Never Can Say Goodbye: *Lonergan* Reaffirmed By Texas Supreme Court 100 Years Later

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TABLE OF CONTENTS

I. Summary **1**

II. The Historical *Lonergan* Versus *Spearin* Debate **1**

III. *Lonergan* Prevails **4**

IV. What is the extent of the *Lonergan* Rule? **8**

V. Does a Contractor Impliedly Warrant the Plans and Specifications? **9**

VI. Lawyers Should Take Care Before Citing Texas Cases Following the Rule Announced in *Spearin* **10**

VII. Closer Calls **11**

VIII. A Contractor in Most Instances Cannot Seek Relief Against a Design Professional Without a Contract. **12**

IX. Methods for Allocating Risk **13**

A. Allocating Risk for Design Errors Through Contractual Provisions **13**

B. Allocating Risk Through Delivery Methods **16**

X. A Potential Exception to the *Lonergan* Rule? **17**

XI. *Spearin* is Applicable in Texas if Federal Common Law Applies. **18**

XII. Conclusion **18**

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I. Summary

Contractors often assume that they have no responsibility for errors in the plans and specifications on a traditional design/bid/build construction project. This assumption logically follows from two realities in the construction business. First, a contractor cannot design or engineer a project unless it has a license from the state to practice architecture or engineering. Second, the owner typically retains the design team.

Despite these realities, the Texas Supreme Court recently clarified in *El Paso Field Servs., L.P. v. MasTec N. Am., Inc*. that the contractor, not the owner, bears the risk of deficient design when the contract is silent on the issue.[1] The Texas Supreme Court opinion in *MasTec* is consistent with its 1907 opinion in *Lonergan v. San Antonio Loan & Trust Co.*[2] but inconsistent with the majority rule announced by the Supreme Court of the United States in *United States v. Spearin*.[3] Consequently, current Texas law is now inconsistent with the majority rule and a common misconception in the Texas construction industry that a contractor has no responsibility for design in the absence of language to the contrary. As a result, the law in Texas is a trap for the unwary.

This paper addresses the origins of the *Lonergan* Rule, the split of authority after *Spearin*, and the Texas Supreme Court's recent affirmation of the *Lonergan* Rule in *MasTec*.

II. The Historical *Lonergan* Versus *Spearin* Debate

In 1907, in *Lonergan*, the Texas Supreme Court held that a contractor bore the risk and liability of a building collapse that was the result of defective design documents.[4] In *Lonergan*, the contractor agreed to construct a building according to plans and specifications developed by an architect hired by the owner.[5]

When the construction was almost complete, the building collapsed. The contractor refused to replace the structure and abandoned the work. When the owner sued the contractor, the contractor defended on the ground that the building fell due to defects in the plans and specifications, the sufficiency of which the owner expressly or impliedly guaranteed. The Court accepted the truth of the allegation for the purposes of the appeal. The Court held that notwithstanding the defects in the specifications, the contractor was liable to the owner as a

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[1] 389 S.W.3d 802, 803 (Tex. 2012).

[2] 104 S.W. 1061 (Tex. 1907).

[3] 248 U.S. 132, 135-36 (1918).

[4] 104 S.W. at 1065-66.

[5] *Id*. at 1061.

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result of his failure to comply with the agreement to construct and complete a building in accordance with the contract and specifications.[6]

The Texas Supreme Court dismissed the contention that the owner impliedly guaranteed the plans and specifications, and found instead that the contractor should bear the risk of loss of defective plans and specifications in the absence of language to the contrary. Specifically, the *Lonergan* Court reasoned as follows:

> There is no more reason why the [owner] should be held responsible for the alleged defects in the specifications that it did not discover for want of skill and knowledge of the business of an architect, than there is for holding [the contractor] to be bound by their acceptance of the defective plans which they understood as well as the [owner] did, and in all probability much better. The fact that [the contractor] contracted to construct the building according to the specifications furnished implied that they understood the plans. ... **If there be any obligation resting upon the [owner], as guarantor of the sufficiency of the specifications, it must be found expressed in the language of the contract, or there must be found in that contract such language as would justify the court in concluding that the parties intended that the [owner] should guarantee the sufficiency of the specifications to [the contractor]**.[7]

In a nutshell, because there was no contractual warranty running from the owner to the contractor that the plans were sufficient to construct the building, the contractor bore the risk of loss.[8]

The *Lonergan* Court called upon the builder to hire someone to review the plans who was confident that the building could be constructed as designed if the contractor was not "competent to judge for themselves."[9] The Court reasoned that the contractor was probably in a better position to judge whether the plans and specifications were sufficient.[10]

The Court noted that "[l]iability of the builder does not rest upon a guaranty of the specifications, but upon his failure to perform his contract to complete and deliver the structure."[11] In fact, the Court likened liability for design errors to liability for natural calamities and noted that the contractor bears the risk of loss for natural disasters before the construction is complete. The *Lonergan* Court also opined that a contractor cannot be liable for insufficient plans and specifications that result in construction failure *after* a structure is completed.

[6] *Id*. at 1065-66.

[7] *Id*. (emphasis added).

[8] *Id*. at 1067.

[9] *Id*. at 1066.

[10] *Id*. at 1065.

[11] *Id*. at 1067.

