The Law

Design Professionals Sue USGBC for False Advertising

MANY READERS are familiar with the U.S. Green Building Council (USGBC), which operates the Leadership in Energy and Environmental Design (LEED) certification system. The LEED system certifies buildings as being designed and constructed in an environmentally sound manner. Ratings are awarded on four levels based on a point system, with points conferred for such aspects as efficient use of water and the extent to which materials that are in keeping with the goals of sustainable development are used. Although LEED certification attests that sustainable features exist, the USGBC does not actually test the ultimate energy performance of any of the structures for which certification is granted.

In the past three years, many legal commentators have wondered whether the trend toward sustainable design and green construction will give rise to "green" litigation. Does green technology perform as expected? Has the project owner been promised a reduced utilities bill? In that vein, some have speculated that issues of legal liability could arise from the failure to achieve a specified rating in the LEED certification process. For example, does a project owner have a breach of warranty claim against a design professional who promises to design a building that will qualify for LEED gold certification but ultimately is accorded only silver? Is a contractor liable for an owner's lost tax credits and financial incentives if the building fails to achieve a LEED rating because of means and methods?

The LEED program has been in place for more than 10 years, and despite the anticipated onslaught of green litigation, there have been just a handful of reported cases. For the most part, litigation concerning green design and LEED issues has either been settled out of court or dismissed during the preliminary phases. This month, we highlight a recent decision by a federal court in New York that dismissed a lawsuit against the USGBC. In contrast to many of the cases discussed in this column, this one did not involve claims for breach of contract. Rather, it was based upon consumer fraud theories.

In *Gifford et al. v. U.S. Green Building Council et al.*, five design professionals claimed unspecified damages against the USGBC for the LEED rating system, which they contended amounted to false advertising and deceptive trade practices. The disputes stemmed in part from a press release from the USGBC touting the results of a 2008 study the council conducted. The results, the release said, "indicate that new buildings certified under the LEED certification system are on average performing 25 to 30 percent better than non-LEED-certified buildings."

The design professionals complained that the methods used in the 2008 study were flawed, that the study lacked objective empirical support, and that LEED-certified buildings were in fact no more energy efficient than those without certification. They also asserted that the USGBC's own data demonstrated that, on average, LEED buildings used 41 percent more energy than do those that were not LEED certified. The lawsuit alleged that, because of the USGBC's false advertising, customers were unfairly steered away from the plaintiffs in favor of LEED-accredited professionals. The suit also contended that consumers potentially face financial harm if they incur significant expenditures for LEED accreditation but do not reap the benefits they expect in energy savings.

The court dismissed the lawsuit on procedural grounds for "lack of standing," meaning that the design professionals were not the proper parties to bring the suit. The court applied two legal tests for determining "standing" under the federal Lanham Act. The first was whether the design professionals and the USGBC were direct competitors. The court found that since the professionals did not certify buildings as being green or accredit professionals, they could not be considered direct competitors of the USGBC.

The second test was whether the professionals had a reasonable interest to be protected from the alleged false advertising and a reasonable basis for believing that the interest was likely to be damaged by the alleged false advertising. The court decided that the allegations were deficient and too speculative in showing how the professionals were damaged by the USGBC's alleged false statement. Since the court dismissed the false advertising claim upon which federal jurisdiction was predicated, it also refused to review and dismissed the New York deceptive trade practices claim.

While it is certainly possible that the design professionals will appeal this decision, they can expect obstacles. Putting aside whether they are considered "direct competitors," they'll face a serious challenge in proving a relationship of cause and effect between the allegedly false statements and their alleged financial harm. One must also wonder about the potential ripple effect on other construction industry organizations that have certification or accreditation processes, for example, the Construction Management Association of America and the Design-Build Institute of America. If the design professionals in this case were allowed to proceed to trial, would this have led to "copycat" lawsuits in other areas? Did the court have this in the back of its collective mind in issuing its decision?

Putting aside the narrow issue of this case, the industry can certainly expect that lawsuits stemming from the LEED rating system will arise in the coming years. The issues posed at the beginning of this column are significant, and we will endeavor to report on the decisions as cases emerge. **CE**

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Subcontractor Recovers Material Escalation Costs despite No-Damages-for-Delay Clause

LAST YEAR we reported on a particular legal trend concerning no-damages-for-delay (NDD) clauses. It was explained there that these exculpatory clauses are being enforced by courts with more frequency, despite well-recognized exceptions to them in most states and despite the hardship to the contractor. In an effort to balance that reporting, this month we highlight a decision in which a state appeals court looked to the "fine print" in a subcontract to avoid the harsh application of an NDD clause.

In *Southern Seeding Service, Inc. v. W.C. English, Inc.,* the Court of Appeals of North Carolina was asked to evaluate a claim for increased material costs. While labor and material cost escalation can be categorized as delay damages, the court in this case found that a separate contract provision governed price escalation and expressly allowed for the recovery of those costs.

The disputes in this case stemmed from a $100-million project owned by the North Carolina Department of Transportation (NCDOT). The department engaged APAC-Atlantic, Inc., as the prime contractor. APAC subcontracted the grading and grassing work to the defendant, W.C. English, Inc. English, in turn, sub-subcontracted a portion of the work to Southern Seeding Services. The agreement between English and Southern Seeding contained an NDD clause in paragraph 7 prohibiting the latter from recovering monetary compensation as a result of delays to the project. The NDD clause, however, was written in such a way that Southern Seeding could recover delay damages if English obtained them from the NCDOT: "In no event shall [Southern Seeding] be entitled to compensation or damages for any delay in the commencement, prosecution, or completion of the work, except to the extent that [English] shall receive such compensation or damages from the Owner or other third party."

The subcontract also contained language regarding equitable adjustment of unit prices in the notes attached to the subcontract, in particular, note 15:

> Unit prices herein quoted are based upon the assumption that the contract will be completed within the time as specified in the specifications at time of bidding. Should our work be delayed beyond said time without fault on our part, unit prices herein quoted shall be equitably adjusted to compensate us for increased cost.

