November 2021

CONSTRUCTION

# CONSTRUCTION UPDATE

**By: Brandon K. Bains**

It is a common quip that everything is bigger (and better) in Texas. While the concept might be debatable for some, one facet of the law that has received continual complaints from the contractor community is the extreme minority position in Texas to not follow the *Spearin* doctrine, which generally holds that owners warrant the accuracy and sufficiency of the plans and specs. The Texas Legislature has now stepped in and changed that.

Until a couple of months ago, Texas was only one of two states in the country that specifically rejected the *Spearin* doctrine set forth by the U.S. Supreme Court in 1918. The reason given by Texas courts over the last century is because of the fact that Texas decided the issue in 1907 in the (perhaps infamous) case of *Lonergan v. San Antonio Loan & Trust*. Texas courts saw no reason to disturb the finding given that it was viewed as an issue of state law, with the U.S. Supreme Court providing only persuasive – but not binding – authority.

At its heart, the impact of *Lonergan* was that a contractor could not assert a claim against the owner based on defective plans or specs unless the contract contained express language where the risk was specifically shifted to the owner. While savvy contractors would negotiate hard for such a provision, often the contract was silent, and the contractor would bear the risk for defective plans and specs. There was some hope that Texas courts would eventually erode the impact of *Lonergan*, which did happen to some degree in the intermediate courts over the years. That door was slammed shut, however, when the Texas Supreme Court found that *Lonergan* was still the correct law in Texas in its 2012 opinion of *El Paso v Mastec*.

After much lobbying by the contractor community, the Texas Legislature took up the charge. In the 2021 session, Senate Bill 219 really started to gain traction (as it had been proposed a couple of years prior, but never finalized). After debate, the bill was signed by Governor Abbott in June 2021, and it went effective on September 1, 2021. With the bill, the Texas Business & Commerce Code has been amended to specifically note that a contractor is not "responsible for the consequences of design defects in and may not want the accuracy, adequacy, sufficiency, or suitability of plans, specifications, or other design documents provided to the contractor . . . ."

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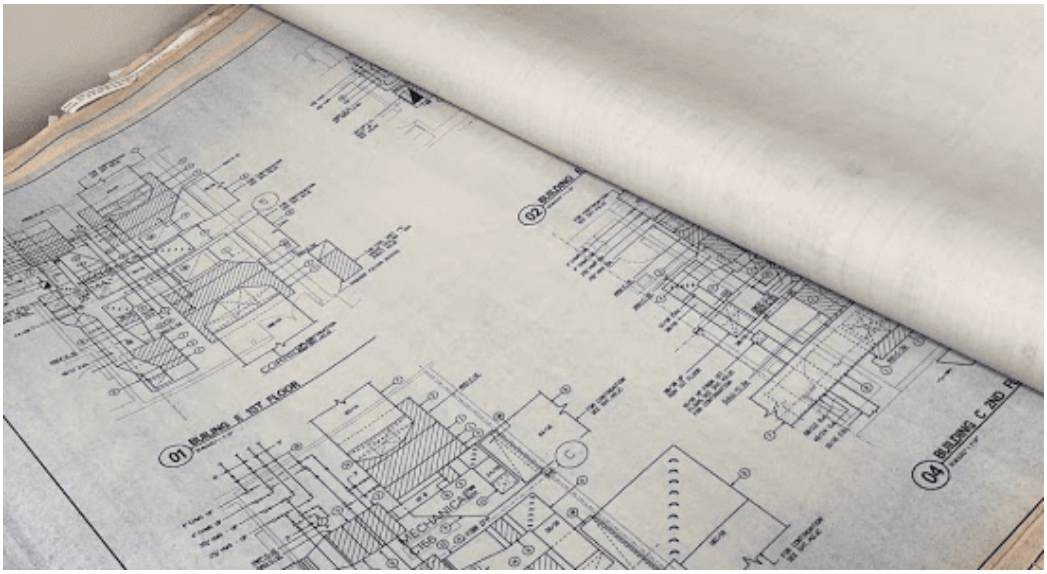
To "Go Green", our firm uses recyclable paper or ceramic cups and no longer uses Styrofoam cups. In addition, we have adopted a less-paper office environment.

We hope that these changes make big differences in the future.

*Well done is better than well said.*

- Benjamin Franklin



While this at first glance is a big win for contractors, there was a bit of a trade-off in the bill. Specifically, there is a shifting burden for the contractor to disclose any defects in the plans or specs that the contractor discovers or **should discover by "ordinary diligence."** While ordinary diligence is defined in the statute itself, it is suspected that this will be the area where we will see legal challenges similar to the significant litigation that exists over whether a defect is truly latent.

Regardless, Texas has now joined the majority and is a quasi-*Spearin* state after more than 110 years on the other side of the design deficiency ledger.

The text of SB219 can be found at: https://capitol.texas.gov/tlodocs/87R/billtext/html/SB00219F.htm

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