Essentially, under *Lonergan*, if the contractor is able to reach completion and then the entire building collapses, the owner bears the risk of loss.[12]

In contrast, in 1918, the United States Supreme Court held that the owner impliedly warrants the sufficiency of plans and specifications.[13] In *United States v. Spearin*, the contractor, Spearin, agreed to build a dry dock in accordance with the plans and specifications prepared by the government/owner.[14] A sewer intersected the site selected by the government and it was necessary to divert and relocate a section of the sewer before Spearin could begin constructing the dry dock.[15] Approximately one year after Spearin relocated the sewer, during the construction of the dry dock, heavy rain combined with a high tide forced water into the sewer which flooded the dry dock excavation. During the investigation of the flood, the parties discovered a dam in the city sewer which contributed to the flooding. The dam was not shown on the plans. The government officials involved in the project were aware that the area surrounding the dry dock previously flooded, but they failed to communicate that information to Spearin. Although the contractor inspected the site prior to building the dry dock, he had no knowledge of the prior floods. Spearin refused to resume work until the government: (1) agreed to take responsibility for the damage to the dry dock excavation and (2) made modifications to the sewer to prevent further flooding. The government retained another contractor to take over Spearin's work and Spearin sued for the balance he was owed under the contract.

The United States Supreme Court held that the contractor was entitled to the funds remaining under the contract because the contractor was not responsible for the defects in the plans and specifications. Specifically, the Court reasoned:

> Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation because unforeseen difficulties are encountered. [citations omitted] Thus one who undertakes to erect a structure upon a particular site, assumes ordinarily the risk of subsidence of the soil. **But if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications.** [citations omitted]. This responsibility of the owner is not overcome by the usual clauses requiring builders to visit the site, to check the plans, and to inform themselves of the requirements of the work. . .[16]

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[12] *Id*. at 1067.

[13] *United States v. Spearin*, 248 U.S. 132, 135-36 (1918).

[14] *Id*. at 133.

[15] *Id*.

[16] *Id*. (emphasis added).

The rule announced in *Spearin* has been expanded to private owners and contractors.[17] It has also been adopted by a majority of American courts.[18] Until now, after *Spearin* was decided, some Texas courts have followed *Lonergan* while others followed *Spearin*, resulting in uncertainty in Texas law.[19]

III. *Lonergan* Prevails

In 2013, faced with a split of authority, the Texas Supreme Court issued an opinion reinforcing the rule announced in *Lonergan*. In *El Paso Field Servs. v. MasTec North America, Inc*., the Texas Supreme Court reviewed a pipeline construction contract between El Paso, the owner, and MasTec, the contractor, and concluded that the contract allocated the risk of undocumented "foreign crossings" to MasTec.[20] In that case, El Paso provided a survey map to potential bidders that detailed locations of 280 foreign crossings along a pipeline's right of way

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[17] 1 Construction Cont Deskbook § 16:2.

[18] *See, e.g.*, 1 Construction Cont Deskbook § 16:2; *Sachse Const. & Dev. Co., LLC v. AZD Assocs., Inc.,* 2014 WL 1351397, at *3 n.7 (Mich. Ct. App. Apr. 3, 2014); *Halcrow, Inc. v. Eighth Jud. Dist. Ct.*, 302 P.3d 1148, 1154 n.3 (Nev. 2013), *Gunkel v. Robbinsville Custom Molding, Inc.*, No. 2:11CV07, 2013 WL 139736, at *3 (W.D. N.C. Jan. 10, 2013); *Martin Constr., Inc. v. U.S.*, 102 Fed. Cl. 562, 575-76 (2011); *BRW, Inc. v. Dufficy & Sons, Inc.*, 99 P.3d 66, 73 (Colo. 2004); *Edward E Gillen Co. v. City, of Lake Forest*, 3 F.3d 192, 198 (7th Cir. 1993) (noting that Illinois courts have "embraced the breach of warranty theory articulated in *Spearin*"); *Fruin-Colnon Corp. et al. v. Niagara Frontier Transp. Auth.*, 585 N.Y.S.2d 248, 253 (N.Y. App. Div. 1992) (noting that a contractor must follow a design specification without deviation, and bears no liability if the specification proves to be inadequate to achieve intended result); *Sherman R. Smoot Co. v. Ohio Dep't of Admin. Servs.*, 736 N.E.2d 69 (Ohio Ct. App. 2000) ("The *Spearin* doctrine holds that, in cases involving government contracts, the government impliedly warrants the accuracy of its affirmative indications regarding job site conditions")).

[19] Cases citing *Spearin* but also claiming to be applying Texas law include: *Newell v. Mosley,* 469 S.W.2d 481 (Tex. Civ. App.—Tyler 1971, writ ref'd n.r.e.); *City of Baytown v. Bayshore Constructors, Inc.*, 615 S.W.2d 792 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.); *Turner, Collie & Braden Inc. v Brookhollow Inc.*, 624 S.W.2d 203 (Tex. Civ. App.—Houston [1st Dist.] 1981), *rev'd on other grounds*, 642 S.W.2d 160 (Tex. 1982); *Shintech Inc. v. Group Constructors, Inc.* 688 S.W.2d 144 (Tex. App.—Houston [14th Dist.] 1985, no writ); *IT Corporation v. Motco Site Trust Fund*, 903 F. Supp. 1106 (S.D. Tex. 1994); and *Beard Fam. Partn. v. Com. Indem. Ins. Co*., 116 S.W.3d 839, 847 (Tex. App.—Austin 2003, no pet.) ("An owner impliedly warrants the adequacy of the plans it supplies and which it requires its contractor to follow."). Certain more recent opinions have reaffirmed *Lonergan* including *Great Am. Ins. Co. v. North Austin Mun. Util. Dist. No.* 1, 902 S.W.2d 488 (Tex. App. —Austin 1993), rev'd in part and aff'd in part, 908 S.W.2d 415 (Tex. 1995). and *Interstate Contracting Corp. v. City of Dallas Texas*, 407 F.3d 708, 720 (5th Cir. 2005).

