

# Construction Laws and Customs: Texas

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A Q&A guide to construction projects in Texas. This Q&A addresses state law and custom relating to public and private construction projects, including prompt payment laws, retainage, project delivery systems, contract forms and commonly negotiated terms, warranties, and licensing requirements for construction professionals. It also addresses payment and performance bonds, including any applicable “Little Miller Act” statutes, construction statutes of limitation and repose, pleading requirements, and the enforceability of specific clauses such as liquidated damages, limitations of liability, and no-damages-for-delay. Answers to questions can be compared across a number of jurisdictions (see Construction Laws and Customs: State Q&A Tool).

## Prompt Payment Acts and Retainage

### 1. Does your state have any statutes governing the timing of payments to contractors or subcontractors on publicly owned or financed construction projects? If so, what do those statutes require regarding:

- Payments by owners to prime contractors?
- Payments by prime contractors to subcontractors?
- Penalties for failure to comply with requirements of the statute?
- A contractor’s right to stop work for failure to receive payment?

In Texas, Tex. Gov’t Code Ann. §§ 2251.021 to 2251.030 govern the timing of payments to contractors or subcontractors on publicly owned or financed construction projects.

### Payments by Owners

A government entity owner under contract must pay prime contractors within 30 days (or 45 days for a

political subdivision whose governing body meets once a month or less) after the later of:

- The date the government entity receives the goods.
- The date the performance of services under the contract is completed.
- The date the governmental entity receives an invoice for the goods or services.

(Tex. Gov’t Code Ann. § 2251.021(a).)

### Payments by Prime Contractors

A prime contractor must pay its subcontractors within ten days of receiving payment from a governmental entity (Tex. Gov’t Code Ann. § 2251.022(a)). Similarly, a subcontractor must pay its lower-tier subcontractors within ten days of receiving payment from the prime contractor (Tex. Gov’t Code Ann. § 2251.023(a)).

### Penalties for Failure to Comply

Interest begins to accrue once the payment becomes overdue (Tex. Gov’t Code Ann. § 2251.025(a)).

The rate of interest that accrues on an overdue payment is the rate in effect on September 1 of the fiscal year in which the payment becomes overdue.

The rate is calculated as 1% over the prime rate as published in the Wall Street Journal on the first day of July of the preceding fiscal year that does not fall on a Saturday or Sunday. (Tex. Gov't Code Ann. § 2251.025(b).)

Interest stops accruing once the governmental entity (excluding state agencies) or prime contractor mails or electronically transmits the payment (Tex. Gov't Code Ann. § 2251.025(c)).

For state agencies where the comptroller is **not** responsible for issuing a warrant or initiating an electronic funds transfer for payment to the prime contractor, the accrual of interest on the overdue payment:

- Stops on the date the agency mails or electronically transmits the payment.
- Is not suspended during any period that a payment law prohibits the agency from paying the prime contractor.

(Tex. Gov't Code Ann. § 2251.025(d).)

For state agencies where the comptroller **is** responsible for issuing a warrant or initiating an electronic funds transfer for payment to the prime contractor, the accrual of interest on the overdue payment:

- Stops on its distribution date.
- Does not stop during any period that a payment law prohibits the comptroller from issuing the warrant or initiating the transfer.

(Tex. Gov't Code Ann. § 2251.025(e).)

### Right to Stop Work

A prime contractor may suspend performance of its work if both:

- The governmental entity does not pay the prime contractor an undisputed amount within the time limits under Tex. Gov't Code Ann. § 2251.021(a).
- The prime contractor provides the governmental entity with written notice that:
  - payment has not been received; and
  - it intends to suspend performance for nonpayment.

(Tex. Gov't Code Ann. § 2251.051(a).)

However, the prime contractor may not suspend performance of its work until the later of either:

- Ten days after providing written notice.
- Twenty days after providing written notice, if the contract is with the [Texas Department of Transportation](#) and is highway related.

(Tex. Gov't Code Ann. §§ 2251.051(b) and 2251.053(b).)

A subcontractor may suspend performance of its work if:

- The governmental entity does not pay the prime contractor (which is in contract with the subcontractor) an undisputed amount within the time limits under Tex. Gov't Code Ann. § 2251.021(a).
- The prime contractor has been paid an undisputed amount but fails to pay the subcontractor an undisputed amount within the time limits under Tex. Gov't Code Ann. § 2251.022(a).

(Tex. Gov't Code Ann. § 2251.052(a).)

To suspend performance of its work, the subcontractor must provide the prime contractor (and, optionally, the governmental entity) with written notice:

- Informing the prime contractor that payment has not been received.
- Stating the subcontractor's intent to suspend performance for nonpayment.

(Tex. Gov't Code Ann. § 2251.052(b).)

However, the subcontractor may not suspend performance of its work until the later of:

- Ten days after providing written notice.
- Twenty days after providing written notice, if the contract is with the [Texas Department of Transportation](#) and is highway-related.

(Tex. Gov't Code Ann. §§ 2251.052(c) and 2251.053(b).)

For more information, see [Prompt Payment Acts \(Private Projects\): State Comparison Chart](#) and [Prompt Payment Acts \(Public Projects\): State Comparison Chart](#).

### **2. Does your state have any statutes governing the timing of payments to contractors or subcontractors on privately owned construction projects? If so, what do those statutes require regarding:**

- Payments by owners to prime contractors?
- Payments by prime contractors to subcontractors?
- Penalties for failure to comply with the requirements of the statute?
- A contractor's right to stop work for failure to receive payment?

In Texas, Tex. Prop. Code Ann. §§ 28.001 to 28.010 govern the timing of payments to contractors or subcontractors on privately owned or financed construction projects.

### **Payments by Owners**

If an owner receives a written payment request from a contractor under a contract for properly performed work or materials, the owner must pay the amount, less any amount properly withheld, within 35 days after the owner receives the request (Tex. Prop. Code Ann. § 28.002(a)).

If a good faith dispute exists concerning the amount owed for a payment under a contract for construction of or improvements to a detached single-family residence, duplex, triplex, or quadruplex, the party disputing its obligation to pay or the payment amount may not withhold more than 110% of the difference between the two disputed claimed amounts (Tex. Prop. Code Ann. § 28.003(a)).

If the good faith dispute concerns construction of or improvements to any other type of property, the party disputing its obligation to pay or the payment amount may not withhold more than 100% of the difference between the disputed amounts (Tex. Prop. Code Ann. § 28.003(b)).

A good faith dispute includes a dispute about whether the work was performed in a proper manner (Tex. Prop. Code Ann. § 28.003(b)).

### **Payment by Prime Contractors**

A contractor must pay each of its subcontractors within seven days after the date the contractor

receives payment from the owner (Tex. Prop. Code Ann. § 28.002(b)).

Similarly, a subcontractor must pay each of its lower-tier subcontractors within seven days after the date the subcontractor receives payment from the contractor (Tex. Prop. Code Ann. § 28.002(c)).

### **Penalties for Failure to Comply**

On the day the payment becomes overdue, interest begins to accrue at a rate of 1.5% each month. Interest stops accruing on the earlier of:

- The date of delivery.
- The date of mailing (if payment is mailed and delivery occurs within three days).
- The date a judgment is entered in an action brought for failure to make a prompt payment.

(Tex. Prop. Code Ann. § 28.004.)

### **Right to Stop Work**

If an owner fails to pay the contractor an undisputed amount within the time limits, the contractor or any subcontractor may suspend contractually required performance ten days after providing a written notice to the owner stating both that:

- Payment has not been received.
- The contractor or subcontractor intends to suspend performance for nonpayment.

(Tex. Prop. Code Ann. § 28.009(a).)

