THE LONG AND WINDING ROAD

A City's Path to Resolving Construction Disputes in 2026

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The Scenario: The New City Hall

The new City Hall was going to be something special. After years of cramped quarters in a building that predated air conditioning as a standard feature, the City was finally getting a modern facility: soaring ceilings, energy-efficient windows, a rooftop terrace, and—most importantly—a state-of-the-art HVAC system. The ribbon-cutting was a proud moment for the City Council and City staff.

That was seven months ago. Since then, the shine has come off the new building considerably.

Almost from the day the City moved in, employees noticed that the building felt warm and humid—even on mild days. Meeting rooms that were supposed to be cool became uncomfortable by midmorning. The building management staff adjusted thermostats, called the contractor, and waited for results that never came. Then the rain came. After a heavy spring storm, wet spots appeared on the ceiling tiles in the second-floor conference rooms. More storms brought more spots. By the time of the contractor's third visit, the stains had spread.

The contractor came and looked and tried a few things. But the problems did not stop. Recently, the contractor's project manager delivered the news the City had been dreading: the contractor had done everything it could, the HVAC system was installed per the architect's design, and the contractor considered the matter closed. The City reached out to the architect, who came out with its mechanical, electrical, and plumbing (MEP) engineer. After their visit, the architect's position was equally unhelpful: the design was sound, and if there was a problem, it was in the installation.

So here we are. The City has a leaking roof, a building that cannot seem to stay cool, parties pointing fingers at each other, and a City Council asking questions. The City is weighing its options. It is considering repairing the roof leaks, which are the most visible problem and are actively damaging City property. The City is also seriously considering filing suit.

Before the City takes an action, it needs to understand the road ahead. It is, as the song says, a long and winding one. The following is a guide to the stops along that road—the procedural, contractual, and statutory hurdles the City must clear before it can make repairs at the contractor's expense or seek relief from a court (or arbitrator).

STOP 1 (the Starting Line): Review the Contracts

A. The Construction Contract: Notice, Cure, and the Right to Make Repairs

The City's first stop is the starting line—what it should do before it even hits the road. Before the City touches a single shingle or files a single pleading, it should sit down with the contract documents and understand exactly what those documents require. The contract is the road map, and detouring around its requirements can be costly.[1]

[1] *See, e.g.*, AIA A201-2017 § 12.2.2.1 (if the Contractor fails to correct nonconforming Work within a reasonable time after receipt of notice, the Owner may correct it and seek costs from contractor); *Id.* § 2.5 (if Contractor fails to correct work

Most standard form construction contracts, including the AIA and EJCDC forms that are frequently used for public projects, contain provisions that require an owner (here, the City) to give the contractor written notice and a reasonable opportunity to make corrections before the owner steps in and makes repairs itself.[2] If the City makes repairs without following the required notice and cure procedure, it may find itself unable to recover the cost of those repairs from the contractor or the surety.

In the City Hall scenario, this is especially important for the roof leaks. The City's instinct to fix the leaks quickly—before more ceiling tiles are damaged and before mold becomes a problem—is understandable and probably the right call from a risk management standpoint. But unless the problem presents a true emergency to health and safety, the City should take the time to ensure it has provided proper notice and allowed the required cure period (usually 7 to 10 days) to pass. If the contract requires written notice to a particular person (and most do), the City should not rely on verbal conversations, phone calls, text messages, or emails.

The same analysis applies to the HVAC issues. Even though the contractor has already been out to look at the system multiple times, those visits may not constitute formal written notice under the contract. If the contract requires a specific form of notice—certified mail, delivery to a specific representative, or notice through the architect—the City needs to make sure it has complied. A paper trail of formal written notices will also be invaluable if the matter eventually proceeds to litigation.

> **Pro Tip:** *Send written notice of each defect, in the form required by the contract, delivered to the contractually-specified representative via the contractually-specified method. Even if the contractor has already been out to investigate the problem, formal written notice starts the clock on the cure period and creates the record the City will need later. Keep copies of everything.*

B. Dispute Resolution Provisions: Arbitration, Litigation, and Mediation

Next, the City should review the dispute resolution provisions of both the construction and architectural (or engineering) contracts to assess three issues.

First, determine whether the contracts call for the same method of dispute resolution. If the City's architectural contract requires arbitration and its construction contract requires litigation in court (or vice versa), the City may find itself pursuing parallel proceedings in different forums against parties whose defenses are deeply intertwined. In the City Hall scenario—where the contractor says the problem is the architect's design and the architect says the problem is the contractor's installation—having to pursue those claims in different forums simultaneously could be expensive and inefficient.

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not in accordance with contract requirements after written notice from Owner, Owner may carry out the work and deduct the cost from any payment due Contractor).

[2] *See, e.g.*, AIA A201-2017 § 12.2.1 (requiring Owner to give prompt written notice before contractor is required to correct defective work).