[20] 389 S.W.3d 802, 803 (Tex. 2012).

including other pipelines, utilities, roads, rivers, canals, fences, wells, cables and concrete structures.[21] MasTec separately performed an aerial inspection of the pipeline route. MasTec provided a bid to El Paso based in part on the survey and was eventually awarded the project. Interestingly, MasTec's bid was less than half of the average bids submitted for the project and the project was MasTec's first pipeline project.[22] During the project, MasTec discovered significantly more crossings than El Paso's survey showed. Many of the undiscovered crossings required a special tie in weld which increased MasTec's labor and costs. El Paso rejected MasTec's claims for additional costs because of contractual language stating that undiscovered foreign crossings were included in MasTec's scope of work.[23]

MasTec filed a lawsuit against El Paso for breach of contract and fraud based on El Paso's failure to locate the additional foreign crossings and contract language obligating El Paso to use due diligence in locating foreign crossings. The jury awarded MasTec over $4 million in damages. The trial court granted El Paso judgment notwithstanding the verdict based on contract language allocating the risk of undiscovered foreign crossings to MasTec. The First District Court of Appeals in Houston reversed the trial court's decision based on the jury finding that El Paso failed to exercise due diligence in locating the foreign crossings. In reversing the Court of Appeals' decision, the Texas Supreme Court relied heavily on the following owner-friendly contract language:

7.1 REPRESENTATIONS AND WARRANTIES

> [MasTec] represents and warrants to [El Paso]:
>
> (e) That its duly authorized representative has visited the site of the Work, is familiar with the local and special conditions under which the Work is to be performed and has correlated the on site observations with the requirements of the Contract and has fully acquainted itself with the site, including without limitation, the general topography, accessibility, soil structure, subsurface conditions, obstructions and all other conditions pertaining to the Work and has made all investigations essential to a full understanding of the difficulties which may be encountered in performing the Work, **and that anything in this Contract or in any representations, statements or information made or furnished by [El Paso] or any of its representatives notwithstanding, *[MasTec] assumes full and complete responsibility for any such conditions pertaining to the Work, the site of the Work or its surroundings and all risks in connection therewith***;
>
> ....
>
> (g) That the Contract is sufficiently complete and detailed for [MasTec] to

[21] *Id*. at 803-04.

[22] *Id*.

[23] *Id*. at 805.

perform the Work required to produce the results intended by the Contract and comply with all the requirements of the Contract; ...

8.1 CONTRACTOR'S CONTROL OF THE WORK

(a)(7) [MasTec] represents that it has had an opportunity to examine, and has carefully examined, all of the Contract documents and has fully acquainted itself with the Scope of Work, design, availability of materials, existing facilities, the general topography, soil structure, substructure conditions, obstructions, and all other conditions pertaining to the Work, the site of the Work and its surrounding; that it has made all investigations essential to a full understanding of the difficulties which may be encountered in performing the Work; and that anything in any of the Contract documents or in any representations, statements or information made or furnished by [El Paso] or its representatives notwithstanding, **[MasTec] will regardless of any such conditions pertaining to the Work, the site of the Work or its surrounding, complete the Work for the compensation stated in this Contract, and pursuant to the extent of [MasTec's] liability under this Contract, assume full and complete responsibility for any such conditions pertaining to the Work, the site of the Work or its surroundings, and all risks in connection therewith**. In addition thereto, [MasTec] represents that it is fully qualified to do the Work in accordance with the terms of this Contract within the time specified.[24]

MasTec also agreed to furnish "all labor, equipment and materials as described in the Specifications for all Work necessary to perform the following applicable Work as shown on the Drawings, including, but not limited to: ... welding (including tie-in and transition welds, if required)." Exhibit B–1 further describes the scope of MasTec's work:

Any Work required to complete installation of the new pipeline but not shown as a pay item is no less included in the scope of work for installation of the new 8–inch Butane Shuttle pipeline and is included in [MasTec's] lump sum proposal. Just because an item of Work is not specifically identified, does not mean such Work is not included in [MasTec's] scope of Work. Any item of Work [MasTec] knows is required for completion of the installation but not specifically identified is to be included in [MasTec's] Lump Sum Proposal.[25]

The contract language MasTec relied upon stated "[El Paso] will have exercised due diligence in locating foreign pipelines and utility line crossings."[26] The Texas Supreme Court noted that the contract provisions requiring El Paso's diligence also required that MasTec

[24] *Id*. at 806 (emphasis added).

[25] *Id*. at 807.

[26] *Id*.

"confirm the location of all such crossings and notify the owner prior to any [horizontal directional drilling] activity in the vicinity of the crossings."[27]

After considering the language cited by both parties, the Texas Supreme Court concluded that the contract documents "clearly place the risk of undiscovered foreign crossings on MasTec."[28] In particular, the Court reasoned that MasTec agreed that it had "assumed full and complete responsibility for . . . conditions pertaining to the Work, the site of the Work, or its surroundings and all risks in connection therewith . . . notwithstanding anything in any of the Contract documents or in any information made or furnished by El Paso."[29]

Considering the strength of the language in contract at issue, the Texas Supreme Court could have rested its opinion on that language alone. Indeed, in *Lonergan*, the contract did not contain any provisions regarding the contractor's assumption of risk.