The written notice must also be given to the owner's lender if:

- The owner has obtained a loan intended to pay for all or part of the construction project.
- The lender has remitted funds for construction purposes.
- The loan obtained is evidenced by a promissory note secured by a deed of trust and recorded in the property records of the county where the real property is located.
- The owner or lender securely posts and maintains a sign on the project site in a location accessible to the contractor and any subcontractor or supplier that states the lender's name and contact information within ten days after construction commences.

- A written copy of the lender's information is properly mailed to the contractor and any subcontractor or supplier identified by the contractor within ten days after construction commences.
- A written copy of this information is provided to a subcontractor or supplier within ten days after the date that subcontractor or supplier performs labor or furnishes material or equipment for the project.

(Tex. Prop. Code Ann. § 28.009(b).)

This right to suspend work does not apply to a contract for:

- The construction of or improvements to:
  - a detached single-family residence; or
  - a duplex, triplex, or quadruplex.
- Improvements to real property for a governmental entity.

(Tex. Prop. Code Ann. § 28.009(e).)

For more information, see [Prompt Payment Acts \(Private Projects\): State Comparison Chart](#) and [Prompt Payment Acts \(Public Projects\): State Comparison Chart](#).

### 3. If your state does not have a prompt payment act, what is the custom and practice regarding:

- Timing of payments by owners to prime contractors?
- Timing of payment by prime contractors to subcontractors?
- Payment of interest on late payments?
- A contractor's right to stop work for failure to receive a payment?

Texas has a prompt payment act that specifies the requirements for payments, interests, and the rights of contractors to stop work on both public and private construction projects (see Questions 1 and 2).

### 4. If your state does not regulate the timing of payments to subcontractors, are there any statutory or common law restrictions on the flow down of payments to subcontractors, such as prohibiting "pay-if-paid" or "pay-when-paid" clauses?

Texas has a prompt payment act (see Questions 1 and 2).

If contingent payment or pay-if-paid clauses are clearly drafted as a condition precedent, Texas courts will generally recognize and enforce the clauses (see *FaulknerUSA, LP v. Alaron Supply Co.*, 322 S.W.3d 357, 359-60 (Tex. App.—El Paso 2010, no pet.)).

However, contingent payment clauses in construction contracts are unenforceable under certain circumstances, including if:

- Certain contractual obligations are not met.
- The contingent payee provides notice objecting to the enforceability.
- The contingent payor is in a sham relationship with the obligor.
- The enforcement would be unconscionable.
- The contingent payment clause would limit the enforcement or perfection of a mechanic's lien.

(Tex. Bus. & Com. Code Ann. §§ 56.051 to 56.057.)

These limitations are not applicable to contracts solely for:

- Design services.
- Construction or maintenance of a roadway, bridge, utility, water, wastewater, wharf, dock airport runway or taxiway, drainage, or related civil engineering construction projects.
- Improvement to or construction of certain residential structures.

(Tex. Bus. & Com. Code Ann. § 56.002.)

### 5. Does your state have a statute related to withholding retainage on a publicly owned or financed construction project? If so, does the statute:

- Regulate the amount of retainage that can be withheld from a contractor or subcontractor?
- Require a partial release of or reduction in retainage at any point during the project?
- Govern when and how final retainage must be released?
- Impose any penalties for failure to comply with the statute?

The following Texas statutes regulate the withholding of retainage on publicly owned or financed construction projects:

- Tex. Gov't Code Ann. §§ 2252.032 and 2252.033.
- Tex. Loc. Gov't Code Ann. § 325.045.
- 31 Tex. Admin. Code §§ 371.2(a) and 371.88(a)).

### Amount of Retainage

Texas law does not generally require withholding any specific amount of retainage on publicly owned or financed construction projects. However, if the total value of a public works contract is:

- Less than \$5 million, a government entity cannot withhold retainage in an amount:
  - more than 10% of the contract price; or
  - more than 10% of any item in a bid schedule or schedule of values for the project, including materials and equipment delivered on site to be installed.
- Equal to or greater than \$5 million, a government entity cannot withhold retainage in an amount:
  - more than 5% of the contract price; or
  - more than 5% of any item in a bid schedule or schedule of values for the project, including materials and equipment delivered on site to be installed.

(Tex. Gov't Code Ann. § 2252.032(b)(1), (2).)

For public works contracts relating to construction or maintenance of a dam, a government entity cannot withhold retainage in an amount:

- More than 10% of the contract price.
- More than 10% of any item in a bid schedule or schedule of values for the project, including materials and equipment delivered on site to be installed.

(Tex. Gov't Code Ann. § 2252.032(b)(3).)

The same retainage-percentage limitations based on contract value or work on a dam that apply between the prime contractor and the government entity apply to contracts on the project between both:

- Prime contractors and subcontractors.
- Subcontractors and their subcontractors.

(Tex. Gov't Code Ann. § 2252.032(d).)

These retainage limitations do not apply to:

- Projects that are less than \$400,000 as estimated at the time of execution of the contract.
- Public contracts with the [Texas Department of Transportation](#).
- Public works contracts executed before August 31, 1981.

(Tex. Gov't Code Ann. § 2252.033.)

For projects upgrading or replacing aging infrastructure to provide the public with safe drinking water, a minimum retainage of 5% of each progress payment throughout the course of construction must be withheld (31 Tex. Admin. Code §§ 371.2(a) and 371.88(a)).

For a sports facility district project, the district may retain 10% of the estimated amount until final completion and acceptance of the contract work (Tex. Loc. Gov't Code Ann. § 325.045(c)).

### Partial Release of Retainage

Texas does not have a statute requiring partial release of or reduction in retainage on public projects. However, in projects upgrading or replacing aging infrastructure to provide the public with safe drinking water, the executive administrator may approve a partial release of retainage when the project is substantially complete. (31 Tex. Admin. Code §§ 371.2 and 371.88(c).)

For a sports facility district project, if the board, at any time after 50% of the work has been completed, finds that satisfactory progress is being made, it may authorize any of the remaining progress payments to be made in full. If the work is substantially completed, the board, if it finds the amount retained to exceed the amount adequate to protect the district, may release all or part of the excess amount to the contractor. (Tex. Loc. Gov't Code Ann. § 325.045(c).)

### Final Release of Retainage

A government entity cannot withhold retainage either:

- After the contract's required work has been performed by the prime contractor, including during the warranty period.

- For the purpose of requiring the prime contractor, after the required contract work has been performed, to work on manufactured goods or systems that were both:
  - specified by the designer of record; and
  - properly installed by the contractor.

(Tex. Gov't Code Ann. § 2252.032(e).)

If, on application for final payment by the government entity, there is a bona fide dispute over contract compliance, the government must provide written notice of the government's reason for withholding retainage. Where there is no bona fide dispute and neither party is in default, the prime contractor may either:

- Cure any noncompliant labor, services, or materials.
- Offer to pay the government a fair price for any noncompliant labor, services, or materials that cannot be promptly cured. The government entity is not obligated to accept the offered payment.

(Tex. Gov't Code Ann. § 2252.032(f), (g).)

In projects upgrading or replacing aging infrastructure to provide the public with safe drinking water, the executive administrator approves a final release of retainage when:

- The engineer approves the contractor's request for release of retainage.
- The governing body approves the release of retainage.
- The executive administrator issues the Certificate of Approval.

(31 Tex. Admin. Code §§ 371.2 and 371.88(b).)

For a sports facility district project, retainage must be released at final completion and acceptance of the contract work (Tex. Loc. Gov't Code Ann. § 325.045(c)).

### Penalties

Texas does not have a statute creating a penalty for failing to timely release retainage on publicly owned or financed projects. However, that payment is subject to the prompt payment provisions of the Texas Government Code (see Question 1).

### 6. Does your state have a statute related to withholding retainage on a privately owned or financed construction project? If so, does the statute:

- Regulate the amount of retainage that can be withheld from a contractor or subcontractor?
- Require a partial release of or reduction in retainage at any point during the project?
- Govern when and how final retainage must be released?
- Impose any penalties for failure to comply with the statute?

