Contents

Volume 38 Number 2, Spring 2018

3 Notes from the Editor
   Michael A. Branca

4 Comments from the Chair
   Wendy Venoit

5 Report of the Diversity Committee
   David J. Theising

6 Join Division 3 and Make the Most of Your Forum Membership
   Mark W. Mercante

7 The Misadventures of Shared Design Risk: Managing Design Risk and Responsibility on Federal Design-Build Projects
   Shiva S. Hamidinia

14 Opening Communication Lines: Evolving Project Delivery Methods to Promote Collaboration
   Justin L. Weisberg and Raymond M. Krauze

22 Key Considerations for the Use of Peer Reviews in Construction
   Jaimee L. Nardiello and Matthew C. Dials

25 Avoiding Pitfalls of Permit Sets
   Kendall Woods and Lance Parker

31 Construction Bills: Recent Changes to Construction Laws
   Asha A. Echeverria and Brian R. Zimmerman

32 Hard Hat Case Notes
   Matthew J. Ninneman and Lauren S. McLaughlin

An index to past issues of this journal appears in the Forum’s website (under Publications). Copies of past articles may be obtained through Westlaw and Lexis/Nexis. Westlaw contains selected articles from 1987, and its searchable database identifier is CONSLAW. The toll-free help line for Westlaw is 1-800-ref-atty. The Lexis database goes back to 2001; its library is ABA and the file is CONSTL. The toll-free help line for Lexis is 1-800-543-6862.

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The Spring 2018 edition of the *Construction Lawyer* is brought to you courtesy of Division 3, Design. At the beginning of my tenure as editor in 2015, I invited the Forum’s 13 divisions to adopt part or all of an edition and to identify and develop the content for the edition through members of the division. I saw this as a win-win: the divisions would have an opportunity to showcase their members and their subject matter, and Forum membership would be treated to great theme-based editions. This is the fourth division-adopted edition (Division 13, Spring 2016; Division 8; Fall 2016; and Divisions 6 and 10, Winter 2017). With respect to this edition, I owe a particular debt of gratitude to Erin Banks, who served as lead copy editor within Division 3. Not only did Erin spearhead the identification of articles and authors, but she also oversaw an internal peer review of the completed articles to make sure that the articles were top-notch upon delivery to the *Construction Lawyer* editorial staff. Please thank Erin when you see her in New Orleans. Nearby, the current chair of Division 3, Mark Mercante, offers a window into the division’s activities, whose mission is to serve the design community and its legal practitioners.

The first of four articles from Division 3 is provided by Shiva Hamidinia, *The Misadventures of Shared Design Risk in the New Design-Build World: Strategies for Managing Design Risk and Responsibility on Federal Design-Build Projects*. Shiva starts her analysis by pointing out that the federal government is the largest purchaser of construction services in the world and that the federal government is using the design-build project delivery method with ever-increasing regularity. Unlike a commercial owner in the private sector, the federal government owner does not enjoy the complete flexibility of a commercial owner in the private sector, the federal government owner does not enjoy the complete flexibility to develop the design-build delivery model on a case-by-case basis tailored to the specific project. Rather, the federal government owner must comply with the applicable rules contained in the Federal Acquisition Regulation (FAR). Shiva notes that, even though design-build considerably alters the traditional roles and obligations of the government, contractor, and designer, the government’s incorporation of traditional design-bid-build FAR clauses and the interjection of design control contravene many of the cost and time-saving benefits of the design-build delivery method. These are the hallmarks of the troubled design-build project: the government attempts to exert the same type of control over the design process as it does on a traditional project, meanwhile seeking to allocate all design risk and failures to the design-builder.

Our second article, *Opening Communication Lines: Evolving Project Delivery Methods to Promote Collaboration*, is authored by Justin Weisberg and Raymond Krauze. Justin and Raymond survey the field of alternative project delivery methods, which have sprouted in the continuing effort to find the sweet spot that produces a project on time and in budget, without claims and disputes. The authors take us through the design-build and construction management models and also one of the newest models, integrated project delivery, which changes everything by placing the owner, contractor, and designer in privity of contract. The authors also discuss the use of building information modeling (BIM), describe how many contracts do not adequately specify rights and responsibilities with respect to the BIM model, and recommend that the parties to a project using BIM insure a mutual understanding regarding the BIM process and the purposes and expectations of BIM for a given project.

Third up is *Key Considerations for the Use of Peer Reviews in Construction* by Jaimee Nardiello and Matthew Dials. Jaimee and Matthew define a peer review as the work of an independent design firm with expertise in a particular discipline to identify errors or omissions in a design, or to remedy a troublesome detail or component of the design, during the design phase of the project. The purpose: to assist owners and design professionals in completing construction projects on time and on budget, while limiting the number of requests for information and change orders, and thereby claims and disputes. I found this article to be the perfect complement to the earlier discussions involving design-build, as contractors jumping in to such projects are also searching for mechanisms to avoid defects and avoid claims and disputes.

Batting cleanup are Kendall Woods and Lance Parker, with *Avoiding Pitfalls in Permit Sets*. A set of drawings that is only intended to be sufficient for obtaining a permit—or a “permit set” as they are commonly called—is almost always insufficient to properly construct a sound building. According to Kendall and Lance, this is where problems for the design professional often arise. The origin of this problem is the effort by owners to minimize the cost of design by contracting for only such services

(Continued on page 35)
**COMMENTS FROM THE CHAIR**

**The Forum: A Value Proposition**

*By Wendy Venoit*

In this day and age, with so many organizations and events competing for marketing dollars, the Forum has been very successful at recruiting and retaining our members, getting people to our national programs in droves (with record-breaking attendance at recent events), and increasing sales of Forum publications. So, what is the Forum’s secret sauce? We “do it right” largely because of our outstanding members and staff (Tamara Harrington and Lisha Morris) and the time and effort they put into providing value to our members and truly making the Forum a value proposition instead of an empty cost for our member firms.

Indeed, many firms have moved away from the traditional model of simply enrolling all attorneys in the ABA and then letting them find their way into sections, divisions, and forums. Now, attorneys themselves identify where they can get the most value and then allocate their marketing budgets and time accordingly.

What have we done differently, and why are we successful? First, we are focused on the financial and market realities that our members are facing. Again, we understand the ever-increasing importance of “value, value, value” for the dollar. To that end, we have tried to up our game with our programming so that it is not just “check off the box” CLE, but informative, cutting edge, and useful to our practices. For example, at this year’s Midwinter meeting, we focused an entire program on issues surrounding subcontracting, managing subcontractors and suppliers, and managing the risk when subcontracting on projects. That theme-based program brought record-breaking attendance for a midwinter meeting, demonstrating that we not only pick good venues (Fort Myers in January) that people want to come to, but continue to produce valuable CLE programming that isn’t available elsewhere. Our annual meeting, coming this April to New Orleans, also will bring something entirely new: “a mini-MBA Program for the Construction Lawyer.” How often are we told by clients that we need to understand their business? Now, the Forum is giving its members the unique opportunity to do exactly that. Attendees will hear from both in-house and outside attorneys and business partners about the “business” of construction and how it plays into our legal representation and advocacy on behalf of our clients.

But CLE is not the only thing that the Forum does. We have really stepped up our game in the past two years with our books and publications. *The Construction Lawyer* and *Under Construction* continue to provide us timely articles on key legal issues that can be used regularly in our practices. For those of you who didn’t know, *The Construction Lawyer* articles are available not only on the Forum’s Knowledge Base (available to all members on the Forum website), but also on Westlaw in the construction module. In addition, our book sales have rebounded with the release of several new books in recent months. You will notice that the Publications Committee has focused on producing books that are valuable resources to our practices and not just legal treatises to be placed on a shelf and dusted off every few years. These are handbooks, form books, guides to contract documents, and the like, that will find their way onto the corner of our desks and not relegated to the back reaches of the firm’s library (if your firm still has one).

And, of course, the Forum provides valuable networking opportunities. This is not just attorneys marketing to other attorneys, although that is part of it. Rather, the Forum provides networking with in-house and outside counsel across the country, exposing our members and attendees to people and opportunities that they could not find in their local jurisdictions or local bars. Indeed, referrals and business opportunities are commonplace within this group and, as many would say, far outweigh the cost of membership. The Forum also presents opportunities to increase our members’ visibility in the industry through speaking, writing, and leadership opportunities within the group. Personally, my involvement in the Forum was a large part of “building my brand” within the industry.

Finally, I would be remiss not to highlight the tremendous personal satisfaction Forum involvement can bring, not only through speaking, writing, and leadership opportunities, but also through the network of friends we make. Our Forum friendships can be life-long, often surpassing the longevity of friendships we made in law school and at our firms. Forum friends not only help us with our careers and legal needs, but provide guidance and support when we need it in our personal and professional lives.

Wendy Venoit is chair of the ABA Forum on Construction Law and a partner in the Construction Practice Group of Hinckley, Allen & Snyder LLP in Boston, Massachusetts.
My New Satellite Radio and the Guy Sitting Next to Me at the Bar Last Friday Night

By David J. Theising

When I bought a new car recently, it came with a complimentary trial subscription to satellite radio. I must admit, I really enjoyed being able to select from among hundreds of stations to listen to the music I preferred, the news the way I liked it reported, and my brand of comedy. I enjoyed it so much that when the trial subscription expired I signed up for an extended subscription so I could continue to enjoy my tastes in music, comedy, and the news.

As I write this, my wife has been out of town, so last Friday night I stopped on the way home from work for a beer and some comfort food at a local watering hole called “The Friendly Tavern.” The name says it all. As I’m listening to the gentleman seated next to me at the bar tell stories, I discover that he is somewhat of a local celebrity, a retired DJ from a local radio station that played Top 40 music during the ’60s. He explained how the playlist consisted of vinyl 45 rpm singles hung from pegs in the broadcast booth. The No. 1 record had a peg, Nos. 2 and 3 shared the next, Nos. 4, 5, 6, and 7 the next, and so on. Moving in a pattern through the pegs, playing the next (or only) record on each peg, ensured that the most popular songs got the most play. He also mentioned that, because his listeners only heard his voice over the radio, few people except his personal friends ever actually recognized him in public as a radio personality.

On the drive home, as I listened to my favorite song on satellite radio, I was struck by two thoughts. I realized that the beauty of the DJ’s playlist was that it compelled all of us to listen to everybody else’s favorite song in order to hear our own favorite song. Now, technology ensures that we never have to listen to anything we don’t want to hear. And that’s true for more than just music. We now seem to live in a world where we’d rather unfriend than understand a person with whom we disagree or differ.

It also occurred to me that the gentleman at the bar might not have been as popular as he was in the ’60s if people had known him personally and realized that he is gay. But as clear as his sexual identity became during the course of conversation, sitting next to him in person at the bar, swapping stories and laughing while we ate, made that part of his identity completely irrelevant to me and everyone else with whom he interacted. Rather, his unique background and identity added far more to the evening than any one of the rest of us.

We aim for the same in person result at the national meetings of the Forum. We know that the presence of diverse individuals makes all of us better, both personally and professionally. We also know that, once a person attends one of our meetings, it is more likely than not that they will return for future meetings. Hoping to capitalize on this, the Forum Diversity Committee established a new Member Bring a Diverse First Timer initiative. Under this program, the Forum will waive the registration fee for the first ten members who register for any of the Forum’s national meetings and who also register and bring a diverse lawyer to his or her first national meeting (a “first timer”), whose registration fee will also be waived. So, if you have never attended a national meeting (or even if you have), you can get in free if you bring a diverse individual who has never attended a national meeting, who will also get in free. It could be a diverse young associate in your office, or a diverse lawyer on the other side of a case. Maybe, since you’re getting in free, you might even offer to pay the reasonable airfare of the diverse First Timer, leaving them to convince the managing partner of their firm to pay only for their hotel room to attend a world-class CLE program and network with hundreds of other construction lawyers from across the country to get referrals.