Instead, the Texas Supreme Court cited to *Lonergan* and reaffirmed its century-old holding as follows:

> Our jurisprudence supports this construction of the contract. In *Lonergan v. San Antonio Loan & Trust Co.,* we held that **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,'** which were provided to the owner by an architect. 104 S.W. at 1066. Here, as in *Lonergan,* El Paso did not guarantee the accuracy of Gullett's alignment sheets. El Paso and MasTec both relied on what Gullett's surveyors were able to locate, with the negotiated provision that MasTec would confirm the surveyor's work and assume the risks of 'subsurface conditions, obstructions, and other conditions pertaining to the Work.' We adhere to the 'practically ... universal rule' that 'where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered.'[30] *City of Dallas v. Shortall,* 131 Tex. 368, 114

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[27] *Id*.

[28] *Id*.

[29] *Id*. (internal quotations and alterations omitted).

[30] Interestingly, the portion of the above quote that the Texas Supreme Court attributes to its opinion in *Shortall* ("We adhere to the 'practically ... universal rule' that 'where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered.") is actually a quote from *Spearin* that was cited in *Shortall*. 248 U.S. at 135-36. The Texas Supreme Court (perhaps inadvertently) adopted the general rule in *Spearin*, but not the exception which is that the contractor is not liable to an owner for design deficiencies when the owner provides the plans and directs the contractor to follow them.

S.W.2d 536, 540 (1938) (internal quotation marks omitted).[31]

As a result, there is no longer a split of authority in Texas. Texas follows the minority rule that the owner does not impliedly warrant plans and specifications.

IV. What is the extent of the *Lonergan* Rule?

In *Lonergan*, the Texas Supreme Court held that the contractor's risk for design ends at the completion of the project.[32] At least one subsequent case extended the contractor's responsibility for design deficiencies through the warranty period. Specifically, in *Emerald Forest Util. District v. Simonsen Constr. Co., Inc*.[33] a utility district hired an engineer to design and a contractor to construct an underground sewer system. The construction bid package included the following provisions:

> **9. CONDITIONS OF SITE AND WORK**
>
> Bidders should carefully examine the Plans, Specifications and other documents, visit the site of the work, and fully inform themselves as to all conditions and matters which can in any way affect the work or costs thereof. Should a bidder find discrepancies in, or omissions from the drawings, specifications or other documents, or should he be in doubt as to their meaning and intent, he should notify the Engineer at once and obtain clarification prior to submitting a bid. The submission of a bid by bidder shall be conclusive evidence that the bidder is fully acquainted and satisfied as to the character, quality and quantity of work to be performed and materials to be furnished.[34]

The contractor encountered wet sand conditions on the project and there was evidence that an alternate wet sand construction method should have been used.[35] Although the contractor orally notified the engineer and owner of these conditions and the design issues, no notice was submitted in writing. The sewer line failed soon after its completion. The trial court found that the owner warranted the plans and specifications to the contractor. As a result, the jury was asked whether the owner failed to provide the contractor with sufficient plans and specifications. Based upon the jury finding that the sewer line failed because of deficient design, the trial court entered judgment against the engineer but not the contractor.

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[31] *MasTec*, 389 S.W.3d at 811.

[32] 104 S.W. 1061, 1067 (Tex. 1907)

[33] 679 S.W.2d 51 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.).

[34] *Id*. at 53.

[35] *Id*. at 52.

On appeal, the court held that the trial court's judgment in favor of the contractor was contrary to *Lonergan* and stated:

> The controlling issue is whether the trial court erred in concluding that appellant warranted the sufficiency of the design of the sewer system. [Our Supreme Court in *Lonergan*] held that: 1) the specifications for a construction project, as a matter of law, are not guaranteed by either the contractor or the owner who employs the contractor, 2) if there is any obligation resting on the contractor as the guarantor of the sufficiency of the specifications, it must be found expressed in the language of the contract; and 3) the liability of the contractor does not rest upon a guaranty of the specifications by him, but upon his failure to perform his contract to complete and deliver the structure. **The rationale underlying the court's holding is that the contractor is in as good a position as the owner to know whether the plans and specifications are sufficient for the intended purpose. There is, therefore, no justification for imposing on the owner a legal duty to insure the sufficiency of the specifications.**[36]

Additionally, the court opined that the contractor assumed the risk that the design was insufficient through the "conditions of site and work" language in the contract.[37]

The court also concluded that the contractor's substantial completion of the line was of no consequence because the engineer refused to issue a certificate of substantial completion and a warranty was in effect when the sewer system failed.[38] Therefore, *Emerald Forest* technically goes a step further than *Lonergan* because the *Lonergan* Court held that the owner bore the risk of design defects after completion of a project.[39]

V. Does a Contractor Impliedly Warrant the Plans and Specifications?

Although the *Lonergan* Rule might have the effect of the contractor impliedly warranting the plans and specifications, the Texas Supreme Court expressly rejected such a warranty.[40] The court noted that "[l]iability of the builder does not rest upon a guaranty of the specifications, but upon his failure to perform his contract to complete and deliver the structure."[41] *Emerald Forest* reiterated that the contractor does not impliedly warrant the plans or specifications.[42] Consequently, provisions shifting risk to the owner can take many forms and there should be no

[36] *Id*. at 52-53 (emphasis added).

[37] *Id*. at 53.

[38] *Id*. at 54.