During the project, the NCDOT and APAC entered into a series of supplemental agreements that altered the work and extended the time for performance. The project was ultimately completed 256 days after its scheduled completion date. As a result of the delays, Southern Seeding suffered market-driven material and labor cost increases to the tune of approximately $194,000. The firm adjusted its unit prices for increased costs arising from work performed after the original completion date and invoiced English. When English refused to pay, citing the NDD clause, Southern Seeding sued English and its sureties on the project's payment bond.

A trial court ruled that Southern Seeding's requested price increase constituted delay damages. However, since English was unable to recover delay damages from APAC or the NCDOT, the NDD clause, said the court, barred any recovery by Southern Seeding. That firm appealed.

The Court of Appeals of North Carolina ruled in favor of Southern Seeding, finding that the parties' subcontract allocated two distinct risks. The NDD clause allocated to Southern Seeding the risk of extended general conditions arising from delays, while the "equitable adjustment clause" allocated to English the risk of increased material and labor costs arising from unforeseen circumstances. Therefore, the NDD clause did not preclude recovery of market-driven cost increases associated with material and labor incurred after the scheduled completion date. The court reasoned as follows:

> While [Southern Seeding's] relief under Paragraph 7 is limited to the extent English is compensated by APAC or NCDOT…, Note 15 does not set forth this limitation. Therefore, we cannot agree with the trial court's conclusion that [Southern Seeding] was foreclosed from an equitable adjustment under Note 15 simply because it was foreclosed from delay damages under Paragraph 7. Such a reading fails to give effect to both contractual provisions and improperly shifts the risk of increased material costs to [Southern Seeding].

This particular decision portrays an important contract maxim: wherever possible, the law will attempt to read two seemingly conflicting provisions in harmony. In other words, while the trial court found the NDD provision and the equitable adjustment clause to be mutually exclusive (the former trumping the latter), the appeals court attempted to read the two together. It did so by ruling that price escalation caused by a delay is separate and distinct from delay damages. This distinction allowed the court to interpret the NDD clause as having no effect on Southern Seeding's recovery under the equitable adjustment provision.

Another contract maxim not discussed in the case is "order of precedence." An order of precedence clause in the subcontract would probably have established that provisions in the subcontract supersede or trump language used in exhibits or notes describing the scope of work. Under that situation, English could have argued that the NDD clause should have been afforded more weight than the equitable adjustment clause found in the attachment to the subcontract. **CE**

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Government Sues A/E Firm for Cost Escalation Caused By Late Delivery Of Design Package

MOST architecture and engineering (A/E) firms conducting business with the federal government are familiar with the limitation on funding (LOF) contract clause in the Federal Acquisition Regulation entitled Design within Funding Limitations. Under this clause, the A/E firm agrees to design a structure that can be built within a certain price limit. Although the LOF clause is not frequently litigated, the A/E firm ostensibly has liability to the government if its design yields bids from third parties that exceed the construction funding limit. This month we highlight a recent Civilian Board of Contract Appeals case, *Moshe Safdie and Associates, Inc. v. General Services Administration,* that involved a multimillion-dollar dispute between a design firm and the government over this issue.

The dispute stemmed from a contract award in 2000 by the General Services Administration (GSA) to the architecture firm Moshe Safdie and Associates, Inc. (MSA), for the design of a courthouse in Springfield, Massachusetts. The $2.3-million design contract required delivery of bid-ready documents within 27 weeks and contained a construction cost limit of $35 million. The contract contained the standard LOF clause on construction cost limit as well as the following language: "When bids or proposals for the construction contract are received that exceed the estimated price, the contractor shall perform such redesign services as are necessary to permit contract award within funding limitation. These additional services shall be performed at no increase in the price of the contract."

The bids that were received on the original courthouse design significantly exceeded the initial construction cost limit. As a result, the GSA adjusted the limit to $43.8 million and directed MSA to redesign the project to meet this new limit. MSA proceeded with the redesign, but the second round of bids continued to exceed the price limit. The GSA did not seek a further redesign from MSA; instead, it entered into a construction contract for approximately $53 million.

MSA ultimately filed a claim against the GSA seeking payment of approximately $3 million in uncompensated changes to MSA's design efforts. The GSA responded with a counterclaim against MSA seeking $5.2 million because MSA was 20 months late in delivering bid-ready documents and this tardiness caused the GSA to receive bids that reflected increased construction costs.

Prior to trial MSA sought judgment as a matter of law, arguing that the contract barred the GSA's counterclaim for construction cost escalation. The firm argued that because the LOF clause provided a specific remedy for a contract breach, the GSA could not seek damages beyond that specific remedy. In other words, the LOF clause stated only that if the bids exceeded the construction cost limit, MSA was to provide redesign services at no cost. MSA claimed that because the GSA had requested (and received) additional services at no cost, the GSA was barred from pursuing such other forms of relief as consequential damages for construction cost escalation.

The board disagreed. It held that the GSA is entitled to pursue both "specific performance" (additional design services at no cost) and damages for breach (the difference between revised construction limit and the price of the construction contract the GSA ultimately awarded). The board concluded that the provision of one contractual remedy does not negate the pursuit of additional remedies. It also noted that "while the clause might be read to provide an exclusive remedy by implication," the clause did not use any wording regarding delay damages. Therefore, MSA's argument failed, and the GSA's $5-million claim was permitted to proceed to trial.

This board decision raises several noteworthy issues. First and foremost, it is a reminder to designers that they can face consequences if they are late in performing their work. In the private sector, several clauses—for example, waiver of consequential damages and limitations of liability—provide some protection to the designer. But under the Federal Acquisition Regulation there is no such protection, and MSA is now faced with explaining why it should not be held responsible for the delay.

