

SUBJECT: Providing pre-suit inspection and correction in certain construction suits

COMMITTEE: Judiciary and Civil Jurisprudence — committee substitute recommended

VOTE: 7 ayes — Leach, Farrar, Krause, Meyer, Neave, Smith, White
2 nays — Y. Davis, Julie Johnson

WITNESSES: For — Jay Farwell, Albert Gutierrez, and Doug McMurry, Association of General Contractors, San Antonio; Corbin Van Arsdale, Association of General Contractors, Texas Building Branch; Jerry Hoog, Bartlett Cocke General Contractors; Darrell Pearson, PBK Architects; Tom Kader, Sedalco Inc.; Jennifer Fagan, Texas Construction Association; Luis Figueroa and Daniel Hart, Texas Society of Architects; Stephanie Cook; (*Registered, but did not testify:* Peyton McKnight, American Council of Engineering Companies of Texas; Joe Woods, American Property and Casualty Insurance Association; Travis Jones and Rodney Ruebsahm, Armko Industries, Inc.; Jon Fisher, Associated Builders and Contractors of Texas; Phil Thoden, Associated General Contractors of America, Austin Chapter; Brian Cook, William Martinez, and Jerry Nevlud, Associated General Contractors of America, Houston Chapter; Wendy Lambert, Central Texas Subcontractor Association; Brad Winans, Hensel Phelps; Burton Hackney, Joeris General Contractors, Ltd.; Mary Tipples, Texans for Lawsuit Reform; Liz Lonngren, Texas Architects; Angie Cervantes, Texas Masonry Council; Becky Walker, Texas Society of Architects; Jennifer McEwan, Texas Society of Professional Engineers; Wade Long, Texas Surety Federation; Perry Fowler, Texas Water Infrastructure Network; Jack Baxley, TEXO The Construction Association; Ryan Therrell, The Beck Group; Jose Villarreal, Vaughn Construction; Tara Snowden, Zachry Corporation; David Deschaine; Jeff Eubank; Will Hodges; Timothy Rosenberg)

Against — Thomas Koger, Jubilee Academies; William Clay Montgomery, Spearman Independent School District; Barry Haenisch, Texas Association of Community Schools; Will Adams, Texas Trial Lawyers Association; Winifred "Winnie" Dominguez, Walsh, Gallegos,

Trevino, Russo and Pyle PC, Texas Association of School Boards; Craig Eiland; (*Registered, but did not testify*: Brie Franco, City of Austin; Sally Bakko, City of Galveston; Jamaal Smith, City of Houston; Jon Weist, City of Irving; James McCarley, City of Plano; Christine Wright, City of San Antonio; Ricardo Ramirez, City of Sugar Land; Jim Allison, County Judges and Commissioners Association of Texas; Michael Fiebig, Fiebig Architecture, PLLC; Donna Warndof, Harris County Commissioners Court; Bill Kelly, City of Houston Mayor's Office; Blaire Parker, San Antonio Water System; Ruben Longoria, Texas Association of School Boards; John Dahill, Texas Conference of Urban Counties; Jerod Patterson, Texas Rural Education Association; John Grey, Texas School Alliance; Alexis Tatum, Travis County Commissioners Court; Julie Gilberg)

DIGEST:

CSHB 1999 would require governmental entities, before filing suit in connection with an alleged construction defect, to submit a report to potential opposing parties and provide these parties with an opportunity to inspect and correct.

Applicability. The bill would apply to a governmental entity's claim against a contractor, subcontractor, supplier, or design professional for damages caused by an alleged construction defect in a public building or public work or for indemnity or contribution for such damages.

The bill would not apply to:

- a claim for personal injury, survival, or wrongful death;
- a claim involving the construction of residential property covered under the residential construction liability provisions of the Property Code;
- a contract entered into by the Texas Department of Transportation;
- a project that received money from a state or federal highway fund;
- or
- certain civil works projects.

Report, inspection, and correction. Before bringing an action asserting a

claim described above, a governmental entity would be required to provide a written report to each party with whom the entity had a contract for the design or construction of an affected structure.

The report would identify the specific construction defect on which the claim was based, describe the present physical condition of the affected structure, and describe any modification, maintenance, or repairs to the affected structure made by the governmental entity or others since the affected structure's initial use or occupation.

Each party would be allowed a reasonable opportunity to inspect any construction defect or related condition identified in the report for a period of 30 days after the report was sent. The parties would have 120 days after the inspection either to correct any construction defect or related condition identified in the report or to enter into a separate agreement with the governmental entity to make such correction.

Tolling. If the report and opportunity to correct were provided during the final year of the limitations period for the claim, the period would be tolled until one year after the date on which the report was provided.

Dismissal. A court, arbitrator, or other adjudicating authority would be required to dismiss without prejudice an action asserting a claim described above if the governmental entity had not submitted a report or provided an opportunity for inspection and correction as required by this bill. If after an action was dismissed without prejudice, a second action was brought and the governmental entity still had not complied with these requirements, then the action would be dismissed with prejudice.

Inspection costs. A governmental entity would be entitled to recover reasonable costs to obtain the report required by this bill if the governmental entity recovered damages for a construction defect identified by the report.

Emergency repairs. A governmental entity would not be prohibited or limited from making emergency repairs to property as needed to protect

the health, safety, and welfare of the public or a building occupant.

Insurance. If a party provided a written notice of an alleged construction defect or report to the party's insurer, the insurer would be required to treat the notice or report to the party as the filing of a suit asserting that claim against the party for purposes of the relevant policy terms.

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2019, and would apply only to any action that accrued on or after the effective date and to any insurance policy delivered, issued for delivery, or renewed on or after January 1, 2020.

**SUPPORTERS
SAY:**

CSHB 1999 would promote fairness and reduce costs in governmental construction projects by giving contractors a chance to inspect and correct alleged defects prior to being sued.

Governmental entities increasingly are suing contractors for alleged construction defects without first notifying them of or offering them a chance to fix such defects. Because reputation is key to attracting new business, many contractors would be willing to repair any defects even without a lawsuit, which renders much of this litigation unnecessary.

These lawsuits can go on for years, harming both contractors and governmental entities. Insurance carriers have been increasing the cost of insurance for contractors that work for governmental entities due to this surge in litigation. This has led contractors to put in fewer bids for public works projects, undermining the competitive bidding process and increasing the cost of such projects.

CSHB 1999 also would result in defects in public works being repaired more quickly, which ultimately would benefit the public.

The bill would not prevent governmental entities from suing contractors. Instead, it would provide contractors with a fair and reasonable opportunity to correct any defects prior to being sued.

OPPONENTS
SAY:

CSHB 1999 would create an additional obstacle for governmental entities seeking to be compensated for damages caused by construction defects. The time and costs of preparing a report and providing an opportunity for inspection and correction could prevent these entities from raising these claims and recovering damages. This could result in an increase in the cost of public works projects.

The bill also would require governmental entities to provide an opportunity for correction to contractors who may have been dishonest or incompetent, which could result in even more damage to the property.

Contractors already can negotiate with governmental entities for a right to cure. As such, the bill is unnecessary and would deprive the parties of their right to negotiate all of terms of their contract.