Contractors' Suit Against Designers Moves Forward despite Lack of Privity

WE OFTEN LIKE to start our January columns by reviewing fundamental contract principles relevant to the engineering community. Contract privity and the economic loss rule (ELR) are important legal principles for engineers to understand, as they have significant impacts on liability. The ELR holds that a plaintiff cannot recover economic damages from a party with whom it has no contract. Put differently, an engineer generally cannot be sued for negligence by a general contractor seeking financial damages stemming from a construction project. However, each time this principle is successfully challenged in any jurisdiction, the principle begins to erode.

This month we look at *Suffolk Construction Company v. Rodriguez and Quiroga Architects Chartered*, a recent decision from a federal court in Florida. The decision revolves around several design professionals' motions to dismiss negligence claims from contractors who, among other things, relied upon their plans and specifications to construct a science museum in Miami.

The Case

The Museum of Science Inc. (MSM) entered into two design agreements for the design of a museum in Miami. It contracted with Rodriguez and Quiroga Architects Chartered (R&Q) to serve as the executive architect and, separately, with Grimshaw Architects P.C. to serve as the design architect. R&Q subcontracted with other professionals to complete the architectural and engineering plans, including the structural design as well as the mechanical, electrical, and plumbing systems for the project.

The MSM later entered into an agreement with Suffolk Construction Company Inc. as its prime contractor. Suffolk subcontracted with Baker Concrete Construction Inc. for the concrete portions of the work. The MSM eventually terminated Suffolk for convenience and engaged Baker directly to complete the concrete-related work. The MSM ultimately hired Skanska USA Building Inc. to complete the remainder of the project.

Suffolk and Baker filed a lawsuit against R&Q, Grimshaw, and two of R&Q's subconsultants, alleging that the design documents created by the design team were flawed, causing increased costs and delays on the project. To be made whole for their alleged damages, Suffolk and Baker asserted four separate counts of negligence against each member of the design team. R&Q answered the suit, but Grimshaw and R&Q's two subconsultants moved to dismiss the counts, arguing that Suffolk and Baker failed to adequately allege the existence of any legal duty owed to them.

The Decision

Prior Florida Supreme Court precedent had determined that a supervising architect owes a duty to a general contractor despite the lack of privity. With that backdrop, the court began its analysis of the negligence claims. To be successful, the suit would need to allege that (1) a duty was owed to the plaintiff, (2) a breach of that duty had occurred, and (3) damages occurred. The court found the duty owed to Suffolk and Baker by the design professionals on this project "arises because of a foreseeable zone of risk arising from the acts of the defendant." The court further reasoned that a defendant's conduct "must create or control the risk before liability may be imposed" and that "the foreseeable zone of risk created by the defendant's conduct defines the scope of the defendant's legal duty."

Again looking to Florida precedent, the court noted that supervising architects have too much control over a contractor not to owe the contractor a legal duty. Therefore, "a third party general contractor, who may foreseeably be injured or sustain an economic loss proximately caused by the negligent performance of a contractual duty of an architect, has a cause of action against the alleged negligent architect, notwithstanding absence of privity."

The court held that in the absence of privity, a design professional must have some control over a contractor or a project for the design professional to have a duty to the contractor. The court also reviewed prior precedent to determine how a design professional manifests its control over a contractor absent privity. Generally, the court found that a design professional's control might manifest itself either through the design professional's supervision of a contractor or through the design professional's knowledge that the contractor will rely on its plans or specifications. According to the court, a duty may be imposed in these circumstances because the design professional places the contractor in a foreseeable zone of risk.

The suit by Suffolk and Baker alleged a variety of ways in which Grimshaw and each subconsultant exercised control over them and their work. One was through the subconsultants' supervisory roles and their development of plans on which the contractors were to rely. Suffolk and Baker alleged that both of R&Q's subconsultants knew Suffolk and Baker would rely on their specifications and that the subconsultants were tasked with approving payment applications submitted by the plaintiffs. Suffolk and Baker further alleged that Grimshaw knew they would rely upon its design, observed and supervised their

work, and had a right to reject work as noncompliant. Specifically, Baker alleged that Grimshaw supervised and observed Baker's concrete mock-ups and observed its concrete installation. If Grimshaw rejected any of the work, Baker was obligated to repair or replace the work to receive payment from the MSM.

The court concluded that, given the preliminary stage of the litigation, the allegations were sufficient to establish potential liability and denied the motions to dismiss.

The Analysis

The parties to this dispute will now proceed through discovery to determine the extent to which Grimshaw and R&Q's subconsultants exercised control over Suffolk and Baker and thus placed them in the foreseeable zone of risk. The reality is, however, that the types of influences alleged by the contractors are typical design professional duties on any construction project. Based on this court's view, it appears that no lead design professional could assert an ELR defense in Florida. One wonders how the professional liability insurance market will react to this.

This decision is particularly notable in that subconsultants to design professionals in privity with owners also owe a duty of care to third parties in Florida, notwithstanding their status as lower-tier design professionals. The subconsultants in this case argued they could not have had supervisory control, given that they were not the executive architect. But the court found sufficient the allegations that they knew the plaintiffs would rely upon their designs.

Readers should consider two other points. Remember that the application of the ELR is a matter of state law. Some states, like Virginia, have found in no uncertain terms that design professionals do not owe a duty of care to general contractors for economic losses arising out of their negligent performance. Additionally, remember that the purpose of the ELR is to force parties to sue the parties with whom they have contracted. Given this, one might ask why Suffolk and Baker did not pursue the owner directly for their claims. Suffolk had a direct contract with the MSM, and Baker could have required the MSM to compensate it for damages as a precondition to its finishing the concrete scope following the termination of Suffolk.

In any event, stay tuned. We will keep you updated as this case develops. **CE**

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Beware the Many Nuances of Contracting With the Federal Government

SUCCESS in private sector construction does not necessarily equate to success in federal government construction. If you doubt this, ask some experienced construction contractors who made the decision to work only for private sector owners after unsuccessfully trying to expand their businesses into the federal market. Their stories are compelling.

Some didn't appreciate the challenges of dealing with contracting officers. Others didn't recognize the impact that government-mandated socioeconomic requirements, such as the Buy American Act, would have on their performance. Yet others found that government representatives viewed their relations with contractors as transactional—more concerned with process and following the contract than how to engage in a mutually successful and rewarding relationship. These private sector contractors were accustomed to owners who actually valued strong relationships. They lost lots of money and hurt their reputations working for the federal government.

But the purpose of this month's column is not to point out all the challenges with federal government contracting. Rather, it is to discuss one of its critical features: the Christian doctrine. Under this longstanding doctrine, a court may rule that a clause is deemed to have been included in a government contract, even if the body of the contract does not have such a clause, if the clause is mandatory and is standard in such contracts. In November 2018, a federal appellate court issued an opinion (*K-Con Inc. v. Secretary of the Army*) that explains how the Christian doctrine works and the challenge that it poses for government contractors.

The Case

In September 2013, the Army awarded to K-Con Inc. design/build task orders for a laundry facility and a communications equipment shelter at Camp Edwards, Massachusetts. Both facilities were pre-engineered metal buildings. The Army's contracting officer issued both solicitations using the General Services Administration eBuy system, using standard forms for the procurement of commercial items. Neither solicitation included an express requirement that K-Con provide performance and payment bonds. Likewise, neither solicitation included or referenced Federal Acquisition Regulation (FAR) clause 52.228-15 (Performance and Payment Bonds – Construction), which is the standard language for performance and payment bonds included in government construction contracts.

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In October 2013, the Army instructed K-Con to provide performance and payment bonds before the Army could issue its notice to proceed with the contracts. K-Con protested this, to no avail. Two years later, K-Con provided the required bonds and the parties modified each contract to compensate K-Con for the cost of the bonding fees. Shortly after providing the bonds, K-Con submitted a request for equitable adjustment for each contract, requesting approximately $116,000 for increases in costs and labor over the two-year period.