Second, MSA was unable to convince the board that the LOF clause was sufficiently broad in scope to prevent the government from pursuing other remedies. Because the clause mandates free redesign (in perpetuity) until construction bids are under the limit, one might be able to argue that such a clause should be the sum total of recovery available to the owner. Exclusive remedies, however, like liquidated damages clauses, need to be written precisely to be enforced, and the board believed that the Federal Acquisition Regulation did not do this.

A/E firms working in the federal sector should be mindful of the risks of the LOF clause, as it is impractical to think that the GSA and other agencies will negotiate this out of their contracts. On the other hand, there are similar clauses in the private sector, and that is where an A/E firm could use the lessons from this case to effect more palatable contract language. **CE**

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Civil Engineer Successfully Sues Owner For Tortious Interference with Contract

IN MOST CONSTRUCTION disputes, the worlds of contract law and tort law do not collide. The former is based on an enforceable written or verbal agreement, whereas the latter stems from a "personal wrong" committed, such as negligence. Contract damages are awarded to give the nonbreaching party the "benefit of the bargain." Tort damages (for nonpersonal injury) are assessed on the basis of the loss suffered as a result of the negligent act. Although there are legal doctrines in place, for example, the economic loss rule, that try to prohibit both contract and tort theories from being raised in a lawsuit, parties occasionally seek to combine the two.

We have previously reported on claims involving "negligent breach of contract" in which the contract establishes a fiduciary role for the cost-plus contractor. Another hybrid theory of recovery is a claim for "tortious interference with contract." These claims are usually lodged by a contractor against the design professional or construction manager for "interfering" with its contractual arrangement with the owner or subcontractor. These theories are generally very difficult to prove. This month we highlight a rather atypical scenario involving a claim by a subcontractor against an owner for tortious interference.

In *Martin A. Torres v. Seaberg Construction., Inc.,* Seaberg Construction, the general contractor, entered into a cost-plus agreement with the developer of a commercial complex. Seaberg was responsible for awarding subcontracts, inspecting and approving the work of its subcontractors, reviewing invoices, and forwarding those costs to the owner for payment.

Seaberg subcontracted with Torres General Engineering on a time and materials basis to finish installation of water, sewer, and fire suppression lines. After initially paying Torres's invoices in full, the owner began questioning Torres's time records and equipment charges and refused to pay the invoices. Torres went out of business and ultimately sued Seaberg for breach of contract and the owner for tortious interference with its contract.

A California trial court found in favor of Torres, awarding it approximately $450,000 on its claim against Seaberg. The court further awarded special damages against the owner in the amount of $306,000 for the latter's interference with Torres's subcontract with Seaberg. This prompted an appeal, in which the appellate court was asked to consider whether an owner of a construction project could be liable to a subcontractor for "tortious interference with contract."

The California appellate court initially noted that such a claim could have merit if a noncontracting party or "stranger to the contract" intentionally interfered with the performance of a contract or prospective contract. Intentional interference requires an intermeddling that is both intentional and improper.

The appellate court concluded that the owner's behavior in this case in disapproving time and expense reports (approved by Seaberg) was an improper and intentional interference with Torres's subcontract. First, it found that there was no evidence from any party that Torres made any errors: "The failure to pay Torres's invoices was not due to any problems with the work which Torres had done." Second, it interpreted the parties' contract as "explicitly" stating that Seaberg had the exclusive obligation and authority to review and approve the invoices. The court further stated that the owner had no contractual authority to question, review, or deny invoices approved by Seaberg and had no authority to refuse payment, even for unsatisfactory completion of the work by the subcontractor. The court therefore held that the owner was not contractually authorized to "insert" itself between Seaberg and Torres by refusing payment.

In its analysis, the court defined a "stranger to the contract" as one who is neither a party to the contract nor an "agent" of any party to the contract. The court held that the owner was neither an agent of the general contractor nor a party to the subcontract. One dissenting judge disagreed, finding that a stranger to the contract is an "outsider" who has "no legitimate social or economic interest in the contractual relationship." In the view of this dissenting judge, the owner had a clear economic interest in the subcontract and therefore could not possibly qualify as a stranger.

The end result is that the subcontractor here found a way around its lack of privity with the owner by pursuing the owner under tort theory and recovering double its contractual damages. Readers who think that this is a quick way of winning a "litigation lottery" should think again. In our view, courts in many other states would probably take the view of the dissenting judge in this decision. This is especially true when one examines the subcontract payment provision in this case. It contained condition precedent language stating that Torres was not entitled to any payment "until [Seaberg] had received payments from the owner." The paid-if-paid clause would certainly have given Seaberg a complete defense against Torres's contract claim, and there is no indication of why the court did not consider this language in deciding whether the owner was a "stranger to the contract." Finally, there is no indication that the court considered the owner's rights and obligations to review costs submitted to it for the project under its cost-plus agreement with Seaberg. **CE**

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Federal Design/Build Contractor Unable to Recover on Differing Site Conditions Claim

PROVING A differing site conditions (DSC) claim is a substantial burden for any contractor because contracts often contain disclaimers that shift the risk posed by subsurface conditions from the owner to the contractor. Moreover, the duty to discover the DSC may rest squarely with the contractor if the site investigation clause requires the contractor to discover such a discrepancy during the bidding phase. A party asserting a DSC claim must also prove that it satisfied the contractual notice provisions and properly documented its claim. To illustrate these legal challenges, consider the recent case *Metcalf Construction Co., Inc. v. United States,* in which a design/build contractor sought to hold the federal government accountable for $4.8 million in costs it incurred in removing soils that it claimed differed materially from those described in the government's soil investigation report.

The disputes arose from a U.S. Navy project for the design and construction of 212 family duplex housing units in Hawaii. The navy's initial request for proposals included a government soil investigation report indicating that the soil had a "slight expansion potential." The report, however, was for "preliminary information only" and advised bidders of the duty to retain a geotechnical firm after award to conduct soil investigations.

