice must include copy of the petition and itemized list of defects.
- If the school district fails to comply with this subsection, the court or an arbitrator or other adjudicating authority shall dismiss the action without prejudice.
- The dismissal of an action under this subsection extends the statute of limitations on the action for a period of 90 days.

Use of Proceeds

- School district must use net proceeds for:
 - repair of the defective design, construction, renovation, or improvement of the facility on which the action is brought, including the repair of any ancillary damage to furniture and fixtures;
 - replacement of facility on which the action is brought;
 - reimbursement of the district for a repair or replacement already made; or
 - any other purpose with written approval from the commissioner.

Enforcement

- School district must provide Commissioner of Education with itemized accounting of use of proceeds.
- Attorney General may bring action if school district violates restriction on use of proceeds or reporting requirements.
- The Attorney General must report annually on all actions taken against school districts.

- **Effective Date** – September 1, 2019
- **Application** – applies to actions brought on or after September 1, 2019

Committee Report

- **Concern** – certain local governmental entities, such as school districts, have been solicited to sue architects, engineers, and contractors for alleged construction defects before notifying the architects, engineers, and contractors of the alleged defects or offering a chance to inspect or correct them.
- **Response** – require certain applicable governmental entities to provide notice of alleged construction defects and provide a chance to repair the defect before bringing a claim for damages.

Added Chapter 2272 to the Texas Government Code

Applies only to a claim:

1. for: (A) damages arising from damage to or loss of real or personal property caused by an alleged construction defect in an improvement to real property that is a public building or public work; or (B) indemnity or contribution for such damage;
2. asserted by a governmental entity with an interest in the public building or public work affected by the alleged construction defect; and
3. asserted against a contractor, subcontractor, supplier, or design professional.

Does not apply to:

1. a claim for personal injury, survival, or wrongful death;
2. a claim involving the construction of residential property covered under Chapter 27, Property Code;
3. a contract entered into by the Texas Department of Transportation;
4. a project that receives money from a state or federal highway fund; or
5. a “civil works project” as defined by Section 2269.351.
 - Roads, streets, bridges, utilities, water supply projects, water plants, wastewater plants, water distribution and wastewater conveyance facilities, desalination projects, wharves, docks, airport runways and taxiways, storm drainage and flood control projects, or transit projects

Report Required

- Before suing, the governmental entity must provide each party with whom the governmental entity has a contract for the design or construction of an affected structure a written report by certified mail, return receipt requested, that clearly:
 - (1) identifies the specific construction defect on which the claim is based;
 - (2) describes the present physical condition of the affected structure; and
 - (3) describes any modification, maintenance, or repairs to the affected structure made by the governmental entity or others since the affected structure was initially occupied or used.

- Within 5 days of receiving such a report, a contractor must provide a copy of the report to each subcontractor retained on the construction of the affected structure whose work is subject to the claim.

Opportunity to Inspect and Correct

- Governmental entity must allow all designers, contractors, and known subcontractors or suppliers:
 - (1) a reasonable opportunity to inspect any construction defect or related condition identified in the report for a period of 30 days after sending the report required by Section 2272.003; and
 - (2) at least 120 days after the inspection to:
 - (A) correct any construction defect or related condition identified in the report; or
 - (B) enter into a separate agreement with the governmental entity to correct any construction defect or related condition identified in the report.

No Opportunity to Correct

Governmental entity not required to allow correction or repair if:

- (1) the party:
 - (A) is a contractor and cannot provide payment and performance bonds to cover the corrective work;
 - (B) cannot provide liability insurance or workers' compensation insurance;
 - (C) has been previously terminated for cause by the governmental entity; or
 - (D) has been convicted of a felony;
- or

(2) the governmental entity previously complied with the inspection and correction process and:
 - (A) the defect or condition was not corrected as was required; or
 - (B) the attempt to correct the construction defect or related condition identified in the report resulted in a new construction defect or related condition.

- **Dismissal** - If governmental entity fails to comply, action is dismissed without prejudice. If refile and still fail to comply, action is dismissed with prejudice.
- **Report Costs** - If the defect is repaired or governmental entity recovers damages, the governmental entity is entitled to recover costs of report.
- **Emergencies** - Governmental entity does not have to comply when emergency repairs are necessary to protect health, safety, and welfare of public.
- **Insurance Trigger** - Insurer that receives notice or report must treat notice or report the as the filing of a suit for purposes of the relevant policy terms.

