

Rebuilding Texas: Protections And Limitations For Designers

By **Brian Gaudet and Courtney Lynch** (January 31, 2018, 1:08 PM EST)

In late August of 2017, Hurricane Harvey dropped a staggering 40-61 inches of rain across southeast Texas. Individual drops of water combined to create over \$180 billion worth of estimated damages to public and private buildings and structures statewide. The federal government has committed substantial dollars toward reconstruction efforts with the promise of more dollars to follow. Many public entities will be the recipients of those federal rebuilding dollars. For members of the construction industry who plan to enter the Texas market, and for those already in the private Texas market who wish to engage in public projects, there are important aspects to know about Texas public procurement law.



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This article is the final part of a five-part series. The first provided an overview of public procurement in Texas. The second explained how Texas public procurement statutes regulate the construction manager-agent and the construction manager-at-risk project delivery methods. The third explored the design-build delivery method. The fourth explained how Texas public procurement statutes, which allow for several alternative delivery methods on public projects, regulate competitive sealed proposals and job order contracting project delivery methods.



Courtney Lynch

Texas public procurement statutes set forth the requirements for the hiring of design professionals and other professional service providers, such as interior designers, surveyors or landscape architects. In addition, the statutes set forth quite a few protections and limitations for design professionals on public projects. This article explores some of the particularities of working as a design professional on a public project in Texas.

This article does not address the qualifications required to perform design services in Texas. The authors encourage any design professional considering this type of work to visit the Texas Board of Professional Engineers' [webpage](#) and the Texas Board of Architectural Examiners' [webpage](#) for additional information related to working in Texas, for the distinctions between the roles of architects and engineers, for other laws and rules pertinent to these disciplines, and for other helpful references.

Hiring Design Professionals

Design professionals are required in conjunction with public construction projects in Texas. When

selecting a design professional, the governmental entity must select the design professional on the basis of the design professional's demonstrated competence and qualifications.

Once the most highly qualified design professional is selected, the parties will then attempt to negotiate a fair and reasonable price for the design services. If negotiations fail and an acceptable contract is not made with the most highly qualified architect, engineer, or surveyor, Texas law requires that the governmental entity end negotiations and make a second selection with the next most qualified design professional. At this point, the process of negotiations will begin again, with the procedure repeating until a contract between the entity and the design professional is formalized.

Design professionals should be aware that any contract entered into that violates the hiring process outlined by the Texas procurement statutes is automatically void. In addition, declaratory and injunctive relief is available to enforce the requirements of the statute, if an action to do so is filed by the 10th day after a contract is awarded. Although declaratory and injunctive relief is statutorily authorized against most governmental entities, the statutes specifically exclude the Texas Building and Procurement Commission from this type of judicial remedy.

An architect or engineer selected by a governmental entity to work on a Texas public project has full responsibility for complying with the rules set forth by the Texas Board of Architectural Examiners in Chapter 1051 of the Texas Occupations Code, or the laws governing engineers found in Chapter 1001 of the Texas Occupations Code, whichever is applicable.

Limits on Indemnity

Texas law limits the type of indemnity a governmental agency can obtain from a design professional. These restrictions explicitly define "governmental agency" as a municipality, county, school district, conservation and reclamation district, hospital organization, or other political subdivision of the state.

Under contracts with these types of entities, the design professional who engages in engineering or architectural services may only be required to indemnify or hold harmless the governmental agency for damage that is caused by, or results from, the professional's own acts. Specifically, a design professional may be held liable for damages caused by its own negligence, an intentional tort, an intellectual property infringement, or its failure to pay a subcontractor or supplier, and it may be required to indemnify the governmental agency in these circumstances. However, a contract that requires the professional to indemnify or hold harmless the entity against liability for any other type of damage is void and unenforceable.

Additionally, if the contract for engineering or architectural services includes a requirement that the licensed engineer or registered architect defend against claims based on the negligence of, fault of, or breach of contract by the governmental agency, then such requirement to indemnify is void and unenforceable.

Notwithstanding the above, a contract for professional engineering or architectural services may include a provision that the professional provide reimbursement of the governmental agency's reasonable attorneys' fees in proportion to the engineer's or architect's liability. The agency may also require that the engineer or architect name the governmental agency as an additional insured under the engineer's or architect's general liability insurance policy and provide any defense provided by such policy.

Application of Other States' Laws

Although Texas is typically forum-selection clause friendly, the Texas Business and Commerce Code disfavors the use of forum selection clauses in construction contracts for improvement to real property within the state. Recently, this provision was extended to include contracts with design professionals.

Specifically, a provision that makes the contract, agreement collateral to the contract, or any conflict arising under the contract or agreement, subject to another state's law, subject to litigation in another state's courts, or subject to arbitration in another state, is voidable by a party bound by the construction contract. Note, because the clause is not automatically void, a contract with such a provision is valid and enforceable unless a party seeks otherwise.

Due to the code's broad definition of what qualifies as a construction contract, almost any agreement that a design professional enters into may be voidable if it contains a forum selection clause.

The Commerce Code defines "construction contract" as a contract, subcontract or agreement made by "an owner, architect, engineer, contractor, construction manager, subcontractor, supplier, or material or equipment lessor for the design, construction, alteration, renovation, remodeling, or repair of, or for the furnishing of material or equipment for, a building, structure, appurtenance, or other improvement to or on public or private real property, including moving, demolition, and excavation connected with the real property." Additionally, the term includes assignment of the construction contract or other modifications. The statute lists three situations where this general rule does not apply: an agreement governing a partnership, entity, or trust; an agreement where the obligation to perform under the construction contract is made to obtain a loan or other extension of credit; or, an agreement where the obligation to perform work under the construction contract is for the management of real property.

Given that this discussion relates to Texas governmental entities it is unlikely that the design professional would encounter a governmental entity seeking to enforce its contract under another states law or in another jurisdiction. Nevertheless, in a rare circumstance where there is a project bridging Texas and a neighboring state this provision may be implicated.

Standard of Care

A recent change to Texas law limits a governmental entity's ability to require an elevated standard of care from a design professional.

The standard of care permitted under Texas law is as follows: First, engineers and architects are required to perform their respective services with the professional skill and care ordinarily provided by other competent engineers or architects who practice under the same or similar circumstances and professional license. Second, engineers and architects are required to perform their services "as expeditiously as is prudent," considering the ordinary professional skill and care of a competent engineer or architect.

If a contract for these services outlines a standard of care that differs from that described above, the provision establishing the standard of care is void. The remaining contract will continue to be enforceable, and the standard of care will be the two-part standard outlined in the local government code.

Role in a Construction Manager Capacity

An architect or engineer is permitted to serve as a project's construction manager in an agent capacity. The architect or engineer is only allowed to also serve as the construction manager-agent if the services it provides are those customarily provided by those professions, or if the architect or engineer is hired into such position through a separate selection process. More information regarding construction management can be found **here**.

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