I took advantage of this program for the 2018 annual meeting of the Forum, and it more than paid for my extended subscription to satellite radio.
Join Division 3-Design and Make the Most of Your Forum Membership

By Mark W. Mercante

Division 3 is Design. Focusing on the duties/liabilities, risks/rewards, and problems/needs of each of the parties involved in the design process, the mission of Division 3 is to serve the design community and its legal practitioners.

Division 3 has a long history of generating informative presentations and written content for Forum national meetings, regional programs, distance learning programs, and publications. Multiple Division 3 members have served as national program organizers and chairs, and are frequently called upon to share their expertise in a myriad of formats. Division 3 has published 50-state surveys on design-related subjects of interest to the legal community including, recently, a survey on Firm Licensure Requirements for Architects and Engineers. Division 3 is currently working on a new 50-state survey addressing Sealing Requirements for Design Professionals and Responsible Charge. That survey will be published in conjunction with the Forum’s April 2018 Annual Meeting in New Orleans.

The Design Division is open to all Forum members and provides a number of participation opportunities:

- Division 3 holds a monthly telephone conference on the first Wednesday of each month. Approximately half of our calls regard timely “Hot Topics” related to design professional representation, with particular emphasis on current case law, legislation or other developments impacting the design community. Recent topics have included the effects of technological advances on permitting, case law on the duty to defend, legislative and judicial erosion of the statute of repose, and document retention and document destruction policies and practices for architects and engineers. All are invited and encouraged to attend our monthly calls at 2pm Eastern (Dial-in: 866-646-6488, Pass Code: 903-406-5734#).
- Division 3 meets in person at each of the Forum’s three national meetings. Typically, that includes either a breakfast or lunch meeting with speakers, as well as a dinner for fellowship and networking. In-person lunch and breakfast meeting topics relate to both Division 3’s design focus as well as the larger meeting theme. Topics have included Designing for Coastal Resistance, Round Table Discussions with In-House Design Firm General Counsel, and Modular Design and Construction.
- Another Division 3 activity—and a unique opportunity for fellowship with the design community we serve—is our outreach program to local design professionals during the Forum’s Annual Meeting. In conjunction with the Forum’s Spring Meeting, Division 3 partners with local design professional organizations to host a social hour and continuing education opportunity for engineers and architects. These events have proven very successful in generating interest within the local design communities and provides our members with direct interaction with local practitioners.
- Division 3’s Steering Committee also meets annually for its Planning Retreat in the home town of its current Chair, typically during the month of September. That meeting is open to all Division members. The Planning Retreat provides an opportunity to discuss and plan events, programs and projects for the upcoming Forum-year.

For more information about our monthly calls or other Division 3 business, please check Division 3’s webpage or contact Division Chair Mark Mercante at mmercante@bakerdonelson.com. By joining our Division 3 Listserv (the link to which can be found on our Division webpage), you will receive updates and invitations associated with our national meeting events, as well as our monthly call agendas and hot topic invitations. You can also find on our webpage links to our past Hot Topic call invitations and meeting agendas, as well as links to various resources related to a design-focused construction practice.

Mark W. Mercante is a shareholder in the Mandeville, Louisiana, office of Baker Donelson and leader of the firm’s Construction Group.

Shiva S. Hamidinia

The federal government is the largest purchaser of construction services both domestically and internationally. With the passage of the Federal Acquisition Streamlining Act of 1994 and the National Defense Authorization Act of 1996, the design-build project delivery system (D/B) has been used to increase the frequency of design-build project delivery systems since the mid-1990s. D/B delivery is one of the federal government’s top choices for international and state-side transportation and reconstruction projects. A large number of the federal government’s solicitations for construction published online as federal business opportunities utilize some element of D/B project delivery, with a significant portion set aside for small business concerns. D/B project delivery market share and market studies have reported the highest share of D/B project delivery occurring in military work for projects above ten million dollars in value at eighty-one percent market share. An uptick in construction solicitations is predicted for fiscal year 2018 and beyond with President Donald Trump proposing one trillion dollars in public-private investment to rebuild U.S. infrastructure. These projects will require construction innovation and fast-tracking to provide the best value for the American taxpayer.

As federal agencies are asked to do more with less, including manpower and funding, it is no surprise that the government sees value in avoiding the fragmented processes of design and construction. However, D/B projects are not free from the issues that plague traditional design-bid-build projects. Defective specifications, a faulty design, or issues with design performance can upset any construction project. Experiencing these issues on a D/B project for the federal government can have dire consequences for a contractor, given the merger of design functions to a single point of responsibility: the prime contractor. Federal Acquisition Regulation (FAR) clauses incorporated into a D/B solicitation and federal administrative and judicial decisions address this scenario in various contexts. Reviewing the FAR and decisions allocating design risk, this article recommends pre-award and other strategies for contractors to mitigate exposure.

I. New Roles Under the Design-Build Project

Under the traditional approach of design-bid-build construction, the government first contracts with an architect/engineer (A/E) to produce full working technical specifications and drawings. After the A/E completes the design for the project, the government then solicits bids from general contractors to perform the project based on the A/E’s detailed drawings and specifications. This approach is time-consuming because separate procurements are required for both the design and the construction of the project.

D/B alters this sequence and the roles and responsibilities of the parties, allocating both design and construction responsibility to one prime contractor. The Clinger-Cohen Act codifies a two-step procurement process for D/B projects. FAR parts 15 and 36 govern the D/B procurement process. The government may negotiate a D/B project on a sole-source basis with small disadvantaged business entities participating in the U.S. Small Business Administration’s Section 8(a) Business Development Program.

During Phase One of the procurement, D/B firms must submit a preliminary offer. The Phase One evaluation process emphasizes the D/B offeror’s technical approach and technical qualifications, such as specialized expertise or technical competence, capability to perform, past performance, and other factors established by the procuring agency. Cost/price may not be considered during Phase One and no more than five offerors may be invited to participate in Phase Two, unless it is in the government’s best interest to do so. Only those offers that are selected as the most highly qualified are invited to submit a detailed proposal for Phase Two.

In Phase Two, the proposals are evaluated under FAR part 15 and the award is based on a best-value determination. Phase One evaluation factors are still considered, with the addition of cost or price, usually as the least
II. Playing Your Hand Right: Risk Allocation in Design-Build

Managing the risks of design defects begins the moment the government issues its solicitation. This is the offeror’s opportunity to review the contract documents, ask questions, form the D/B team, and prepare a technical proposal that satisfies the government’s performance specifications. In its request for proposals (RFP) for a D/B project, the government is required to describe how it wants the project to perform, rather than how it must be designed. The government is obligated to spend taxpayer dollars only on bare necessities, not desires. Agencies are mandated to specify their needs using market research to promote full, fair, and open competition, and limit the use of restrictive provisions or conditions to the extent necessary to satisfy the needs of the agency or as authorized by law.

FAR 15.201 encourages the exchange of information among all interested parties. These types of exchanges help to identify and resolve terms and conditions, the acquisition planning schedule, and the feasibility of the requirements. FAR 15.201 exchanges also identify the suitability of the proposal instructions and evaluation criteria, including the approach for assessing past performance information, the availability of reference documents, and other industry concerns or questions. This advisory multistep process allows the agency to publish a pre-solicitation notice that provides a general description of the scope or purpose of the acquisition and invites potential offerors to submit information or questions. This allows offerors to assess their potential as viable competitors.

The government must include sufficient information in its solicitations to allow offerors to compete intelligently and on an equal basis. A procuring agency must provide specifications that are free from ambiguity and defects and that accurately describe the agency’s minimum needs. The solicitation also must clearly advise D/B offerors of the basis upon which their proposals will be evaluated. Contracting officials may not announce in the solicitation that they will use one evaluation scheme and then follow another. It is imperative that the procuring agency informs offerors of any changes to plans for evaluations and provides offerors an opportunity to submit proposals on the updated basis.

D/B offerors can utilize the question and answer process (Q&A) after a solicitation is issued to gain a better understanding of the government’s design and performance specifications. If there are obvious conflicts between the solicitation, amendments, instructions, and provided answers, contractors should seek clarification at the pre-solicitation stage. A challenge to the sufficiency of the agency’s responses to questions is essentially a challenge to the sufficiency of the solicitation’s terms. Therefore, supplemental information, such as the agency’s pre-award Q&A responses, which are in writing, signed by the contracting officer, and provided to all prospective offerors during the course of the procurement, act as an amendment to the solicitation and effectively become part of the solicitation’s requirements.

The procuring agency’s refusal to clarify or commit to a firm answer regarding ambiguities in the contract documents can serve as the subject of an agency-level protest or protest before the U.S. Government Accountability Office (GAO). The agency is required to provide offerors adequate time to bring a challenge to a solicitation containing a patent error or ambiguity prior to the award of the contract.

FAR 33.103 also encourages prospective offerors to protest apparent improprieties within solicitation terms in writing to the contracting officer prior to bid opening or the closing date for receipt of proposals. When an agency protest is filed prior to contract award, the award is generally suspended pending resolution of the protest. Agencies are required to use their best efforts to resolve a pre-award protest within thirty-five days. If the agency’s resolution is not satisfactory, the offeror can appeal the agency’s adverse determination to the GAO within ten days or file a civil action at the U.S. Court of Claims.

The D/B offeror’s response to a solicitation can constructively amend the contract if the response varies from government specifications but is accepted by the government. For example, in Marcon Engineering, Inc., the U.S. Corps of Engineers conducted a task order competition on a low-price/technically acceptable basis and awarded the contract to Marcon after determining that its proposal was technically acceptable. The solicitation contained a requirement that a fence be built within a sixty-foot-wide strip of land and be capable of handling a 100-year flood. The Armed Services Board of Contract Appeals found that these detailed requirements were impossible to meet and found further that the contractor
had submitted a design (that the government accepted) that deviated from the sixty-foot-wide requirement. The board concluded that a constructive change had occurred. Marcon’s proposal contained a detailed description of how it would perform the work materially different from the government’s specifications in the solicitation. The board held that by determining that the technical proposal was acceptable, the agency had agreed to the deviations and was bound by them.

Similarly, in Sherman R. Smoot Corp., the Armed Services Board of Contract Appeals, in a firm-fixed-price D/B project to renovate, design, and construct certain buildings at the Washington Navy Yard, denied the contractor’s claim for the additional cost of supplying the brand-name lighting mentioned in its proposal rather than cheaper lighting that would satisfy the government’s requirements. The solicitation provided for “greening” opportunities that would have permitted different light fixtures. The contractor interpreted the contract to allow the contractor to implement the “greening” changes after award. The contracting officer rejected the contractor’s proposal to provide light fixtures different from those specified in the contractor’s proposal and incorporated into the contract. The board agreed with the government, concluding that the contractor was required to provide the materials and items it submitted with its proposal at no extra cost to the government.

III. Failure to Adapt: Going off the Traditional Script on the Design-Build Project

There are a number of variations to the D/B project, all of which require the government to relinquish control of the detailed design of the project. In each of the variations of D/B, it is usually during the bid phase of the procurement that the government develops its design (up to a certain percentage) and performance requirements for the project.

A peculiar downfall of federal D/B contracts is that there are no FAR clauses specific to D/B governing the actual performance of the contract. The government often will incorporate standard FAR clauses under subpart 52.236, despite the fact that these clauses specifically contemplate a traditional design-bid-build project.

For example, FAR 52.236-21, Specifications and Drawings for Construction, requires the D/B contractor to promptly report discrepancies in the drawings to the contracting officer (who is required to promptly make a determination in writing) even though the D/B contractor is supposed to be the single point of responsibility for determining design and construction direction on the D/B project. The clause further provides that any shop drawing variations from the contract requirements be independently described in writing, separate from the drawings at the time of submission. If the contracting officer approves the variation, the contracting officer must then issue a contract modification, unless it is a minor change. This clause treats the D/B contractor as a traditional general contractor, requiring the D/B contractor to report to the contracting officer any design discrepancies and to await the government’s design direction. While this clause provides D/B contractors some relief for ambiguities in the government’s contract documents, this relief only extends to discrepancies that were not obvious when the D/B contractor submitted its bid. This FAR clause does not contemplate the phased nature of design and construction on D/B projects and the government’s surrender of the design responsibilities to the D/B contractor to achieve performance standards.