Pro Tip: *The best time to avoid mismatched dispute resolution provisions is before the contracts are ever signed. At the contracting stage, the City should review the dispute resolution clauses in both the construction contract and the architectural or engineering contract side-by-side and confirm that they require the same method of binding dispute resolution—whether litigation or arbitration—and the same pre-suit procedures. If the contracts are inconsistent, negotiate conforming language before execution. Fixing a contract mismatch on the front end costs far less than litigating forum disputes on the back end.*

Second, review whether mediation or other informal dispute resolution is required before filing suit or an arbitration demand.[3] Most construction and architectural contracts require mediation as a condition precedent to binding dispute resolution. If mediation is required, the City must comply or risk having its proceeding stayed. The timing and strategy for mediation will be discussed further at Stop 3 of this paper.[4]

Third, check for any other pre-suit requirements. Some construction contracts require disputes to be submitted to an initial decision maker (usually the architect) prior to both mediation and litigation. Other contracts require an initial meeting between the top officials and executives prior to mediation or litigation.

C. The Performance Bond: Notice to the Surety

While the City is reviewing its construction contract, it should not forget about the performance bond. For public construction projects in Texas with a contract value over $100,000, the contractor is required to provide a performance bond to the governmental entity.[5] That bond is an important asset in a construction dispute—but it is only as valuable as the City's ability to make a proper claim on it.

Performance bonds cover the faithful performance of the work in accordance with the plans, specifications, and contract documents. Generally, this includes any warranty work required by the contract,[6] which is directly relevant in the City Hall scenario because the City is seeking repairs during the standard one-year contractual warranty period. A surety's liability is co-extensive with that of its principal; if the contractor has failed to perform its warranty obligations, the surety may be liable for those failures as well.[7]

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[3] *See, e.g.*, AIA A201-2017 § 15.3 (mediation required as condition precedent to binding dispute resolution); EJCDC C-700 2018 Standard General Conditions § 10.06 (providing for mediation before arbitration or litigation).

[4] *See infra* Stop 3.

[5] Tex. Gov't Code § 2253.021(a)(1).

[6] Tex. Gov't Code § 2253.021(b); *see also Bayshore Constructors, Inc. v. S. Montgomery Cnty. Mun. Util. Dist.*, 543 S.W.2d 898, 902 (Tex. App.—Beaumont 1976, writ ref'd n.r.e.) (construction contract, including one-year warranty, was incorporated into performance bond). The coverage provided by the bond is defined by the bond language itself. While performance bonds often cover contractual warranty obligations, it is important to review the bond and confirm it includes such coverage.

[7] *See, e.g., Beard Family P'ship v. Com. Indem. Ins. Co.*, 116 S.W.3d 839, 845 (Tex. App.—Austin 2003, no pet.) (a surety stands in the shoes of its principal); *City of Wolfe City v. Am. Safety Cas. Ins. Co.*, 557 S.W.3d 699, 703 (Tex. App.—Texarkana 2018, pet. denied).

However, a surety's obligations do not arise automatically. The City must take specific steps to preserve and perfect its rights under the bond. The most important of those steps is providing proper notice of the contractor's default to the surety. Notice requirements are controlled by the language of the bond and the bonded contract (*i.e.*, the construction contract), and they must be strictly followed.[8] Bond forms vary widely—some require notice only to the surety, some require simultaneous notice to both the contractor and the surety, some require notice of the City's intention to declare a default, and some require the City to request a conference with the surety before taking further action. The City needs to read the bond carefully, compare the bond's requirements with the bonded contract's requirements, and comply with whichever is more onerous.[9]

Including the surety in the dispute resolution process can sometimes provide practical leverage that the City would not otherwise have. A surety that is properly notified and understands its exposure may pressure the contractor to respond more seriously to the City's complaints. In some limited cases, a surety will step in and take corrective action directly, particularly if the contractor appears unwilling or unable to cure the defects on its own.[10] But this leverage only exists if the City has followed the proper notice procedures.

The City also needs to be keenly aware of the limitations period for suit against the surety. A suit on a public performance bond in Texas must be brought within one year of the date of final completion, abandonment, or termination of the public work contract.[11] The statute does not define "final completion," and courts have indicated that the final-completion date depends heavily on the facts of the case and the terms of the contract. Some courts have treated final completion as occurring upon substantial completion—the point at which the owner can occupy or use the project for its intended purpose.[12] But courts have also recognized that final completion may extend beyond substantial completion where the bonded public work contract imposes continuing closeout, correction, or defect-remedy obligations.[13] In the City Hall scenario, where the City moved in seven

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[8] *See Harrison, Walker & Harper, L.P. v. Federated Mut. Ins. Co.*, No. 2-03-048-CV, 2004 WL 726813, at *2 (Tex. App.—Fort Worth Apr. 1, 2004, no pet.) (surety's liability determined by language of bond itself, applying rule of strict construction); *see also Nova Cas. Co. v. Turner Constr. Co.*, 335 S.W.3d 698, 703-05 (Tex. App.—Houston [14th Dist.] 2011, no pet.).