In Texas, Tex. Prop. Code Ann. § 53.101 regulates the withholding of retainage on a privately owned or financed construction project.

### Amount of Retainage

For privately owned or financed construction projects, the owner must reserve 10% of:

- The contract amount.
- The value of the work in proportion of work done using:
  - contract price; or
  - if there is no contract price, the reasonable value of the completed work.

(Tex. Prop. Code Ann. § 53.101(a).)

### Partial Release of Retainage

Texas does not have a statute addressing partial release of retainage on privately owned or financed construction projects.

### Final Release of Retainage

The retainage or reserved funds can be released 30 days after the work under the contract has been completed (Tex. Prop. Code Ann. § 53.101(a)).

### Penalties

Claimants may obtain a lien if an owner fails or refuses to comply with the requirement to reserve funds. The lien may be at least to the extent of the amount that



should have been reserved from the original contract. (Tex. Prop. Code Ann. § 53:105(a).) If multiple claimants exceed the amount reserved, the claimants share the lien proportionately in accordance with the preference provided by Tex. Prop. Code Ann. § 53:104 (Tex. Prop. Code Ann. § 53:105(b)).

### **7. If your state does not regulate retainage on privately owned construction projects, what is the custom and practice regarding:**

- The amount of retainage withheld from each payment requisition? Does it differ for labor or material?
- Partial or early release of retainage upon achieving any project milestone or for early completion subcontractors?
- Requirements for the final release of retainage, including hold backs for incomplete work or disputed amounts?

Texas regulates the retainage on privately held construction projects (see Question 6).

## **Project Delivery Systems and Contract Forms**

### **8. What forms of project delivery systems are most commonly used in your state? Do they differ by the nature of the construction project?**

The forms of project delivery systems most commonly used in Texas are:

- Design-bid-build.
- Design-build.
- Construction manager methods (see Construction Manager at Risk and Construction Manager as Advisor).

Typically, public projects are handled via the design-bid-build method. However, in recent years, TxDOT has begun to implement the design-build method as it shifts both the engineering and construction risk and responsibilities to the general contractor.

For private projects, some owners may implement the design-build method if the engineering drawings

are not yet complete and there is a rush to get the project completed. Otherwise, in private projects, owners typically use the design-bid-build method.

The type of project affects the delivery method but not as much as the project's:

- Cost.
- Delivery time.
- Difficulty of work.

### **9. Does your state have any statutes specifically related to design-build or construction management? If so, do they apply to:**

- Publicly owned or financed construction projects?
- Privately owned or financed construction projects?

## **Public Projects**

In Texas, the following statutes specifically relate to design-build or construction management project management delivery methods for public projects:

- Tex. Gov't Code Ann. §§ 2269.301 to 2269.311 (public project design-build projects).
- Tex. Gov't Code Ann. §§ 2269.251 to 2269.258 (public project construction manager-at-risk projects).
- Tex. Gov't Code Ann. §§ 2269.201 to 2269.208 (public project construction manager-agent).
- Tex. Water Code Ann. § 60.460 (municipal district design-build contracts).
- Tex. Water Code Ann. § 60.461 (municipal district construction manager-agent contracts).
- Tex. Water Code Ann. § 60.462 (municipal district construction manager-at-risk contracts).
- Tex. Educ. Code Ann. § 51.780 (educational facility design-build contracts for higher education only).
- Tex. Educ. Code Ann. § 51.781 (educational facility construction manager-agent contracts for higher education only).
- Tex. Educ. Code Ann. § 51.782 (educational facility construction manager-at-risk contracts for higher education only).

- Tex. Transp. Code Ann. §§ 370.401 to 370.410 (transportation project design-build contracts).
- Tex. Transp. Code Ann. § 366.185(e) (construction manager-at-risk contracts for turnpike projects).

### Private Projects

Texas does not have any statutes governing private design-build or construction management projects. The parties are generally free to contract and allocate risk.

#### 10. Are industry standard forms of documents customarily used in private construction projects? If so:

- Do they vary by delivery system or type of project?
- Which forms are most widely used?

Depending on the dollar value, nature, and complexity of the project, parties in Texas may use an industry standard form of agreement that is modified to reflect the specific terms of the transaction or a manuscript agreement drafted specifically for that transaction.

There are several different construction contract forms that are available and commonly used in Texas, including Engineers Joint Contract Document Committee (EJCDC) contracts. Design Build Institute of America (DBIA) contracts are common in design-build projects and Texas Association of Builders (TAB) contracts are common in residential construction. Otherwise, a majority of Texas construction projects use standard or modified [American Institute of Architects \(AIA\)](#) form contracts.

The AIA creates documents and bundles them into categories for specific delivery methods. For example:

- The A101 form is the first document in the traditional design-bid-build contract family.
- The A132 form is the first document in the contract family for construction manager as advisor.
- The A133 form is the first document in the construction manager as constructor family.
- The A141 form is the first document in the design-build family.

For more information on industry form agreements, see [Practice Note, Standard Construction Industry Documents: Overview](#).

#### 11. What terms are customarily most heavily negotiated in construction contracts? Do they vary by delivery system or type of project?

In Texas, the most commonly negotiated terms in construction contracts are:

- The project's price or cost.
- The scope of work and exceptions.
- Change order provisions.
- Contract time and performance provisions, including:
  - time for completion of the work;
  - delay or time extension provisions;
  - payment for additional costs for extended contract durations;
  - no-damages-for-delay provisions; and
  - liquidated damages provisions.
- Risk allocation provisions, including:
  - indemnity;
  - insurance;
  - limitations of liability;
  - due diligence in inspecting the project prior to execution of the contract;
  - differing or unforeseen conditions;
  - design responsibility; and
  - pay-if-paid provisions.
- Dispute resolution provisions.
- Recovery of attorneys' fees.

In certain types of contracts, like cost-plus and guaranteed maximum price contracts, parties also frequently negotiate:

- The definition of "cost" of the work.
- The formula for paying the contractor's fee (for example, fixed amount or percentage).
- The mechanism for adjusting the fee paid on change orders.



### Licensing

#### 12. Does your state license construction professionals? If so:

- Which construction professionals are licensed (general contractors, specialty contractors, construction managers, design professionals)?
- Which departments oversee the licensing and regulation of these construction professionals?

Texas requires the following construction professionals to be licensed or registered:

- Engineers (Tex. Occ. Code Ann. §§ 1001.301 to 1001.312; see Professional Engineers).
- Architects (Tex. Occ. Code Ann. §§ 1051.701 to 1051.705 and 1052.151 to 1052.155; see Architects).
- Landscape architects (Tex. Occ. Code Ann. §§ 1052.003 to 1052.252; see Landscape Architects).
- Land surveyors (Tex. Occ. Code Ann. §§ 1071.251 to 1071.262; see Land Surveyors).

Texas does not require commercial general contractors to be licensed to perform public or private construction work. However, there are certain regulatory bodies that oversee this work. Certain specialized contractors, including but not limited to asbestos abatement contractors, electricians, plumbers, and welders, must obtain licenses or certifications specific to their trade. (Tex. Occ. Code Ann. §§ 51.051, 1301.351, 1305.151, 1954.101.)

#### Professional Engineers

An engineer in Texas must be licensed by the [Texas Board of Professional Engineers and Land Surveyors](#) (TBPELS) to practice engineering (Tex. Occ. Code Ann. § 1001.301). The practice of engineering is the performance of or an offer or attempt to perform any public or private service or creative work, the adequate performance of which requires engineering education, training, and experience in applying special knowledge or judgment of the mathematical, physical, or engineering sciences to that service or creative work (Tex. Occ. Code Ann. § 1001.003(b)). The practice of engineering includes, but is not limited to:

- Consulting, investigating, evaluating, analyzing, planning, and engineering for program management.