- **Effective Date** – June 14, 2019
- **Application** – applies to a cause of action that accrues on or after June 14, 2019

Committee Report

- **Concern** – contractors not adequately protected from liability for damages resulting from deficiencies, errors, or omissions in a design prepared by a governmental entity for the construction, repair, or improvement of a road or highway.
- **Response** – statutorily protect contractors from certain types of liability.

Added Chapter 473 to the Texas Transportation Code

Applicability

Applies to a contract for the construction or repair of a road or highway owned or operated by a governmental entity and any improvement, extension, or expansion to that road or highway, including:

- (A) an improvement to relieve traffic congestion and promote safety;
- (B) a bridge, tunnel, overpass, underpass, interchange, service road ramp, entrance plaza, approach, or tollhouse; and
- (C) a parking area or structure, rest stop, park, or other improvement or amenity the governmental entity considers necessary, useful, or beneficial for the operation of a road or highway.

No Liability

A contractor is not liable or otherwise responsible for the accuracy, adequacy, sufficiency, suitability, or feasibility of any project specifications and is not liable for any damage to the extent caused by:

- (1) a defect in those project specifications; or
- (2) the errors, omissions, or negligent acts of a governmental entity, or of a third party retained by a governmental entity under a separate contract, in the rendition or conduct of professional duties arising out of or related to the project specifications.

Contrary contractual terms are void and unenforceable.

Design Standard of Care

A governmental entity may not require that engineering or architectural services be performed to a level of professional skill and care beyond the level that would be provided by an ordinarily prudent engineer or architect with the same professional license and under the same or similar circumstances.

- **Effective Date** – June 2, 2019
- **Application** – does not apply to a contract that is entered into before June 2, 2019 or to any subcontract or purchase order “associated with that contract” no matter the date

Committee Report

- **Concern** – political subdivisions are being overcharged by attorneys who provide legal services under a contingent fee contract.
- **Response** – establish requirements for the procurement of contingent fee contracts for legal services by political subdivisions.

Amended Chapter 2254 of the Texas Government Code

- Political Subdivision means:
 - a district, authority, county, municipality, or other political subdivision of the state;
 - a local government corporation or another entity created by or acting on behalf of a political subdivision in the planning and design of a construction project; or
 - a publicly owned utility.

Notice and Approval in Open Meeting

To hire an attorney on a contingent fee basis, a political subdivision must issue a notice stating:

- (1) The reasons for pursuing the matter that is the subject of the legal services and the desired outcome;
- (2) the competence, qualifications, and experience demonstrated by the attorney or law firm;
- (3) the nature of any relationship, including the beginning of the relationship, between the political subdivision or governing body and the attorney or law firm;
- (4) the reasons the legal services cannot be adequately performed by the attorneys and supporting personnel of the political subdivision;
- (5) the reasons the legal services cannot be reasonably obtained from attorneys in private practice on an hourly basis; and
- (6) the reasons entering into a contingent fee contract is in the best interest of the residents of the political subdivision.

Must then approve the contract in an open meeting called for the purpose of considering the matters listed above.

Approval by AG

- Attorney general must approve contract.

- Attorney general has 90 days from submission to approve or refuse to approve the contract.

- May refuse to approve if:
 - Political subdivision has not complied with requirements, or
 - The legal matter presents a question of law or fact that is in common with a matter the state has already addressed or is pursuing and pursuit of the matter by the political subdivision will not promote the just and efficient resolution of the matter.

Prior to Payment

- Attorney must provide written statement that describes outcome, amount of recovery, computation of fee, and includes final complete time and expense records.
- All records must be verified by auditors and charges must be reasonable.

- **Effective Date** – September 1, 2019
- **Application** – applies to any contingent fee contracts entered into on or after September 1, 2019

Committee Report

- **Concern** – statutory requirements relating to actions brought against certain licensed professionals should apply irrespective of who brings the claim.
- **Response** – change "plaintiff" to "claimant" to clarify that any party seeking to sue certain licensed professionals is required to file a certificate of merit.

Amended Chapter 150 of the
Texas Civil Practice and Remedies Code

Extension of CoM Requirement

- A “claimant” is required to file a certificate of merit with their “complaint.”
- "Claimant" means a party, including a plaintiff or third-party plaintiff, seeking recovery for damages, contribution, or indemnification.
- "Complaint" means any petition or other pleading which, for the first time, raises a claim against a licensed or registered professional for damages arising out of the provision of professional services by the licensed or registered professional.