[9] *See* AIA Document A312-2010 Performance Bond § 5 (listing surety options upon contractor default, including arranging for contractor to complete, undertaking completion itself, obtaining bids, or paying damages); EJCDC C-610 Performance Bond (similar options).

[10] *See* Amy M. Emerson, *Surety (Performance) Bonds: How to Get Paid by the Surety*, TCAA 2022 Summer Conference (June 16, 2022).

[11] Tex. Gov't Code § 2253.078(a).

[12] *Commercial Union Ins. Co. v. La Villa Indep. Sch. Dist.*, 779 S.W.2d 102, 105 (Tex. App.—Corpus Christi 1989, no writ) (holding that final completion occurred, for accrual purposes, when the owner accepted the architect's certificate of substantial completion)*; Transamerica Ins. Co. v. Hous. Auth. of Victoria*, 669 S.W.2d 818, 823 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.) ("It has been uniformly held that 'substantial completion' of a construction contract is regarded, in legal parlance, as 'full performance.'").

[13] *Transamerica Ins. Co.*, 669 S.W.2d at 822 (noting that final completion "may be extended by the existence of an agreement to remedy defects that arise within a time after final completion"); *Bayshore Constructors*, 543 S.W.2d at 902 (Tex. Civ. App.—Beaumont 1976, writ ref'd n.r.e.) (holding that the contract was not "finally completed" until one year after final acceptance because the contract required the contractor to correct defects arising during that period).

months ago, the limitations period may be running and the City *could* have as little as five months left to file suit against the surety. The City needs to act accordingly.

> **Pro Tip:** *Do not let the one-year limitations period for suit against the surety catch you off guard. Mark the substantial completion date on a calendar as the earliest possible date that may apply and set reminders well in advance of the anniversary. This deadline is often more urgent than it appears—it may arrive before the City has finished its investigation, completed its Chapter 2272 report, and attempted any required pre-suit mediation.*

STOP 2: Complying with Texas Government Code Chapter 2272

A. History and Purpose of the Statute

Before a Texas governmental entity may properly file suit against a contractor, subcontractor, supplier, or design professional arising from a construction defect, it must comply with a pre-suit inspection and report requirement created by Chapter 2272 of the Texas Government Code.[14] This statute is relatively new.

Chapter 2272 was created in 2019 by the 86th Texas Legislature through House Bill 1999.[15] The Legislature's purpose was to require governmental entities to conduct a methodical investigation of alleged construction defects, give contractors formal notice of the specific defects claimed, and provide them a meaningful opportunity to inspect and repair before a lawsuit could be filed. The statute drew conceptually on similar pre-suit notice and inspection requirements that existed in the residential construction context under Residential Construction and Liability Act (RCLA).[16] The statute was subsequently amended by the 88th Legislature in 2023, which added Section 2272.0025—a provision making the requirements of Chapter 2272 non-waivable by contract.[17]

The statute is worth understanding in detail because, despite being on the books for several years, it has not generated significant appellate case law. That lack of judicial interpretation leaves some important questions open—questions that a City must navigate carefully before filing suit.

B. When the Statute Applies

Chapter 2272 applies to claims arising from damage to or loss of real or personal property caused by an alleged construction defect in an improvement to real property that is a public building or public work. It also covers claims for indemnity or contribution arising from such damage, claims asserted by a governmental entity with an interest in the affected structure, and claims asserted against

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[14] *See* Tex. Gov't Code §§ 2272.001–.010.

[15] Chapter 2272 was added to the Texas Government Code in its entirety by Acts 2019, 86th Leg., R.S., Ch. 1287 (H.B. 1999), § 1, eff. June 14, 2019. It was subsequently amended by Acts 2023, 88th Leg., R.S., ch. 588 (H.B. 2965), § 1, eff. Sept. 1, 2023, which added § 2272.0025 prohibiting waiver of the chapter's requirements.

[16] *See* Tex. Prop. Code § 27.001–.008.

[17] Tex. Gov't Code § 2272.0025; *see also supra* note 15 (describing the 2023 enactment of § 2272.0025).

contractors, subcontractors, suppliers, or design professionals.[18] Importantly, the statute does not apply to civil works projects.[19] Several other exclusions apply as well.[20]

The statute defines construction defect broadly, encompassing not only deficiencies in actual construction but also deficiencies arising out of the design, specifications, surveying, planning, or supervision of construction. This breadth is significant: the definition covers both the contractor's installation work and the architect or engineer's design, which means the report obligation applies regardless of which party's conduct is primarily at fault.[21]

Chapter 2272 squarely applies to the City Hall scenario. The City is a governmental entity with a contractual interest in a public building, the HVAC and roof defects are alleged "construction defects" (whether construction or design-related) in an improvement to real property, and the City is contemplating a construction defect suit. Accordingly, the requirements of Chapter 2272 must be satisfied before that suit can be filed.