- Providing an expert engineering opinion or testimony.
- Evaluating materials for construction or other engineering use.
- Mapping.
- The design, conceptual design, or conceptual design coordination of engineering works or systems.
- Developing or optimizing plans and specifications for engineering works or systems.
- Planning the use or alteration of land or water or the design or analyzing works or systems for the use or alteration of land or water.
- Performing an engineering survey or study.
- Engineering for:
  - construction, alteration, or repair of real property;
  - preparation of an operating or maintenance manual; and
  - review of the construction or installation of engineered works to monitor compliance with drawings or specifications.
- A service, design, analysis, or other work performed for a public or private entity in connection with a utility, structure, building, machine, equipment, process, system, work, project, or industrial or consumer product or equipment of a mechanical, electrical, electronic, chemical, hydraulic, pneumatic, geotechnical, or thermal nature.
- Any other professional service necessary for the planning, progress, or completion of an engineering service.

(Tex. Occ. Code Ann. § 1001.003(c).)

A professional engineering license covers various types of engineering and is not solely limited to engineering related to construction. Each discipline of engineering has a separate exam that tests on specific issues related to that discipline.

The TBPELS oversees the licensure of qualified engineers, enforces the Texas Engineering Practice Act, and regulates the practice of professional engineering in Texas (Tex. Occ. Code Ann. § 1001.201). The TBPELS consists of nine members, appointed by the governor with the senate's advice and consent (Tex. Occ. Code Ann. § 1001.101(a)).

### Architects

Architects must be registered with the [Texas Board of Architectural Examiners](#) (TBAE) as an architect (Tex. Occ. Code Ann. § 1051.701). The practice of architecture is a service or creative work applying the art and science of developing design concepts, planning for functional relationships and intended uses, and establishing the form, appearance, aesthetics, and construction details for the construction, enlargement, or alteration of a building or environs intended for human use or occupancy, the proper application of which requires education, training, and experience in those matters (Tex. Occ. Code Ann. § 1051.001(7)). The practice of architecture includes, but is not limited to:

- Establishing and documenting the form, aesthetics, materials, and construction technology for a building, group of buildings, or environs intended to be constructed or altered.
- Preparing, or supervising and controlling the preparation of, the architectural plans and specifications that include all integrated building systems and construction details, unless otherwise permitted under Tex. Occ. Code Ann. § 1051.606(a)(4).
- Observing the construction, modification, or alteration of work to evaluate conformance with architectural plans and specifications for any building, group of buildings, or environs requiring an architect.
- Programming for construction projects, including:
  - the identification of economic, legal, and natural constraints; and
  - the determination of the scope and spatial relationship of functional elements.
- Recommending and overseeing appropriate construction project delivery systems.
- Consulting, investigating, and analyzing the design, form, aesthetics, materials, and construction technology used for the construction, enlargement, or alteration of a building or environs and providing expert opinion and testimony as necessary.

(Tex. Occ. Code Ann. § 1051.001(7).)

The TBAE oversees the examination, registration, and professional regulation of architects, interior designers, and landscape architects in Texas (Tex. Occ. Code Ann. § 1051.202). The TBAE consists

of nine members appointed by the governor with the senate's advice and consent (Tex. Occ. Code Ann. § 1051.101(a)).

### Landscape Architects

A landscape architect must be registered by the Texas Board of Architectural Examiners to practice landscape architecture (22 Tex. Admin. Code §§ 3.5 and 3.61). Landscape architecture is:

- The art and science of:
  - landscape analysis;
  - landscape planning; and
  - landscape design.
- The performance of professional services such as:
  - consultation;
  - investigation;
  - research;
  - preparing general development and detailed site design plans;
  - preparing studies; and
  - preparing specifications.

(22 Tex. Admin. Code § 3.5.)

Landscape architecture also includes the responsible supervision of the development of landscape areas for:

- The planning, preservation, enhancement, and arrangement of land forms, natural systems, features, and plantings, including ground and water forms.
- The planning and design of vegetation, circulation, walks, and other landscape features to fulfill aesthetic and functional requirements.
- The formulation of graphic and written criteria to govern the planning and design of landscape construction development programs, including:
  - the preparation, review, and analysis of master and site plans for landscape use and development;
  - the analysis of environmental, physical, and social considerations related to land use;
  - the preparation of drawings, construction documents, and specifications; and
  - construction observation.

- Design coordination and review of technical submissions, plans, and construction documents prepared by individuals working under the direction of the landscape architect.
- The preparation of feasibility studies, statements of probable construction costs, and reports and site selection for landscape development and preservation.
- The integration, site analysis, and determination of the location of buildings, structures, and circulation and environmental systems.
- The analysis and design of:
  - site landscape grading and drainage;
  - systems for landscape erosion and sediment control; and
  - pedestrian walkway systems.
- The planning and placement of uninhabitable landscape structures, plants, landscape lighting, and hard surface areas.
- The collaboration of landscape architects with other professionals in the design of roads, bridges, and structures regarding the functional, environmental, and aesthetic requirements of the areas in which they are to be placed.
- Field observation of landscape site construction, revegetation, and maintenance.

(22 Tex. Admin. Code § 3.5.)

### Land Surveyors

A person may not practice or offer to practice professional surveying in Texas unless the individual is either a registered professional land surveyor or licensed state land surveyor (Tex. Occ. Code Ann. § 1071.251). Professional surveying is the practice of land, boundary, or property surveying or other similar professional practices (Tex. Occ. Code Ann. § 1071.002(6)). Professional surveying includes:

- Performing any service or work the adequate performance of which involves applying special knowledge of the principles of geodesy, mathematics, related applied and physical sciences, and relevant laws to the measurement or location of sites, points, lines, angles, elevations, natural features, and existing man-made works in the air, on the earth's surface, within underground

workings, and on the beds of bodies of water to determine areas and volumes for:

- locating real property boundaries;
  - platting and laying out land and subdivisions of land; or
  - preparing and perpetuating maps, record plats, field note records, easements, and real property descriptions that represent those surveys.
- Consulting, investigating, evaluating, analyzing, planning, providing an expert surveying opinion or testimony, acquiring survey data, preparing technical reports, and mapping to the extent those acts are performed in connection with acts described by this subdivision.

(Tex. Occ. Code Ann. § 1071.002(6).)

A licensed state land surveyor is a surveyor licensed by the board either:

- To survey land in which the state or the permanent school fund has an interest.
- To perform other original surveys for the purpose of filing field notes in the General Land Office.

(Tex. Occ. Code Ann. § 1071.002(5).)

A registered professional land surveyor is a person registered by the Texas Board of Professional Engineers and Land Surveyors as a registered professional land surveyor (Tex. Occ. Code Ann. § 1071.002(7)).

Texas does not require a professional land surveyor for establishing an easement or a construction estimate that does not involve the monumentation, delineation, or preparation of a metes and bounds description (Tex. Occ. Code Ann. § 1071.004).

The TBPELS licenses and regulates land surveyors (Tex. Occ. Code Ann. § 1071.002(1)). The TBPELS consists of nine members, appointed by the governor with the senate's advice and consent (Tex. Occ. Code Ann. § 1001.101(a)).

**13. What are the licensing requirements for each licensed construction professional in Question 12? Are there any continuing education requirements for those licensed construction professionals?**

### Professional Engineers

#### Licensing Requirements

To obtain a license to practice engineering, an individual must pay the required fee and submit an application for license with evidence showing that the applicant has accomplished all of the following:

- Graduated from:
  - an engineering curriculum approved by the [Texas Board of Professional Engineers and Land Surveyors](#) (TBPELS); or
  - an engineering or related science curriculum at a recognized institution of higher education other than a board-approved curriculum.
- Passed the board's examination requirements.
- Engaged in the active practice of engineering for at least:
  - four years if the applicant graduated from an engineering curriculum approved by the TBPELS; or
  - eight years if the applicant graduated from an engineering or related science curriculum at a recognized institution of higher education that does not meet the requirements of the TBPELS.