[39] *Lonergan*, 104 S.W. at 1067.

[40] *Id*.

[41] *Id*.

[42] 679 S.W.2d at 53.

need for the contractor to expressly disclaim an implied warranty. On the other hand, the Supreme Court has not elaborated on the language necessary to shift the risk of design from the contractor to the owner.

VI. Lawyers Should Take Care Before Citing Texas Cases Following the Rule Announced in *Spearin*.

As a result of the uncertainty regarding the *Lonergan* Rule that existed for decades, there are many cases in Texas citing to *Spearin*. The Supreme Court did not expressly overrule or disapprove of these cases in *MasTec*. However, practitioners should be aware that these cases can most likely no longer be cited as good law.

In *Newell v. Mosley*, the owner sued the contractor for failing to construct his house. The contractor defended on the basis that the plans and specifications given to him by the owner and drawn by an independent architect were deficient.[43] The architect admitted that his plans were deficient. The contractor brought the problem to the owner's attention; however, the owner refused to approve an alteration to the house plan, which would have added $1,500 to the cost of construction. Upon the refusal of the contractor to proceed further, the owner sued the architect and the contractor. In affirming an instructed verdict in favor of the contractor, the court addressed the issue of who bore the risk for defective plans and specifications. The *Newell* court ignored *Lonergan* and cited C.J.S.:

> In 17A C.J.S. Contracts § 329, p. 294, we find this rule: "Subject to some exceptions, if a party furnishes specifications and plans for a contractor to follow in a construction job, he thereby impliedly warrants their sufficiency for the purpose in view, particularly, if the party furnishing the plans is the owner. . ."[44]

Newell is likely now bad law because the court did not mention a warranty clause in the owner/contractor agreement and specifically relied on an implied warranty not recognized by the Texas Supreme Court.

In *City of Baytown v. Bayshore Constructors, Inc.*, the court held that owners have a contractual duty to provide accurate and complete plans and specifications to contractors.[45] Specifically, the court stated "[t]he failure of an owner to provide correct or adequate plans and specifications as are necessary to carry out the work required by a contract constitutes a breach of the contract and the contractor is entitled to recover its damages resulting from the breach."[46] After *MasTec*, citation to *Bayshore* is likely improper because the opinion contains no references to a contractual provision obligating the owner to provide suitable plans and specifications.

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[43] 469 S.W.2d 481 (Tex. Civ. App.—Tyler 1971, writ ref'd n.r.e.).

[44] *Id*. at 483.

[45] 615 S.W.2d 792 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.).

[46] *Id*. at 793.

The First Court of Civil Appeals in *Turner, Collie & Braden, Inc. v. Brookhollow, Inc.*, was again faced with the argument by an owner that the risk of deficient plans and specifications was on the shoulders of the contractor.[47] The court acknowledged *Lonergan*, yet failed to distinguish it and simply refused to follow it.[48] *Brookhollow* was previously overruled on other grounds and should also not be cited for its proposition that a cause of action exists against an owner for furnishing defective plans to a contractor.

Shintech Inc. v. Group Constructors, Inc.[49] primarily rested its holding on contractual language that allocated risk to the owner for delay. However, *Shintech* also reaffirmed the holding in *Newell* that the owner bears the risk of defective plans and specifications:

> More specifically, we reject [the owner's] contention that [the contractor] assumed the risk of defective specifications. We find no evidence that [the contractor] had knowledge of defective specifications prior to beginning its work. *Where the contract is silent on the subject, there is an implied warranty that the plans and specifications for a construction job are accurate and sufficient for the purpose in view*. [citing *Newell*].[50]

Therefore, the portion of the opinion affirming *Newell* is questionable.

The court in *Beard Fam. Partn. v. Com. Indem. Ins. Co*. held that "[a]n owner impliedly warrants the adequacy of the plans it supplies and which it requires its contractor to follow." [51] The *Beard* Court also cited to *Spearin* and did not discuss *Lonergan*. Consequently, *Beard* is inconsistent with *Lonergan* and *MasTec*.

VII. Closer Calls

In *IT Corporation v. Motco Site Trust Fund*, Judge Rosenthal held that a remediation contractor on a waste disposal site did not assume design risks for unanticipated subsurface conditions where: (i) the contractor was not in as good of a position as the owner to evaluate the information provided by the owner and (ii) "contract language provide[ed] a basis for concluding that the parties objectively intended the owner to bear the risk that the information provided [was] inadequate or inaccurate." [52] The court noted that despite a site investigation clause, there

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[47] 624 S.W.2d 203 (Tex. Civ. App.—Houston [1st Dist.] 1981), *rev'd on other grounds*, 642 S.W.2d 160 (Tex. 1982).

[48] *Id*. at 207.

[49] 688 S.W.2d 144 (Tex. App.—Houston [14th Dist.] 1985, no writ).

[50] *Id*. at 151 (emphasis added).

[51] 116 S.W.3d 839, 847 (Tex. App.—Austin 2003, no pet.)