> **Pro Tip:** *Remember, the statute's requirements are a condition precedent to filing suit regardless of what has already happened on the project. The fact that the City has informally notified the contractor and architect, that the contractor has made repair attempts, and/or that the parties are pointing fingers does not excuse the City from complying with Chapter 2272 before it files suit.*

C. The Written Report: What Is Required

The centerpiece of Chapter 2272 is the written report. Before a City may bring an "action asserting a claim to which the chapter applies" (*i.e.*, a lawsuit or arbitration), the City must mail each party with whom the City has a contract for the design or construction of the project a written report.[22]

The statute requires the report to clearly: (1) identify the specific construction defect(s) on which the claim(s) is based; (2) describe the present physical condition of the building; and (3) describe any modification, maintenance, or repairs made by the City or others since the building was initially occupied or used.[23]

Within five days of receiving the report, the contractor must provide a copy to each of its subcontractors whose work is subject to the claim. In the City Hall scenario, the contractor would

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[18] Tex. Gov't Code § 2272.002(a).

[19] *Id.* § 2272.002(b)(5). A "civil works project" includes roads, streets, bridges, utilities, water-supply projects, water plants, wastewater plants, water-distribution and wastewater-conveyance facilities, desalination projects, wharves, docks, airport runways and taxiways, storm-drainage and flood-control projects, transit projects, related projects or facilities associated with civil-engineering construction, and incidental buildings or structures that are primarily civil-engineering construction projects). *Id.* § 2269.351(1)(A)–(C).

[20] The chapter does not apply to (1) claims for personal injury, survival, or wrongful death; (2) claims involving the construction of residential property covered under Chapter 27 of the Property Code; (3) a contract entered into by TxDOT; and (4) a project that receives money from a state or federal highway fund. *Id.* § 2272.002(b)(1)–(4).

[21] Tex. Gov't Code § 2272.001(3) (defining "construction defect" to include deficiencies arising out of the design, specifications, surveying, planning, or supervision of the construction).

[22] Tex. Gov't Code § 2272.003(a). The report must be sent by certified mail, return receipt requested. *Id.*

[23] Tex. Gov't Code § 2272.003(a)(1)-(3).

need to notify at least its HVAC and roof subcontractors. This pass-through obligation helps ensure all parties potentially responsible for the defects are involved in the pre-suit process, even though the governmental entity's report is directed only to the parties with whom the City has contracts.[24]

D. Who Can Prepare the Report: An Open Question

One practically significant and open question about Chapter 2272 is who may prepare the required report. The potential answer requires not just understanding the statute as enacted, but what the Legislature originally proposed and then chose to eliminate before the bill passed.[25]

The introduced version of House Bill 1999 that created Chapter 2272 required a governmental entity to obtain the report from an "independent third-party licensed professional engineer."[26] That requirement did not survive into the enacted statute. When House Bill 1999 was enrolled and signed into law, every reference to an independent third party or a licensed professional engineer was removed. The enacted version of Section 2272.003 says ***only*** that the governmental entity must provide a written report—the section says nothing about who prepares it.

The practical implication is that the current statute may well permit a governmental entity's own staff—a City engineer, facilities director, or building official—to prepare the Chapter 2272 report. However, as of the date of this paper, no Texas appellate court has considered or decided this question.[27] And while the legislative history might cut against implying a third-party requirement, it does not mean that a report prepared by City staff will necessarily be treated by a court as sufficient. A contractor or design professional could still argue that the report was inadequate in substance—not specific enough, not based on a competent inspection, or not credible as an independent assessment of the defect—even if no particular preparer is required by statute.

In most cases, the author recommends the City have the report prepared by a qualified, independent design professional—an architect or licensed engineer with expertise relevant to the claimed defects. Even though the statute does not expressly require it, there are strong practical reasons to follow that approach. A third-party professional's report is harder to attack on credibility grounds. A design professional is better equipped to identify the full scope of defects, including latent or concealed conditions that City staff might miss and to determine whether the issue is the result of poor design, poor construction, or a combination of both.

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[24]Tex. Gov't Code § 2272.003(b) (requiring a contractor, not later than the fifth day after receiving the report, to provide a copy to each subcontractor retained on the construction of the affected structure whose work is subject to the claim).
[25] Compare H.B. 1999, 86th Leg., R.S. (Tex. 2019) (introduced version), § 2272.003(a) (requiring the governmental entity to obtain the report from an 'independent third-party licensed professional engineer') with Acts 2019, 86th Leg., R.S., Ch. 1287 (H.B. 1999), § 1 (enrolled version), codified at Tex. Gov't Code § 2272.003(a) (omitting any reference to an independent third party or a licensed professional engineer).
[26]H.B. 1999, 86th Leg., R.S. (Tex. 2019) (introduced version), § 2272.003(a) (requiring the governmental entity to obtain the report from an 'independent third-party licensed professional engineer'); *see also supra* note 25.
[27]As of the date of this paper, the authors' research has identified no published Texas appellate decision addressing who may prepare the report required by Tex. Gov't Code § 2272.003.