(Tex. Occ. Code Ann. §§ 1001.302(a) and 1001.308(a).)

When determining an applicant's eligibility under the experience requirement, the following are **not** considered "active practice in engineering work":

- Teaching engineering.
- Mere execution, as a contractor, of work designed by an engineer.
- Supervision, as a superintendent or foreman, of the construction of work designed by an engineer.

(Tex. Occ. Code Ann. § 1001.302(c).)

In addition to the education and experience requirements, applicants must pass:

- Two written experience and knowledge examinations, which may include the Fundamentals of Engineering exam and the Principles and Practice of Engineering exam, provided and graded by the National Council of Examiners for Engineering and Surveying or the TBPELS.
- The Texas Engineering Professional Conduct and Ethics exam.

(22 Tex. Admin. Code § 133.61(a), (c).)

Licenses must be renewed every year (22 Tex. Admin. Code § 137.7(a)).

The fee to renew is \$50 (see [TBPELS: TBPELS Agency Fees](#)). If an engineer does not renew the license within two years, then the engineer must also pay a \$50 or \$100 late renewal fee, depending on the amount of time that has lapsed since the renewal deadline (22 Tex. Admin. Code § 137.9; see [TBPELS: TBPELS Agency Fees](#)). If an engineer does not renew the license within two years, then the engineer must reapply for a license (22 Tex. Admin. Code § 137.9(d)).

#### Continuing Education Requirements

Every license holder must obtain 15 professional development hour (PDH) units annually (22 Tex. Admin. Code § 137.17(c)).

At least one PDH per year must be in one of the following areas:

- Professional ethics.
- Roles and responsibilities of professional engineering.
- Review of the Texas Engineering Practice Act and Board Rules.

(22 Tex. Admin. Code § 137.17(d).)

The PDH units in excess of the annual requirement can be carried over to the subsequent period, but the PDH units carried over cannot:

- Exceed 14 in number.
- Be used to meet the professional ethics requirement.

(22 Tex. Admin. Code § 137.17(d), (e).)

### Architects

#### Licensing Requirements

To become a registered architect, an individual must:

- Pass the Architect Registration Examination.
- Have a professional degree from an architectural program either:
  - accredited by the [National Architectural Accrediting Board](#) (NAAB); or
  - deemed substantially equivalent to an NAAB accredited professional program.
- Complete the [Architectural Experience Program](#).

(Tex. Occ. Code Ann. § 1051.704; 22 Tex. Admin. Code § 1.21(a).)

Licenses must be renewed every year. The fee to renew is \$108 for a Texas resident and \$200 for a nonresident. If an architect fails to renew the license:

- Within 90 days of expiration, the renewal fee is \$160.50 for a resident and \$300 for a nonresident.
- After 91 days, but before two years from the expiration date, the renewal fee is \$213 for a resident and \$400 for a nonresident.
- Within two years, the license is cancelled by operation of law.

(22 Tex. Admin. Code §§ 1.65, 1.82, and 7.10.)

### Continuing Education Requirements

Architects must complete a minimum of 12 continuing education hours in the last full calendar year before registration renewal in topics including:

- Construction contract administration and post-occupancy evaluation.
- Practice management.
- Programming and analysis of project requirements, constraints, and opportunities.
- Project development and documentation.
- Project management.
- Project planning and design.

(22 Tex. Admin. Code § 1.69(a), (b).)

Additional requirements for the 12 credits include that:

- All credits relate directly to health, safety, or welfare.
- At least one hour must cover either:
  - barrier-free design; or
  - sustainable or energy-efficient design.
- At least eight of the 12 hours must involve structured course study (relevant to the practice of architecture).
- No more than four hours may be self-directed study.

## Landscape Architects

### Licensing Requirements

To become a registered landscape architect, an individual must pay the required fee and submit an

application for a license with evidence showing that the applicant has accomplished all of the following:

- Obtained a professional degree from a landscape architectural program either:
  - accredited by the Landscape Architectural Accreditation Board (LAAB); or
  - deemed substantially equivalent to an LAAB accredited professional program.
- Gained sufficient experience working directly under a licensed landscape architect or other experience approved by the TBAE in accordance with 22 Tex. Admin. Code § 3.191.
- Passed the Landscape Architect Registration Examination.

(Tex. Occ. Code Ann. § 1052.154; 22 Tex. Admin. Code §§ 3.21, 3.41, and 3.82.)

Licenses must be renewed every year. The fee to renew is \$105 for a Texas resident and \$200 for a nonresident. If a landscape architect fails to renew the license:

- Within 90 days of expiration, the renewal fee is \$157.50 for a resident and \$300 for a nonresident.
- After 91 days, but before two years from the expiration date, the renewal fee is \$210 for a resident and \$400 for a nonresident.
- Within two years, the license is cancelled by operation of law.

(22 Tex. Admin. Code §§ 3.82 and 7.10.)

### Continuing Education Requirements

A landscape architect must complete a minimum of 12 qualifying continuing education program hours (CEPH) each year. Of the 12 CEPH, a landscape architect must complete:

- At least one CEPH relating to barrier-free design and one CEPH relating to sustainable or energy-efficient design.
- At least eight CEPH in structured course study.
- A maximum of four CEPH of self-directed study.

(22 Tex. Admin. Code § 3.69.)

A landscape architect may receive credit for up to 24 CEPH earned during a calendar year. A maximum of 12 CEPH may be carried forward to satisfy the continuing education requirements for the next calendar year. (22 Tex. Admin. Code § 3.69(n).)

### Land Surveyors

#### Licensing Requirements

A written application with the TBPELS must be filed for all:

- Applicants for certification as a surveyor-in-training.
- Registrations as a registered professional land surveyor.
- Licensing as a licensed state land surveyor.

(Tex. Occ. Code Ann. § 1071.252(a).)

The application for registration as a registered professional land surveyor must show that the applicant:

- Holds a certificate as a surveyor-in-training.
- Has at least two years of experience as a surveyor-in-training.
- Has earned an associate or bachelor's degree from an accredited institution of higher education that included, in a combination acceptable to the board, at least 32 semester hours in:
  - civil engineering;
  - land surveying;
  - mathematics;
  - photogrammetry;
  - forestry;
  - land law; or
  - the physical sciences.

(Tex. Occ. Code Ann. § 1071.254(a).)

The TBPELS can waive the requirement for a bachelor's degree for an application filed after September 1, 2019, if it finds both of the following:

- The applicant has sufficient qualifications to justify the waiver.
- The applicant's registration does not pose a threat to the public health, safety, or welfare.

(Tex. Occ. Code Ann. § 1071.254(c).)

The applicant must also successfully complete the required sections of the appropriate examinations (Tex. Occ. Code Ann. §§ 1071.254(b) and 1071.255).

The applicant must provide to the board at least three references from registered professional

land surveyors with personal knowledge of the applicant's surveying experience (Tex. Occ. Code Ann. § 1071.252(b)).

Licenses must be renewed every year. The TBPELS must designate that certificates of registration or licenses are valid for terms of one or two years. (Tex. Occ. Code Ann. § 1071.301.) License renewal fees depend on the type of land surveyor license in question and the lateness of renewal ([TBPELS: TBPELS Agency Fees](#)).

#### Continuing Education Requirements

Every license or registration holder must complete during the annual renewal period at least 12 hours of professional development activities approved by the TBPELS (22 Tex. Admin. Code § 138.17(c)).