[52] 903 F. Supp. 1106, 1120 (S.D. Tex. 1994).

was no clear intent in the contract to place design responsibility on the contractor.[53] Moreover, the owner represented in the contract that it had provided sufficient information for the contractor's proposal. Specifically, the request for proposal which was incorporated into the contract stated that "[s]ufficient information for the proposal is included in the attached SCOPE OF WORK."[54] Additionally, in *Motco*, language barring claims for insufficient plans and specifications relating to subsurface conditions was removed through negotiations.[55]

On the other hand, Judge Rosenthal appears to rest some of her opinion on the *absence* of the parties' intent to shift risk to the contractor.[56] *Lonergan* and *MasTec*, however, clearly hold that the contractor bears the risk of issues in the design in the absence of contractual language to the contrary. *Motco* is also likely inconsistent with *Emerald Forest* which held that a site investigation clause evidences the contractor's intent to assume the risk that the design was insufficient.[57] Therefore, whether the owner's representation that sufficient information was included for the contractor to formulate its bid is enough to conclude that the owner guaranteed the sufficiency of the information provided to the contractor is an open question in light of *MasTec*.

VIII. A Contractor in Most Instances Cannot Seek Relief Against a Design Professional Without a Contract.

Although contractors must bear the risk of deficient plans and specifications in the absence of contractual provisions otherwise allocating risk for design deficiencies, a contractor in most instances has no cause of action against a design professional for economic loss unless the architect and contractor have a direct contractual relationship.[58] In *LAN/STV v. Martin K. Eby Constr. Co*, the Texas Supreme Court determined that a contractor has no negligence claim against an architect for the increased cost of construction associated with design errors.[59] Ironically, in the *Eby* opinion, the court reasoned as follows when declining to recognize the existence of a claim against the architect:

> But we think the contractor's principal reliance must be on the presentation of the plans by the owner, with whom the contractor is to reach an agreement, not the

[53] *Id*.

[54] *Id*. at 1121.

[55] *Id*. at 1125.

[56] *Id*. at 1121.

[57] *See* discussion of *Emerald Forest* cited above.

[58] *LAN/STV v. Martin K. Eby Constr. Co*., 435 S.W.3d 234 (Tex. 2014).

[59] *Id*. at 235.

architect, a contractual stranger. The contractor does not choose the architect, or instruct it, or pay it.[60]

Therefore, the rule announced in *Lonergan*, and affirmed in *MasTec*, is in tension with the reasoning in *Eby* because a contractor likely cannot look to the owner for damages for design errors when the contract is silent on who should bear the risk for defective plans. As the door is now closed for most negligence claims by a contractor against an architect, the contractor must be extremely careful to allocate risk in its contract with the owner.

IX. Methods for Allocating Risk

A. Allocating Risk for Design Errors Through Contractual Provisions

Now that the Texas Supreme Court has affirmed *Lonergan*, contractors in particular must make sure that the contract reflects their understanding of risk allocation for design errors. Several cases in Texas have upheld simple provisions relieving a contractor from liability for design errors. For example, in *N. Harris County Junior Coll. Dist. v. Fleetwood Constr. Co.*[61] the court found that the owner was liable for design errors because the contract contained the following simple provision: "The Contractor shall carefully study and compare the Contract Documents and shall at once report to the Architect any error, inconsistency or omission he may discover. The Contractor shall not be liable to the Owner or the Architect for any damages resulting from any such errors, inconsistencies or omissions in the Contract Documents."[62] Central to the court's decision was the contractor's swift reporting of a differing site condition and the owner and architect's lack of action to redesign the project.[63] In *Shintech Inc. v. Group Constructors, Inc.*, the court held that the contractor shifted risk for faulty design to the owner with the following ineloquent but effective provision "Upsets of this schedule caused by acts of the client or those over which he controls causing undue expense on the Contractor shall be for the Owner's account."[64]

The AIA's A201 – 2007 General Conditions of the Contract for Construction (the "A201") is a widely used agreement between an owner and contractor. The commentary for the A201 is available on the AIA's website at http://www.aia.org/groups/aia/documents/pdf/aias076835.pdf. In the A201, it appears that the AIA seeks to shift risk from the contractor to the owner with regard to the existing site conditions in the following provision stating that the contractor can rely on the owner to furnish accurate site information:

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[60] *Id*. at 247.

[61] 604 S.W.2d 247, 253 (Tex. Civ. App.–Houston [14th Dist.] 1980, writ ref'd n.r.e.).

[62] This language is from the AIA's A201 – 1976 General Conditions of the Contract for Construction.

[63] *Id*. at 253-54.

[64] 688 S.W.2d 144, 148 (Tex. App.—Houston [14th Dist.] 1985, no writ).

AIA COMMENTARY	A201–2007 TEXT
It is appropriate for the owner to furnish surveys of the site because, as the owner of the land, the owner has the most knowledge of it and control over it. If the owner is a tenant, it may need to obtain the survey from the building or land owner. The contractor should be able to rely upon the surveys and not have to duplicate this effort and expense.	**§ 2.2.3 The Owner shall furnish surveys describing physical characteristics, legal limitations and utility locations for the site of the Project,** and a legal description of the site. **The Contractor shall be entitled to rely on the accuracy of information furnished by the Owner** but shall exercise proper precautions relating to the safe performance of the Work.

