SUBJECT: Prohibiting certain covenants in architectural and engineering contracts

COMMITTEE: Judiciary and Civil Jurisprudence — committee substitute recommended

VOTE: 9 ayes — Leach, Farrar, Y. Davis, Julie Johnson, Krause, Meyer, Neave, Smith, White

0 nays

WITNESSES: For — Charlie Geer, American Council of Engineering Companies of Texas; (*Registered, but did not testify*: Peyton McKnight, American Council of Engineering Companies of Texas; David Lancaster, Texas Society of Architects; Jennifer McEwan, Texas Society of Professional Engineers)

Against — (*Registered, but did not testify*: Clifford Sparks, City of Dallas; Keith Strama, ExxonMobil; Michael Garcia, Texas Association of Manufacturers; Sam Gammage, Texas Chemical Council; George Christian, Texas Civil Justice League; Shana Joyce, Texas Oil and Gas Association; Jay Brown, Valero)

DIGEST: CSHB 1211 would impose restrictions on the covenants that could be included in a contract for engineering or architectural services related to the improvement of real property.

Any covenant in connection with such a contract that required a licensed engineer or registered architect to defend any party would be void and unenforceable. A covenant could provide for the reimbursement of an owner's reasonable attorney's fees in proportion to the engineer's or architect's liability.

Contracts would be prohibited from requiring a licensed engineer or registered architect to perform professional services to a level of professional care beyond that of an ordinarily prudent architect or engineer in the same or similar circumstances.

An owner that was a party to contract that was not a design-build contract could require that the owner be named as an additional insured under the engineer's or architect's commercial general liability insurance policy and be provided with any defense available to a named insured under the policy.

The bill would take effect September 1, 2019, and would apply to any covenant or contract entered into on or after this date.

SUPPORTERS SAY:

CSHB 1211 would protect design professionals from uninsurable risk by prohibiting duty-to-defend provisions in design contracts and limiting the standard of care that could be required of design professionals only to that of a reasonably prudent design professional in the same or similar circumstances.

Many architectural and engineering contracts contain duty-to-defend provisions that require the design professional to defend against a third-party claim of the owner's alleged liability. These provisions might be triggered even if the design professional was not at fault and the claim was based solely on the owner's negligence. Defending such claims gives rise to significant costs that often are not covered by professional liability insurance policies.

CSHB 1211 would prevent this abuse from happening by rendering duty-to-defend provisions void and unenforceable. Such provisions already are prohibited in governmental contracts, so the bill merely would extend this treatment to nongovernmental contracts. Contracts also would be prohibited from requiring design professionals to provide services at an uninsurable and unreasonable standard that exceeded that of an ordinarily prudent and similarly-situated design professional.

The bill would preserve the rights of parties to negotiate the terms of design contracts while balancing the bargaining positions so that design professionals would not have to assume all of the risk in order to work in Texas.

OPPONENTS SAY:

CSHB 1211 would apply a one-size-fits-all approach to contracts with architects and engineers, which could negatively impact owners in complex projects.

The bill would undermine owners' ability to maintain a coordinated defense in litigation involving construction and design defects in complex projects by depriving companies of the right to include a duty-to-defend provision in contracts with architects and engineers. Such provisions are essential to making sure that all of the parties to the contract for a complex project are on the same page in the event of such litigation.

While duty-to-defend provisions may be unfair in contracts involving smaller architectural or engineering firms that have less bargaining power, more complex projects usually involve bigger firms that are more than capable of negotiating for themselves.