A minimum of three of the hours must be in either:

- Professional ethics.
- Roles and responsibilities of professional surveying.
- Review of the acts and board rules.

(22 Tex. Admin. Code § 138.17(d).)

**14. What is the best way to confirm that a construction professional is duly licensed? Are there any consequences if a construction professional is not properly licensed?**

#### License Confirmation

In Texas, a construction professional's license can be confirmed by searching the following websites:

- [Texas Board of Professional Engineers and Land Surveyors](#) website for professional engineers and land surveyors.
- [Texas Board of Architectural Examiners](#) website for individual architect licenses and business architect licenses.

#### Consequences of Violation

Any person, firm, or corporation who engages in business as one of the following licensed professionals without being duly authorized may be subject to criminal prosecution, imprisonment, fines, or all three:

- Professional engineers (Tex. Occ. Code Ann. §§ 1001.501 to 1001.58, 1001.551 to 1001.556).



- Architects (Tex. Occ. Code Ann. §§ 1051.451, 1051.452, and 1051.801).
- Landscape architects (Tex. Occ. Code Ann. §§ 1051.451, 1051.451, and 1052.251).
- Land surveyors (Tex. Occ. Code Ann. §§ 1001.502(a)(2), 1071.503, and 1071.504).

### Warranties

#### 15. Does your state recognize any implied warranties related to construction projects, whether established by statute or case law?

In Texas construction projects, there is an implied warranty that a contractor will perform its work in a “good and workmanlike manner” (*Barnett v. Coppel N. Tex. Court, Ltd.*, 123 S.W.3d 804, 823 (Tex. App.—Dallas 2003, pet. denied)). The Texas Supreme Court has defined good and workmanlike as “that quality of work performed by one who has the knowledge, training, or experience necessary for the successful practice of a trade or occupation and performed in a manner generally considered proficient by those capable of judging such work” (*Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349, 354 (Tex. 1987)).

The implied warranty of good workmanship can be waived when the agreement provides for the manner, performance, or quality of the desired construction. There is also an implied warranty of habitability in residential construction, which generally cannot be waived. (*Centex Homes v. Buecher*, 95 S.W.3d 266, 274-75 (Tex. 2002).)

The Texas Business and Commerce Code applies to all sales and transactions in goods (Tex. Bus. & Com. Code Ann. § 2.102). Several implied warranties under the Business and Commerce Code may apply in the construction context including:

- Warranty of title (Tex. Bus. & Com. Code Ann. § 2.312(a)).
- Implied warranty of merchantability (Tex. Bus. & Com. Code Ann. § 2.314(b)).
- Warranty of fitness for a particular purpose (Tex. Bus. & Com. Code Ann. § 2.315).

Texas courts determine whether the essence or dominant factor of the transaction is the sale of materials or providing of services (*G-W-L, Inc. v. Robichaux*, 643 S.W.2d 392, 394 (Tex. 1982),

overruled on other grounds by *Melody Home Mfg. Co.*, 741 S.W.2d at 355 (Tex. 1987)). The Texas Business and Commerce Code applies if the essence of the transaction concerns the sale of materials.

#### 16. What types of warranties are customarily included in construction contracts? What are the customary warranty periods?

Contractors in Texas generally warrant all work by agreeing to repair any deficient or defective work for a period of one year after substantial completion of the work. This warranty is separate and apart from any transferred manufacturer warranties (i.e., roof).

#### 17. Does your state have any statutes governing warranties for new residential construction? If so:

- What building structures and systems are warranted?
- When is each warranty in effect?
- Are there any restrictions on filing claims under the warranty?

Texas does not have any statutes governing warranties for new residential construction. However, Texas courts recognize a common law implied warranty of habitability for new residential construction projects (*Centex Homes*, 95 S.W.3d at 274; see Question 15).

For more information on residential construction warranties, see Quick Compare Chart, Statutory Residential Construction Warranties – Select States.

### Payment and Performance Bonds

#### 18. Does your state have a “Little Miller Act” requiring contractors to provide security in connection with performing public improvement contracts? If so:

- What are the minimum requirements to trigger the law?
- What types of security can be posted?
- Where is the security posted?

Texas has a Little Miller Act, codified at Tex. Gov't Code Ann. §§ 2253.021 to 2253.079 and Tex. Prop. Code Ann. §§ 53.231 to 53.239.

### Minimum Requirements

A governmental entity that makes a public work contract with a prime contractor must require the contractor, before starting work, to execute to the governmental entity both:

- A performance bond if the contract is in excess of \$100,000.
- A payment bond if the contract is in excess of:
  - \$25,000 and the governmental entity is not a municipality or a joint airport board; or
  - \$50,000 and the governmental entity is a municipality or a joint airport board.

(Tex. Gov't Code Ann. § 2253.021(a).)

### Security

A performance bond is all of the following:

- Solely for the protection and use of the state or governmental entity awarding the public work contract.
- In the amount of the contract.
- Conditioned on the faithful performance of the work according to the plans, specifications, and contract documents.

(Tex. Gov't Code Ann. § 2253.021(b).)

A payment bond is both:

- Solely for the protection and use of the payment bond beneficiaries who have a direct contractual relationship with the prime contractor or subcontractor to supply public work labor or material.
- In the amount of the contract.

(Tex. Gov't Code Ann. § 2253.021(c).)

A corporate surety must execute a bond required under Tex. Gov't Code Ann. § 2253.021. The [Texas Department of Insurance](#) has a [toll-free number](#) for payment bond beneficiaries to call for information on the surety for claims on the bond. (Tex. Gov't Code Ann. § 2253.021(d), (f).)

### 19. What is the mechanism for making a claim or filing a lawsuit against the security? Specifically:

- Are there any statutory notices for making claims against the security?
- What is the statute of limitations for making a claim against the security? For filing a lawsuit?
- Are there any other requirements associated with collection of funds against the security?

### Statutory Notices

#### First Tier Claimants

For government code bonds on public projects in Texas, claimants with a contract directly with the prime contractor (first tier claimants) must mail written notice to the prime contractor and surety. The notice must be mailed on or before the 15th day of the third month after each month in which any of the claimed labor was performed or any of the claimed material was delivered. (Tex. Gov't Code Ann. § 2253.041(a), (b).)

The notice must contain a sworn statement of the account, stating in substance:

- The amount claimed is just and correct.
- All just and lawful offsets, payments, and credits known to the affiant have been allowed.

(Tex. Gov't Code Ann. § 2253.041(c).)

Notice to the prime contractor must be sent by certified or registered mail, addressed to the prime contractor's last known business address or residence (Tex. Gov't Code Ann. § 2253.048(a), (b)).

The notice to the surety or sureties may be sent by certified or registered mail to:

- The address stated on the bond or attachments.
- The address on file with the [Texas Department of Insurance](#).
- Any other address allowed by law.

(Tex. Gov't Code Ann. § 2253.048(a), (c).)

To recover on a payment bond for a claim for retainage, the claimant must send written notice to the prime

contractor and surety on or before the 90th day after the date of final completion of the contract (Tex. Gov't Code Ann. § 2253.046(a)).

The notice must consist of a statement of:

- The amount of the contract.
- Any amount paid.
- The outstanding balance.

(Tex. Gov't Code Ann. § 2253.046(b).)

The notice of a claim for retainage is not required if the amount claimed is part of a prior bond claim (Tex. Gov't Code Ann. § 2253.046(c)).

### Second Tier Claimants

Claimants that are not directly in privity with the prime contractor (second tier claimants) must provide written notice to the prime contractor on or before the 15th day of the second month after each month in which public work labor was performed or public work material was delivered (Tex. Gov't Code Ann. § 2253.047(a), (c)).