Another FAR clause included in D/B contracts is FAR 52.236-23. This clause provides that the D/B contractor is jointly and severally liable for any design errors or omissions and must correct or revise errors or deficiencies in the design without additional compensation. The D/B contractor usually provides a one-year warranty providing that the construction work performed under the contract conforms to the contract requirements and is free from any defects in equipment, material, or design. The D/B contractor is required to correct any errors or deficiencies in the designs, drawings, and specifications, applying a negligence standard for the performance of design duties. Subpart (b) of FAR 52.236-23 further provides that the government’s review, approval, acceptance, or payment for the services required under the contract does not operate as a waiver of the government’s contractual rights or any cause of action arising out of contract performance, and that the contractor remains liable in accordance with applicable law for damages caused by negligent performance of any of the services rendered.
Defining the scope of the project is one of the most important ways of ensuring that the government receives a completed project that meets the government’s needs.

Brunson argued that the Corps actively participated in the design through its required review and approval process by listing recommended fabrics to be used and by insisting on the use of certain cables, and any defect in the design was readily apparent during the Corps’ inspection of the construction. Despite the government listing materials that could be used to perform the contract, relying on FAR 52.236-23, the board held that the government review, approval, and acceptance of the contractor’s design services did not relieve the contractor from liability for all damages to the government caused by contractor’s negligent performance of those services. With respect to the Corps’ monitoring of the construction, the board found that the Corps inspected the structures for compliance with the contract plans, drawings, and specifications—not for the purpose of identifying design defects.

Even though in *Brunson* the government specifically listed materials that could be used to perform the contract, the board held that the government was relieved of any liability that the D/B contractor’s decision to use any of those listed materials would produce a catastrophic result. Regardless of the unsuitability and approval of a material suggested by the government for use on the project, because the government did not expressly direct use of that particular material, the D/B contractor retained ultimate responsibility for its failure.

**IV. Identifying Design versus Performance Specifications**

Notwithstanding that the government does not provide 100% developed detailed design specifications for a D/B project, it is still required to develop a scope of work that defines the project and states the government’s minimum requirements, which may include criteria, preliminary designs, budget, and schedule and delivery requirements. Government solicitations must contain adequate information to allow contractors to compete intelligently and on an equal basis by providing clear and unambiguous specifications. The D/B contractor is entitled to rely on the accuracy of government-furnished design specifications and design elements included in performance specifications.

The government’s specifications and drawings must be reasonably accurate and suitable. Whether a specification is a design or performance specification depends upon the obligations imposed by the specification, not upon the label given to it. Contracts may have both design and performance characteristics. Performance specifications generally “set forth an objective or standard to be achieved, and the successful bidder is expected to exercise his ingenuity in achieving that objective or standard of performance, selecting the means and assuming a corresponding responsibility for that selection.”

Design specifications, set forth in detail the materials to be employed and the manner in which the work is to be performed, and the contractor is “required to follow them as one would a road map.”

For example, in *Acquest Government Holdings U.S. Geological, LLC*, the Civilian Board of Contract Appeals held that it could not rule on summary judgment as to whether the government’s thirty percent developed drawings given to the contractor for “design intent only” were detailed specifications or performance specifications because the contract was unclear and included language requiring the contractor to obtain government approval before deviating from the detailed requirements in the drawings.

In *J.E. Dunn Construction Co.*, the General Services Board of Contract Appeals held that, notwithstanding the presence of performance requirements in the specifications, the aluminum mullion specifications included in an architect’s drawings for the fabrication and installation of a glass curtain wall at issue were primarily design in nature. This dispute involved a D/B contractor that was unable to construct a glass curtain wall within the criteria identified in the contract. The contractor alleged that the specifications were defective. In response, the government argued that the drawings were performance specifications and the contract language indicated they were only intended to be diagrammatic. The board disagreed. Because the contractor’s discretion was limited to the requirements indicated within the drawing details, with very little latitude to make changes, the schematics that led to the impossibility of performance were design specifications for which the government was liable. If specifications are mixed, the board will test each portion of the specification to determine which party is responsible.

D/B contractors are required to perform omitted details of work necessary to carry out the intent of the
drawings. The D/B contractor only can recover for a
constructive change when the government’s contract design
specifications contain errors or omissions that signifi-
cantly hinder performance.58

V. Recognizing Patent versus Latent
Ambiguities in the Solicitation
Defining the scope of the project is one of the most
important ways of ensuring that the government receives
a completed project that meets the government’s needs.
The Boards of Contract Appeals will give reasonable
meaning to all parts of the contract in a way that will
not render any portion meaningless.59

The general rule for choosing between competing
interpretations of ambiguous contract language is contra
proferentem, which requires that ambiguities be con-
strued against the drafter.60 The exception to this rule is
when ambiguities are so patent and glaring that it is
unreasonable for the D/B contractor to not discover
and inquire about them.61 Contractors have a duty to
inquire as to inconsistent specifi cations, which include
patent—that is, obvious or glaring—defects.62 The D/B
off eror must protest any improprieties in a solicitation
that are apparent prior to bid opening or the time set for
receipt of initial proposals.63 An apparent deficiency is
based on an objective test and asks whether a reasonably
competent off eror acquainted with all the surrounding
circumstances would fi nd the defects within the gov-
ernment specifi cation “apparent” from the face of the
solicitation.64

For example, in Brantley Construction Co., Inc.,65 the
Armed Services Board of Contract Appeals denied an
appeal of a contractor’s claim for equitable adjustment
for an emergency generator that was not specifi ed in
the specifi cations but was indicated on the drawings.
The concurring opinion held that evidence of a con-
tractor’s or subcontractor’s awareness of an omission
of an emergency generator in the government’s technical
specifi cations pre-bid meant that an inquiry should
have been made by the contractor to resolve any ambi-
guity. The majority opinion specifi cally referenced FAR
52.236-21(a), “Specifications and Drawings for Con-
struction,” required to be included in most fi xed-price
construction contracts that exceed the simplified acquisi-
tion threshold. This clause states that “[a]nything
mentioned in the specifi cations and not shown on the
drawings, or shown on the drawings and not mentioned
in the specifi cations, shall be of like effect as if shown
or mentioned in both.” The clause further provides
that “[i]n case of a difference between the specifi ca-
tions and drawings, the specifi cations shall govern.”66
However, “[i]n case of a discrepancy in the fi gures in
the drawings or in the specifi cations, the matter shall
be promptly submitted to the Contracting Officer, who
shall promptly make a determination in writing.”67
Based upon the order of precedence in this FAR clause,
the board held that there was no ambiguity or conflict
in the government’s contract documents and the con-
tractor should have known that the project required an
emergency generator to be included in the contractor’s
firm fi xed price bid.

A similar result was held in A.T.I. TACOSE S.C.A.
R.L.,68 which involved a dormitory construction project
for the Navy at Aviano Air Base in Italy, where FAR
52.236-21(a) was relied on by the court to deny a contrac-
tor’s claim for additional compensation due to contract
ambiguities. The RFP mandated that the contractor com-
ply with the minimum requirements in the specifi cations
and drawings.

The D/B contractor requested an equitable adjustment
for discrepancies between the government’s drawings and
specifi cations, arguing that the discrepancies were specifi-
cation defects for which the government was responsible.
One of the specifi cations required a fi re alarm speaker in
each sleeping room of a barracks, but a drawing showed
one speaker in the common room between four sleeping
rooms. When the government ordered the contractor to
follow the specifi cation, the contractor fi led a claim for
the added cost of the additional speakers.

The government denied the D/B contractor’s claim
on the grounds that Uniform Fire Code (UFC) 3-600-
10N required “audible notifi cation appliances in each
sleeping room” and that the performance technical speci-
fications required compliance with the UFC. In addition,
the contract incorporated FAR 52.236-21, mandating
that specifi cations should govern in differences between
specifi cations and drawings.

FAR contract clauses ultimately place the burden on the D/B contractor to identify patent drafting errors and to calculate their proposed costs accordingly.

The board agreed with the government in denying the contractor’s appeal, reasoning that the contract con-
templated the possibility of inconsistencies between
drawings and specifi cations and dictated how to resolve
them pursuant to FAR 52.236-21. The board also held
that the D/B contractor had not relied on its interpreta-
tion in computing its proposed price and had not sought
clarifi cation of the patent defi cit in the drawing and the
specifi cations.

FAR contract clauses ultimately place the burden on the D/B contractor to identify patent drafting errors and to calculate their proposed costs accordingly. To the
extent there are ambiguities in the government’s contract documents that are obvious or patent on the face of the documents, the rules require the D/B contractor to identify and resolve these prior to the due date for responses to the solicitation.⁶⁹

VI. Government’s Liability for GFI, GFP, or GFM

When a D/B construction contract offers government-furnished information (GFI), government-furnished property (GFP), or government-furnished materials (GFM) for performance, there is an implied warranty that the property or materials will be suitable for their intended use.⁷⁰ If the GFI, GFP, or GFM is not suitable for its intended use, the D/B contractor is entitled to an equitable adjustment under the changes clause of the contract.⁷¹

D/B contractors have grounds to claim excess costs if the government has superior knowledge of information that it does not disclose to a D/B contractor pre-bid.

For example, if GFP/GFM is not furnished in a timely manner, in represented quantities or in a condition suitable for use, the contractor can request an equitable adjustment to the contract.⁷² In Engineering Technology Consultants, the contract provided that the contractor would be entitled to use a reasonable amount of government-operated utilities.⁷³ The Armed Services Board of Contract Appeals determined that the contractor was entitled to a reimbursement for the cost of renting fuel-powered substitute machinery when the government-provided equipment was incompatible with the contractor’s equipment. The government’s argument that the contractor had a duty to inspect the utility system was rejected in the light of the fact that the solicitation provided that the site’s electrical capacity was adequate for the contractor’s needs.

D/B contractors have grounds to claim excess costs if the government has superior knowledge of information that it does not disclose to a D/B contractor pre-bid. One of the issues decided in Yates-Desbuild Joint Venture (YDJV) v. Department of State⁷⁴ was whether the government’s superior knowledge of a likely delay by the government of India in the issuance of construction permits for the construction of a nine-building Department of State compound in Mumbai, India, could offset the State Department’s assessment of liquidated damages. Although the Civilian Board of Contract Appeals answered this question affirmatively, the board concluded after a thirteen-day hearing that the responsibility for the bulk of the delays on the project rested with the D/B contractor. The board evaluated the critical path method (CPM) analyses in a detailed opinion assigning responsibility for, quantifying, and allocating costs for the project’s delays after making factual findings about the scheduling and sequence of contract work on the project. The board assessed the D/B contractor over six million dollars in liquidated damages because the project took three and one-half years longer to complete than anticipated.⁷⁵

VII. Forming the D/B Team: Special Considerations

Frequently, the D/B team is led by a general contractor, which must ensure that the government agency evaluating offers will credit the D/B offeror the experience and past performance of its design team member(s) or subcontractor. The agency may reasonably consider a proposed subcontractor’s experience when rating prime contractor qualifications only if the solicitation allows subcontractors to perform the particular work.⁷⁶ A case in point is G4S–SJC, LLC, where the D/B firm G4S was not selected for award because the agency found that it failed to demonstrate designer experience.⁷⁷ All of the projects submitted under the designer experience factor were performed by entities other than G4S and, under the terms of the solicitation, none of these projects could be considered because G4S failed to submit evidence of a binding teaming agreement or other contractual agreement between G4S and its design subcontractor. G4S argued that a designer should not be considered a subcontractor under the terms of the solicitation because the design portions of the work could be performed in-house by the prime contractor, by a joint venture partner, or by a subcontractor. The GAO disagreed. Because the RFP required that offerors submit evidence of a binding teaming agreement or other contractual agreement, the GAO held that the agency reasonably concluded that it could not consider the projects submitted under the designer experience factor because none of the projects were performed by G4S, and G4S failed to submit the requisite contractual agreements to allow the agency to consider projects performed by other entities.⁷⁸

Conclusion

Even though D/B considerably alters the traditional roles and obligations of the government, contractor, and designer, the government’s incorporation of traditional design-bid-build FAR clauses in the D/B agreement and the interjection of design control contravene many of the cost and time-saving benefits of the D/B delivery method. On many troubled D/B projects, the government attempts to exert the same type of control over the design process as it does on a traditional project, meanwhile seeking to allocate all design risk and failures to the D/B contractor. This does not work and leads to claims and
disputes, forfeiting the benefits offered by the D/B methodology. Because the government does not provide 100% of the detailed design specifications for a D/B project, it is imperative for the D/B contractor to review the contract documents, determine whether there are ambiguities or inconsistencies in the government’s requirements, and bring these to the agency’s attention pre-bid.