In connection with design errors, the AIA attempts to strike a middle ground in the A201 requiring the contractor to promptly report known design errors to relieve itself from liability:

	§ 3.2 REVIEW OF CONTRACT DOCUMENTS AND FIELD CONDITIONS BY CONTRACTOR
	§ 3.2.1 Execution of the Contract by the Contractor is a representation that the Contractor has visited the site, become generally familiar with local conditions under which the Work is to be performed and correlated personal observations with requirements of the Contract Documents.
The contractor is required to report errors and omissions promptly in order to minimize the costs of correction. The contractor's failure promptly to report errors and omissions may result in liability to the contractor, pursuant to Section 3.2.4, for remediation costs that would have been avoided by prompt notice. The contractor is not expected to engage in a professional review of the architect's design. If professional design services are required of the contractor pursuant to Section 3.12.10, review of the architect's design by the contractor's design professional is required to the extent necessary for the contractor's design professional to design those elements that the contractor is obligated by the contract documents to both design and build.	**§ 3.2.2** Because the Contract Documents are complementary, the Contractor shall, before starting each portion of the Work, carefully study and compare the various Contract Documents relative to that portion of the Work, as well as the information furnished by the Owner pursuant to Section 2.2.3, shall take field measurements of any existing conditions related to that portion of the Work, and shall observe any conditions at the site affecting it. These obligations are for the purpose of facilitating coordination and construction by the Contractor and are not for the purpose of discovering errors, omissions, or inconsistencies in the Contract Documents; **however, the Contractor shall promptly report to the Architect any errors, inconsistencies or omissions discovered by or made known to the Contractor** as a request for information in such form as the Architect may require. It is recognized that the Contractor's review is made in the Contractor's capacity as a contractor and **not as a licensed design professional, unless otherwise specifically provided in the Contract Documents.**
As with the discovery of errors and omissions in Section 3.2.2, prompt notice is required in order to minimize the costs of correction. This obligation does not require the contractor to review the contract documents for the purpose of seeking out nonconformities, but only to report those nonconformities that the contractor discovers. The contractor's failure to report promptly nonconformities that it discovers may result in liability to the contractor, pursuant to Section 3.2.4, for remediation costs that would have been avoided by prompt notice.	**§ 3.2.3** The Contractor is not required to ascertain that the Contract Documents are in accordance with applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities, but the Contractor shall **promptly report to the Architect any nonconformity discovered by or made known to the Contractor** as a request for information in such form as the Architect may require.
Pursuant to Sections 3.2.2 and 3.2.3, the contractor's duty to report arises when design errors or omissions, or nonconformities are discovered or made known to the contractor. The failure to make prompt notification, or the contractor's failure to perform other obligations set forth in Sections 3.2.2 or 3.2.3, may result in liability to the	**§ 3.2.4** If the Contractor believes that additional cost or time is involved because of clarifications or instructions the Architect issues in response to the Contractor's notices or requests for information pursuant to Sections 3.2.2 or 3.2.3, the Contractor shall make Claims as provided in Article 15. **If the Contractor fails to perform the**

contractor for the remediation costs that would have been avoided by prompt notice.	**obligations of Sections 3.2.2 or 3.2.3, the Contractor shall pay such costs and damages to the Owner as would have been avoided if the Contractor had performed such obligations. If the Contractor performs those obligations, the Contractor shall not be liable to the Owner or Architect for damages resulting from errors, inconsistencies or omissions in the Contract Documents**, for differences between field measurements or conditions and the Contract Documents, or for nonconformities of the Contract Documents to applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities.

Similarly, in the case of differing site conditions, the AIA 201 requires prompt reporting, but does not leave the contractor without any avenue of recovery:

This section covers physical conditions not specifically addressed in the contract documents (type 1), and/or that differ materially from conditions that might reasonably be assumed to exist at the site (type 2). For example, bedrock may be discovered when none was expected (type 1) or the expected bedrock encountered may fracture much more readily than is typical and expected for that type of rock (type 2). If the difference between what the contractor could reasonably have expected and what it actually found were material to the required work, a claim would be appropriate. The contractor must give notice to the owner and architect before disturbing the differing conditions and within 21 days of first observing them in order to give the architect the opportunity to investigate the conditions. Conditions that materially differ from reasonable expectations may result in either an increase or decrease in the contract sum or contract time.	**§ 3.7.4 Concealed or Unknown Conditions. If the Contractor encounters conditions at the site that are (1) subsurface or otherwise concealed physical conditions that differ materially from those indicated in the Contract Documents or (2) unknown physical conditions of an unusual nature that differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents,** the Contractor shall **promptly provide notice to the Owner and the Architect before conditions are disturbed and in no event later than 21 days after first observance of the conditions. The Architect will promptly investigate such conditions** and, if the Architect determines that they differ materially and cause an increase or decrease in the Contractor's cost of, or time required for, performance of any part of the Work, will recommend **an equitable adjustment in the Contract Sum or Contract Time, or both**. If the Architect determines that the conditions at the site are not materially different from those indicated in the Contract Documents and that no change in the terms of the Contract is justified, the Architect shall promptly notify the Owner and Contractor in writing, stating the reasons. If either party disputes the Architect's determination or recommendation, that party may proceed as provided in Article 15.

MasTec leaves open the question as to whether these types of provisions are sufficient to shift risk to the owner for design errors.

Great Am. Ins. Co. v. North Austin Mun. Util. Dist. No. 1 includes an example of contractual language that was ***insufficient*** to insulate the contractor for risk of an omission in the design documents.[65] In *Great Am.*, the specifications required the contractor to construct a dry well as follows: "The thickness of the sides shall be determined by the structural requirements for the depth of burial involved but shall be a minimum of ¼ inch thick."[66] The specifications

[65] 908 S.W.2d 415 (Tex. 1995).

[66] *Id*. at 424.

included no information regarding any additional structural requirements for the thickness of the well. Although the sides of the dry well were ¼ inch thick, the well collapsed.