The navy awarded the design/build contract to Metcalf Construction for a fixed price. The contract contained a standard DSC clause requiring the contractor to give prompt written notice of a differing site condition if encountered and requiring the government to promptly investigate. After receiving the contract, Metcalf engaged a geotechnical engineering firm, and the latter's investigation revealed that the soils had a "moderate to high swelling potential," which differed significantly from the soils indicated in the government's report. Metcalf's geotechnical engineer recommended that the building pads be overexcavated by 2 ft and that slab subgrades be capped with 2 ft of nonexpansive granular fill. Metcalf's geotechnical report further concluded that if the design in the government's report were implemented, there would be a significant risk of slab failure. Metcalf notified the navy of the problem.

The navy took the position that the different testing methodology used by Metcalf's engineer accounted for the difference in swelling potential. In response, Metcalf hired a second geotechnical firm to independently assess the shrink-swell value of the soil. That engineering firm concluded that the shrink-swell value was highly expansive over at least half of the project site. Metcalf proceeded with the extra excavation even though it did not have a change order from the navy for the work. After expending $4.8 million on the removal of expansive soils and backfilling, Metcalf submitted a formal claim.

The navy denied the claim, arguing that Metcalf assumed the risk of subsurface conditions and that as the design/build firm it was obligated to prepare a design that would accommodate those conditions. In formally rejecting the claim, the navy pointed to the contract documents advising potential contractors of their responsibility to perform engineering and design work after the award. The navy also adduced the disclaimers on the government's soil report, which stated that it was for "preliminary information only." Metcalf then filed suit with the U.S. Court of Federal Claims.

After a bench trial, the court denied Metcalf's claim, although it acknowledged that the firm had encountered soil that differed materially from what was represented in the government's report. The court restated the legal burden of proof that a contractor must satisfy to recover on a DSC claim. The contractor must demonstrate that there was an affirmative contractual representation regarding a site condition, that the actual site condition was not reasonably foreseeable to the contractor based on information from other sources, that the contractor placed reasonable reliance on the contractual representation, and that an actual site condition differed materially from the contractual representation.

The court found that Metcalf could not meet the first requirement. The navy's soil report could not constitute an affirmative representation because it expressly indicated it was for "preliminary information only." Regarding the second requirement, the court noted that Metcalf was an established contractor in Hawaii and should have been aware of the presence of expansive soils or should have carried out studies of its own. It also found that Metcalf was contractually responsible for geotechnical investigation and foundation designs and that its reliance on the navy's report was unreasonable. Although the court denied Metcalf monetary compensation, it granted the firm a 306-day extension for the navy's delay in investigating the conditions encountered by Metcalf.

The results of this case do not seem to be well founded. Disclaimer language to the effect that data are for "preliminary information only" has rarely been used to override the clear purpose of the DSC clause, which informs contractors not to submit bids concerning site conditions that cannot be reasonably foreseen. Likewise, the fact that this was a design/build project should not have created more risk to the contractor, as the doctrine arising from the case *Spearin v. United States* has been recognized as allowing design/build firms to reasonably rely upon information provided by the owner during the proposal process.

Other aspects of this decision are significant, particularly for design/build firms. The government and the design/build firm seemed to be at war throughout the project, and there was little evidence of the partnering spirit that is vital to design/build success. **CE**

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Florida Jury Exonerates Design Engineering Firm

MANY READERS have no doubt been following the high-profile case *Tampa Bay Water v. HDR Engineering, Inc.*, in which a jury recently exonerated HDR Engineering, Inc. from any liability for cracking at the C.W. Bill Young Regional Reservoir, in Florida. Tampa Bay Water (TBW) had sought more than $140 million from HDR based on allegations that the firm's design was defective, and it has indicated that it will appeal the verdict. Complicating matters for TBW is that its board had, several months before the trial, accepted a $30-million settlement offer made by HDR in mediation but later changed its position and publicly stated that the $30 million was unreasonable.

This litigation provides a unique opportunity to reflect on the approaches taken by a major engineering firm and a large owner when a project faces difficulties. Thus we depart from our usual approach of waiting until a case works its way through the appellate process and results in a written decision that explains the legal and factual underpinnings of the dispute.

TBW hired HDR to design the reservoir in 1998 based on a capacity of approximately 15 billion gal and a gravitational operational drawdown rate of 66 mgd. The design was completed in 2002, and construction was completed by Barnard Construction Company in 2005. The reservoir was filled, and it operated for a short period of time. In late December 2006, some cracking was discovered in some areas of the soil-cement embankment lining. While such erosion protection covers as the soil-cement one used on the reservoir are expected to have some cracks and allow free water flow, neither HDR nor TBW believed the cracks were normal and they both carried out thorough investigations.

The two seemed to be working in concert for many months to determine the cause of the cracking, but that changed in late 2008, when TBW filed a lawsuit charging that HDR's defective design required that the interior of the reservoir be ripped out and replaced. However, TBW proceeded to award a $164-million design/build contract that covered not only the repairs but also an increase in the reservoir's capacity and almost a doubling its drawdown rate, to 120 mgd.

TBW argued in the trial that the cracks were caused by HDR's failure to properly account for pore pressure. HDR contended that the cracks were caused by poor compaction by the contractor, citing construction photographs and testimony from TBW's project manager. It refuted the excess pore pressure theory by pointing to piezometer data taken during the monitoring program. HDR also argued that, after absolving Barnard Construction of any significant responsibility, TBW went after HDR's "deep pocket," viewing it as a source for funding the reservoir's operational enhancements.

One never knows with certainty what motivates a jury's deliberations. While it may have reached this verdict by concluding that TBW failed to demonstrate that excess pore pressure caused the cracking, experience shows jurors' opinions are shaped by the behavior of the parties. Stated differently, "optics" matter as one assesses who deserves to win or lose, and the evidence shows that HDR did many things right once the cracks were discovered.