While the government must prepare specifications, drawings, and a statement of work that reasonably communicate the scope of the D/B contractor’s obligations (and the contractor is entitled to rely on the accuracy and suitability of this information), the ultimate design risk on a D/B project rests with the prime contractor. The D/B team’s upfront investment in challenging ambiguous or conflicting specifications and contract requirements can save the prime contractor the headaches, costs, and risks of filing claims for changes for design faults and deficiencies against the government.

Endnotes

4. Advanced searches of federal business opportunities can be conducted on the following websites, which publish up-to-date information on solicitations and government spending: https://www.fbo.gov; https://www.fpds.gov; and www.usaspending.gov.
5. DUGGAN & PATEL, supra note 3.
7. ROBERT F. CUSHMAN & MICHAEL C. LOULAKIS, DESIGN BUILD CONTRACTING HANDBOOK § 1.08, Design-Build Liability Issues (2d ed. 2018).
9. FAR subpart 36.102 defines D/B as a means of combining design and construction in a single contract with one contractor.
11. See FAR 36.3, which provides the policies and procedures for the use and conduct of D/B acquisition techniques.
12. FAR 36.303-1(a)(ii).
14. FAR 36.303-1(a)(4).
15. Source selection officials are imparted with broad discretion in best-value procurements to determine whether one proposal’s technical superiority is worth the higher cost. See FAR 15.101-1(c), 15.308; see also All Star-Cabaco Enter., Joint Venture, B-290133, B-290133.2, 2002 CPD ¶ 127, at 8–9 (June 25, 2002); Erc Inc., B-407297, B-407297.2, 2012 CPD ¶ 321, at 6 (Nov. 19, 2012); Remington Arms Co., Inc., B-297374, B-297374.2, 2006 CPD ¶ 32, at 15 (Jan. 12, 2006); Chenega Tech. Prod., LLC, B-295451.5, 2005 CPD ¶ 123, at 8 (June 22, 2005).
16. See Feldman, supra note 1; see also FAR 36.301(b)(2) (acknowledging the expense of D/B proposal preparation).
18 See FAR 11.002, 36.202(b), (c).
19. FAR 15.201(b).
20. FAR 5.201(c).
21. FAR 15.201.
24. See FAR subpart 15.304 for explanation of evaluation factors and significant subfactors.
27. Id.
28. Id.; see also Linguistic Sys., Inc., B-296221, 2005 CPD ¶ 104 (June 1, 2005).
30. 4 C.F.R. § 21.2(a)(1); see, e.g., COMINT Sys. Corp. v. United States, 700 F.3d 1377 (Fed. Cir. 2012); Mobile/Modular Express, B-246183, 91-2 CPD ¶ 459 (Nov. 13, 1991).
31. The Big Picture Co., B-210535, 83-1 CPD ¶ 166 (Feb. 17, 1983) (finding that even where the protester received a solicitation amendment just two or three days before a bid or proposal due date, this time frame afforded an offeror a reasonable opportunity under 4 C.F.R. § 21.2(a)(1) to file a protest against the terms of the solicitation).
32. FAR 33.103(f)(1).
33. FAR 33.103(g).
34. FAR 33.103(d)(4).
35. ASBCA No. 57471, 15-1 B.C.A. (CCH) ¶ 35974 (May 1, 2015).
36. ASBCA No. 52150, 03-1 BCA ¶ 32,073 (Nov. 18, 2002).
37. See FAR subpt. 36.102.
38. FAR 52.236 contract clauses include FAR 52.236-1, Performance of Work by the Contractor; FAR 52.236-2, differing Site Conditions; FAR 52.236-3, Site Investigation and Conditions Affecting the Work; FAR 52.236-5, (Continued on page 35 )
Opening Communication Lines: Evolving Project Delivery Methods to Promote Collaboration

By Justin L. Weisberg and Raymond M. Krauze

While construction projects generally followed a standard form of delivery for decades involving a traditional process that separated design from construction, over the past two decades alternative delivery projects that cross the line between design and construction have become more popular.

The Traditional Form of Project Delivery
Under the traditional design bid build (DBB) construction procurement process, an owner hired a designer to provide a complete set of drawings and specifications that could be competitively bid upon by contractors to provide the lowest price. The contractors’ bids were often based solely upon the bidding documents received from the owner and the contractors’ observation of the site conditions. The competitive environment resulted in a design that was developed without any input from the contractor ultimately responsible for constructing the project. The contractors’ bids were based upon the bidders’ interpretation of hundreds of pages of specifications and drawings without any meaningful collaboration with the designer.

The DBB process put the contractor and the designer in adverse positions. Problems encountered during construction including, for example, delays, impacts, differing site conditions, discrepancies in the design or construction coordination issues would normally result in additional costs incurred by one or more parties involved in the design and construction of the project.

Under the DBB process, the assessment of additional cost is based solely upon the determination of fault, placing the parties in a path towards disputes from the inception of the project.

Consequently, the prevalent claims process associated with DBB projects introduced a significant amount of uncertainty into the construction process which was already an industry that by its very nature had a significant amount of inherent risk. Non-governmental owners began to see the advantage of negotiated agreements instead of contracts awarded to the lowest qualified bidder as a path to curb unanticipated claims and litigation. Negotiated construction contracts were generally based upon a different compensation model. Instead of a fixed price provided by lowest bidder, the contractor would initially be paid its actual costs plus an agreed upon fee. In many cases, after a contractor had the opportunity to review the contract documents, it would develop a value engineering report and propose a guaranteed maximum price (GMP), which included one or more contingencies for risks that could not be easily quantified (known but unquantifiable risks). Negotiated contracts were generally known as open book contracts which provided the Owner with open access to the financial records to verify the contractor’s costs.

Design Build Contracts
Design build contracts (DB) combined the responsibilities of design and construction with one contracting party, theoretically mitigating problems due the adverse relationship between the architect/engineer and the contractor. In many cases a contractor would enter into a design build agreement with an owner and retain a lead designer as a subcontractor, although there were design build firms with both design and construction capabilities. In many cases a design builder during the design phase is compensated by the payment of an hourly rate for design related services with construction to be compensated based upon a cost plus contract with the negotiation of a final schedule and GMP when the design hits a certain stage, for example, 30 percent completion.

While a design build contract is understood to incorporate a greater of collaboration from the parties to the design build agreement, it is also understood that the claim and notice requirements for state construction projects were still applicable.

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Construction Management Contracts

More recently, the use of construction managers—whether at risk (CMAR) or in the role of advisor (CM advisor)—has increased on both public projects and private projects. The construction expertise provided by construction managers during the design phase of the project, including cost estimation, constructability reviews and scheduling, provides the owner with critical information to assist in minimizing claims and approximating cost and schedule.

A CMAR is different than a contractor in that a CMAR provides consulting services during the design phase of the project and is hired on a negotiated cost plus fee with a guaranteed maximum price basis rather than in a closed lowest price bid. For example, a CMAR has been defined by one state as: “A project delivery method in which the purchasing officer enters into a single contract with an offeror that assumes the risk for construction at a contracted guaranteed maximum price as a general contractor, and provides consultation and collaboration regarding the construction during and after design of a capital project.”

Unlike a CMAR, a CM advisor does not directly contract with subcontractors. Instead the first tier trade contractors either contract directly with the owner or a general contractor that has been hired by the owner. Consequently, the CM advisor has no direct contract with the trade contractors and therefore has no contractual responsibility directly to the trade contractors. The CM advisor may have authority under various trade contracts or a general contract, although the authority is derived from the CM advisor’s agency relationship with the owner limiting the direct liability the CM advisor would have with trade contractors or a general contractor if one is retained.

The CM advisor has greater protection from third party claims in tort than a CMAR or general contractor. A party that entrusts work to an independent contractor generally is not liable for that independent contractor’s acts of negligence. An exception to the general independent contractor rule is known as “retained control exception” and it allows a general contractor or construction manager who has entrusted work to an independent contractor to be liable for acts of negligence when such a contractor retains sufficient control over any part of the work that causes an injury.

The “retained control exception” allows for both vicarious and direct liability, depending on the degree of control the CM advisor exercised over the subcontractors. For a CM advisor to be deemed vicariously liable there must be evidence to show the CM advisor had a right of supervision over the subcontractor such that the subcontractor was not entirely free to do the work in the subcontractor’s own way. For a CM advisor to be deemed directly liable there must be evidence to show the CM advisor knew or should have known that a subcontractor carelessly performed its work in such a way as to create a dangerous condition, and failed to exercise reasonable care either to remedy the condition itself or by the exercise of its control over that subcontractor.”

In Rivers v. Cent. Ill. Arena Mgmt., Inc., an arena professional football player was injured when he went through a gate that was built into the dasher board system that surrounded the indoor football field. Johnston, the CM advisor, had a contract with the Owner of the stadium, which had the following relevant contractual provisions:

2.1.6 SUBCONTRACTORS AND SUPPLIES The Construction Manager shall seek to develop subcontractor interest in the Project and shall furnish to the Owner and Architect for their information a list of possible subcontractors . . .

2.3.2 ADMINISTRATION The Construction Manager shall obtain bids from sub-contractors and from suppliers of materials or equipment fabricated to special design for the work and after analyzing such bids shall deliver such bids to the Owner and Architect. The Owner shall then determine, with the advice of the Construction Manager, and subject to the reasonable objection of the Architect, which bids will be accepted. The Owner will enter into contracts with the subcontractors with contracts acceptable to the Construction Manager.

2.3.2.8 The Owner shall designate Construction Manager as owner’s representative on all contracts for construction work to be performed by third parties (subcontractors).

Johnston sought summary judgment based upon its argument that it was not responsible for designing or constructing the dasher board system. The Rivers court found that the plaintiff did not present enough evidence on the issue of retained control to survive Johnston’s motion for summary judgment. The court recognized that in Illinois, the general rule is that a party that entrusts work to an independent contractor is not liable for that independent contractor's acts of negligence. And generally, a construction manager/general contractor owes no duty to third parties harmed by the negligence of independent subcontractors. However, the court also recognized the “retained control exception,” which imposes liability upon a general contractor or construction manager who has entrusted work to an independent contractor for acts of negligence when such a contractor retains sufficient control over any part of the work that causes an injury.