The contracting officer denied the claims, concluding that the contracts were for construction and, consequently, that the bonds were mandatory. The contracting officer also took the position that the bond requirements set forth in FAR 52.228-15 were incorporated into the contracts at the time they were awarded under the Christian doctrine. K-Con unsuccessfully appealed to the Armed Services Board of Contract Appeals (ASBCA), which led to K-Con appealing to the Court of Appeals for the Federal Circuit.

The Decision

K-Con first argued that the contracts were for commercial items (pre-engineered metal buildings) and that commercial items did not have mandatory bonding requirements. The Army responded that both contracts were patently ambiguous as to whether they were construction or commercial contracts and that it was incumbent on K-Con to inquire of this during bidding. Because K-Con did not seek clarification, the Army argued that K-Con was precluded from claiming, after the award, that the contract was for commercial items.

The appellate court agreed with the Army that the contracts were patently ambiguous. The contracts were issued using the government's standard commercial items contract form and even included a line-item description for delivery, which is typically used for commercial items contracts. However, there were many indications that the contracts were for construction. There were references in the statement of work to "construction" of the facilities. The statement of work also included many construction-related tasks, including developing and submitting construction plans, obtaining

construction permits, and cleaning up construction areas. It also required K-Con to comply with the Davis-Bacon Act, which applies to construction, not commercial, contracts.

As a result of these ambiguities, the appellate court found that K-Con was obligated to seek clarification during the bidding process. The court agreed with the Army that K-Con, having failed to do so, could not later argue that the contracts should be considered to be for the supply of commercial items.

K-Con's next argument was that even if the contracts were properly considered construction contracts, the ASBCA erred in holding that the contracts included bond requirements under the Christian doctrine. In assessing this argument, the court noted that for a court to incorporate a clause into a contract under the Christian doctrine, it generally must find that the clause: (1) is mandatory and (2) expresses a "significant or deeply ingrained strand of public procurement policy." The relevant clause (FAR 52.228-15) is derived from the decades-old Miller Act and requires that construction contractors whose contracts are valued at more than $150,000 furnish performance and payment bonds.

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K-Con argued, unsuccessfully, that the clause was not mandatory, because sections of the FAR allowed contracting officers to revise the penal sum of the bonds to something less than 100 percent of the contract price, thereby giving them discretion to waive the bonding requirements. The appellate court disagreed, stating that the ability of the contracting officer to revise the bond requirements did not change the fact that bonding requirements were mandatory for construction contracts worth more than $150,000.

As to the second prong of the test, the court looked to the long-standing Miller Act statute and its legislative history and concluded that payment and performance bond requirements were "deeply ingrained" in procurement policy. It particularly noted the importance of payment bonds to subcontractors, who had no effective way of protecting their rights to be paid without a bond. The court also rejected K-Con's argument that if the bonding requirements were deeply ingrained into procurement policies, the government should have rejected K-Con's bondless contract bids as nonresponsive. It also rejected the argument that the Christian doctrine only applied to "administration-type" clauses, and not something like the bond requirements.

> THOSE UNFAMILIAR WITH FEDERAL government contracting might be surprised that something like the Christian doctrine—which deems a contract to include clauses that are not contained in the body of the contract or solicitation—even exists.

The Analysis

Those unfamiliar with federal government contracting might be surprised that something like the Christian doctrine—which deems a contract to include clauses that are not contained in the body of the contract or solicitation—even exists. Yet this doctrine has been found in cases involving "missing" change clauses, termination for convenience clauses, and other important contract provisions.

How do professionals deal with this? First, it requires that those contracting with the government really understand what is required as a matter of law by the FAR and other federal statutes. If you are new to federal contracting, retain an experienced government contract lawyer and accountant to help navigate this. Second, be vigilant if you see something in the solicitation documents that doesn't appear right. K-Con was held responsible for not asking about bonding during bidding.

We have many questions about the reasons this dispute played out the way it did. A front-end delay can have a material impact on a contractor's costs. Why did it take the parties two years to reconcile this issue, particularly when the Army apparently agreed to pay the cost of bonding? Did K-Con have difficulty getting a bond? Did K-Con try to back out of the contract because of the bonding requirement? Why didn't the Army terminate the contract for default? The answers to these questions are not evident from the appellate decision, but the backstory of this case would be fascinating. **CE**

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California Ruling Expands Liability of Site-Safety Consultants

JOBSITE INJURIES on construction projects typically result in multiparty litigation in which it seems that everyone who had any potential involvement with the injured party is sued. When an engineer has little to no construction-phase duties and/or does not perform any on-site services, courts will typically find that the engineer had no duty to warn workers of any unsafe conditions that might exist. Conversely, when an engineer has construction observation duties or responsibilities regarding safety, legal exposure for jobsite safety is lurking.

While there are many cases around the country that address engineers' liability for safety, there are few that address the liability of safety consultants. Since many of our readers provide consulting services related to jobsite safety inspections, we wanted to highlight a recent appellate decision that offers a thorough analysis of jobsite safety liability for consultants.

The Case

The issues in *Peredia v. HR Mobile Services Inc.*, arose when the front-end loader of a tractor struck and killed a 19-year-old dairy farm employee in California. The parties disputed whether the driver of the vehicle was paying attention and whether the employee was wearing earbuds to listen to an electronic device at the time of the accident. Nevertheless, the parents of the deceased employee sued site consultant HR Mobile Services Inc. and others. HR Mobile had been hired by Double Diamond, the dairy farm, under a handshake contract to assist the farm with human resources issues, training, loss prevention, and workers' compensation issues. HR Mobile was paid $24,000 per year for services related to the farm.

When it was sued, HR Mobile argued that while it agreed to assist the farm in carrying out some workplace safety tasks, it did not fully assume Double Diamond's workplace safety obligations. In HR Mobile's view, it agreed to accept only a secondary role with respect to quarterly safety meetings, quarterly site inspections, accident investigations, and safety training. HR Mobile considered Double Diamond as primarily responsible for compliance with site-safety inspections, hazard corrections, safety training, and record keeping.

Specifically, HR Mobile supplied Double Diamond with certain employee safety policy documents, including an injury and illness prevention plan (IIPP). (The document did not comply with updated and amended standards issued by California's Division of Occupational Safety and Health, known as Cal/OSHA.) HR Mobile also conducted a jobsite safety inspection one month before the incident and conducted an employee safety training meeting attended by the driver of the tractor.

THE PARTIES DISPUTED whether the driver of the vehicle was paying attention. The parties also disputed whether the employee was wearing earbuds to listen to an electronic device at the time of the accident.

The plaintiffs in this case alleged that HR Mobile was negligent in failing to design and create a safety program addressing (1) the safety of ground workers in the vicinity of heavy equipment, (2) the use of high-visibility clothing for ground workers, (3) the dangers of heavy equipment, and (4) adequate management of its responsibilities under the IIPP.

HR Mobile was granted summary judgment in its favor at the trial level. The court concluded that HR Mobile's "passive failure to identify and correct dangerous working conditions" at the farm was not wrongful under the guiding California statute. Therefore, HR Mobile had no responsibility (and thus owed no duty of care) to any third parties who worked at the farm.

The Appeal

The parents appealed the decision to a California appellate court on a matter never previously considered in California—whether a safety consultant retained by a California employer owes a duty of care to the employer's workers. The court's analysis began with a careful review of the state statute establishing the elements of a claim for negligent undertaking.

To institute such a claim, the plaintiff had to establish that (1) HR Mobile undertook to render services to Double Diamond, (2) the services rendered were of a kind that HR Mobile should have realized were necessary for the protection of Double Diamond's workers, (3) HR Mobile failed to exercise reasonable care in the performance of its duties, (4) the failure to exercise the reasonable care resulted in the harm, and (5) HR Mobile's carelessness increased the risk of such harm or the harm was suffered because of the employee's or Double Diamond's reliance on HR Mobile's performance of its job duties.