Second tier claimants must also provide an additional written notice to the prime contractor and surety on or before the 15th day of the third month after each month in which any of the claimed labor was performed or any of the claimed material was delivered. The substance of the notice and the delivery method are identical to those for first tier claimants. (Tex. Gov't Code Ann. § 2253.047; see First Tier Claimants.)

If the second tier claimants have retainage agreements in their contracts, they must provide written notice to the prime contractor on or before the 15th day of the second month after the date of commencing delivery of work or material. This notice must:

- State that the contract provides for retainage.
- Generally indicate the nature of the retainage.

(Tex. Gov't Code Ann. § 2253.047(b).)

### Statute of Limitations

For government code bonds on public projects in Texas, a party may not bring suit on a performance bond after the first anniversary of the date of final completion, abandonment, or termination of the public work contract (Tex. Gov't Code Ann. § 2253.078(a)). A payment bond beneficiary may not bring suit on a payment bond after the first

anniversary of the date notice for a claim is mailed under Tex. Gov't Code Ann. §§ 2253.001 to 2253.079 (Tex. Gov't Code Ann. § 2253.078(b)).

### Additional Requirements

First or second tier claimants asserting a payment bond claim on a public project in Texas must wait 60 days after mailing notice of the sworn statement of account to file suit (Tex. Gov't Code Ann. § 2253.073). The suit must also be filed in a court in a county in which any part of the public work is located (Tex. Gov't Code Ann. § 2253.077).

**20. Do private owners generally require payment or performance bonds or other types of security? Does the security vary by project type or dollar value of the construction? What types of security can be posted?**

Private owners in Texas may require payment or performance bonds. The most common types of security in Texas are payment and performance bonds.

Whether security generally is required depends on the project's:

- Type.
- Size.
- Dollar value.

### Litigation Concerns

**21. What are the applicable statutes of limitation for filing a lawsuit or commencing arbitration in connection with a construction project for:**

- Breach of contract?
- Breach of warranty?
- Negligence resulting in bodily injury or property damage?
- Professional malpractice by a design professional?
- Latent defects in design or construction?

The following statutes of limitations apply to claims in Texas:

- **Breach of contract.** The statute of limitations is four years (Tex. Civ. Prac. & Rem. Code Ann. § 16.004).
- **Breach of warranty.** The statute of limitations is four years (Tex. Civ. Prac. & Rem. Code Ann. § 16.004; *Certain-Teed Prods. Corp. v. Bell*, 422 S.W.2d 719, 721-22 (Tex. 1968)).
- **Negligence resulting in death, bodily injury or property damage.** The statute of limitations is two years (Tex. Civ. Prac. & Rem. Code Ann. § 16.003). However, the accrual of the cause of action may be tolled under the discovery rule and is different for asbestos- or silica-related bodily injury or death (Tex. Civ. Prac. & Rem. Code Ann. § 16.0031).
- **Professional malpractice.** A claimant must bring any claims against a registered or licensed architect, engineer, interior designer, or landscape architect who designs, plans, or inspects the construction of an improvement to real property or equipment attached to real property no later than ten years from either:
  - the date of substantial completion of an improvement to real property or equipment attached to the real property; or
  - the beginning of operation of the equipment if the cause of action is related to an unsafe condition.(Tex. Civ. Prac. & Rem. Code Ann. § 16.008(a).)
- **Latent defects.** A claimant must bring suit for damages regarding the construction or repairs of improvements to real property no later than ten years after substantial completion of the improvement in an action arising out of either:
  - a defective or unsafe condition of the real property; or
  - a deficiency in the construction or repair of the improvement.(Tex. Civ. Prac. & Rem. Code Ann. § 16.009(a).)

### 22. Are there any special requirements for filing a construction-related lawsuit? For example:

- Is an affidavit of merit required for filing a professional malpractice claim against a design professional?
- Must a party required to be licensed allege or attach proof of licensure?
- Are there any special requirements for lawsuits alleging damages resulting from latent design or construction defects?

### Certificate of Merit

Under Texas law, in any action or arbitration proceeding for damages arising out of professional services by a licensed or registered professional, the claimant must file a certificate of merit with the claim. The certificate of merit is an affidavit of a third-party licensed architect, licensed professional engineer, registered landscape architect, or registered professional land surveyor who:

- Is competent to testify.
- Holds the same professional license or registration as the defendant.
- Practices in the area of the defendant's practice.
- Offers testimony based on the person's knowledge, skill, experience, education, training, and practice.

(Tex. Civ. Prac. & Rem. Code Ann. § 150.002.)

This certificate of merit requirement:

- Is mandatory, so that failure to comply requires dismissal of the claim (*TRW Eng'rs, Inc. v. Hussion St. Bldgs., LLC*, 2020 WL 4457975, at \*4 (Tex. App.—Houston [1st Dist.] Aug. 4, 2020, no pet.)).
- Applies to any party making a damages claim against a professional for the first time in a pleading, such as a plaintiff's complaint, defendant's counterclaim, or third-party cross-claim (Tex. Civ. Prac. & Rem. Code Ann. § 150.001).

However, a third-party plaintiff that is a design-build firm or a design-build team, or an architect, engineer, or other member of a design-build firm or design-build team, is not required to file an affidavit of merit in connection with filing a third-party claim or cross-claim against a licensed or registered professional if the action or arbitration proceeding arises out of a design-build project in which a governmental entity contracts with a single entity to provide both design and construction services to construct, expand, extend, rehabilitate, alter, or repair a facility, a building or associated structure, a civil works project, or a highway project (Tex. Civ. Prac. & Rem. Code Ann. § 150.002(i)).

### Proof of Licensure

Texas law does not expressly require proof of licensure but requires a third-party affiant to testify that the third party holds a license (Tex. Civ. Prac. & Rem. Code Ann. § 150.002(a)(2)).

### Special Requirements

There are no special requirements for lawsuits alleging latent design or construction defects. A plaintiff may, however, want to plead the discovery rule if the statute of limitations is an issue.

### Residential Construction Liability

The Texas Residential Construction Liability Act (RCLA), codified at Tex. Prop. Code Ann. §§ 27.001 to 27.009, applies to:

- Any action to recover damages or other relief arising from a construction defect, other than for personal injury, survival, wrongful death, or damage to goods.
- Any subsequent purchaser of a residence that files a claim against a contractor.

(Tex. Prop. Code Ann. § 27.002(a).)

The RCLA requires a homeowner to provide the contractor with written notice before commencing an action. This notice must:

- Specify in reasonable detail the construction defects that are the subject of the complaint.
- Be sent by certified mail, return receipt requested, to the contractor's last known address.
- Be sent at least 60 days before initiating an action.

(Tex. Prop. Code Ann. § 27.004(a).)

The claimant must provide any evidence that depicts the nature and cause of the defect and the extent of repairs necessary to remedy the defect. This evidence must include any expert reports, photographs, video, and audio recordings. (Tex. Prop. Code Ann. § 27.004(a).)

Within 35 days after service of the notice of claim, if the contractor makes a written request, the claimant must provide the contractor with a reasonable opportunity to inspect the property to determine the nature and cause of the defect and the extent of necessary repairs (Tex. Prop. Code Ann. § 27.004(a)).

### 23. Does your state have a statute of repose? If so:

- What is the applicable period of limitations?
- What types of claims fall under the statute?
- Are there any special notice requirements or conditions precedent to filing a lawsuit?

### Period of Repose

In an action in Texas arising out of a defective or unsafe condition of real property or a deficiency in the construction or repair of an improvement against a person who constructed or repaired the improvement, the claimant must bring the suit for damages either:

- Within ten years of substantial completion of the improvement.
- Within eight years of substantial completion of the improvement if the claimant is a governmental entity, excluding claims arising out of:
  - a contract entered into by the Texas Department of Transportation;
  - a project that receives money from the state highway fund or a federal fund designated for highway and mass transit spending; or
  - a civil works project as defined in Tex. Gov't Code Ann. § 2269.351.