As stated by the Rivers court, the Restatement has been adopted by Illinois courts, and provides for both vicarious and direct liability, depending on the degree of control the allegedly negligent defendant retained over the subcontractors. The court determined that for the retained control.
exception to apply such that Johnston would be deemed directly liable there must have been evidence to show Johnston knew or should have known that CIMCO and/or Sport Systems carelessly performed their work in such a way as to create a dangerous condition, and failed to exercise reasonable care either to remedy the condition itself or by the exercise of its control over CIMCO and Sport Systems to do so. “In order for the “retained control” exception to apply, it is not enough that the party against whom liability is sought merely to have retained “a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations.” 16

The court identified a two-part test under the Retained Control exception that applied regardless of whether the plaintiff sought to impose either direct or vicarious liability. First, the negligent party must have entrusted the work to an independent contractor, and second, the negligent party must have retained sufficient control over part of the work. For the retained control exception to apply such that Johnston would be deemed directly liable there must have been evidence to show Johnston retained a right of supervision over the subcontractors, CIMCO and Sport Systems, such that they were not entirely free to do the work in their own way.

The court applied a test recognized under Illinois law of determining whether Johnston merely retained general oversight of work progress and safety or actually engaged in detailed supervision and/or control of subcontractors’ methods and means of performing work. The court determined that the plaintiff presented no evidence that the defendant, actually engaged in a detailed supervision or control of how Sport Systems or CIMCO performed their work.11

The Rivers court determined the fact that Sport Systems provided drawings to Johnston and CIMCO sought Johnston’s approval did not establish Johnston was in the decision maker over how these entities performed their work. The court determined Sport Systems’ and CIMCO’s subjective views of Johnston’s role did not establish that Johnston had any control over how they performed the work they were hired to perform. With respect to Johnston’s direction to CIMCO to delay fabrication of the dasher board materials called for by Sport System’s design, the court noted that such action was entirely consistent with Johnston’s contractual obligation to analyze and deliver to the owner and architect for decision the bids of subcontractors and suppliers of materials or equipment fabricated to special design for the work. The court stated, “it is the sort of general supervisory oversight that expressly will not garner a general contractor liability under [the retained control exception, Restatement (Second of Torts) § 414].” 12

Integrated Form of Agreement (IFOA) is a multi-party form of contract, to include the owner, design team, and contractor, and potentially certain trade contractors.

In Rivers, the plaintiff demonstrated that in Johnston’s role as construction manager of the Coliseum, it received drawings of the dasher boards from Sport Systems, the party that fabricated and installed the dash board system. Plaintiff also produced a communication from CIMCO, the party responsible for operating and managing the stadium and which contracted with Sport Systems, in which CIMCO sought Johnston’s approval for what it perceived to be a deviation by Sport Systems in utilizing a fastening dasher board system instead of a welded system. Lastly, the plaintiff produced a communication from a Johnston employee to CIMCO directing them not to fabricate any dasher board materials until Sport Systems’ use of the fastening system over the welding system was resolved. The clear implication of this is that Sport Systems and CIMCO viewed Johnston as having a role in deciding the propriety of the dasher board system’s design and installation. The court determined that none of the points raised by the plaintiff demonstrated that Johnston exercised a right to direct Sport Systems or CIMCO in their work. The court applied a test recognized under Illinois law of determining whether Johnston merely retained general oversight of work progress and safety or actually engaged in detailed supervision and/or control of subcontractors’ methods and means of performing work. The court found that the plaintiff presented no evidence that Johnston actually engaged in a detailed supervision or control of how Sport Systems or CIMCO performed their work.11

The Rivers court determined the fact that Sport Systems provided drawings to Johnston and CIMCO sought Johnston’s approval did not establish Johnston was in the decision maker over how these entities performed their work. The court determined Sport Systems’ and CIMCO’s subjective views of Johnston’s role did not establish that Johnston had any control over how they performed the work they were hired to perform. With respect to Johnston’s direction to CIMCO to delay fabrication of the dasher board materials called for by Sport System’s design, the court noted that such action was entirely consistent with Johnston’s contractual obligation to analyze and deliver to the owner and architect for decision the bids of subcontractors and suppliers of materials or equipment fabricated to special design for the work. The court stated, “it is the sort of general supervisory oversight that expressly will not garner a general contractor liability under [the retained control exception, Restatement (Second of Torts) § 414].”12

Building Information Modeling and the Integrated Form of Agreement

In an effort to leverage “Lean Construction Practices” and the use of BIM, the use of Integrated Project Delivery (IPD) has been implemented. IPD is based upon on Integrated Form of Agreement (IFOA). An IFOA is a multi-party form of contract, to include the owner, design team, and contractor, and potentially certain trade contractors. The AIA and ConsensusDocs both publish standard form IFOA contracts. An IFOA contract provides for the expertise of the general contractor and selected trade contractors during the design phase of the project. The parties to the contract develop a target value for the project. For example, under the ConsensusDocs IFOA13, decisions are made by a Core Group that includes members from the architect, owner and contractor. As the design progresses, the parties continue to work toward a budget and schedule. An Expected Maximum Price (EMP) is developed through Target Value Design (TVD) and a risk pool account is established to hold the profits of the construction and design team risk pool members. If the construction costs exceed the EMP, the risk pool account is used to fund the amounts in which the construction costs exceed the EMP. Once the risk
pool is exhausted, the remaining construction costs are funded by the owner. Because an IFOA includes the architect and contractor in the same contract with the owner, there is privity between the architect and contractor which requires the parties to agree upon a mutual waiver of liability. To mitigate the right of the contractor and architect to sue each other directly, various form agreements have conditional waivers which waive liability unless the claim is covered by insurance. However, whether or not there is coverage for an insured that is not subject to liability in the first place creates a significant question regarding the enforceability of the current waiver used in some form documents.

Lean Construction Practices involve the use of concepts developed in manufacturing to improve the construction process. Some of these “Lean” concepts include the “Last Planner System,” “Pull Planning,” and others including continuous improvement and the elimination of waste. Some practices used by Lean savvy contractors include requiring materials to be delivered when they are needed rather than allowing large amounts of materials on site and maximizing the use of prefabrication and modular construction. On a Lean Project, a schedule is developed through Pull Planning sessions as the design is developed. Using methods such as Pull Planning, activities are not initiated until the specific time that the particular activity is scheduled. The incorporation of the construction expertise of the major trade contractors into the design and development process increases the expectation of a constructible design with a relatively accurate construction schedule. The participation of all parties from design through construction spread the responsibility of both design and construction between the ownership, design, and construction teams. The collaboration throughout the process is targeted to result in less uncertainty than a project based upon a typical schedule developed from milestone dates created by an owner with the advice of an A/E in a vacuum without input of the parties responsible for constructing the project.

While the IFOA is developed to minimize the possibility of disputes between the parties, the possibility of litigation can never be completely eliminated. For example, while IFOAs are relatively new forms, there has been litigation in California regarding whether an IFOA agreement required the owner to pay unearned overhead and profit in the event of termination for convenience.14

The alternative construction procurement methods including CM, DB, and IPD provided a process for the construction, design and ownership parties to collaborate before the design was completed and decisions were set in stone. The introduction of construction expertise into the design process provided for more efficient and cost-effective projects allowing for issues that traditionally could not be solved until the submittal process to be resolved during the design process.

Building Information Modeling

The implementation of building information modeling (BIM) provided for collaboration with computer generated models enhancing the design assist process and allowing for certain activities such as clash detection at an earlier stage in a project. A BIM model can be characterized as a 3D, 4D, or 5D model. A 3D model is a three-dimensional model of the proposed design. A 4D model generally adds the variable of scheduling and time to the model. A 5D Model can provide information regarding quantities and cost. In addition, models going forward in various xD variations can include a number of benefits, such as code review, environmental analysis or clash detection. The identification of little BIM versus big BIM has been used to denote the use of BIM technology without collaboration for the former and the use BIM technology with collaboration for the latter.

The “retained control exception” allows for both vicarious and direct liability, depending on the degree of control the CM advisor exercised over the subcontractors.

If the parties will be using BIM, it is important for all of the parties involved in the BIM process to have agreement regarding the terms and responsibilities relative to the use of BIM. As a first step to insure a mutual understanding between the parties regarding the BIM process, a plan should be developed identifying the purposes and expectations regarding the use of BIM for a given project. The plan should determine the BIM models that will be developed and the parties to be involved in the development of the BIM models. The parties should also agree upon the uses and limitations of the BIM models that are developed and the obligations of the various parties relative to the development, administration, operation, modification and maintenance of the BIM models. Additional provisions to be agreed upon include the party to be responsible for administering the BIM process, key contact people from each of the parties, and the software to be used. Specifications relative to the use of the BIM models would include a determination of the model dimensions and the granularity of the model, the software to be utilized, the types of models to be developed including the design and construction models to be developed, and the key contributors to the various models. The 2D documents needed to supplement the model would be determined along with the specific uses.
The parties would further agree upon standards of care, intellectual property rights and allocate liability relative to individuals that contribute to or use the BIM models. Currently, while the BIM models provide significant assistance in the design and construction of projects where they are utilized and even serve as contract documents in a number of circumstances, there is currently very limited opportunity to use BIM models instead of 2D documentation for the purposes of obtaining building permits.

Failure to clearly set the expectations of the BIM process can result in later disputes between the parties. For example, in one case a misunderstanding of the format and the ability to modify a BIM model provided under the parties’ contract led to litigation concerning whether a party hired to perform laser scanning and BIM modeling had complied with the terms of its contract. The failure to include terms relating to the BIM model in the agreement—for example, allocating the liability between the parties for BIM related claims—can result in the loss of the right to recover for errors and omissions in a BIM model that can result in additional costs, or the loss of the ability to rely on the model to plan and budget work. In another example, it was determined that a party could not rely upon the work planned in the BIM model even though the mechanical contractor was required to perform extra work because other parties failed to accurately indicate the actual conditions of construction in the BIM model.

In N. Am. Mech., Inc., a mechanical contractor that contributed to the BIM process as part of its contract scope was unsuccessful at trial in pursuing its claim for additional compensation, (the “BIM Claim”), because the BIM model was not a contract document. The BIM Claim was based upon conflicts and space constraints caused by other trades that did not participate in the BIM process and mistakes by the architect, including the failure to use the correct wall thickness, the failure to indicate rolling doors and the failure to indicate existing conduit in the BIM model. These conflicts and omissions resulted in additional mechanical work beyond the work indicated in the final BIM model. However, in denying the claim, the court noted that the plaintiff needed to establish that the work was in addition to the work included in its original bid, rather than in addition to the work shown on the BIM model.

While alternative project delivery systems have resulted in time and cost savings, the evolution in building delivery methods have led to concerns regarding the allocation of risk among the parties. Historically, the party that created the design would bear responsibility for any design defects. But what happens when the design is created in a more collaborative manner? Legal commentators have warned that more collaboration and information-sharing between the designer and the contractor could and would blur the bright line between design and construction and alter traditional allocations of risk. Similarly, when BIM technology first began receiving widespread use, many legal commentators warned of new legal risks posed by the information sharing and collaboration essential to the process. The potential impact of alternative delivery methods and BIM on the implied warranty of design accuracy drew particular attention.

The Spearin Doctrine

A basic principle of construction law is that an owner who provides plans and specifications for a construction project impliedly warrants that those plans and specifications are free from defects and that a contractor that adheres to the project’s design specifications cannot be held liable for defects arising from those specifications. This implied warranty of design accuracy is more commonly known as the Spearin Doctrine.

The Spearin Doctrine is named after the 1918 United States Supreme Court decision in United States v. Spearin. In Spearin, a contractor agreed to construct a dry dock at the Brooklyn Navy Yard under a contract with the United States. The government’s detailed plans and specifications required the contractor to excavate the site and then relocate and reconstruct a six-foot brick sewer line that intersected the site. The contractor completed the relocation as specified. About a year later, after the sewer was relocated and reconstructed, heavy rains caused it to back up which, in turn, created internal water pressures that broke the line in several places and flooded the dry dock excavation. After an investigation, it was determined that the flooding was caused by an existing internal dam that had diverted water into a portion of the sewer that overflowed into the dry dock. The internal dam was an existing feature but was not shown on the plan and specifications the government gave to the contractor. The government insisted that the contractor was responsible for the damage, and demanded that the contractor clean up the site and reconstruct the damaged line at the contractor’s own expense. The contractor claimed the government was responsible. Ultimately, the government canceled the
contractor’s contract and had a replacement contractor complete the work. The contractor brought suit to recover the balance due under its contract with the government.