HR Mobile argued that its limited consulting role with Double Diamond could in no way have extended to an assumption of Double Diamond's jobsite safety duties. However, the court found that summary judgment should not have been entered for HR Mobile and reversed the lower court's decision.

The court reasoned that the first prong had been met—even by handshake and even though the deal was for

THE COURT DETERMINED that California law does not require a full assumption of the employer's duties to provide a safe workplace in order for a consultant to be liable to the company's employees.

a small sum. HR Mobile had an oral contract to provide services annually to Double Diamond, including site-safety training and inspections. Second, the court concluded that HR Mobile should have foreseen that its services would directly relate to the safety and protection of Double Diamond's employees. The third and fourth prongs would have to be proved at trial. HR Mobile asserted that it could not be liable under the fifth prong because it did not *fully assume* safety obligations to the dairy farm employees. The court determined that California law does not require a full assumption of the employer's duties to provide a safe workplace in order for a consultant to be liable to the company's employees.

The Analysis

The case has important ramifications for our readers with expertise in site safety, be it as engineers or consultants. The court noted that there was a split in jurisdictions as to whether liability should be extended to those who merely supplemented, rather than fully supplanted, the employer's duty for jobsite safety. For instance, decisions in Pennsylvania, Maryland, and Delaware have held that liability arises in the workplace setting only if the consultant's undertaking was intended to be in lieu of, rather than as a supplement to, the employer's own duty of care to its employees. Another group of cases, which the California appellate court adopted here, applied a less stringent standard. For example, Tennessee has ruled that liability will come into play as long as the employer has delegated any part of its duty to a consultant.

One other important takeaway from this case is that it was based on an oral contract. It is a reminder that oral contracts *are* enforceable. Had the safety consultant used a written contract, it may very well have limited the extent of its site-safety duties or its liability for such services. **CE**

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Court Rejects Suit against Design Team for Negligent Contract Administration

IN THE WORLD OF designers' professional liability, the significance of exculpatory provisions cannot be overstated. Readers know that exculpatory contract language comes in all shapes and sizes, whether it is a limitation of liability (LoL) clause, a no damage for delay (NDD) clause, or any other provision that seeks to shift some or all the risk for one event or duty away from one contracting party. Architects and engineers are often cautioned to include these provisions in their contracts, as they are typically enforced by courts and can dramatically reduce the exposure design professionals may have on jobs.

This month's case, *Domson Inc. v. Kadrmas Lee & Jackson Inc.*, underscores this concept. It demonstrates how a design professional was able to avoid more than $1 million in claims from the contractor concerning, among other things, the design team's performance of typical contract administrative duties—namely, the review and processing of payment requisitions and change orders.

The Case

The disputes in *Domson* arose from a road construction project on the Pine Ridge Indian Reservation in South Dakota. The owner, Oglala Sioux Tribe, engaged Dakota Engineering/KLJ (a joint venture of Dakota Engineering and KLJ, of Bismarck, North Dakota) to design the reconstruction project. Bidders were permitted to review the contract documents, including the drawings and project manual. Domson Inc., the low bidder, reviewed all contract documents before bidding.

The prime contract designated Dakota Engineering/KLJ as the engineer and the tribe's representative. Under Domson's contract, KLJ had the duty to administer the contract for the tribe, including processing applications for payment and change orders. Domson did not substantially complete the project on time, and KLJ assessed it, on behalf of the owner, for more than $100,000 in liquidated damages.

Domson then brought a professional negligence suit against Dakota Engineering/KLJ, seeking more than $1.1 million in damages. Domson alleged that Dakota Engineering/KLJ owed a duty to reasonably develop the design and that it was negligent in doing so. Domson went further, however, alleging that Dakota Engineering/KLJ owed a duty to Domson in its interpretation and application of the contract documents. Essentially, Domson argued that Dakota Engineering/KLJ was negligent in carrying out its contract administration duties.

For its part, Dakota Engineering sought an early exit from the lawsuit, arguing that it was only involved in the initial design work and had no duties concerning the contract administration. Additionally, both professional design firms answered the lawsuit but moved for summary judgment, relying on contract language that they claimed shielded them from any liability concerning their duties in administering the contract. That language reads:

> Neither Engineer's authority or responsibility under this Article 9 or under any other provision of the Contract Documents nor any decision made by Engineer in good faith either to exercise or not exercise such authority or responsibility or the undertaking, exercise, or performance of any authority or responsibility by Engineer shall create, impose, or give rise to any duty in contract, tort, or otherwise owed by Engineer to Contractor, or any Subcontractor, any Supplier, any other individual or entity, or to any surety for or employee or agent of any of them.

The circuit court concluded that Dakota Engineering was not an appropriate party to the lawsuit and allowed it to be dismissed from the case. The court further ruled in KLJ's favor on all claims, essentially handing the design team an early "defense verdict" on the $1.1 million lawsuit. Importantly, the court found the contract provision cited above to be the controlling factor because it stated that the engineer's performance of duties, absent bad faith, should in no way expose it to liability to the contractor.

Domson moved for reconsideration at the trial level and was denied, prompting an appeal.

The Appeal

The questions for the appellate court primarily concerned whether the circuit court erred in granting summary judgment based on the exculpatory clause. Domson's chief attack on the exculpatory language was that even though it existed, the court should find it void and hold it unenforceable because it was contrary to public policy. Additionally, Domson's questions on appeal included whether judgment should have been awarded to the design team when Dakota Engineering and KLJ agreed that the defendants owed a duty to Domson.

The court began its analysis by noting that under South Dakota law, an engineer can owe a duty to the contractor despite the lack of contractual privity between the parties. Here, however, the court noted that the contract between the tribe and Domson "insulated" Dakota Engineering/KLJ from liability for its good-faith acts and failures to act. The court stated that the exculpatory language "unambiguously" informed Domson that Dakota Engineering/KLJ would be immune from any tort or contract suit arising out of its good-faith performance.

Next, the court defined good faith as "honesty in fact concerning conduct or a transaction" and distinguished negligence from an honest mistake. Based on its review of the record, the court found that Dakota Engineering/KLJ had established that it used good faith in interpreting and applying the contract documents. As such, the protections of the contract's exculpatory clause acted as a proverbial Teflon shield to Domson's claims concerning contract administration.

Additionally, the court noted that even Domson's own expert witness's affidavit arguably supported the design team, stating, "[n]o set of project documents [is] perfect, nor are field conditions exactly as described in those documents. Consequently, projects have several strategies for adjusting to these changed conditions. Change orders are a commonly recognized method for dealing with any condition or circumstance that might arise and was unforeseen or overlooked at the time of document preparation." There was nothing to show that the design team lacked good faith in the performance of its duties.

The court also found that even though there was evidence to suggest the existence of errors in the bid documents, Domson had not established that those errors constituted a breach of the applicable standard of care related to the duty to reasonably draft project specifications. Through its holdings in favor of Dakota Engineering/KLJ, the court affirmed the trial court ruling.

The Analysis

The exculpatory language in this case was ultimately enforced, despite the contractor's request to essentially have the clause stricken as unfair. As we frequently note in this column, however, the "win" for the design team in this case did not come without costly litigation at the trial level, including dispositive motions and a motion for reconsideration, and an expensive appeal. Readers must nonetheless keep paramount the impact that one paragraph of text can have on a design professional's legal exposure.

As another example, an architect recently avoided more than $30 million in claimed damages due to a court's enforcement of an LoL cap. Conversely, an appellate court in Florida recently held that an architect could not rely on the NDD clause contained in the prime contract to defend against the contractor's claims. Clearly these clauses must be carefully considered, incorporated, and used by design professionals when negotiating contracts. **CE**

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The Right to Terminate for Convenience Has Its Limits

RARELY DO THE contract doctrines of interference, frustration of purpose, and termination for convenience arise in one case. Yet a recent Texas decision, *De Avila v. Espinoza Metal Building & Roofing Contractors*, addressed all those items in a dispute between a general contractor and a subcontractor.