Change in Standards

- Affiant used to have to be “knowledgeable” in the area of practice of the defendant.
- Now – Affiant must “practice” in the area of practice of the defendant.
- Author’s Statement of Intent – “[U]nder current law, the affiant must have knowledge in the area in which the defendant practices. S.B. 1928 would require the affiant to actually practice in the same area as the defendant, which would mean the affiant has experience in the area rather than just claiming ‘knowledge’ of it.”

- **Effective Date** – June 10, 2019
- **Application** – applies to an action or arbitration proceeding commenced on or after June 10, 2019

Committee Report

- **Concern** – Despite procurement reforms over the past two legislative sessions, several well-publicized instances of agencies failing to adhere to procurement laws highlight the need for further reform. S.B. 65 ensures that safeguards and consistent contracting practices are in place to achieve the best value for the state in every procurement.
- **Response** – S.B. 65 amends current law relating to oversight of and requirements applicable to state agency contracting and procurement.

Amended Chapters 441, 2054, 2102, 2155, 2252, 2254, 2261,
and 2262 of the Texas Government Code

- Very complex and lengthy.
- Requires state agencies to certify their vendor assessment process.
- If the state agency awards a contract to a vendor who did not receive the highest score in an assessment process must state in writing in the contract file the reasons for making the award.
- State agencies must include in the contract file a written explanation of the agency's decision to include or not include a liquidated damages provision or another form of liability for damages caused by the contractor.
- Contract files must also include a written justification for any provision in the contract that limits the liability of a contractor for damages.

- **Effective Date** – September 1, 2019

- **Application** – applies to a contract:
 - (1) for which a state agency first advertises or otherwise solicits bids, proposals, offers, or qualifications on or after September 1, 2019;
 - (2) that is extended or modified on or after September 1, 2019; or
 - (3) for which a change order is submitted on or after September 1, 2019.

Committee Report

- **Concern** – elimination of consumer and builder choice in construction through overly restrictive local municipal zoning ordinances, building codes, design guidelines, and architectural standards.
- **Response** – prevent the enactment of overly restrictive, vendor-driven building regulations.

Added Subtitle Z to Title 10 of the Texas Government Code

Governmental entities may not adopting or enforce a rule, charter provision, ordinance, order, building code, or other regulation that:

- (1) prohibits or limits, directly or indirectly, the use or installation of a building product or material if the building product or material is approved for use by a national model code published within the last three code cycles that applies to the construction, renovation, maintenance, or other alteration of the building; or
- (2) establishes a standard for a building product, material, or aesthetic method if the standard is more stringent than a standard under a national model code published within the last three code cycles that applies to the construction, renovation, maintenance, or other alteration of the building.

Prohibition does not apply to:

- (1) State agency programs that require particular standards, incentives, or financing arrangements in order to comply with requirements of a state or federal funding source or housing program;
- (2) Requirements for a building necessary to consider the building eligible for windstorm and hail insurance coverage under Chapter 2210 (Texas Windstorm Insurance Association), Insurance Code;
- (3) Certain ordinances that regulate outdoor lighting; and
- (4) Ordinances and rules related to historic buildings.

- **Effective Date** – September 1, 2019
- **Application** – A rule, charter provision, ordinance, order, building code, or other regulation adopted by a governmental entity that conflicts with this section is void.

- **Committee Report Concern** – when allocating state resources for approved state-funded projects, preference should not be based on whether the contract involves unionized labor or non-unionized labor.
- **Response** - Chapter 51 of the Texas Education Code and Chapter 2269 of the Texas Government Code amended.
- Public institutions of higher education and certain governmental entities awarding a public work contract funded with state money may not prohibit, require, discourage, or encourage a person bidding on a contract from entering into or adhering to an agreement with a collective bargaining organization relating to the project or discriminate against such a person based on the person's involvement in the agreement.
- **Effective Date** – September 1, 2019
- **Application** – only applies if advertised after September 1, 2019

