

Contractor Liability for Design: Really?



Jeff Chapman is the founder of The Chapman Firm, a construction law boutique serving clients throughout Texas. Chapman practices construction law with a focus on the heavy industrial, water and wastewater, transportation and municipal sectors of the industry. Chapman provides his clients with the full range of construction representation, ranging from transactional, project management, dispute resolution, and general counsel services. He can be reached at Jeff@ChapmanFirmtx.com or 512.872.3838



A Balanced Approach to Construction Law.

Last month this column provided a preview for the 2019 Texas Legislative session. One item highlighted in that issue was the proposed legislation to reallocate responsibility for design defects. Because this issue arises frequently and is not certain to make it through the legislature this session, this column will discuss contractor liability for design in more detail to provide contractors an understanding of the issue and provide tools and tips to address this concern.

For more than a century, Texas law has held that a contractor warrants the adequacy of design as to the owner of a project. That does not mean that the contractor is liable for all design deficiencies, errors, or omissions. If a designer commits such an error, and violates an applicable standard of care, then the designer may become liable to the owner for damages that arise from the error. But, where a design is implemented and fails, absent contractual language to the contrary, the contractor may be liable to the owner to repair or replace the failed portion of the project under the Loneragan Doctrine. In essence, the owner may be able to look to both the contractor and the designer to recover for design defects.

This area of law began in 1907 with the Loneragan case. That case involved a contractor hired to construct a building based on plans provided by the owner. After the building collapsed, the owner sought to hold the contractor liable for the reconstruction. The contractor claimed that the owner should warrant the plans for adequacy. The Supreme Court disagreed. As a result, unless there is contractual language otherwise, contractors may be liable to the owner for defects even if those defects arose from the design itself.

One hundred years later, that rule of law still exists in Texas. With modern construction contracts frequently containing language allowing owners to reject defective work and back-charge or force correction by the contractor without limitation, the Loneragan Doctrine puts contractors in a difficult position. Even where the defect may have arisen from a design condition, the contractor may be compelled to correct the deficiency at its cost or risk termination.

Once correction has been made and the contractor has suffered a loss, it must bring a claim for extra work based on the position that the design correction is outside the original scope of work. That claim must be brought against the owner even if the designer is ultimately responsible for the cost. Contractors in Texas cannot sue a designer who contracted with an owner. The Supreme Court, in a case called Eby, eliminated the ability of a contractor to sue a designer.

Because of the Loneragan and Eby cases, contractors that negotiate work can try to include contractual language that absolves the contractor from liability for defects arising out of design. However, most public work is not subject to extensive negotiation and many public works contracts do not contain that language. On a project where the contractor is compelled to correct design-caused defects, the contractor must reserve its rights before performing the work and then bring a claim once completed.

Consider the following example. An owner hires a contractor to construct a retaining wall associated with a civil project. The designer specifies a certain ratio of steel to concrete in compliance with applicable codes. The designer also specifies certain drainage elements to be constructed in order to ensure structural integrity of the wall. The contractor builds the wall per plan but it begins to exhibit distress that concerns the owner. The owner then demands the contractor correct or rebuild the wall. The contractor, believing it has constructed the wall as designed hires a consultant to evaluate the structural integrity of the wall. That consultant determines the drainage was inadequate and recommends changes to the wall. The design engineer disputes the findings and alleges improper concrete placement and curing. The owner directs the contractor to repair the wall and implement certain additional and extra measures to add support to the structure. In this situation, the contractor is forced to pay for this extra work because the owner uses the Loneragan Doctrine to reject a request for extra payment.

From the contractor's perspective, any statute that addresses this scenario to the contractor's benefit must contain language that obliges the owner to pay the contractor for work performed to correct design deficiencies. However, groups that represent owners' interests at the legislature will likely oppose that type of provision with vigor. If the legislature passes a law that absolves the contractor of the obligation to pay for correction to design errors, without compelling a funding source, disputes like the one above may result in increased delays, added costs, and potentially more litigation for all parties to the process because of the stalemate that may arise when contractors, owners, and designers point their fingers at the other parties on a project.

If, on the other hand, proposed legislation merely changes the implied warranty for the adequacy of design from the contractor to the owner, claims may still arise but contractors would be able to rely on the statute to refuse to perform additional work. Under any scenario, however, it is not hard to imagine situations like the one described above as creating significant and difficult issues for certain projects.

While recognizing the limitations public works contractors face in negotiating terms to contracts, this conundrum can be relieved with good contract language. By way of example, language that would address this situation to a contractor's benefit might resemble the following:

"The Owner, having retained a competent design professional to design the Work of this Contract, warrants to the Contractor the adequacy of the design for its intended purpose. Should the design prove improper, or should Contractor incur additional costs to construct the Work due to inadequate or erroneous design, the Contractor shall be entitled to an adjustment in the Contract Sum and Contract Time."

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