The Case

The disputes in this case arose during renovations to the Tigua Business Center in El Paso, Texas. The contractor, Eduardo de Avila (acting as sole proprietor), entered into a subcontract with Espinoza as the roofing contractor to perform repairs at the project. Under the subcontract, Espinoza was required to install an energy-efficient roofing system known as thermoplastic polyolefin (TPO) roofing. The original contract value for Espinoza's scope was approximately $87,000, with no timetable or date of completion specified for the installation. However, the contract contained a "time is of the essence" clause and required that all changes be presented in writing and signed by both parties. Additionally, the contract contained a termination for convenience clause, allowing Avila to terminate the contract with or without cause after a 48-hour grace period.

After Espinoza began working on the roofing system, a decision was made (presumably by the owner) to move heating, ventilation, and air-conditioning (HVAC) units from the interior of the building to the roof. Unfortunately, the roofing system was almost completed by Espinoza when other contractors began drilling holes to accommodate the rooftop unit (RTU) installation. The change involving the RTUs required Espinoza to furnish and install new insulation, bonding adhesive, roofing material, and counter flashing in order to maintain the 20-year manufacturer's warranty for the TPO roof system. Espinoza prepared a change order for the extra costs and submitted it to Avila.

Before responding to the change order, Avila sent an email giving notice to Espinoza that Espinoza would be expected to fix alleged roof leaks and make the penetrations for the HVAC units watertight. Subsequently, Avila sent a letter to Espinoza, asserting that it failed to complete the roofing work in a timely fashion and demanding its work be completed. Shortly thereafter, Espinoza discovered that all remaining material and work supplies were missing from the jobsite. Believing the items had been stolen, an Espinoza representative called the police and began filing a report. Avila, however, advised that he was the one who had removed Espinoza's materials and supplies. At some point Espinoza's crews returned to complete their work but were thrown off the jobsite by Avila.

Avila ultimately responded to Espinoza's proposed change order, agreeing to pay a reduced amount. Espinoza accepted the negotiated amount on the condition that Avila pay half the additional cost by a date certain; otherwise, no work would be completed. No response was given, and Espinoza did no further work on the project. Avila then hired a replacement subcontractor to complete the roof installation.

Espinoza sued Avila for breach of contract, seeking the outstanding balance due on the contract. Avila counterclaimed, seeking damages for having to hire a subcontractor to complete the work.

During the bench trial, Espinoza representatives testified that the company's roofing work was between 95 and 98 percent complete when Avila removed the company's supplies and building materials and forced the workers off the jobsite.

Avila in turn testified that he had been dissatisfied with Espinoza's job performance, that Espinoza had been difficult to reach, and that Espinoza's team had not been attending the weekly contractors' meetings with any regularity. He further testified that Espinoza had never repaired the leaks Avila complained of.

The trial court found that Avila's removal of the roofing materials and his eviction of Espinoza's crew from the jobsite was a breach of contract and that it occurred before any alleged breach by Espinoza. The court awarded Espinoza $12,594 for its breach of contract claim and $10,500 in attorney's fees.

Avila appealed to the Court of Appeals of Texas, alleging that the evidence demonstrated Espinoza was first to breach the contract by refusing to complete the work provided for in the original agreement and that Avila was free to terminate the contract at his convenience and therefore could not have been in breach of contract for removing Espinoza's materials or forcing its workers off the jobsite.

The Appeal

The appellate court began its analysis by defining the legal standard for contract interference—a starting point that would not bode well for Avila. "When a party to a valid and enforceable contract wrongfully interferes with another party's ability to render its performance under the contract, and thereby makes that party's performance impossible, the party committing the interference is in breach of contract and the afflicted party is entitled to damages sustained by the breach," the court stated.

The appellate court noted that at trial, Espinoza representatives testified that any delay on the company's part was due to the disagreement arising over the additional work necessitated by the decision to move the HVAC units from the inside of the building to the roof. The appellate court relied on testimony that Espinoza could not complete the project without installing the

COURTS OFTEN FIND THAT DEFAULT terminations are carried out improperly.

new materials because the manufacturer's warranty would be voided without them. Ultimately, the appellate court found that Espinoza's testimony and the multiple change orders supported a finding that the changes were necessary, that the parties did not agree on the price of the changes, and that Avila acted to remove Espinoza from the jobsite before the work was completed.

The court was also not persuaded by Avila's reliance on the termination for convenience clause. The court noted that any convenience termination required 48 hours' written notice, which was not provided. In fact, it was just the opposite; Avila maintained that he continued to request Espinoza complete the roofing installation right up to the point at which he engaged a replacement contractor. These facts adduced at trial convinced the appeals court that Avila wrongfully prevented Espinoza's performance under the contract and that Avila did not comply with the notice provision.

The Analysis

Courts often find that default terminations are carried out improperly. This case is noteworthy, however, in that the propriety of the termination also involved the doctrines of frustration of purpose and contract interference. The facts of this case should foremost remind readers that, with the exception of the federal government, termination for convenience clauses have both express and implied parameters that must be met.

Clauses that require written notice and grace periods must be abided by for the termination to be upheld in court. A convenience termination must also be carried out in good faith (not for bid shopping and not usually exercised at a stage when the work is 98 percent complete).

Additionally, the design change in this case that prompted the change order appears somewhat straightforward. Avila's failure to process it in a timely way may have had an impact on the court's view of its position. So, too, may have Avila's removal of the subcontractor's materials and equipment from the site before a formal termination. **CE**

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Designers Prevail in Statute of Limitations Case

ONE OF THE MOST fundamental defenses that design professionals have to negligence lawsuits is the timing of when the suits are brought. Statutes of limitations (SOLs), which exist in every state, limit the time frame within which claims may be filed against design professionals for negligence. While SOLs vary across the country, they typically specify the time period in which a negligence suit may be filed as two or three years from when the alleged malpractice first occurred. If a negligence suit is asserted beyond this period, the case is automatically dismissed.

As a result, negligence litigation often revolves around a determination of when the cause of action first accrued. In many scenarios, this is a gray area, involving both when a design professional first allegedly departed from the standard of care and when a claimant had reason to know of that alleged breach. In a recent case involving some very sophisticated parties on a megaproject, an SOL issue was litigated in favor of the design team.

The Background

The disputes in *Washington State Department of Transportation v. Seattle Tunnel Partners et al.* began 18 years ago when the Washington State Department of Transportation (WSDOT) contracted with WSP USA Inc., a New York City-based engineering and design firm (formerly known as Parsons Brinckerhoff), as a consultant to assist in the process of evaluating the repair or replacement of the Alaskan Way Viaduct. WSP, in turn, engaged Shannon & Wilson Inc. (S&W), of Seattle, for geotechnical services. Together these two firms are known in the case as the designers.

Between 2001 and 2010, WSP and S&W conducted various investigative field explorations. In 2002, they installed a pumping well identified as Test Well 2 (TW-2) with 8 in. diameter steel casing. In 2009, WSDOT determined that a bored underground tunnel stretching approximately 1.7 mi long and 57 ft in diameter was the best option for the viaduct replacement project. In 2010, the designers prepared a geotechnical baseline report (GBR) for the tunnel project specifically to document and establish the baseline subsurface site conditions that could be expected to be encountered in the performance of the work.

A year later, WSDOT entered into a contract with design/builder Seattle Tunnel Partners (STP) to execute the tunnel plan. Shortly after STP began work, in December 2013, the tunnel boring machine (TBM) stopped advancing, overheated, and shut down. A prompt investigation determined that the TBM had hit steel casing—specifically, the TW-2 that the designers installed 11 years earlier. The project manager for STP sent an email a few days after the stoppage stating: "We hit it right where WSDOT left it in the ground." The incident ultimately caused an indefinite work stoppage.

In mid-December, STP issued a report indicating that the stoppage was caused by obstructions in front of the machine, within the cutterhead of the machine, or both. The report went on to identify that the obstruction in front of the machine could be several large boulders, a giant boulder, or the steel casing from the TW-2. An internal WSDOT memorandum further questioned whether the steel casing was the cause of the TBM stoppage when it noted that the TBM had advanced another 60 ft after encountering the steel pipe with no detected issues. WSDOT further opined that the 3/8 in. thick wall of the steel casing should not have been a challenge for a boring machine with 30,000 psi in compressive strength and designed to mine boulders of up to 8 ft in diameter.