Further, as discussed at Stop 4, the City will need a certificate of merit from a licensed architect to proceed against the architect. If an architect or other design professional has already conducted the Chapter 2272 inspection and prepared the report, that professional may be positioned to also serve as the affiant for the certificate of merit, or at least to provide its technical foundation. Planning the Chapter 2272 inspection and the certificate of merit investigation together—rather than sequentially—can reduce both cost and delay.

E. Practical Considerations for the Inspection

The inspection underlying the Chapter 2272 report should be thorough and systematic. The person preparing the report should review all relevant contract documents—the construction contract and general conditions, the plans and specifications, the project manual, and any relevant submittals, RFIs, and change orders—to understand what the contract required and compare it to existing, "as-built" conditions. The person preparing the report should also conduct a physical site visit to observe and document the specific defects, review the current condition of the project, and review any maintenance work or records, all of which must be addressed in the report.

In the City Hall scenario, properly investigating the HVAC performance issues may require testing the mechanical system against its design parameters. The roof leaks could require inspection of the roof assembly and flashing details. In some cases, properly determining the root cause of a defect requires opening up portions of the building—removing ceiling tiles, cutting into the roof, exposing ductwork, etc. When destructive testing is necessary, the City must proceed carefully.

> **Pro Tip:** *Before conducting any destructive testing during the Chapter 2272 inspection, notify the contractor and the design professionals in writing of the nature, location, and timing of the testing, and give them an opportunity to have their representatives present. Failure to provide this notice can expose the City to claims of spoliation of evidence, which could undermine the City's case at trial or arbitration.*[28]

F. The Inspection and Repair Period

Once the report is sent, each party is entitled to (1) 30 days to inspect the project and (2) an additional 120 days to either correct the identified defect or condition or to enter into a separate agreement with the City to do so.[29]

The City is not required to grant a correction opportunity in every case. The statute identifies specific circumstances in which the City may deny the right to repair: (1) if the contractor cannot provide payment and performance bonds to cover the corrective work; (2) cannot provide required liability or workers' compensation insurance; (3) has been previously terminated for cause by the City; (4) has been convicted of a felony; or (5) if the City has previously gone through the Chapter 2272

[28] The spoliation doctrine prohibits a party from destroying or substantially altering evidence relevant to pending or reasonably foreseeable litigation. *See Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718, 721-22 (Tex. 2003). While destructive testing of a defect is often necessary to determine its cause, the inspecting party should provide advance written notice to all potentially adverse parties and, where possible, retain samples and permit observation.

[29] Tex. Gov't Code § 2272.004(a)(1)–(2).

process and the contractor either failed to correct the defect as required or its repair attempt created new defects.[30]

In the City Hall scenario, if the contractor's prior repair attempts have resulted in the same defects persisting—or worse, have created new conditions—the City may have a basis to proceed without granting a new repair period or to at least require the repairs be made in a certain manner. However, this determination should be made carefully, in consultation with legal counsel, to ensure that the City is not skipping any required steps.

G. The Statute's Insurance Provision and Why Insurers Often Remain Unmoved

One unique provision of Chapter 2272 addresses how insurers must treat notice under the statute. Section 2272.009 states that if a party receives written notice of an alleged construction defect or a Chapter 2272 report identifying a defect, and provides that notice or report to its insurer, the insurer must treat the provision of the notice or report as the filing of a suit for purposes of the relevant policy terms.[31]

The legislative intent is evident: the Legislature wanted to ensure that insurance carriers would engage with the dispute seriously at the pre-suit stage, treating the Chapter 2272 report with the same urgency as a filed lawsuit.

While professional liability (PL) insurers may take this provision seriously—PL policies generally already include pre-claim coverage—the author doubts the same will be true for contractors' and subcontractors' commercial general liability (CGL) carriers. CGL insurers virtually never engage at the pre-suit stage with that level of urgency. Notwithstanding what the statute requires, CGL carriers are unlikely to contribute money towards repairs or settlement without a suit on file. If insurance is important to resolve the issue—and they often are when the repairs are expensive—cities should be prepared for the reality that a suit will likely need to be on file before the problems can be resolved.

H. Cost Recovery for the Report

A small piece of good news on this long, expensive road: Section 2272.007 provides a mechanism for recovering report costs. When a Chapter 2272 report identifies a construction defect that is subsequently corrected or leads to the recovery of damages, the responsible party must pay the reasonable amounts incurred by the governmental entity to obtain the report with respect to the identification of that construction defect.[32]

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[30] *Id.* § 2272.004(b)(1)–(2).