The United States Supreme Court found that by providing the plans and specifications which provided where the sewer should be relocated, the government warranted the accuracy of the specifications. Because the internal dam which caused the flooding was not shown on the plans provided to the contractor, the contractor was not responsible for the flooding. Therefore, the contractor was entitled to recover its contract costs notwithstanding boilerplate disclaimers that were in the parties’ contract.

However, the Spearin Doctrine was applied in the context of a traditional design-bid-build (DBB) project delivery method for construction projects. In a traditional DBB construction project, the owner hires a design professional to provide a complete set of drawings and specifications for the project. Once the plans and specifications are complete, the owner puts them out for bid. Thereafter, the owner typically hires the contractor submitting the lowest bid to complete the project. But does the Spearin Doctrine apply outside of the traditional DBB context in more integrated project delivery methods where contractors assist with the project’s design and have more involvement in the development of the project’s design and specifications? Some have feared that more integrated project delivery methods would lead to the retrenchment of the Spearin Doctrine. Although, as of the time of this writing, there are no recorded cases that specifically discuss how the Spearin Doctrine might be applied in the IPD context or how BIM collaboration may affect the Spearin warranties, we have recently gotten some indication as to how courts might apply the doctrine to more collaborative project delivery methods.

In a case of first impression, the highest court in Massachusetts, the Massachusetts Supreme Judicial Court, in a much anticipated ruling, addressed the application of the Spearin Doctrine in a non-traditional and more integrated CMAR. In Coughlin Electrical Contractors, Inc. v. Gilbane Building Co., the owner, the Massachusetts Division of Capital Asset Management and Maintenance (the “owner” or “MDCAMM”), hired an architect to prepare the designs for the construction of a new psychiatric hospital facility. Thereafter, the Owner hired Gilbane Building Company (Gilbane) as the CMAR for the project. Gilbane’s preconstruction services included a review of the design documents prepared by the architect. However, Gilbane’s contract with the Owner specifically provided that Gilbane did not assume responsibility for the design. In connection with the project, Gilbane entered into a contract with a subcontractor to perform the electrical work on the project.

During the project, the electrical subcontractor submitted design related change orders that were the result of various errors, omissions, and changes to the project’s plans and specifications which resulted in increased costs to the electrical subcontractor. When the electrical subcontractor was denied an equitable adjustment following completion of the project, the electrical subcontractor brought suit against Gilbane to recover its costs due to the design errors. Gilbane then brought a third-party complaint against MDCAMM seeking indemnity for the electrical contractor’s claim. The trial court dismissed Gilbane’s indemnity claim finding that an owner’s implied warranty of design accuracy only applied to traditional design-bid-build projects, and Gilbane appealed and sought direct appellate review from the Massachusetts Supreme Judicial Court.

Gilbane is one of the first reported cases that address the applicability of the Spearin Doctrine to alternative project delivery systems such as construction manager at risk.

In reversing the trial court, the Massachusetts Supreme Judicial Court held that, although the role of the parties in a construction manager at risk project differed from those in a design-bid-build project, the differences were not so great that the owner’s implied warranty of design should not apply at all absent an express disclaimer to the contrary. The Court found that while the CMAR may have consulted in the design of the project, the owner, through its designer, ultimately controlled the design of the project. The Court did, however, find that the scope of the implied warranty in a construction manager at risk project will depend on whether the construction manager at risk “acted in good faith reliance on the design and acted reasonably in light of the [construction manager at risk’s] own design responsibilities” thus limiting the application of the Spearin Doctrine in construction manager at risk projects.

While the Gilbane decision is fact-specific to Massachusetts public projects, there is little reason to believe that it would not be applicable to private projects. Moreover, it is one of the first reported cases that address the applicability of the Spearin Doctrine to alternative project delivery systems such as construction manager at risk. No doubt other states that allow for the construction manager at risk delivery system will look to the Gilbane decision for guidance in applying the Spearin Doctrine to alternative delivery methods.

It remains to be seen what the potential impact of more collaborative project delivery systems will have.
Today, more than half of the U.S. states allow for some form of alternative project delivery on public projects.

Public Construction Contracts
While design-bid-build remains a popular option for construction projects, alternative project delivery methods such as design-build, construction manager at risk, and integrated project delivery (IPD) as well as the use of technological advances such as Building Information Modeling (BIM) are gaining wider acceptance around the country. This is true in both the private and public sectors, although the adoption of alternative project delivery in the public sector has lagged behind the private sector. The lag in public sector use of alternative project delivery systems has primarily been the result of state laws and regulations that govern the procurement process for public construction projects. Historically, these laws and regulations were put in place to protect the public interest and make the procurement process more transparent. While many of these laws and regulations work well with traditional design-bid-build projects, they are inimical to the benefits of alternative project delivery systems which allow for a more collaborative process between the owner, designer, and contractor which in turn allows for more economical and efficient project delivery. The times, though, are a-changing.

In recent years, many state legislatures have adopted new laws and regulations which expand the ability for government entities to use alternative project delivery systems. Today, more than half of the U.S. states allow for some form of alternative project delivery on public projects. This past year alone, several state legislatures passed authorizing legislation allowing for use of alternative project delivery or expanding its use. In New York, the state legislature reauthorized design-build for a number of state agencies including the New York Department of Transportation and authorized project specific use of design-build for several other entities that had not previously been authorized to use design-build. In Virginia, the state legislature expanded design-build authority to all local governments. Previously, the use of design-build had been restricted to only those local governments with populations in excess of 100,000 people. In Arkansas, the state legislature passed authorization for use of design-build on local municipal sewage systems, as well as authorization for P3s for all state entities.

What follows is a small survey of laws authorizing the use of alternative project delivery systems that have been adopted by various states.

Design-Build
The most widely accepted alternative project delivery system is design-build. As of the fall of 2017, design-build is fully permitted by all state agencies in more than half of the fifty states.

In Arizona, design-build is authorized for all state agencies and for all counties, cities, towns, as well as irrigation, power, electric, drainage, flood protection and flood control districts, tax levying public improvement districts, and county or city improvement districts. Arizona also authorizes its Department of Transportation to use design-build under separate statute.

In Florida, all state agencies are authorized to use design-build using the best value or qualification based selection to award contracts. Counties, municipalities, and other political subdivisions of the state are also authorized to use design build as permitted by local ordinance. Local government bodies may use best value or qualifications-based selection to award such contracts.

In North Carolina, governmental entities are authorized to utilize design-build contracting provided that the governmental entities establish the criteria for determining the circumstances under which the design-build method is appropriate. The North Carolina Department of Transportation is also authorized to use design-build contracting for the construction of transportation projects of any amount.

In Ohio, all state agencies, state institutions of higher education, counties, townships, municipal corporations, school districts, or other political subdivisions are authorized to use design build. The Ohio
Department of Transportation is also authorized to use design-build contracting for projects totaling $1 billion annually.\textsuperscript{28}

Other states that fully permit its agencies to use design-build include: Alaska, Colorado, Hawaii, Idaho, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, Oregon, South Carolina, South Dakota, Tennessee, Utah, Virginia, Washington, West Virginia, and the District of Columbia.

Although design-build is not fully permitted in all fifty states, design-build is still widely permitted in various other states. For example, design-build is widely permitted in states such as California, Texas, Illinois, and Georgia although the use of design-build is not fully permitted in those states.

Construction Manager at Risk
Less widely accepted than design build is the construction manager at risk project delivery system.

In Connecticut, the Commissioner of Transportation is authorized to designate specific projects to be completed using construction manager at risk with a guaranteed maximum price as an alternative to using design-bid-build contracting.\textsuperscript{29}

In addition to authorizing the use of design-build, the District of Columbia has also authorized the use of construction manager at risk.\textsuperscript{30}

In Kentucky, all state agencies and political subdivisions are authorized to use the construction manager at risk project delivery methods for all capital projects.\textsuperscript{31}

Arizona, Kansas, Nevada, Tennessee, and Vermont are among the other states that authorize the use of the construction manager at risk project delivery method.

Integrated Project Delivery (IPD)
One of the more recent developments in project delivery is integrated project delivery. Integrated project delivery, although championed by many within the construction industry, has not been as readily adopted as other alternative project delivery methods such as design build and construction manager at risk. There are several reasons for the slow adoption of integrated project delivery among them being that owners do not fully understand its benefits, a concern about the degree of risk associated with collaborate delivery methods, as well as a concern about the time and cost associated with adopting new methodologies associated with implementing the project delivery system. Notwithstanding its slow adoption nationally, some states have seen the inherent benefits of integrated project delivery and have authorized its use. In Colorado, all state agencies are authorized to use integrated project delivery for a public project if it is determined by such agency to be a timely and cost-effective delivery method.

Section 24-93-104 of the Colorado Revised Statutes specifically provides: “Notwithstanding any other provision of law, any agency may award an IPD contract for a public project in accordance with the provisions of this article upon the determination by such agency that integrated project delivery represents a timely or cost-effective alternative for a public project.”\textsuperscript{32}

Conclusion
Recognizing that alternative project delivery methods have had demonstrated success and are continuing to increase in popularity, as these project delivery methods evolve, there are still questions to be answered regarding the allocation of risk and responsibility between the parties participating in alternative delivery projects, especially when new technology such as BIM is utilized.

Endnotes
3. Louisville Arena Auth., Inc. v. Ram Eng’g & Constr., Inc., 415 S.W.3d 671 (Ky. App., 2013)[quoting KRS 45A.030(6)]
5. Id. See also Restatement (Second) of Torts § 414 (1965).
6. Id.
17. Id.
19. Id. at 136–37.
20. Id. at 137–38.
22. Id. at 558.
23. Id. at 559.
24. Id. at 560-61.
26. Id. at p. 8.
27. Id. at p. 17.
28. Id. at p. 20.
29. Id. at p. 7.
30. Id.
31. Id. at p. 12.
32. CRS § 24-93-104.
Key Considerations for the Use of Peer Reviews in Construction

By Jaimee L. Nardiello and Matthew C. Dials

A peer review can be an important tool in assisting owners and design professionals to complete construction projects on time and on budget, while limiting the number of requests for information and change orders seen on a project. Typically, a peer review is performed by an independent design firm with expertise in a particular discipline to identify errors or omissions in a design or to remedy a troublesome detail or component of the design. With the growing number of complex construction projects in the United States, the number of peer reviews being performed on construction projects continues to increase.

In fact, cities such as Miami, New York City, and San Francisco have each implemented mandatory peer review programs for structural engineering submissions. Similarly, the city of Chicago has implemented an optional peer review program for structural engineering submissions. The purpose behind these structural peer review programs is to streamline the permit process and to reduce the time and resources being expended by the building departments for the respective cities. In addition to structural peer reviews, building departments and state agencies have implemented peer reviews of other disciplines on a project-by-project basis when needed. For example, in Nestle Waters N.A., Inc. v. Town of Fryeburg, the town’s planning board conducted an independent peer review to determine whether the project presented major traffic concerns.

Similarly, private owners continue to retain design professionals to perform peer reviews of state-of-the-art structural, mechanical, and architectural systems on a multitude of projects, including green projects, medical facilities, performing arts centers, and high-rise towers. Due to project complexity and the use of numerous consultants, poorly coordinated construction documents are a prevalent risk factor for owners on major projects. For example, one study estimates that typical construction drawings include five potential coordination errors per design drawing.

I. Timing Is Everything: When to Engage the Peer Reviewer

While owners typically include between two and five percent of the total cost of construction in a construction budget as a contingency to address cost overruns stemming from design and coordination issues, having the design reviewed by other competent industry professionals prior to construction provides a direct benefit to all interested parties. In most cases, the benefit derived from retaining peer reviewers by catching errors or omissions early on likely exceeds their associated cost to the project.