The Case

In 2016, WSDOT and STP sued each other for breach of contract, each contesting contractual responsibility for the work stoppage. STP alleged that WSDOT did not disclose the existence of the TW-2 in the contract documents. WSDOT alleged that STP was at fault for the TBM malfunction. STP sued the designers in late January 2017, alleging professional negligence, negligent misrepresentation, and implied indemnity. The designers filed a motion for summary judgment on the tort claims, asserting that the claims were untimely under Washington's three-year SOL for tort claims.

STP conceded that it identified the TW-2 as the potential cause of the TBM stoppage almost immediately. However, STP argued that it did not have sufficient knowledge of causation to trigger the SOL. The superior court denied the designers' motion, holding that there were "material factual issues in dispute as to whether STP had factual knowledge as to the causation element prior to February of 2014." After a request for reconsideration was denied, the designers appealed.

The Appeal

The Court of Appeals of Washington first stated that the SOL begins to run when a claimant's cause of action accrues. Accrual means when a claimant can show that a defendant's breach of duty caused damages. The court added that a cause of action should not accrue, however, until a claimant knows, or through due diligence should have discovered, the factual basis for the cause of action.

The designers argued that STP knew as early as December 2013 that the steel casing caused the stoppage. STP contended that it did not have sufficient knowledge of the cause of the damage to the TBM until February 2014, thus rendering its tort claims timely.

The court found that in correspondence between December 2013 and early January 2014, STP "routinely

identified the steel casings from TW-2 as the likely source of the obstruction." STP also noted the casings in a December 2013 report on the incident, and on January 15, 2014, wrote that the "well casing left in place is the most likely cause for such serious damage." The court noted that this last writing was "indisputable" evidence that STP was aware of the factual elements of its claims by January 15, 2014—more than three years before STP's commencement of its lawsuit against the designers.

STP argued that it was not "sufficiently" aware of the cause of the TBM stoppage, and that even WSDOT and the designers disputed that the casing was the cause of the problem. The court held that for purposes of the tort claim, the opinions of WSDOT and the designers were of no import, writing: "[T]he action accrues when *the plaintiff* discovers the salient facts underlying the elements of the cause of action."

STP secondarily argued that the SOL should have been put on hold until it was "determined whether [the casing] was the 'true cause' of the TBM stoppage." The court disagreed, noting that the lower court misconstrued the requirement for knowledge of causation. The appellate court again pointed to STP's communications in December 2013 and early January 2014, in which STP stated its belief that the casings were the "primary cause of the damage." The court concluded, "Neither the fact that STP initially considered the possibility that there may have been additional contributing factors to the TBM's damage, nor that it continued its investigation of the stoppage beyond January 15, alters that it had sufficient notice for its claims to accrue."

Accordingly, the court found in favor of the designers that STP's tort claims were untimely and outside Washington's three-year SOL.

The Analysis

The case underscores how SOLs are applied to limit suits against design professionals and how the accrual issue plays out when a claimant has knowledge of a claim. Readers should be mindful that if a party is still investigating the cause of a problem, its SOL defense may be running. In this case, the court would not permit the claimant to determine with finality the root cause of the problem before its SOL clock began to tick. Notably, STP's claim for indemnity survived, so the designers are not yet out of the case entirely. **CE**

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Are Prescriptive Specifications in Design/Build Contracts Traps for the Unwary?

THERE HAS BEEN a great deal of industry discussion about the public sector's use of prescriptive versus performance-based specifications on design/build projects. An owner's performance specification will define problems and desired outcomes (for example, "provide reliable, uninterrupted power to this piece of equipment") and invite prospective design/builders to propose their best solutions. Giving design/builders discretion as to how to solve the owner's problem encourages creative solutions that balance concerns related to price (such as initial and lifecycle costs) with other factors (such as schedule and operations and maintenance requirements).

Despite these benefits, many public-sector owners are unwilling to give the design/builder that discretion, fearing, among other things, that the design/builder will offer something inferior. But prescriptive specifications raise some of their own challenges. For example, what happens if there is a prescriptive specification for 8 in. conduit, and the design/builder optimizes this to a 4 in. conduit, a solution accepted by the owner? Do all of the cost savings from using smaller conduit go to the design/builder? Is it considered value engineering, with savings shared? Does the owner get a full credit for the cost difference because the prescriptive specification was relaxed?

This month's case, *Appeal of American West Construction LLC*, explains how one court viewed this issue.

The Case

The project involved the construction of bridges over irrigation canals in El Paso County, Texas, near the Mexican border. To access one site, for a bridge referred to in the case as the Herring bridge, the contract's technical requirements called for the construction of two temporary bridges over another canal and drainage ditch to provide access to the Herring bridge site. These temporary bridges were to be disassembled and removed after completion of the Herring bridge.

American West, the design/builder, was concerned that it would not have enough time to complete the project if it had to build the temporary bridges, so it developed a plan to access the Herring bridge site through a levee on property held by the El Paso County Water Improvement District (a local political entity devoted to delivering surface water and managing water rights). Through its construction site and traffic control plan, submitted in late September 2015, American West first informed the owner, the U.S. Army Corps of Engineers, that it intended to use a levee instead of temporary bridges. The Corps's plan reviewer responded in late October, noting that the haul roads identified in the submittal had not been approved by the Corps and directing American West to provide the required permits and approvals for using these haul roads.

American West provided the necessary permits and approvals shortly after this response. Additionally, by the end of October, American West obtained the levee easement from the water district and informed the Corps of this at its weekly construction meeting in early November. The Corps never explicitly approved the plan to use the levee in lieu of the bridges. However, American West proceeded in accordance with its plan and completed the project in May 2016 without constructing the temporary bridges.

The issue in this case came down to one point: Was the Corps entitled to a credit for American West not having constructed the temporary bridges? The Corps's administrative contracting officer claimed that he raised the issue at the monthly meetings as soon as he knew that the levee would be used. American West's project manager denied that the Corps ever asked about credits in these meetings.

The first documented request referencing a credit came in early March 2016, when the Corps asked American West for its budgeted temporary bridge costs. American West never responded to this request, and the Corps sent a letter in early June 2016, after substantial completion, demanding that American West submit a proposal to the Corps for proceeding without the temporary bridges.

When American West rejected the notion that the Corps was due a credit, the Corps issued a contracting officer's final decision asserting that the Corps was owed a credit of more than $40,000. This amount represented the estimated difference in price between performing the project with the temporary bridges and without them. American West appealed to the Armed Services Board of Contract Appeals.

The Appeal

The Board's decision made it clear that the Corps was entitled to require American West to build the temporary bridges. Even though there was no need for these bridges after the contract was completed, and "all concerned were better off because they were never built," it has long been held that the government "can engage a contractor to make snowmen in August" if it chooses. However, the Board also noted that the government may waive strict compliance and be precluded from later reimposing those requirements if it knowingly fails to require strict performance and a contractor reasonably "believes the requirement to be dead."

The Board concluded that the Corps waived the temporary bridge requirement. The Corps knew about American West's plan to use the levee as early

as September 2015 and never explicitly objected to it. Not only did American West believe the Corps had accepted this approach, but it relied on this acceptance by spending money to secure the easement from the water district.

The Corps argued that while it may have permitted a contractual deviation, that deviation was essentially conditional upon getting a credit from American West. The Board found this unpersuasive. The conditional nature of the Corps's waiver became evident only after the contractual requirement was effectively eliminated in March 2016, well after American West began working on the levee. In examining the conflicting testimony about whether or not credits had been discussed in meetings before March 2016, the Board was influenced by the fact that neither the daily reports nor the meeting minutes evidenced any such discussions. The Board concluded that if the Corps had in fact raised the issue of a credit in these meetings, "it was done in an off-hand manner" that did not register with American West.