[31] Tex. Gov't Code § 2272.009. The statute provides that when a party receives a written notice of an alleged construction defect or a report under § 2272.003 identifying a construction defect and provides the notice or report to its insurer, the insurer shall treat the provision of 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.

[32] Tex. Gov't Code § 2272.007. The statute provides that when a report identifies a construction defect that is corrected under § 2272.004 or for which the governmental entity recovers damages, the party responsible for that defect shall pay

This provision raises several open questions that, again, courts have not yet resolved. First, the statute requires the responsible party to pay the reasonable amounts incurred to obtain the report with respect to identification of the defect. It is not clear whether this language encompasses the full cost of the investigation underlying the report—including testing, engineering analysis, site visits, and expert consultation—or only the cost of preparing the written document itself. In a complex case like the City Hall scenario, those costs could be substantial and the distinction matters.

Second, when there are multiple responsible parties—*e.g.*, a contractor whose installation was deficient and an architect whose design was also at fault—the statute appears to allow each responsible party to be charged only for the portion of the report attributable to the identification of the defect for which it bears responsibility. Whether each party owes the full cost of the report or only its proportionate share is an open question. Until courts address this issue, the City should carefully document all costs associated with the inspection and preparation of the Chapter 2272 report and assert them as recoverable in its pleadings.

I. Consequences of Failing to Comply

The consequences of failing to comply with Chapter 2272 before filing suit can be severe. If a governmental entity brings an action without complying with the report and inspection requirements, the court or arbitrator must dismiss the action without prejudice on the first occurrence.[33]

While a dismissal without prejudice might not sound particularly harsh, consider what happens next. If the City then attempts to comply with Chapter 2272 and re-files suit, but the second filing is also found to be non-compliant, the court must dismiss the suit with prejudice. The City's claims are then gone. And even on a first dismissal, the City faces the prospect of re-starting the Chapter 2272 clock: 30 days to inspect plus 120 days to repair. This could be particularly dangerous if the City's suit involves the surety, who has a short 1-year limitations period. Dismissal for failure to comply with Chapter 2272 could make it legally or practically impossible to later assert claims against the surety.

The lesson is simple: comply with Chapter 2272 before filing suit, every time, without exception.

J. No Consequences for Contractor Inaction—A Contrast with Chapter 27

Chapter 2272 contains an asymmetry that city attorneys should understand when setting expectations with their councils: the statute imposes its burdens almost entirely on the governmental entity, not on the contractor or design professional. If a contractor or design professional receives a

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the reasonable amounts incurred by the governmental entity to obtain the report with respect to identification of that construction defect. Whether this language encompasses the full cost of investigation and testing, or only the cost of preparing the report document itself, has not been resolved by any Texas court.

[33]Tex. Gov't Code § 2272.006(a)-(b). If a governmental entity brings an action without complying with secs. 2272.003 and 2272.004, the court, arbitrator, or other adjudicating authority shall dismiss the action without prejudice. *Id.* § 2272.006(a). If a second non-compliant action is filed, it shall be dismissed with prejudice. *Id.* § 2272.006(b).

Chapter 2272 report and simply does nothing—does not inspect, does not respond, does not offer to repair or redesign—the statute imposes no express consequence beyond the eventual filing of the lawsuit that the Chapter 2272 process was designed to forestall.

Because Chapter 2272 gives contractors very little statutory reason to engage seriously in the pre-suit process, the City should not expect the process to function as a genuine dispute resolution mechanism in most cases. It is most often a procedural prerequisite to litigation, not a substitute for it. The City should comply with it fully, use the inspection period to build the evidentiary record it will need for trial, and proceed to suit without unnecessary delay once the statutory period has run.

STOP 3: Pre-Suit Mediation (Where Required and Desirable)

A. Check the Contracts

The City's first task is to review both the construction and design contracts to determine whether either—or both—requires mediation before filing suit. If both require mediation, skip down to Stop 3, Section B. If only one contract requires mediation, consider the following.

Mediation is generally most likely to resolve a dispute when all parties with a stake in the outcome are at the table. In the City Hall scenario, the contractor and the architect are pointing fingers at each other. A mediation that includes only one of them is unlikely to produce a meaningful resolution, because no single party can accept full responsibility or offer adequate compensation without the other being present. If only one contract requires mediation, the other party cannot be compelled to participate—and a mediation without all key parties present may be a wasted exercise. If the City cannot get all parties to the table voluntarily, it should carefully weigh whether proceeding with a partial mediation serves any useful purpose.

B. Agreements to Mediate—and Agreements Not To

Even where a contract requires pre-suit mediation, the parties can agree at any point to waive that requirement and proceed directly to suit. Contractual mediation provisions exist for the parties' benefit, and the parties are free to modify or waive them by mutual agreement. If the contractor, the architect, and the City all conclude that a pre-suit mediation would be unproductive, they can agree in writing to skip it without jeopardizing the City's right to file suit.