Timely retention of a peer review firm has a direct impact on the success of a project. If the peer review firm commences its services early in the design process, many conflicts will likely be identified early and corrected. A study performed by the General Services Administration, in conjunction with the University of Colorado at Boulder and Peter Associates, analyzed twenty-two construction projects and found that “companies and organizations can strategically improve projects by conducting peer reviews early in the construction process.”

In Swire P. Holdings, Inc. v. Zurich Insurance Co., the owner and developer retained the services of an independent peer reviewer after being notified by the building department that the owner’s structural engineer was being investigated in connection with noncompliance in a number of the structural engineer’s designs for other projects. Upon the peer reviewer’s retention, the firm performed a peer review of the structural engineer’s design, which revealed “numerous errors and omissions in the project that had to be corrected.” In Swire, the owner attempted to recoup nearly $4.5 million arising from the corrective costs necessitated by the peer review from a builder’s risk policy. To the owner’s detriment, the policy excluded damages arising from design defects. If the owner had retained the peer reviewer during the
project’s design phase, the design defects may have been identified and corrected, thereby reducing the potential cost and expenses paid directly by the owner. In this situation, the owner’s only recourse was to file a claim against the design professional, which will be subject to applicable statutes, insurance coverage, and contractual language.

While the philosophy of better late than never arguably applies in the context of a peer review, when the peer reviewer is retained at an advanced stage of the project, such as during the construction documents phase, conflicts in the design drawings already may exist and changes at a late stage in the project may require substantial redesign services or rebidding to contractors. Further, if the peer review firm is retained during construction, any deficiencies or design errors and omissions that are identified at this stage may result in costs to correct the work that are exponentially greater than the cost had they been identified early in the design stage because components within the built work may need to be demolished in order to correct the deficiency.

II. Liability Implications for Peer Review Firms

A peer review benefits the owner as well as the primary design professional by serving as verification that a project’s design was prepared with the ordinary and reasonable skill of other architects or engineers in the community—i.e., the standard of care. It is axiomatic that the services performed by design professionals are not required to be perfect and are judged against the competence level of similar professionals in the surrounding area. Similar to the services of a project’s primary design professional, the peer reviewer’s services also must comply with the standard of care.

A. Legislation Designed to Protect Peer Reviewers

Given the importance of a peer review and the potential liability that could result from a peer reviewer’s failure to detect an error coupled with the nominal sum that many peer reviewers are paid for their services, states such as Kansas and Missouri have enacted legislation to protect peer reviewers from liability arising out of their peer review services. The Kansas statute, for example, renders the peer reviewer immune from civil liability if it acted in good faith and without malice and its actions are reasonably related to the peer review process.

In March 2017, the National Society of Professional Engineers (NSPE) adopted a proposed Model Peer Review Statute. The purpose of the Model Statute is to protect engineers participating in peer reviews and post-project review processes. The NSPE stated that peer reviews lead to improved practices [and] will also inherently benefit the public health, safety, and welfare. Well-crafted peer review legislation which includes appropriate safeguards can help to limit the liability and risk exposure for both engineers and engineering firms that employ peer reviewers as well as those engineers who actually perform the peer reviews and post-project reviews.

B. Other Contractual Considerations to Protect Peer Reviewers

In states that have not yet adopted peer review legislation, a peer reviewer can take steps to limit its potential risk contractually by incorporating certain provisions within its professional service agreement. These provisions include, but are not limited to, (a) incorporating a limitation of liability, such as a provision limiting liability to fees earned; (b) mutually waiving consequential damages; (c) eliminating personal liability; and (d) limiting the scope of work to specific elements being “peer reviewed.”

The EJCDC offers a template agreement for the provision of peer review services. The E-581, Agreement among the Owner, Design Engineer, and Peer Reviewers for Peer Review of Design, includes a waiver of claims by the engineer of record against the peer reviewer and an indemnification commitment by the owner on behalf of the peer reviewer, in an effort to “induce potential reviewers to participate and to encourage an independent and candid review.”

C. A Peer Reviewer’s Potential Liability to Third-Parties

A key consideration for a peer review firm should include whether it could face potential liability to a third party with whom it is not in privity for negligently performing a peer review. Massachusetts has specifically addressed this issue. In Meridian at Windchime, Inc. v. Earth Tech, Inc., an engineering firm contracted with a town to perform a peer review of a residential development. A series of construction issues arose and the contractor commenced an action against the peer review firm sounding in negligence. The Appeals Court of Massachusetts found that absent a contractual relationship, a peer review firm that is in privity of contract with a town does not owe a duty of care to a third-party developer or contractor unless that third party reasonably relied on the peer reviewer’s services and the peer reviewer was aware of this reliance.

Specifically, the Meridian court found that the contractor could not have reasonably relied on the peer reviewer’s services because (1) the contract between the peer reviewer and the town specifically provided that the peer review firm did not bear responsibility for the contractor’s means and methods of construction; (2) the peer review firm informed the developer in writing at the commencement of the project that it would not be responsible if the contractor deviated from the approved subdivision plans; and (3) the developer hired its own project engineer, yet it chose to rely on the peer review firm in lieu of relying on the advice of its own engineer.

III. The Role of the Peer Reviewer During the Project and Beyond

Given the somewhat unique role of a peer reviewer,
firms performing peer review services face the prospect of transitioning their services from a design professional responsible for reviewing the primary professional’s designs for code compliance and safety issues, to the role of an expert witness in the event issues arise with the primary professional’s design services.

The peer reviewer’s work product performed prior to any litigation, including its conversations and written materials, are likely discoverable in future litigation as factual testimony rather than expert materials.

This was the precise situation in School Board of Broward County v. Pierce Goodwin Alexander & Limville, where a school board undertook an extensive multi-phase renovation to an existing high school. In light of the project size and complexity, the school board also retained “ongoing services of a peer reviewer to monitor and offer a second opinion of the design plans.” The court recognized that in addition to reviewing the primary professional’s services, the peer reviewer was also the arbiter if “disputes regarding interpretation of the building codes arose” during the project. During the initial phase of the designer’s performance, the peer reviewer identified certain code compliance issues with the designer’s plans and repeatedly notified the designer of the deficiencies. Relying on the peer reviewer’s work product, the school board later asserted claims against the primary professional for certain errors and omissions that allegedly arose from the identified code compliance issues.

Peer reviewers may be retained in certain situations as nontestifying experts. Federal Rule 26(a)(2)(B) recognizes the existence of this type of “hybrid witness” who is “employed in some capacity, but not specifically for the purpose of giving expert testimony.” While an owner’s goal may be to engage the peer reviewer as a nontestifying expert pursuant to local rules, the peer reviewer still may be obligated to appear for a deposition or testify during trial due to his/her factual knowledge or involvement in the underlying project. Additionally, firms or individuals with no connection to the facts of the underlying project who are retained solely for the purpose of litigation must comply with the state or federal disclosure requirements. The party designating the expert or in control of the witness “bears the burden of demonstrating that their designated expert is not one retained or specially employed to provide expert testimony in the case, and not one whose duties as an employee of the party regularly involve giving expert testimony.”

Because most states require expert testimony to establish that a design professional or contractor deviated from the applicable standard of care, some find it economical to engage the peer reviewer as the owner’s expert rather than retaining an additional consultant. However, consideration must be given to the discoverability of documents prepared by a peer reviewer also serving as an expert witness. For example, the peer reviewer’s work product performed prior to any litigation, including its conversations and written materials, are likely discoverable in future litigation as factual testimony rather than expert materials. Failure to appreciate the distinction between a hybrid witness and a retained expert also may cause other problems with respect to required expert disclosures, ability to take depositions, and other discovery requirements.

IV. Takeaways
As evidenced in this article, peer reviews are gaining prevalence on construction projects. The reviews are beneficial to multiple parties as they identify potential errors and omissions within design and construction documents, thereby reducing costs associated with design changes and delays in construction. In order to ensure that the peer review is successful, project owners should keep in mind the following issues and/or take the following steps:

(a) a peer review is typically a worthwhile investment; (b) given the relatively low fees associated with a peer review, indemnification or other limitations of liability may be necessary to induce professionals to assume the role of peer reviewer; (c) determine if design professional will be solely a peer reviewer or act in a hybrid role; (d) negotiate and execute a professional service agreement that clearly defines each party’s role, including the scope of the peer review; and (e) comply with the agreement’s terms with respect to the roles and methods of communication.

Similarly, design consultants should consider (a) the project requirements; (b) cooperation with ownership, design, and construction team; (c) whether they are practicing in a jurisdiction that provides statutory protections for the performance of peer reviews; (d) their ability to negotiate for the inclusion of risk-limiting provisions within their professional service agreement; (e) whether they could face potential exposure to third parties for their peer review services; and (f) the potential risk versus the benefits of performing services for the project.

Endnotes
1. See ASCE Policy Statement 351, Peer Review, defining a peer review as “the practice of obtaining an independent, unbiased evaluation of the adequacy and application of engineering principles, standards and judgment from an independent group of professionals having substantial experience in the same field of expertise.”

2. City of Miami, Structural Peer Review (revised Apr. 2, (Continued on page 37)
Avoiding the Pitfalls of Permit Sets

By Kendall E. Woods and Lance Parker

Most construction projects, especially ones of any significant size, involve teams of engineers (civil, structural, mechanical, electrical, plumbing, to name a few) led by an architect. Early on in the planning stages of a project, developers interact with the architect to determine a conceptual design, and the architect determines which engineering disciplines need to be involved during the conceptual design process. However, to take a design from concept to reality, design professionals must prepare construction documents that detail the components, materials, and systems for the project. These construction documents, consisting of drawings and specifications, provide specific information to a general contractor that details how to achieve the end result, whether it is a single-family home, an elementary school, a hospital, or a high-rise office building.

The cost of professional design services to prepare the construction documents can be considerable. By necessity, developers are cost conscious. Their pro formas indicate the dollars to be spent and the profit to be made. The more dollars that are spent, the less profit will be made. Some developers often attempt to save money by minimizing the cost of the design services, requesting that the architect, and its design team, provide only the content needed to obtain a building permit from the authority having jurisdiction (AHJ). Or as a developer might say: “All I need are drawings that will get me a permit.” It is important to keep in mind that the detail and type of drawing content that are necessary to obtain a permit are not sufficient to construct a building and are not to be used for that purpose. In this scenario, it is incumbent upon the design professional, even when only providing a permit set of drawings, to ensure there is sufficient detail to adequately construct a safe and habitable building. Not only is this the best practice for architects and design professionals, it will reduce potential liability for errors and omissions.

A set of drawings that is only intended to be sufficient for obtaining a permit—or a “permit set,” as they are commonly called—is almost always insufficient to properly construct a sound building. This is where problems for the design professional often arise. Due to the competing interests of the developer’s concern for the cost of fully developed construction documents (drawings and specifications) and a design professional’s concern over providing sufficiently detailed and complete documents, there is often pressure on the architect to take short cuts that reduce the architect’s fee, thereby saving the developer money. However, an architect should be wary of supplying permit sets that do not contain enough detail to properly construct a safe and habitable building. Even if the permit set meets the AHJ’s requirements for procuring a permit, the design professional faces the risk that the developer will improperly use the permit set to attempt to construct a building, increasing the possibility of constructing a building with defects. The potential misuse of the permit set could expose the design professional to liability for what may later be classified not as a permit set but, instead, as an incomplete or insufficient set of drawings and documents that falls below the design professional’s standard of care.