The Analysis

More often than not, owners and design/builders work through these types of issues, and they never go to trial. Most design/builders recognize that they are obligated to meet prescriptive requirements, even if there is a better way of doing something. However, most owners are also willing to give design/builders reasonable discretion to make minor design changes to prescriptive requirements and in doing so do not expect a credit for these minor changes. If a building is prescribed to be 300 by 400 ft, would most owners expect a credit if the design was optimized to be 290 by 402 ft? Probably not. Would a design/builder expect to receive additional compensation if the building was actually 302 by 403 ft? Probably not.

That said, two teaching points come from this case. First, parties don't always get along. If the Corps truly expected a credit, it should have ensured that this expectation was fully explained to American West as soon as the deviation surfaced. This would have clearly put the onus on American West to decide whether to stick with the temporary bridge solution. Second, what was served by the Corps dictating means and methods of this issue in the first place? A better contractual approach would have been to use a performance specification and let American West, as the design/builder, figure out how to best handle this—which is exactly what it did. **CE**

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Unlicensed Subcontractor Loses Right to Sue

ANYONE WHO RUNS a business knows that it is critical to have all the required licenses in hand before entering into contracts and starting work. Yet sometimes important administrative details like this fall through the cracks. A company might get a referral to work a mile down the road, or across a state or county line, and not think about what, if any, business license consequences this could have. A small company might lose its office manager and forget about renewing a license, or a company may know it needs a license but be told by a customer, "Don't worry about it."

The implications of being unlicensed can be substantial—even if the unlicensed business entity can offer a good reason for why it failed to comply. One of the likely implications is that the business will be unable to use the courts to protect its rights. This is precisely what happened in *HVAC Specialist Inc. v. Dominion Mechanical Contractors Inc.*

The Case

The project involved the renovation of what is referred to in the court opinion as the Takoma Elementary School, which is part of the Takoma Education Campus in Washington, D.C. HVAC Specialist Inc. (HVAC), a Virginia corporation, was the heating, ventilation, and air-conditioning subcontractor to Dominion Mechanical Contractors Inc. (Dominion). Among other things, HVAC was to furnish and install refrigeration piping and equipment. HVAC allegedly ran into difficulties paying its employees and suppliers, and Dominion eventually terminated HVAC for default.

HVAC filed its initial complaint in December 2012. Dominion moved for dismissal of the complaint on the grounds that HVAC was an unregistered foreign business entity doing business in D.C., and that D.C. statutes precluded HVAC from maintaining an action in the D.C. courts. The Superior Court of the District of Columbia agreed with Dominion and dismissed the original complaint without prejudice.

HVAC filed a new complaint in December 2015. Dominion answered this complaint in March 2016, asserting a number of affirmative defenses, and concurrently filed a counterclaim for damages associated with the default termination. In August, Dominion filed a motion to dismiss, arguing (for the first time) that HVAC could not recover under the subcontract or under a *quantum meruit* (quasi-contractual) basis because HVAC lacked the refrigeration and air-conditioning contractor's license required under D.C. law to perform the subcontract work.

HVAC acknowledged that it did not have the contractor's license when it entered into and performed the subcontract. However, it argued that Dominion waived any illegality defense by failing to assert this defense in relation to the 2012 case and for nearly eight months after HVAC refiled its complaint. HVAC further argued that Dominion was "estopped" (i.e., precluded) from raising the defense because Dominion filed a counterclaim for damages for breach of the allegedly void contract.

In ruling on Dominion's motion to dismiss, the D.C. superior court stated that it was "constrained to grant" Dominion's motion "inasmuch as the statutes and regulations requiring licenses for businesses operating in the District of Columbia are very clear that businesses performing refrigeration or air conditioning work must have a license to do so and there are no exceptions." Relying on D.C. case precedent, the superior court found that this prevented HVAC from recovering based on contract and quantum meruit legal theories, even though Dominion was aware that HVAC lacked proper licensure at the time the parties entered into the subcontract. The court also dismissed Dominion's counterclaim, as it was based on an illegal contract. Both parties appealed.

The Appeal

The District of Columbia Court of Appeals ultimately agreed with the superior court. It first noted that the refrigeration and air-conditioning occupation is regulated to protect public health, safety, and welfare and ensure that persons engaged in such occupation have the specialized skills or training required to perform the services offered. Consequently, the "rule is well-established in the District of Columbia that a contract made in violation of a licensing statute that is designed to protect the public will usually be considered void and unenforceable, and that the party violating the statute cannot collect monies due on a quasi-contractual basis either."

The court of appeals squarely addressed the issue of whether the application of this rule would be unfair to a party like HVAC:

> Although the operation of this rule may appear to be harsh and disproportionate in some cases, we have uniformly rejected appeals to deviate from or mitigate it; the potential unfair applications of the rule at the margins have not persuaded us to sacrifice the benefits of a clear-cut, unmistakable requirement, with equally clear consequences for noncompliance.

As a result, the court found that even when a party like Dominion was familiar with the licensing rules and knew of HVAC's unlicensed status, it does not prevent the rule from being applied, because courts "must pay deference to the legislature's intentional exposure of unlicensed contractors, which discourages unlicensed work."

Using this logic, the court also rejected HVAC's argument that Dominion waived its rights to raise the defense of illegality or was estopped from rais-

THE IMPLICATIONS OF BEING unlicensed can be substantial—even if the unlicensed business entity can offer a good reason for why it failed to comply.

ing the defense. As a matter of public policy, the court found that the defense of illegality is not waivable in the context of a contract entered into in contravention of a D.C. law, such as a licensing requirement, that is designed to, and does, afford significant protections to the public. The court also cited D.C. case law finding that the invalidity of a contract cannot even be waived "by the express stipulation of the parties."

As for Dominion's counterclaim, HVAC argued that it should be dismissed as well, based on the logic that this was formed from an illegal contract. The appellate court concluded that it did not need to address this issue, as Dominion was only asserting its rights to recover from HVAC on a "set-off" basis, in the event HVAC's claims were allowed to proceed.

The Analysis

We suspect that many readers are asking themselves whether this holding is unique to the District of Columbia. Wouldn't other courts be reluctant to wipe out the remedies available to HVAC, particularly when Dominion knew HVAC was unlicensed? It is an important question, as at least some other state laws are more lenient than those in D.C. For example, some state courts have allowed unlicensed contractors to sue for unpaid contract monies if they substantially performed their contracts in good faith and did not have actual knowledge that they needed licenses. Courts in other states have found that the contractor can "cure" the license problem by getting properly licensed after entering into the contract.

A word of caution, however. By not having proper licenses at the time of contracting, the business entity will always have an uphill battle, particularly in relation to an estoppel or waiver argument. As stated by the D.C. Court of Appeals, recognizing these theories would "require the court to breathe life into an illegal bargain."

What is the clear lesson to be learned from this case? Don't treat license requirements lightly. **CE**

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Shoddy Record-Keeping Costs Contractor Its Delay Claim

CONTRACTORS have heard time and again about how important it is to keep detailed and contemporaneous project documentation. Doing so enables their management teams to understand their performance on projects and react with timeliness to challenges. Detailed and contemporaneous records are also needed if a contractor intends to seek recourse from the owner or a subcontractor for project delays or cost overruns.

Despite knowing this, many contractors fall woefully short in this task. They often fail to update schedules, cost reports, and change-order logs. They often fail to provide notification of problems to owners or subcontractors. Any one of these failures can be devastating to claim recovery, as demonstrated by this month's case, *Rustler Construction Inc. v. District of Columbia*.

The Case

The District of Columbia and Rustler Construction Inc. entered into a $5-million contract to reconstruct approximately 0.75 mi of a high-traffic, six-lane highway. The contract was to be completed in 360 days and mandated that four lanes of traffic be maintained through the work area. Rustler encountered several problems that affected its plan.