The reverse is equally true. If neither (or only one) contract contains a mediation requirement, the parties can nonetheless agree to mediate voluntarily before or after filing. Mediation does not require a contractual mandate—it only requires a willing mediator and parties who choose to participate.

> **Pro Tip:** *Before investing time and money in a pre-suit mediation, confirm that all parties whose participation is necessary for a meaningful resolution are either contractually required to attend or have agreed to do so voluntarily. A mediation that proceeds without a key party present rarely produces a durable result and may simply delay the litigation that lies ahead.*

C. Whether to Mediate

If pre-suit mediation is not required the City must make a strategic decision about whether and when it wants to mediate. Pre-suit mediations are rarely successful because of a lack of information. The parties have not exchanged documents in discovery, taken depositions, or retained testifying experts to quantify damages with the precision that litigation demands. In this environment, neither side has a clear picture of what a trial would look like, and neither side has experienced enough of the time and expense of litigation to make the concessions that meaningful settlement requires.

The insurance problem compounds this issue significantly. In almost every commercial construction dispute involving a contractor or subcontractor, the contractor's CGL carrier is the primary source of settlement funds. And as discussed above, CGL carriers at the pre-suit stage rarely engage in pre-suit mediations in any meaningful way.

None of this is to say that pre-suit mediations are useless. Occasionally, the parties are close enough in their assessment of the facts and damages that a pre-suit mediation can produce a positive result, and when it does, it saves everyone a significant amount of time and money. The City may also gain value in understanding the other side's position early. Above all, cities should approach pre-suit mediation with realistic expectations. The goal at this stage is often not to settle the case—it is to satisfy the contractual prerequisite, open a dialogue, and set the stage for a more productive mediation later.

However, if the City has the choice, the better time for mediation in a construction dispute is generally after discovery is substantially complete and after expert reports have been exchanged. At that point, everyone has more information, the insurance carriers have a clearer picture of their exposure, and the parties have experienced enough of the cost and disruption of litigation to genuinely value resolution. If the City gets through a required pre-suit mediation without settling, it should plan to revisit mediation after the key depositions have been taken and the experts have weighed in.

STOP 4: Obtaining a Certificate of Merit

A. What Is a Certificate of Merit and When Is It Required?

If the City intends to file suit against the architect (or other design professional) the City will need a certificate of merit before it can file its petition.[34] Chapter 150 of the Texas Civil Practice and Remedies Code requires that any suit against a licensed or registered architect or engineer arising out

[34]See Tex. Civ. Prac. & Rem. Code §§ 150.001–.006. A certificate of merit is an affidavit of a third-party licensed professional engineer, architect, landscape architect, registered professional land surveyor that must be attached to the claimant's petition at the time of filing. *Id.* § 150.002(a).

of the provision of professional services must be accompanied by a certificate of merit affidavit filed with the original petition at the time of filing.[35]

The affiant must be competent to testify, hold the same professional license or registration as the defendant, and practice in the defendant's area of practice. The affidavit must set forth specifically, for each theory of recovery for which damages are sought, at least one negligent act, error, or omission and the factual basis for each claim.[36] General or conclusory language will not suffice.

B. The Architect Requirement: A Critical Point for the City Hall Scenario

Here is a practically important point for the City Hall scenario that cannot be overlooked. Suppose the City, recognizing that the HVAC problem is primarily a mechanical engineering issue, retains an MEP engineer to conduct the Chapter 2272 inspection and prepare the report. That was a reasonable decision for the purpose of the report—an MEP engineer is likely in the best position to identify why the HVAC system is not working properly.

Just be aware that if the Chapter 2272 report does not lead to repairs, the City's design claim will be against the design professional with whom it contracted—generally, the architect. To file suit against the architect, the City must have a certificate of merit from a licensed architect.[37] Accordingly, the City will not be able to use its Chapter 2272 report as a certificate of merit because that report was prepared by an MEP engineer.

This does not mean the City made the wrong decision. It is simply a reminder that it is important to survey the entire road from the start. If the City is facing a wide variety of issues, it might be more efficient to hire an architect to lead the Chapter 2272 inspection and let the architect determine if specialist subconsultant help (*e.g.,* MEP engineer) is needed. If the issues are narrower, it may be more prudent to engage a specialist initially with the understanding that an architect may need to review the specialists' work before the City files suit.

C. The Cost of a Certificate of Merit

A certificate of merit is expensive. The affiant must hold the same license as and practice in the same area as the design professional being sued, be willing to publicly opine that the architect committed negligence or a professional error or omission, and be prepared to be identified as an expert at the time the suit is filed—before the case has even been formally opened and before any discovery has taken place. Finding a qualified professional willing to undertake that role, reviewing the contract documents and project history in sufficient depth to render an informed opinion, and preparing an affidavit that will withstand legal scrutiny all require significant time and cost.