First and foremost, HDR never adopted a "bunker mentality." It appeared to fully cooperate with TBW to discover the cause of the problem, even if that cause was a defect in HDR's design. Part of this process was management's decision to assign a senior HDR executive to coordinate efforts with TBW and the investigation. This individual had no direct involvement in the original design or management of the TBW relationship and was there to ensure that the problem was being evaluated objectively. HDR's board of directors and management demonstrated their objectivity and seriousness in putting this matter behind the company by offering $30 million during mediation, even as evidence was mounting that the problem derived not from the design but from construction means and methods.

Contrast this with TBW's behavior. By rejecting HDR's offer to toll the statute of limitations and filing the lawsuit, it created an avalanche of legal and expert fees, making the case harder to settle both economically and politically. One would not normally expect this when the potential defendant is cooperating and a monitoring program is in place. By rejecting the $30-million offer, one could conclude that TBW was either blindly "in love" with its position (despite the evidence of improper compaction) or that it was playing to win a "litigation lottery," hoping a jury would give it access to HDR's deep pockets. The fact that TBW settled with Barnard Construction well before the trial for only $750,000 lends credence to both of these conclusions. The role and interaction of TBW's publicly elected board in this litigation and the question whether TBW's ratepayers were well served are topics that require careful evaluation but that are beyond the scope of this column.

Business relationships are not always perfect, and it is easy to point fingers when a problem arises. Engineers are generally "wired" to determine the causes of problems. However, they also generally fear being sued and, as a matter of professional pride, have difficulty acknowledging fault. Would the result in this case have changed if HDR had been defensive instead of cooperative and objective? While no one but the jury members knows for sure, the safe answer is that acting reasonably should always put you in good litigation position. And if your client behaves reasonably as well, the likelihood is that the problem will be resolved amicably and the business relationship will be preserved. **CE**

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International Design/Build Firm Loses Constructive Acceleration Claim

THE SAYING "Time is money" is attributed to Benjamin Franklin, who was simply conveying the notion that time is valuable and money is wasted when one's time is not used productively. This expression has no stronger applicability than in the construction business since all projects have schedules. Disputes involving delays come in a variety of categories, and one of the more difficult legal theories to prove in a scheduling dispute is constructive acceleration.

In this month's case, *Fluor Intercontinental Inc. v. Department of State*, a designer/builder claimed that the U.S. Department of State forced it to accelerate its work. The dispute stems from a project involving the design and construction of a United States embassy complex in Astana, the capital of Kazakhstan.

In September 2003 the contract was awarded to Fluor Intercontinental for $63 million. It required Fluor to complete the project by March 5, 2006, with liquidated damages of $18,000 per day. Under the contract, Fluor was required to give the contracting officer written notice of any potential issues that could cause a delay to the project. In particular, it was required to submit a "time impact analysis" within 15 calendar days of suffering a delay. If it failed to submit such an analysis within the specified time, the firm was deemed to have waived any rights to additional time and compensation.

Fluor began mobilizing to the site in February 2004, but the area lacked such critical utilities as electricity, water, and roads. The State Department wrote to Fluor very early in the project noting that the firm's schedule contained work activities that fell beyond the completion date. It reminded Fluor of its contractual responsibility to complete by that date or suffer an imposition of liquidated damages. In October 2004 Fluor claimed that the government told it that no schedule extensions would be granted, even if warranted, and in December of that year it informed the contracting officer that the State Department's delay in approving the design for steel H-piles was affecting its work. In March 2005 the department wrote as follows to Fluor: "Fluor must be committed to achieving…the project completion dates…. We expect Fluor to deliver these projects on time." Fluor did not respond to the letter but later contended in litigation that it construed the letter as a written directive to accelerate. It later submitted a letter to the contracting officer stating that it might seek a 25-week extension and $10 million in additional costs. Flour achieved substantial completion by September 2006. While it acknowledged 42 days of delay on its part, it asserted that it was entitled to compensable delay damages for 154 days and thus should be able to recover the liquidated damages for those days. The State Department disagreed and withheld approximately $2.7 million in assessed liquidated damages.

Although Fluor did not submit a time impact analysis for delays during the project, it argued that the State Department had both formal and actual notice of the delays. Fluor submitted a certified claim seeking damages of $4.1 million for constructive acceleration. The State Department, however, took the position that all delays were Fluor's responsibility. It rejected Fluor's claims on the grounds that the firm failed to submit a request for an extension supported by an impact analysis and contended that it never ordered Fluor to accelerate performance and that Fluor could not demonstrate its entitlement to damages. Fluor appealed to the Civilian Board of Contract Appeals.

Relying on precedents, the board said that, to prevail in a situation involving constructive acceleration, the contractor must establish (1) that it encountered an excusable delay; (2) that it made a timely and sufficient request for an extension; (3) that the government denied its request; (4) that the government insisted on completion of the contract within a period of time shorter than the one to which the contractor was entitled; and (5) that the contractor was required to expend extra resources to compensate for the lost time and remain on schedule.

The board found here that there were no excusable delays and that, even if there were, Fluor did not comply with the contract in requesting time extensions. It found that Fluor did not submit any formal written requests to the State Department for a time extension and failed to submit any time impact analyses. Moreover, the letter from the department directing Fluor to complete the work on time was deemed to be a communication of disappointment over the rate of progress, not a directive to accelerate. The board found this consistent with the fact that Fluor never notified the contracting officer that it believed it had received an order to accelerate.