The surety, Great American, argued that its principal, Underground, was relieved of responsibility for design errors by the following provision:

> CONTRACTOR [Underground] shall supervise and direct the Work competently and efficiently, devoting such attention thereto and applying such skills and expertise as may be necessary to perform the Work in accordance with the Contract Documents. CONTRACTOR shall be solely responsible for the means, methods, techniques, sequences and procedures of construction, **but CONTRACTOR shall not be responsible for the negligence of others in the design** or selection of a specific means, method, technique, sequence or procedure of construction **which is indicated in and required by the Contract Documents**. CONTRACTOR shall be responsible to see that the finished Work complies accurately with the Contract Documents.[67]

The Texas Supreme Court held that the contractual provision was insufficient on its face to relieve Great American from liability because the provision "does not relieve Underground from responsibility for all design defects, but instead only for those means, methods, techniques, or procedures of construction that are required in the contract documents."[68] As the specifications did not specify a procedure for calculating the thickness of the well, the surety and contractor were not relieved of liability for the design omission. Therefore, contractors should specifically negotiate provisions negating liability for omissions in the design if that is their intent.

MasTec, discussed above, contains owner friendly provisions that clearly allocate risk to the contractor.

B. Allocating Risk Through Contract Delivery Methods

Contractors may also consider performing work under design build contracts to manage risk for design errors. As noted above,[69] contractors must recognize that in addition to incurring risk for design when the contract is silent on the issue, contractors lack the ability to sue design professionals in the absence of a contractual relationship.[70] As a result, it may be preferable for the contractor to have a direct contract with an architect so that the contractor can directly control its allocation of risk with the party who prepared the design documents.

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[67] *Id*. at 424-25.

[68] *Id*. at 425.

[69] *See* § VIII.

[70] *LAN/STV v. Martin K. Eby Constr. Co*., 435 S.W.3d 234 (Tex. 2014).

Construction Managers at Risk also have the opportunity to lower their risk of incurring responsibility for design. Specifically, because Construction Managers at Risk review the design at an earlier point in time, they potentially have the opportunity to learn more about the design and to comment on constructability. Accordingly, a well-functioning team with a Construction Manager at Risk provides the opportunity for a contractor to decrease its risk for design errors.

X. A Potential Exception to the *Lonergan* Rule?

Although the Texas Supreme Court has not explored this issue, under the logic in *Zachry Constr. v. Port of Houston Auth.*, it is possible that a contractor would not be liable for design deficiencies to the extent the owner prevented the contractor from correcting them.[71] In *Zachry*, the Court found that the owner, the Port of Houston Authority, could not shield itself from liability for damages caused by delays resulting from its intentional misconduct (*i.e*. arbitrary and capricious conduct, active interference, bad faith, and fraud) despite including a provision in its construction contract with Zachry purporting to insulate the Port for delays caused by the Port.[72]

In that case, to facilitate the originally planned expansions to the Port in dry conditions Zachry used a freeze-wall which is a retaining wall that utilizes a freezing technique.[73] The Port realized during the project that it needed a larger wharf to accommodate the ships it expected to service.[74] Zachry proposed the freeze-wall for the expansion before a change order was signed.[75] The Port internally expressed concerns regarding the freeze-wall approach but did not communicate its concerns to Zachry because of its fear that Zachry would not agree to work on the expansion. After the change order was executed, the Port refused to allow Zachry to construct the expansion using the freeze-wall. As a result, Zachry was forced to perform the expansion in wet conditions which dramatically delayed Zachry's work and increased its costs. In defense of Zachry's claim for delay damages, the Port attempted to rely on a no damages delay clause.[76] The Texas Supreme Court refused to insulate the Port from liability for its intentional interference with Zachry's work, despite the no damages for delay clause.[77]

These facts are analogous to a claim by an owner for damages that result from an owner's refusal to permit the contractor to change the design. The facts in *Newell v. Mosley* discussed

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[71] No. 12-0772, 2014 WL 4472616, at *1 (Tex. Aug. 29, 2014).

[72] *Id*. at * 9.

[73] *Id*. at *1.

[74] *Id*. at *2.

[75] *Id*. at *2.

[76] *Id*. at *9.

[77] *Id*. at *10.

above present this exact situation.[78] Specifically, in that case, the contractor brought a design problem to the owner's attention; but, the owner refused to approve an alteration to the house plan, which would have added $1,500 to the cost of construction. In that case, the court found that the owner impliedly warranted the plans to the contractor and refused to award damages against the contractor for its refusal to complete the project. Although it is unlikely after *MasTec* that the Texas Supreme Court would use an implied warranty to shift responsibility for design defects to the owner, perhaps the Texas Supreme Court would find that the owner accepted responsibility for the design by intentionally preventing the contractor from changing it to be consistent with *Zachry*.

XI. *Spearin* is Applicable in Texas if Federal Common Law Applies.

In *Spodek v. United States Postal Service*, the Fifth Circuit applied a version of the *Spearin* Doctrine to overturn a Texas district court ruling where the district found that the plans and specifications were not relevant to questions of liability in a lease dispute between the United States Postal Service and a private lessor, Spodek.[79] *Lonergan* did not apply because the federal common law was applicable to the dispute.

XII. Conclusion

MasTec reaffirmed *Lonergan*, but also reiterated the importance carefully negotiating contractual provisions. Understanding that in the absence of contractual language to the contrary the contractor has the risk of deficient design is important to negotiate effective contractual clauses regarding shifting risk.

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[78] 469 S.W.2d 481 (Tex. Civ. App.—Tyler 1971, writ ref'd n.r.e.).

[79] 551 Fed. Appx. 781, 787-88 (5th Cir. Jan. 10, 2014).