

## A Sea-Change for Texas Construction Projects

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Effective September 1, 2021, Senate Bill 219 adds Chapter 59 to the Texas Business and Commerce Code. SB 219 places Texas in the company of only three other states – California, Louisiana, and North Dakota – that impose nonwaivable constraints on the freedom of construction project owners to contractually transfer certain design risks to their contractors. While certain industries are exempted from the restrictions, the vast majority of construction projects in Texas will be impacted by the legislative changes.

Proponents presented SB 219 as a move to bring Texas in line with federal contracting and the other 49 states as it relates to who, between a construction contractor or the owner, is responsible for any deficiencies in the design documents for the project when the contract is silent. Under the federal *Spearin* doctrine and the common law of almost every other state, parties are allowed to contract by written agreement around the default rule, which puts the burden of design responsibility on the project owner.

The Texas Supreme Court has long recognized the importance of allowing sophisticated parties to freely allocate risks like these on construction projects. Rather than simply flipping the default rule regarding implied responsibilities for defects to align with the federal rule, however, SB 219 makes a significant shift in public policy and prohibits parties from making express agreements regarding those responsibilities. Outside the exempt industries, the only exceptions to the prohibition are projects where the construction firm contracts directly with a design professional such as design build agreements, engineering procurement contracts, and delegated design for specialized trades.

What does this sea-change mean for your construction project? Most importantly, owners and developers (and their lenders) will need to revise standard contract language, improve procurement processes, reconsider project delivery methods, and retool risk assessments in light of the new restrictions. Owners and lenders will need to plan for the additional financial risk they can no longer shift to contractors, who had the ability to spread the cost of design risks across multiple projects.

The enrolled version of SB 219 can be accessed [here](#).

A number of other statutes effective September 1, 2021, also impact construction projects, including a shortened statute of repose for claims against contractors and design professionals on public projects; revisions to lien laws; restrictions on retainage for public projects; limits on duty to defend for design professionals, building code updates, and others. For a detailed listing of those statutes and advice regarding changes to your construction contracts in light of the new laws, [please contact the author](#).