- **Committee Report Concern** - the mandatory award of costs and attorney's fees to the prevailing party in a motion to dismiss a baseless cause of action discourages potential motions because parties are often reluctant to expose themselves to such costs and fees.
- **Response** - HB 3300 seeks to encourage the dismissal of baseless causes of actions and reduce court backlog by making the award of costs and fees discretionary.
- Section 30.021 of the Texas Civil Practice and Remedies Code amended – “on a trial court's granting or denial, in whole or in part, of a motion to dismiss ... the court may [~~shall~~] award costs and reasonable and necessary attorney's fees to the prevailing party.”
- **Effective Date** – September 1, 2019
- **Application** – applies to actions commenced on or after September 1, 2019

Committee Report

- **Concern** - Two decisions from the Texas Supreme Court in 2015 interpreting the Public Information Act - *Boeing* and *Greater Houston Partnership* - drastically reduced the public's access to information about state and local contracting. In both cases, the court overruled decades of Texas Attorney General interpretations that protected transparency. These rulings have been used to deny over 2,600 PIA requests.
- **Response** - amend current law relating to the disclosure of certain contracting information under the Public Information Act.

Amended Chapter 552 of the Texas Government Code

Contracting Information

- “Contracting Information” is public and must be disclosed unless limited exceptions apply.

- Contracting Information includes –
 - (A) information in a voucher or contract relating to the receipt or expenditure of public funds by a governmental body;
 - (B) solicitation or bid documents relating to a contract with a governmental body
 - (C) communications sent between a governmental body and a vendor, contractor, potential vendor, or potential contractor during the solicitation, evaluation, or negotiation of a contract;
 - (D) documents, including bid tabulations, showing the criteria by which a governmental body evaluates each vendor or contractor and, if applicable, an explanation of why the vendor or contractor was selected; and
 - (E) communications and other information sent between a governmental body and a vendor or contractor related to the performance of a final contract with the governmental body or work performed on behalf of the governmental body.

Contracting Information

- New Trade Secret and Confidential Information exceptions do not apply to –
 - Portions of certain contracts;
 - The following contract or offer terms or their functional equivalent:
 - (A) any term describing the overall or total price the governmental body will or could potentially pay, including overall or total value, maximum liability, and final price;
 - (B) a description of the items or services to be delivered with the total price for each if a total price is identified for the item or service in the contract;
 - (C) the delivery and service deadlines;
 - (D) the remedies for breach of contract;
 - (E) the identity of all parties to the contract;
 - (F) the identity of all subcontractors in a contract;
 - (G) the affiliate overall or total pricing for a vendor, contractor, potential vendor, or potential contractor;
 - (H) the execution dates;
 - (I) the effective dates; and
 - (J) the contract duration terms, including any extension options;
 - Information indicating whether a vendor, contractor, potential vendor, or potential contractor performed its duties under a contract, including information regarding: (A) a breach of contract; (B) a contract variance or exception; (C) a remedial action; (D) an amendment to a contract; (E) any assessed or paid liquidated damages; (F) a key measures report; (G) a progress report; and (H) a final payment checklist.

Revised Trade Secret Exception

- Definition of “Trade Secret” now aligns with definition in Texas Uniform Trade Secrets Act
- Exception now only applies “if it is demonstrated based on specific factual evidence that the information is a trade secret.”

Revised Confidential Information Exception

- Contractor information is excepted from disclosure if the contractor demonstrates based on specific factual evidence that disclosure of the information would:
 - (1) reveal an individual approach to: (A) work; (B) organizational structure; (C) staffing; (D) internal operations; (E) processes; or (F) discounts, pricing methodology, pricing per kilowatt hour, cost data, or other pricing information that will be used in future solicitation or bid documents; and
 - (2) give advantage to a competitor.

- Does not apply to:
 - (A) information in a voucher or contract relating to the receipt or expenditure of public funds by a governmental body; or
 - (B) communications and other information sent between a governmental body and a contractor related to the performance of a final contract with the governmental body or work performed on behalf of the governmental body.

Information Held by Third Parties

- New requirement for governmental entities to obtain and provide “contracting information” held by contractors if contract exceeds \$1 million.
- Contracts exceeding \$1 million must include preservation and provision requirements. Must also allow governmental entity to termination contract if contractor fails to comply.

➤ **Effective Date** – January 1, 2020

➤ **Application** –

- Applies to PIA requests received after January 1, 2020
- Contract requirements apply to contracts executed on or after January 1, 2020

Sean M. McChristian
Porter Hedges LLP

(713) 226-6632

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