This decision by the Civilian Board of Contract Appeals yielded a very harsh outcome for Fluor. Not only did it lose on the acceleration issue; the board also ruled against Fluor across the board on claims totaling $9.1 million. While "home runs" like this in federal litigation are rare, the reason for this complete legal victory for the government is relatively simple: the government merely had to point to the express contractual notice and claim process provisions to win. Many contractors that work on federal projects do not take these types of provisions seriously, believing that they would be able to convince a board or court that the government had actual knowledge of problems giving rise to the claim. As Fluor learned the hard way, when this argument does not work, the consequences can be catastrophic. **CE**

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Court Upholds Engineering Firm's Limitation of Liability Clause

DESIGN PROFESSIONALS often seek to minimize their legal risk on projects by negotiating limitation of liability (LOL) clauses in their contracts. These clauses seek either to place a monetary cap on a design professional's overall liability to his or her counterparty or to bar certain kinds of claims against the design engineer. We have written on this topic previously, stating that courts typically uphold LOL clauses as long as the clauses are consistent with public policy. This month we highlight the case *Thrash Commercial Contractors, Inc., v. Terracon Consultants, Inc.,* in which a federal court was recently asked to invalidate a LOL clause between a general contractor and a design professional.

Thrash Commercial Contractors contracted with the Mississippi Department of Finance and Administration's Bureau of Building, Grounds, and Real Property Management to renovate a Navy Reserve facility in Jackson, Mississippi. Thrash subcontracted with Terracon Consultants to perform "laboratory testing of proposed fill materials to determine compliance with the project specifications…to determine the in-place density, moisture content, and compaction level achieved on each lift of the compacted materials."

Thrash contended that the project plans and specifications required Terracon to test the soil density of the fill material every 1,000 sq ft but that Terracon instead tested the soil density every 2,500 sq ft. Because of this lapse, the Bureau of Building, Grounds, and Real Property Management and the project architect required Thrash to hire an independent testing lab to determine whether the fill material met the required soil density level. That lab found that the required soil density levels had not been achieved. As a result, Thrash was ordered to remove the top 6 ft of fill material and the concrete footings that had already been installed for the foundation and to redo the work in accordance with the plans and specifications.

Thrash filed suit against Terracon seeking $300,000 in damages for the additional costs it incurred from Terracon's alleged "failure to perform soil density testing." Terracon denied that it had breached the contract, stating that the contract contained a clear, express LOL clause. Terracon also took the position that, in contravention to the agreement between the parties, Thrash failed to schedule Terracon's testing services.

Thrash moved for summary judgment, arguing that the LOL clause was unenforceable under Mississippi law. In support of its effort to have the LOL clause stricken, it cited four factors that courts have looked at in determining whether such clauses should be enforced: (1) whether the party against which the provision is to be enforced was actually free to bargain during contract negotiations; (2) the amount of the limitation in relation to the scope of the potential liability of the party; (3) whether there are conflicting provisions in the same document; and (4) whether the clause is void because it seeks to provide indemnity for a party's own negligence. The court considered these factors and ultimately concluded that the LOL clause was enforceable.

Regarding the first factor, the court was not persuaded that the LOL clause was "nonnegotiable," as Thrash contended. Indeed, the clause itself stated that, upon written request to Terracon, Thrash "may negotiate a higher limitation of liability for an additional fee." Terracon adduced evidence that Thrash made no attempt to negotiate a higher limit. As a result, the court found that the LOL clause at issue was at least fairly and honestly negotiated.

Thrash next argued that Terracon's $50,000 limitation of liability should be held unenforceable because it was disproportionate to the $300,000 in actual harm caused by Terracon's alleged breach. Thrash contended that Terracon's attempt to reduce its liability to less than a fifth of the actual damages was disproportionate by any measure. The court, however, looked at it from the engineer's perspective, reasoning that while Terracon's fees under the contract were only $14,900, it contractually assumed the risk of $50,000 in liability (more than three times its fees under the contract).

With regard to the notion of conflicting provisions in the document, Thrash had no success. The contract contained an indemnity provision requiring the parties to indemnify and hold each other harmless from all claims, losses, or damages caused by the other's negligent acts or omissions. Thrash unsuccessfully argued that the LOL provision was inconsistent with the indemnity provision, for the court noted that the LOL clause stated plainly that the $50,000 limit applied "regardless of…indemnity."

Finally, the court ruled that the LOL clause did not violate the state's anti-indemnity statute. The court drew a distinction between indemnity provisions that eliminate the incentive to exercise due care (which the state has an interest in voiding as contrary to public policy) and LOL clauses under which the engineer stands to lose his or her entire fee. Moreover, as Terracon argued, Thrash was suing it not under a negligence theory but for breach of contract. The anti-indemnity statute would therefore have no application to the LOL clause because no allegations of negligence were made.

The decision underscores the tendency of case law in this country to countenance clauses that allow design professionals to limit their liability appropriately in contract negotiations. While a party adversely affected by an engineer's alleged wrongdoing (Thrash, for example) might vehemently argue that these clauses are unfair, the industry has generally tended to look at this pragmatically. When a party is receiving a fee of only $14,900, should that party be exposed to damages by a counterparty that could be significantly higher than that fee? The industry and most courts around the country have answered this question with a resounding no. **CE**

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Texas Court Reverses Jury Verdict by Enforcing No-Damage-for-Delay Clause

EVERY SO OFTEN there are truly stunning results in the world of construction litigation. In a decision just issued, *Port of Houston Authority of Harris County, Texas, v. Zachry Construction Corporation,* a state appeals court reversed a $19-million jury verdict in favor of the contractor and directed the contractor instead to "take nothing" and pay the owner $11 million for attorneys' fees. While some readers may view the sum for attorneys' fees as shocking, consider that the approximately $30 million "swing" on appeal resulted from one contract provision. In other words, the issue on appeal did not hinge as much upon the facts, the evidence at trial, the witnesses, or the testimony as upon the court's enforcement of a no-damage-for-delay provision.