The first was associated with travel-lane widths. The parties had originally agreed to maintain 9 ft, 4 in. travel lanes throughout construction. When it was later learned that this width could not accommodate buses, the District issued a stop-work order so it could reevaluate the situation. The travel lanes were ultimately widened to 10 ft for bus-restricted lanes and 11 ft for all other lanes. Together these changes narrowed Rustler's work area by more than 6.5 ft.

The reduction in work area impacted Rustler's means and methods in several ways, particularly in terms of equipment usage. For example, Rustler was unable to use a boom truck to install granite curbs, had to place pavement by hand instead of using a concrete paving machine, and had to hand-grade around certain existing utility access panels instead of using its equipment. Additionally, the removal of excavated material took longer because of the restricted space.

Another problem involved the removal of existing catch basins (storm drains) and the installation of new ones. During excavation, Rustler discovered that the catch basins were on top of an active high-pressure gas line. Although Rustler knew that a gas line was in the vicinity, it did not know the exact location. To remediate this problem, Rustler relocated the catch basins into the street and returned at a later time to pour concrete around the basins. According to Rustler, it took the District "a good two months" to instruct Rustler as to how to respond once the issue was discovered.

Another issue involved Potomac Electric Power Co. (Pepco) access panels located along a portion of the reconstructed roadway. The specifications stated that these 41 manholes were abandoned, so Rustler planned to pave over them. Rustler later learned that the manholes were in fact, still in use. To keep them functional, Rustler paved around them rather than over them as it had planned.

The final significant issue involved the placement of a thin strip of asphalt between the new and existing roadbeds in order to allow vehicles to transition smoothly from lane to lane. While creating this tie-in, the parties discovered a several-inch discrepancy between the height of the existing roadway and the new one. The District instructed Rustler to create a wider tie-in than was originally expected. Rustler had to cut down the old roadway and install a much wider strip of asphalt between the lanes. While the District paid Rustler for the direct costs for this, it did not pay additional field overhead.

Rustler submitted a claim for defective specifications and differing site conditions to the District and sought approximately $1.3 million. The matter was ultimately heard by the D.C. Contract Appeals Board, which agreed that Rustler was entitled to recover for all its claims on the above theories. However, the board did not rule on damages and remanded the case back to the parties for negotiation. This proved fruitless, as the District firmly believed that Rustler was entitled to no compensation.

As a result, the board issued a "quantum order" that awarded Rustler an adjustment of $155,481.70 plus interest. Because Rustler's poor record-keeping created a failure of proof, the amount awarded represented the board's estimate of the costs incurred by Rustler for additional tasks and out-of-sequence work. The board emphasized that Rustler did not break down its costs by task, and neither actual costs nor cost estimates were available to provide a reliable basis for calculating damages. Both the District and Rustler appealed this decision to the District of Columbia Court of Appeals.

The Appeal

The court completely affirmed the board's decision, and its analysis can be summarized by the following quote:

> The same flaw—poor record-keeping—permeates all of Rustler's claims. Rustler was unable to recover under a theory of "overall delay" because it failed to submit appropriate evidence to show the extent of delay to items on the critical path. It likewise could not justify the total number of days it requested for additional and out-of-sequence work because it did not keep records detailed enough to prove its claim.

Most instructive about the court's decision was its views on what it takes to prove a delay claim. Citing long-

standing judicial precedent, the court stated that the best way to prove delay is with a critical path method (CPM) schedule. However, Rustler failed to do so. It submitted only four CPM schedules throughout the course of the contract, two of which were given to the District before construction started. The only CPM schedules that Rustler produced after construction began were insufficient to establish the effect any delay had on the critical path.

Because Rustler did not maintain up-to-date CPM schedules and failed to delineate which items were on the critical path, it could not show what effect the District's mistakes had on the schedule for completing those tasks. The court noted that while this deficiency in record-keeping "may not have prevented Rustler from proving its entitlement to an equitable adjustment, we agree with the [board] that it did affect the [damages] award, as it was difficult to quantify the effect the defective specifications and differing site conditions had on the critical path."

The court also pointed out that in the absence of CPM schedules, Rustler could have relied on expert testimony to support its claim for delay damages. Rustler did not use an expert but instead primarily relied on the testimony of its vice president, who prepared the claim. The court found her testimony to be "conclusory," "uncorroborated," and "self-serving."

Rustler also argued that the board should have applied a "lighter evidentiary burden" at the damages stage of the proceeding and that it was only required to "prove the amount with sufficient certainty such that the determination of the amount will be more than mere speculation."

The court found Rustler to be mistaken. While Rustler did not need to prove its damages with absolute certainty, it still had to meet its burden of proving its damages by a "preponderance of the evidence." It failed to do so.

The Analysis

The lessons learned from this case are very straightforward. A contractor's "hands-down" victory on entitlement means virtually nothing if there is inadequate documentation of the damages suffered. It is hard to imagine why a contractor that was presumably delayed and disrupted as much as Rustler was would not have had contemporaneous CPM and project schedules available to show the impact of problems for which the project owner was clearly responsible. **CE**

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Engineer Unknowingly Waives Legal Protection from Lawsuit

SEVERAL STATES have laws in place to protect design professionals from baseless lawsuits. These laws, generally called certificate of merit (COM) statutes, essentially impose a heightened standard on those claiming negligence against architects and engineers. COM statutes require a plaintiff filing a negligence lawsuit to also file an affidavit from another engineer who is willing to testify that he or she has read the complaint *and* that the defendant seems to have committed professional negligence.

Litigation surrounding COM statutes typically concerns the timeliness of a filed affidavit; whether the affidavit was, in fact, required; or whether the engineer supporting the complaint has the requisite credentials. This month's case, however, showcases a dispute over whether the design professionals essentially forfeited the protections of the COM statute through their actions during litigation. The Texas Supreme Court was ultimately asked to decide whether an engineering firm can be determined to have waived its right to require a COM because of its conduct during litigation.

The Case

The disputes in this action arose when Paul and Kim Gosnell hired an engineer, the engineer's company, and an engineering consultant group (referred to collectively in the case as "the engineers") to evaluate and stabilize their home's foundation. The Gosnells alleged that the engineers' work exacerbated the foundation problems, causing significant damage to their residence, and filed a lawsuit against the engineers for breach of contract and tort claims. They did not contemporaneously file a COM, as required by Texas law.

Twenty months after the lawsuit was filed, the engineers filed their original answer, denying the allegations and requesting attorneys' fees. Though a COM had still not been filed by the Gosnells, the parties agreed to a scheduling order that established discovery deadlines and set a trial date. Shortly thereafter, the parties voluntarily participated in mediation to try to resolve the case without further litigation.

When settlement efforts failed, the parties began proceeding in accordance with the scheduling order. As a result, over the course of 18 months, the engineers successfully moved to withdraw and substitute counsel; supplemented their answer with specific denials and affirmative defenses; asked for discovery and responded to discovery requests; and designated expert witnesses. The engineers asked the Gosnells for an extension of the trial date, which the Gosnells agreed to. A few days after the close of discovery, the parties participated in court-ordered mediation, which was unsuccessful.

> DESIGN PROFESSIONALS and their counsel take significant risks in engaging in litigation without raising important procedural defenses.

Just a few weeks before trial, the engineers filed a motion to dismiss the suit with prejudice because the Gosnells had not included a COM when they filed the original lawsuit—1,219 days earlier. The trial court ultimately granted the motion and dismissed the Gosnells' lawsuit with prejudice.

The Gosnells successfully appealed to an intermediate court of appeals, which prompted the engineers to file a petition for review to the Supreme Court of Texas.

The Appeal

The legal issue considered by the Supreme Court of Texas was whether the extent of the engineers' participation in litigation could result in an implied waiver of their right to enforce the COM statute. The court concluded that the court of appeals was correct and that the engineers had been "sitting on their rights" for far too long.