(Tex. Civ. Prac. & Rem. Code Ann. § 16.009(a), (a-1).)

The statute of repose is lowered to six years if a contractor's written contract expressly includes the following warranties for work related to a new or existing residence:



- At least one year for workmanship and materials.
- At least two years for plumbing, electrical, heating, and air-conditioning delivery systems.
- At least six years for major structural components.

(Tex. Civ. Prac. & Rem. Code Ann. § 16.009(a-2) and (a-3).)

In an action arising out of a defective or unsafe condition of real property, an improvement to real property, or equipment attached to real property, the claimant must bring the suit for damages against the registered or licensed architect, engineer, interior designer, or landscape architect who designed, planned, or inspected the construction of the improvement or equipment either:

- Within ten years of:
  - the substantial completion of the improvement; or
  - the beginning of operation of the equipment.
- Within eight years of the substantial completion of the improvement or the beginning of operation of the equipment if the claimant is a governmental entity, excluding claims arising out of:
  - a contract entered into by the Texas Department of Transportation;
  - a project that receives money from the state highway fund or a federal fund designated for highway and mass transit spending; or
  - a civil works project as defined in Tex. Gov't Code Ann. § 2269.351.

(Tex. Civ. Prac. & Rem. Code Ann. § 16.008(a), (a-1).)

### Types of Claims Allowed

The limitations period applies to claims for:

- Injury, damage, or loss to real or personal property.
- Personal injury.
- Wrongful death.
- Contribution.
- Indemnity.

(Tex. Civ. Prac. & Rem. Code Ann. §§ 16.008(b) and 16.009(b).)

If the claimant presents a written claim for damages, contribution, or indemnity to the architect, engineer,

interior designer, or landscape architect during the applicable limitations period, the period is extended for either:

- Two years from the date the claim is presented.
- One year from the date the claim is presented, if the claimant is a governmental entity.

(Tex. Civ. Prac. & Rem. Code Ann. § 16.008(c))

These extensions also apply to claims against a person performing or furnishing the construction or repair of improvements (Tex. Civ. Prac. & Rem. Code Ann. § 16.009(c)).

If the damage, injury, or death occurs during the last year of the applicable limitations period, the claimant may bring suit against a person who constructed or repaired an improvement to real property within two years after the day the cause of action accrues (Tex. Civ. Prac. & Rem. Code Ann. § 16.009(d)).

The limitations period against a person who constructed or repaired an improvement to real property does not apply to actions:

- On a written warranty, guaranty, or other contract that expressly provides for a longer effective period.
- Against a person in actual possession or control of the real property at the time that the damage, injury, or death occurs.
- Based on willful misconduct or fraudulent concealment in connection with the performance of the construction or repair.

(Tex. Civ. Prac. & Rem. Code Ann. § 16.009(e).)

### Notice or Conditions Precedent

Although not necessarily required by statute, it is common for construction contracts in Texas to require written notice as a condition precedent to filing suit.

However, a contract stipulation that requires a claimant to give notice of a claim for damages as a condition precedent to the right to sue on the contract is not valid unless the stipulation is reasonable. A stipulation that requires notification within less than 90 days is void. (Tex. Civ. Prac. & Rem. Code Ann. § 16.071(a).)



### 24. Are the following contractual provisions enforceable in your state:

- Liquidated damages?
- Limitations on liability?
- No-damages-for-delay clause?
- Choice of law or forum?

### Liquidated Damages

Liquidated damages clauses are enforceable in Texas if:

- The harm caused by the breach is difficult or incapable of estimation.
- The amount of liquidated damages is a reasonable forecast of just compensation.

(*FPL Energy, LLC v. TXU Portfolio Mgmt. Co., L.P.*, 426 S.W.3d 59, 69-70 (Tex. 2014).)

Courts generally consider the enforceability of a liquidated damages clause from the perspective of the parties at the time of contracting. However, if the application of a reasonably written clause creates an unjust result, the clause may be rendered unenforceable. (*FPL Energy, LLC*, 426 S.W.3d at 72.)

### Limitations of Liability

Contractual limitations of liability are valid in Texas unless there is a controlling public policy to the contrary (*Head v. U.S. Inspect DFW, Inc.*, 159 S.W.3d 731, 748 (Tex. App. —Fort Worth 2005, no pet.)).

Texas courts look at the relationship of the parties and their bargaining power in determining whether any limitations on liability are enforceable (*Head*, 159 S.W.3d at 748).

Limitations of liability clauses are generally struck down by courts in cases based on the Texas Deceptive Trade Practices Act (DTPA). However, the Texas Supreme Court has drawn a distinction between liability limitations in DTPA “laundry list claims” cases and limitations in cases involving breach of an express warranty (*Southwestern Bell Tel. Co. v. FDP Corp.*, 811 S.W.2d 572, 576-77 (Tex. 1991)).

Courts also analyze whether or not the limitation of liability clause is conspicuous. For a clause to be conspicuous, it must appear on the face of the contract to attract the attention of a reasonable person looking at it (*Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508 (Tex. 1993)).

A provision in a construction contract is void and unenforceable if it requires a contractor to indemnify or hold harmless a registered architect, licensed engineer, or their agents, servants, or employees for a liability that is caused by or results from:

- A defect in plans, designs, or specifications prepared, approved, or used by the architect or engineer.
- The architect’s or engineer’s negligence in the conduct of professional duties arising out of the contract and the plans, designs, or specifications.

(Tex. Civ. Prac. & Rem. Code Ann. § 130.002(a).)

A provision in a construction contract (other than a contract for a single family or multifamily residence) is void and unenforceable if it requires an architect or engineer to indemnify or hold harmless an owner for its own or its agents’ or employees’ negligence (Tex. Civ. Prac. & Rem. Code Ann. § 130.002(b)).

A provision in a construction contract is void and unenforceable if it requires an indemnitor to indemnify, hold harmless, or defend a party against a claim caused by negligence, fault, violation, or breach by the indemnitee, its agent, employee, or a third party under its control or supervision (Tex. Ins. Code Ann. § 151.102). Section 151.102 does not apply to a provision in a construction contract that requires an indemnitor to indemnify another party against a claim arising out of a bodily injury or death of an employee of the indemnitor, its agent, or its subcontractors (Tex. Ins. Code Ann. §151.103).

For more information, see [Construction Anti-Indemnity Statutes: State Comparison Chart](#).

### No-Damages-for-Delay Clause

No-damages-for-delay clauses are generally valid and enforceable in Texas. The Texas Supreme Court, however, has specified generally recognized exceptions to the rule, including when the delay:

- Was not intended or contemplated to be within the purview of the provision.
- Resulted from fraud, misrepresentation, or other bad faith of the party seeking the benefit of the provision.
- Extended for such an unreasonable length of time that the delayed party is justified in abandoning the contract.
- Is not within the specifically enumerated delays to which the clause applies.

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- Is based on active interference with the contractor or other wrongful conduct, including:
  - arbitrary and capricious acts; or
  - willful and unreasonable actions without due consideration and in disregard of the rights of other parties.

(*Zachry Constr. Corp. v. Port of Hous. Auth. of Harris Cty.*, 449 S.W.3d 98, 115 (Tex. 2014).)

### Choice of Law or Forum

Choice-of-law and choice-of-forum clauses are generally enforceable and presumptively valid in Texas. However, Texas has a “home rule” statute

that applies to contracts principally for construction projects on Texas real property. Under this statute, a provision is voidable if it either:

- Makes the contract or any conflict under the contract subject to another state’s law.
- Requires that litigation or arbitration be held in another state.

(Tex. Bus. & Com. Code Ann. § 272.001.)

For more information, see [Choice of Law and Forum Selection in Construction Contracts: State Comparison Chart](#).

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