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[35] Tex. Civ. Prac. & Rem. Code § 150.002(a). The statute applies to any action arising out of the provision of professional services by licensed architects, licensed professional engineers, registered professional land surveyors, registered landscape architects, and firms in which such professionals practice. *Id.* § 150.001(1-c).

[36] *Id.* § 150.002(b).

[37] Tex. Civ. Prac. & Rem. Code § 150.002(a). Where the defendant is a licensed architect, the certificate of merit must be prepared by a licensed architect.

In complex construction defect cases, certificates of merit can cost tens of thousands of dollars to obtain, particularly when the affiant must review a large volume of project documents, evaluate testing results, or inspect the project. The City needs to budget for this cost at the outset.

D. Challenges to the Certificate and the Risk of Appellate Delay

Perhaps the most frustrating aspect of the certificate of merit requirement is that it is subject to frequent challenge.[38] Once the City files its petition and certificate, the defendant architect may challenge the sufficiency of the certificate by filing a motion to dismiss. Such a motion typically argues that the affidavit fails to meet Chapter 150's statutory requirements—perhaps because the affiant is not qualified in the defendant's area of practice, because the affidavit is not specific enough about the alleged professional errors or omissions, or because the affidavit does not provide the required factual basis for each theory of recovery.[39]

If the trial court grants or denies the motion to dismiss, either party may immediately appeal that ruling as an interlocutory order.[40] And here is where the certificate of merit can become a serious problem for the City's case. The defendant may seek a stay, the trial court may limit discovery while the appeal is pending, and the parties may be forced to litigate the sufficiency of the certificate before the case can proceed meaningfully on the merits. Interlocutory appeals in Texas can take a year or more to resolve. During that period, while the City's damages continue and interest accrues, the case may be slowed or partially paused while the appellate court considers whether the certificate was legally sufficient.

The best protection against a successful certificate challenge is a well-prepared certificate of merit. The affidavit should be specific, thorough, and prepared by a qualified professional. It should address each theory of recovery the City intends to assert against the architect, identify with particularity the specific plans, specifications, or professional decisions that are alleged to be deficient, and explain how those deficiencies caused the conditions described in the City's petition. A certificate that is prepared hastily, that relies on generalities, or that is not precisely matched to the claims in the petition will invite a challenge—and the resulting delay can be enormously damaging to the City's case.

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[38] *See, e.g., Melden & Hunt, Inc. v. E. Rio Hondo Water Supply Corp.*, 520 S.W.3d 887 (Tex. 2017) (addressing requirements for certificate of merit affidavit); *Levinson Alcoser Assocs., L.P. v. El Pistolon II, Ltd.*, 513 S.W.3d 487 (Tex. 2017) (discussing sufficiency of certificate of merit).

[39] *See Melden & Hunt*, 520 S.W.3d at 894–96 (addressing challenges that the certificate-of-merit affiant was unqualified and that the affidavit failed to provide the factual basis required by § 150.002, while rejecting the argument that the affidavit must address every legal element of each cause of action); *Levinson Alcoser*, 513 S.W.3d at 493–94 (holding certificate insufficient where the record did not show that the affiant was knowledgeable in the defendant's area of practice); *M-E Eng'rs, Inc. v. City of Temple*, 365 S.W.3d 497, 503–06 (Tex. App.—Austin 2012, pet. denied) (addressing affiant's subject-area expertise and explaining that the certificate must verify the existence of professional errors or omissions, not address operative facts unrelated to those errors or omissions); *Couchman v. Cardona*, 471 S.W.3d 20, 26 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (explaining that the certificate need not address every element of the plaintiff's claims but must provide a factual basis for the alleged professional errors or omissions).

[40] Tex. Civ. Prac. & Rem. Code § 150.002(f).

Conclusion: The Road Ahead

The City Hall scenario is frustrating precisely because it is so common. Two sophisticated parties—a contractor and an architect—each with their own insurance carriers and their own interest in avoiding liability, are pointing at each other while the City sits in a warm, leaking building. The City wants to fix the problem and it wants someone to pay for the fix. Those are entirely reasonable goals. But achieving them requires patience, discipline, and a clear understanding of the procedural road that lies ahead.

The stops on that road—reviewing the contracts and the bond, complying with Chapter 2272, participating in any required pre-suit mediation, and obtaining a certificate of merit—are not mere bureaucratic obstacles. They are, if approached thoughtfully, opportunities. The Chapter 2272 inspection can lay the groundwork for the certificate of merit. The certificate of merit can identify the claims worth pursuing. The pre-suit mediation, even if unlikely to fully resolve the case, can open a dialogue and set the stage for a more productive session later. Each stop, done right, makes the next one easier.

The road is long and winding. But with the right preparation, the City will get where it needs to go.

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The author gratefully acknowledges the assistance of her colleagues at Allensworth in the preparation of this paper. The views expressed are those of the author alone. This paper is intended for educational purposes and does not constitute legal advice. Readers should consult qualified legal counsel regarding their specific circumstances.