The court explained that although the COM requirement is mandatory, it can be waived, even if the statute does not provide a deadline for asserting the remedy. Though a waiver comes down to a question of intent, that intent need not be explicit or express, the court ruled. In other words, a party's conduct sufficiently demonstrates its intent to waive a right if, in light of the "surrounding facts and circumstances," it is "unequivocally inconsistent with claiming" that right, according to the court's decision. To clarify its position, the court outlined that the universal test for implied waiver by litigation conduct is whether the party's conduct—by action or inaction—clearly demonstrates the party's intent to relinquish, abandon, or waive the right at issue.

From the court's perspective, there were several factors weighing in favor of finding an implied waiver in this case, namely that the engineers engaged in discovery in attempting to learn more about the case; sought affirmative relief from the trial court, particularly summary judgment; and delayed raising the issue as a defense until what the court referred to as "the eve of trial." These factors guided the court's analysis that while the Gosnells failed to file the affidavit, the engineers impliedly waived that requirement by "substantially invoking the judi-

cial process contrary to their statutory right to dismissal." The court's decision also reflected concern over prejudice to the Gosnells:

> While the Engineers were sitting on their rights, limitations expired on the Gosnells' contract claims. For two years after filing suit and in the four months after the Engineers had filed their original answer, the Gosnells could have cured the pleading defect by refiling the lawsuit. Due to unexplainable, and unexplained, delay, they are now time-barred from doing so.

This opinion, however, reflected a divided court. In a lengthy dissent, several justices argued that the language of the statute gave the engineers the right to obtain a dismissal of the Gosnells' claims at any time during this litigation process. The dissent also argued that the court should not have held that the engineers impliedly waived that right unless that conduct clearly demonstrated that they knew about and intended to relinquish that right. Because the statute did not require the engineers to seek dismissal early in the process or prohibit them from engaging in litigation before seeking dismissal, none of their conduct clearly demonstrated an intent to relinquish their right to obtain the dismissal whenever permitted by the statute, the dissent explained.

The Analysis

The takeaway from this case is clear: design professionals and their counsel take significant risks in engaging in litigation without raising important procedural defenses. In this case it was a COM defense. In another case, the defense might be that the litigation should be dismissed because the contract calls for disputes to be resolved by arbitration. Delay may not result in defeat, as evident from the dissent in this case. But why wait and give someone an argument that you sat on your rights or waived your defenses?

Readers are also advised to be mindful that COM statutes vary considerably by state. In some states, the statute simply calls for the case to be dismissed without prejudice, as opposed to it being dismissed outright. The plaintiff can then file a new complaint (with the required COM), assuming the time permitted by the statute of limitations has not elapsed. Make sure you are guided by competent, experienced counsel with a strong understanding of the state laws governing the disposition of the case. **CE**

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Design-Builder Loses in Attempt to Sue Bridging Designer

MANY PUBLIC-SECTOR owners procure their design-builders by using "bridging" documents to express the owner's desired end result, typically through prescriptive design requirements. Proposers are expected to use these documents to develop their technical and price proposals, and the final design will be based on these documents.

Though bridging documents are often used this way, they create some challenges. One of the benefits of using the design-build method is that design-build teams can find innovative ways of meeting the owner's goals. By prescribing the design in its bridging documents, the owner effectively stifles this creativity. Another benefit of design-build is that the owner can substantially limit its exposure to claims for design defects. However, when an owner uses bridging documents, it can erode this benefit if those documents contain defects that the design-builder did not find until after the contract was awarded. As we have reported in some of our earlier columns, several courts have applied the *Spearin* doctrine to hold owners liable for the consequences of these design defects, even when contract language attempts to shift this risk to the design-builder.

Because bridging documents are typically developed by a design professional retained by the owner, questions arise as to what liability the bridging designer should have for defects in these documents. There are only a handful of cases that address this important issue, and this month's case, *Arco Ingenieros,* S.A. *v.* CDM *International*, is one of them. It considers this question from the perspective of the design-builder's right to sue the owner's bridging designer under a third-party beneficiary legal theory.

The Case

After Tropical Storm Ida devastated El Salvador in November 2009, the U.S. Agency for International Development (USAID) provided $25 million in funding to rebuild damaged infrastructure. CDM International Inc. (CDM), which had a master contract with USAID to provide architecture and engineering (A/E) services for projects worldwide, was given a task order to create design-build bridging documents for the El Salvador project. The task order required CDM to, among other things, create 30 percent design documents that would be used to procure design-build contractors.

> IN ASSESSING THIS issue, the district court distinguished between "intended" beneficiaries and "incidental" beneficiaries.

USAID solicited proposals from design-build contractors for eight schools and one health clinic, with the solicitation requiring that final designs be based on CDM's preliminary designs. USAID ultimately engaged Arco Ingenieros, S.A., one of El Salvador's largest construction companies, to serve as design-builder for the project.

Simply stated, the project did not go well. It resulted in USAID assessing liquidated damages against Arco for delays, and withholding payment of $9 million in invoices. Arco attributed its performance problems to CDM's preliminary designs, which Arco alleged contained numerous defects and errors, and constituted substantially less than 30 percent of the final designs for the facilities. Arco alleged that the school plans did not comply with codes and did not account for subsurface conditions, and that the clinic designs did not address flooding requirements or bioinfectious waste disposal, and failed to note that the annex to the clinic was structurally unsound.

Arco claimed that these errors caused it to spend significant time redrawing the designs, obtaining new permits, conducting additional excavation and soil compaction, and demolishing more structures than planned. It also claimed that CDM delayed the project by failing to approve technical documents in a timely way and used outdated technical specifications.

Arco sued CDM in Massachusetts federal district court on a variety of counts, one of which was a breach-of-contract claim based on Arco being a third-party beneficiary of CDM's task order with USAID. CDM moved to dismiss the claim on the grounds that there was no contract between the parties and that Arco was not an intended beneficiary of the contract between it and USAID.

The Decision

In assessing this issue, the district court distinguished between "intended" beneficiaries and "incidental" beneficiaries. The court stated that only an intended beneficiary can sue to enforce a contract. A third party qualifies as an intended beneficiary only if the language and circumstances of the contract show that the parties to the contract clearly and definitely intended the beneficiary to benefit from the promised performance. If there is no demonstrable intent in the contract to benefit a third party, then that third party is merely an "incidental" beneficiary with no rights to sue under the contract.

The court concluded that the lan-

guage of the task order did not indicate that USAID and CDM intended to benefit the design-build contractor (Arco) with respect to the task order. The express purpose of the task order was for CDM to "provide professional architecture and engineering (A/E) services for the technical tasks associated with USAID's Tropical Storm Ida Reconstruction Project," the court stated. The court found nothing in this language to suggest that the parties intended any benefit to Arco, and that all of the tasks were to benefit USAID and its reconstruction project.

The court was not persuaded by Arco's argument that CDM's preliminary designs were to be used by Arco to bid on and complete the reconstruction. While Arco was required to use these preliminary designs, the purpose of creating these designs was to benefit USAID in its reconstruction efforts—not to benefit Arco.

The court noted that construction projects generally involve multiple contracts that are "inevitably intertwined" to ensure the project is completed in a timely manner and according to the agreed-upon specifications. It cited case law from other jurisdictions finding that "this interrelationship by itself does not justify imposing third-party beneficiary duties." Many of these other cases rejected third-party beneficiary claims made by contractors against architects or engineers who separately contracted with the project owner.

The Analysis

As the court noted, many contractors have attempted to use third-party beneficiary status to recover from A/Es that provided defective design documents on design-bid-build projects. The CDM case is the first reported decision of which the authors are aware in which a design-build contractor has used this theory in an attempt to recover against a bridging designer.

The lesson is clear. Unless the contract itself specifically conveys the notion that the design-builder is an "intended" beneficiary of the bridging designer's services, the design-builder cannot sue on a third-party beneficiary status.

This case involves a number of intriguing issues for those involved in design-build projects. Arco still has six other counts that remain live against CDM. How will these be resolved? Did Arco sue USAID under a *Spearin* theory, and if so, will that survive? Unless this case settles, we will likely report on these issues in future columns. **CE**

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