In 2004 the Port of Houston Authority contracted with Zachry Construction Corporation to construct a wharf on the Bayport Ship Channel. The wharf consisted of five sections, each approximately 330 ft. Zachry's approach was to build the wharf "in the dry" by using a U-shaped frozen earth wall to keep water out of the construction site. The port liked this approach, as fewer nitrogen oxide emission credits would be used in having the work done in the dry. While the port had concerns about the possible effect of the frozen soil on adjacent structures, the contract provided that Zachry would control the means and methods. Zachry, through a subcontractor, retained a geotechnical engineer to design the wall.

Early in the project the port extended the design of the original wharf by 332 ft, which resulted in a change order for the extra costs associated with the additional work. To split the project into two phases, Zachry (through its subcontractor) designed a frozen cutoff wall that was perpendicular to the main frozen earth wall. Zachry considered this new wall to be consistent with its original design and part of the "means and methods" necessitated by the port's redesign of the wharf. Consequently, it did not believe that the wall required port approval. The port disagreed, and because of concerns it had over the design of the new wall, it asked Zachry to revise and resubmit a proposal with an alternative wall.

Shortly thereafter Zachry abandoned the frozen wall and switched to an "in the wet" scenario, alleging that the port's rejection of the frozen wall and its unwillingness to depart from the contract deadlines made it necessary to abandon the original approach. The port, however, contended that Zachry switched course because it recognized that the frozen wall concept was "killing the schedule." The port ultimately withheld $2.3 million in liquidated damages as the schedule slipped.

Early in the project the port extended the design of the original wharf by 332 ft, which resulted in a change order for the extra costs associated with the additional work.

Zachry sued the port for the difference between the cost that it would have incurred had it been allowed to complete the wharf in the dry and the actual cost of constructing the wharf in the wet. The port counterclaimed for attorneys' fees. Under the contract, Zachry was liable to the port for fees if it brought a claim against the port and did "not prevail." After a three-month trial, the jury found that the port breached the contract, and it awarded Zachry approximately $19 million. As part of its award, the jury found that the port delayed or hindered Zachry's work by its actions relating to the cutoff wall.

On appeal, the port persuaded the court to reverse the jury verdict. The port pointed to the no-damage-for-delay (NDD) clause in the contract, which expressly addressed one of the commonly recognized exceptions in such clauses. The clause here stated, "Contractor shall receive no compensation for delay or hindrance of the Work…EVEN IF SUCH DELAY OR HINDRANCE RESULTS FROM…THE NEGLIGENCE, BREACH…OR FAULT… OF THE PORT AUTHORITY."

The Texas Court of Appeals found this provision unambiguous, especially given the use of the capital letters to emphasize the parties' intent. Reasoning that Zachry proceeded with the wet scenario knowing that delay damages were prohibited, the court refused to "rewrite" that provision because it would deprive the port of the deal it struck when the contract was signed. The court relied upon fundamental contract law that contracting parties are "masters of their own choices" and are entitled to select the terms and provisions that are to be included or omitted. Moreover, because Zachry did not prevail in its claim (despite an all-out war lasting three years), the court ruled that Zachry would have to reimburse the port for its attorneys' fees, to the tune of $11 million.

Because sizable jury verdicts of the type seen here are hard to obtain in construction disputes, Zachry's "take nothing" result on appeal seems especially harsh. The NDD clause, however, made it clear that the owner was provided with the ultimate protection. Because a generally recognized exception was written into the clause, Zachry was unable to recover any delay damages, even though the port was found to have hindered or delayed the work. **CE**

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Claim Accrual Bars Subcontractor Suit Against Government

SUITS AGAINST the federal government are fraught with procedural hurdles. To start, there are several deadlines that must be met in order to bring a valid claim, statutes of limitations (SOLs) being among the most fundamental. A claim will be dismissed, regardless of its merits, if it is brought beyond the SOL. But even computing deadlines can be the subject of litigation, which is why readers should be mindful of the claim accrual concept. The date on which a claim is known by a plaintiff triggers the "running of the clock" to file suit. This month we highlight *FloorPro, Inc. v. United States,* in which a six-year SOL for suits against the government was rigidly enforced against a subcontractor. The subcontractor had actually pursued its claim for those six years but had done so in the wrong court.

FloorPro was the floor-coating subcontractor on a U.S. Navy contract. It satisfactorily completed its work in February 2002 but was never paid the entire subcontract price, $37,500. After the firm notified the navy of the nonpayment, the navy and the general contractor entered into a written contract modification to pay for the floor-coating work. The navy agreed to issue a joint check for the work payable to the general contractor and FloorPro.

Despite this agreement, the navy's accounting branch mistakenly paid the general contractor directly for FloorPro's work through an electronic fund transfer. The next day, the navy's contracting officer admitted the error and conceded that the electronic payment ignored the express terms of the modification.

Floor Pro continued to request payment via joint check. However, on August 9, 2002, the navy sent FloorPro a letter altering its position. The letter advised that the government had paid the general contractor in full on the contract and that it would not be paying FloorPro directly or via joint check because "the government does not possess privity of contract with FloorPro, Inc., or any other subcontractor." The letter stated that the navy had fulfilled the extent of its obligations under the prime contract and that FloorPro's only recourse was to seek payment from the general contractor through the civil court system.

In March 2003 FloorPro filed an action against the navy with the Armed Services Board of Contract Appeals, and in 2007 the board determined that FloorPro was legally entitled to $37,500, together with interest, from the navy for the latter's breach of the modification. The board addressed the privity argument by finding that FloorPro was the intended third-party beneficiary of the modification and could therefore sue the navy directly. The government appealed the board decision to the U.S. Court of Appeals for the Federal Circuit, which reversed the board's decision in 2009. The court held that a party lacking privity with the government generally has no right to sue at the board level. However, it pointed out that, under the Tucker Act, a statute that allows claims against the government based upon "an intended third-party beneficiary" theory, FloorPro could have the right to enforce the modification in the Court of Federal Claims.

Accordingly, in October 2009 FloorPro filed suit in the Court of Federal Claims. The navy filed a motion to dismiss, contending that the claim was barred because it was beyond the six-year SOL period. The navy argued that the claim accrued for purposes of triggering the six-year clock in August 2002, when FloorPro received the navy's letter denying the firm's claim. The court denied the government's motion to dismiss, holding that FloorPro's claim actually accrued in October 2004, when the navy filed its first brief at the board level. (That brief contended that FloorPro had no enforceable rights under the modification.) The court further decided that FloorPro "did not sleep on its rights" and diligently pursued its claim and that it would be unjust to bar the claim. The court awarded FloorPro $37,500 in damages for the government's breach. The navy followed with an appeal.

The U.S. Court of Appeals for the Federal Circuit reversed the ruling of the Court of Federal Claims, holding that FloorPro's claim accrued no later than August 2002, when the firm learned of the navy's "unequivocal refusal to pay" under the modification. The appellate court determined that FloorPro's claim accrued for purposes of the SOL clock when the navy told the firm that its only recourse was to seek payment "through the civil court system." The court found that at that point FloorPro had "a complete and present cause of action." Because FloorPro did not file its complaint in the Court of Federal Claims until October 2009, more than six years after its claim accrued, the appellate court held that its action did not meet the time requirements.

While it is rare for subcontractors to sue the government directly, this case demonstrates that the procedural hurdles of filing suit against the government can far outweigh even the most meritorious claims. The subcontractor here won twice on its claim, first in the Armed Services Board of Contract Appeals and then in the Court of Federal Claims, but the government ultimately prevailed on purely jurisdictional grounds. The harsh result demonstrates the rigidity of SOLs and came after nine years of litigation. As an aside, we question whether the amount of the claim justified nine years of attorneys' fees. **CE**

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Subcontractor Alleges Fraud for Scope Reduction on DOT Contract

THE LEGAL definition of "fraud in the inducement" is the use of deceit or trickery to cause someone to act to his or her disadvantage. At the heart of this type of fraud is the act of misleading someone as to the facts upon which that person will base decisions in entering into a contract. In construction disputes, a successful fraudulent inducement claim requires a party to establish that it "reasonably relied" upon the promises of future conduct made by another party. When these kinds of fraud claims fail, it is typically because a court decides that it was unreasonable for a party to rely upon the statements or promises made. Nevada's highest court, however, recently struck down a subcontractor's fraudulent inducement claim for a different reason.

The disputes in *Road and Highway Builders, LLC v. Northern Nevada Rebar, Inc.,* stemmed from a construction project to build a 2.3 mi portion of the Carson City Freeway. The Nevada Department of Transportation (NDOT) was the owner, and Road and Highway Builders was the general contractor. The project required the installation of more than 3,000 lineal ft of reinforced-concrete boxes (RCBs) under the roadway surface in order to drain water. The work required a substantial amount of reinforcing steel, or rebar.

As part of its bid price to the NDOT, Road and Highway Builders used the pricing of Northern Nevada Rebar (NNR) for that scope of work. NNR's bid was based upon providing approximately 2.7 million lb of black and epoxy-coated rebar and manufacturing the RCBs by placing the concrete at the jobsite. Unbeknownst to NNR, however, Road and Highway Builders was considering using precast RCBs rather than boxes poured in place. It had even begun the anticipated change order approval process for the substitution. If it secured the award and if the NDOT approved the use of precast RCBs, the firm was planning to use a different rebar subcontractor, Rinker Materials.

Upon receiving the award, Road and Highway Builders simultaneously executed a subcontract with NNR and issued a purchase order to Rinker for the precast RCBs. The NDOT quickly gave its approval to use precast RCBs, but Road and Highway Builders did not inform NNR of the change.

When NNR began delivering and installing rebar on the project, it discovered that precast RCBs had already been installed by Rinker. NNR sought an equitable adjustment to modify its unit price, but that request was rejected by Road and Highway Builders. NNR then sought payment for the work it had done so far and requested to be released from the subcontract. Road and Highway Builders rejected those requests but eventually terminated the contract with NNR after the latter had provided approximately 28 percent of the total black rebar and 6 percent of the total epoxy-coated rebar.

When Road and Highway Builders filed suit against NNR for breach of contract, NNR counterclaimed not only for fraud in the inducement and consumer fraud but also for breach of contract and breach of implied duty of good faith and fair dealing. After a four-day trial, a jury unanimously awarded NNR $1 million in damages. The jury award comprised $700,000 for breach-of-contract damages and $300,000 for punitive damages for fraud.

On appeal, the Supreme Court of Nevada overturned the jury award for fraud and held that NNR was not entitled to recover on its claim of fraud in the inducement. The court relied on the changes clause in the contract, which expressly stated that Road and Highway Builders could order a reduction in NNR's scope of work. The subcontract also stated that the total subcontract price would be subject to additions and deductions for changes in the work, and it stipulated that the unit price could not be modified for any reason, including quantity changes.

The high court held that while the general contractor might have breached the contract by unilaterally making alterations to the scope of work without an agreement in writing, this could not form a basis for fraud under these circumstances because the parties' subcontract contemplated a potential alteration in the scope of work. The court upheld the $700,000 in damages as supported by the evidence that Road and Highway Builders wrongfully refused to pay NNR for the work the latter performed and the profit it was entitled to earn.

> But what we seek to emphasize as often as we can in this column is that "contract is king." Courts look to—and will always try to enforce—the terms agreed to in the contract.

In a sense, the jury award was easy to understand. NNR entered into a unit-price contract in the belief that it would be furnishing a large quantity of rebar. Thus, it was induced to strike a deal without knowing that Road and Highway Builders had no intention of performing and that the firm had already ordered a substantial amount of the contracted rebar from another supplier. But what we seek to emphasize as often as we can in this column is that "contract is king." Courts look to—and will always try to enforce—the terms agreed to in the contract. Here NNR could not avoid the fact that the deal it struck expressly allowed for a reduction in scope as well as quantity changes. **CE**

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