Certainly, there are many legitimate reasons for providing permit sets: All of the project funding may not yet be in place, there may be time constraints or pressure to get the project underway, or perhaps some project aspects have not yet been resolved. And there is nothing wrong with preparing permit sets. Indeed, it can be a win-win situation, especially if this type of process has historically been successful for multiple projects between the same developer and architect. By working together repeatedly, they will have learned each other’s approach to their respective crafts and established a shared set of expectations. Nevertheless, projects can go awry, so a design professional always must proceed with care in this type of situation to ensure that he or she is protected. Not only must the architect and its design team meet their applicable standard of care with regard to the permit set’s content, the design team also must ensure that its contract with the developer is sufficiently clear to limit the scope of work to a permit set. Doing so will protect against inadvertently increasing the scope to include post-permit construction items and inadvertently expanding liability.
This article outlines some of the pitfalls to avoid when preparing permit sets, such as failing to prepare and provide a project manual, omitting specification sections, inappropriately using “selected by Owner” within the drawings, not including sufficient detail in the drawings, and others.

It cannot be disputed that a project manual is required to properly construct a safe and habitable building.

Pitfall: Not Preparing a Project Manual

To provide sufficient information to properly construct a building, an architect must provide construction documents consisting of drawings and a project manual. The drawings are technical in nature and contain graphic information that is generic and general regarding a building’s primary materials, components, and systems. For example, on an elevation drawing of a building that is to be clad with brick, a simple note stating “brick cladding” will suffice. This same approach is also sufficient for wall section details, or most any other details for that matter, that feature brick. The drawings themselves do not contain sufficient information to know which type of brick to purchase or how the brick is to be installed—that type of information is found in the project manual.

The first portion of a project manual contains general requirements regarding the construction process. These requirements are used by a general contractor and provide guidance to the general contractor regarding the “management” of the project (i.e., how schedules, pay applications, shop drawings, etc., are to be submitted and processed). The balance of the project manual contains individual specification sections that provide the specific written information that is necessary for the proper construction and installation of each of the primary materials, components, and systems. Each specification section has its own industry standard identifying number, like chapters in a book. Continuing with the example of the brick cladding, the project manual would contain specification section 04 21 00, “Clay Masonry Units.” In this section, the brick would be identified by its size, type, color, texture, and bond pattern and also would include information regarding the common accessory items used for brick construction (mortar type, brick ties, flashing material, weeps). The specifications complement the drawings and provide the necessary additional information to construct the building.

Despite the importance of a project manual, most AHJ’s do not require submission of a project manual as part of the process to obtain a permit. This raises two potential issues. First, this could give a design professional a false sense that a project manual is not an integral part of the requirement to construct a building. However, the American Institute of Architects (AIA) has long published The Architect’s Handbook of Professional Practice, which specifically addresses the necessity of a project manual for a complete set of construction documents. The fifteenth edition of the handbook contains a section on construction drawings that states: “Both drawings and specifications are needed to make up a completed set of construction documents.” It cannot be disputed that a project manual is required to properly construct a safe and habitable building.

Second, provision of a project manual potentially increases the scope of the design professional’s work beyond the drawings necessary to obtain a permit. In the scenario set forth above, the developer asks only for a permit set. If the project manual is not required to obtain a permit, the developer is potentially not including or willing to pay for a project manual as part of the architect’s scope of work. In this situation, it is incumbent upon the design professional to ensure that its permit set includes a project manual that meets industry standards and not succumb to pressure by the developer to take shortcuts. Providing drawings that are insufficient to construct the building opens the architect up to liability. The best practice is for the design professional to prepare a complete set of construction documents, including a project manual that meets the standard of care and enables a contractor to construct a complete and sound building.

In light of the issues discussed above, what does the architect do when the developer has requested, and will only pay for, documents sufficient to obtain a permit, which often do not include a project manual? To protect himself or herself, the design professional must include language in the contract with the developer stating that the drawings are intended only for procurement of permits and not to construct the building. Indeed, even if the design professional does provide a project manual as part of its permit set but does not intend for its permit set to be used to construct a building, it is prudent to include such language.

Under either scenario discussed above, the design professional needs to make sure that the contract clearly defines his or her scope of work. Additionally, the contract must contain limiting language. One example of such language is:

The documents provided by the design professional to the developer are for the sole purpose of allowing the developer to obtain permits and are not intended to be used for construction of the Project. The design professional’s performance responsibility under this Contract is terminated upon issuance of the permit by the AHJ.
This language identifies the sole purpose of the drawings and specifically identifies what the drawings are and are not to be used for. Additionally, the architect can revise the licensing language found in section 7.3 of the AIA’s B101 owner/architect agreement to limit the allowable use of the permit set. A proposed modification would be:

Upon execution of this Agreement, the Architect grants to the Owner a nonexclusive license to use the Architect’s Instruments of Service solely and exclusively for purposes of obtaining a permit from the Authority Having Jurisdiction.

By including language limiting the approved use of the documents, the design professional would have the ability to file an injunction if he or she discovered that the developer was using the permit set of documents to construct the building.

**Pitfall: Omitting Specification Sections by Using “Install According to Manufacturer’s Recommendations” in the Drawings**

A design professional might feel inclined to omit specification sections and simply include the phrase “install according to manufacturer’s recommendations” for various items in the drawings in an effort to reduce the fee. However, this practice results in an incomplete project manual and potential liability for the design professional. To prepare a proper project manual, it is not sufficient to omit specification sections the design professional feels are less pertinent and then include the missing content by using a blanket statement within the drawings such as “install according to manufacturer’s recommendations.” This practice is unacceptable for two reasons. First, the proper location for this language is in the specification sections. Specification sections contain much more content than just a blanket directive to install an item according to the manufacturer’s recommendations. When preparing specification sections, the design professional needs to read and edit each section so that it applies to the project at hand. In addition, the design professional needs to be aware of the manufacturer’s recommendations for the various selected products and how these recommendations relate to the overall construction process. The design professional cannot blindly rely on the manufacturer’s recommendations because the design professional knows the project in its entirety, while a product manufacturer only knows the details of its specific product and not the overall integration of the product into a project. The design professional must evaluate and integrate the manufacturer’s recommendations with the needs of the specific project. Given all of the information in the specifications that expand upon the language “install according to manufacturer’s recommendations,” it is apparent why putting this statement in a drawing is insufficient and against industry standards.

Second, specification sections work together to form a comprehensive, coordinated manual regarding assembling the “parts and pieces” of a building. Each individual specification section is set up so that the “Part 1 General” portion of the technical specification sections includes a subsection titled “Related Sections.” In the Related Sections portion, additional specification sections are listed that relate to the section at hand. For example, for specification section 04 21 00, “Clay Masonry Units,” the related sections could include references to specification sections for the backup substrate, the weather barrier, wall openings (doors and windows), joint sealants, and more. Omitting specification sections is like leaving out chapters of a book—you might be able to get the essence of the story, but if you had the missing chapters, you would have all of the details and the experience would have been much better. This pitfall is a good way to end up with a building that is not properly constructed and having the blame for the shoddy project fall at the architect’s feet.

**Pitfall: Inappropriately Using “Selected by Owner” within the Drawings**

One way a design professional can save time is to put the burden of selecting building materials and components onto the owner. The specific materials and components for this process should be agreed upon ahead of time and then implemented by using the phrase “selected by Owner” within the drawings. However, while it is acceptable to use this wording for certain building materials and components, it is not acceptable for others. For example, there are many nonessential materials and components that the design professional can indicate within the drawings in a general sense and denote “selected by Owner,” thus leaving the specifics for the owner to select. Examples include interior finishes (e.g., wall covering, paint, floor covering, wall base), prefabricated millwork, and plumbing and light fixtures. These items are important for a completed building but are not critical items in the overall functional aspects and performance of a building. On the other hand, it is not acceptable to use the phrase “selected by Owner” to apply to materials and components that involve life safety, that are used to establish an airtight and watertight building envelope, that are technical in nature, and that are required for code compliance.
Pitfall: Not Including a Sufficient Amount of Detail for Items in the Drawings

The AHJ is not responsible for making sure that the design team has provided an adequate amount of details in the drawings so that the project is constructible. The AHJ only is determining if the drawing content complies with the applicable building code. As has been noted, the content necessary for code compliance versus the content needed to construct a building is quite different. The design professional needs to ensure that the construction documents it provides meet the standard of care for constructability. If not, the design professional could be exposed to liability for a poorly constructed building. To protect against liability, the design professional must add language such as that set forth above to its contract limiting the use of its construction documents to procurement of permits.

Unless the design professional has sufficiently protected itself in its contract, the design professional could face significant liability as a result of the deficient building, notwithstanding that it only prepared a permit set of drawings.

If the design professional intends to include a sufficient amount of detail in the drawings to make the project constructible, one way to check that sufficient information actually has been included is to reference prior Requests for Information (RFIs) on past permit sets. During construction, RFIs are a reality for most projects. However, if the design team’s response to several RFIs is a fully developed detail that did not appear anywhere in the drawings, that is a sign that the drawings did not contain a sufficient amount of detail.

Pitfall: Thinking Your Scope Ends When the Drawings Are Filed for the Permit

Defining the scope of the design professional’s work is critical to both establishing expectations and protecting the design professional against liability. Once the permit set is submitted to the AHJ, the design professional often will have to address comments from the AHJ prior to issuance of the permit.

Within the AHJ, plan examiners review their respective portion (architectural, structural, mechanical, etc.) of a permit set for compliance with the applicable building code. If the plan examiners determine all is in order, a permit is issued. However, in some instances, one or more of the examiners might determine an item within the permit set is non–code compliant and generate a review comment that must be addressed before a permit will be issued. It is common for an AHJ to issue these types of comments, which must be addressed within the drawing set and resubmitted to the AHJ. Only the design team members (i.e., the licensed professionals) can make the necessary revisions to their respective drawings. If the revisions within the resubmitted set adequately address the comments, the permit is issued. If not, the process repeats itself until the AHJ is satisfied and indicates its satisfaction by issuing the permit. The contract documents should be clear that the design professional’s scope of work terminates upon issuance of the permit, which would include responding to all comments from the AHJ to ensure issuance of the permits. However, the design professional must stop all involvement at permit issuance and be sure to avoid participating in any activity that could be considered construction administration or facilitation.

Pitfall: Thinking That If a Permit Was Issued, Your Drawing Content Was Technically Sound

The content within a set of drawings submitted to the AHJ for the purposes of obtaining a permit must comply with the applicable building code. As previously noted, the AHJ is not making sure the drawings contain the content needed to construct the building. Rather, the AHJ is simply making sure that the drawings “meet code” by complying with the building code establishing the minimum requirements. AHJ priorities focus on allowable square footage, construction type, occupancy, life safety requirements, and similar types of items.

In many jurisdictions, the AHJ requires a certification or compliance statement indicating that the design profession certifies the drawing’s content complies with the code. By way of example, the 2017 Chicago Building Code contains the following requirement:

**Final drawings and plans required to comply with code provisions—Certification.** It shall be unlawful for any architect or structural engineer or professional engineer or other person permitted under the laws of the state to make drawings and plans, to prepare or submit to the buildings commissioner, for his approval, any final drawings or plans for any building or structure, which do not comply with the requirements in the building provisions of this Code. It shall be the duty of the building commissioner to require that all drawings and plans submitted to him or her for approval, for any building or structure, shall be accompanied by a certificate of such architect or structural engineer or professional engineer preparing such drawings and plans, that said drawings and plans comply with the requirements in the building provisions of this Code.

This requirement results in a signed and sealed
The first section of Chapter 5 is titled “5.1 Architects and Management” and contains chapters five through eight. The title block on a set of drawings will typically list several milestones and their corresponding dates, such as “Issued for Owner Review,” “Issued for Bid,” “Issued for Permit,” “Addendum 1,” and “Issued for Construction.” It is important to realize that once the AHJ has issued a permit, construction can begin. If the architect was contracted only to develop a permit set, then the developer is not obligated to involve the architect during the construction phase. And if the permit set does not contain the necessary information to construct a building, problems could arise during construction that could be blamed on insufficient drawing content.

Ideally, the developer and architect would negotiate an additional contract for the architect to develop the permit set into an “Issued for Construction” set. However, this does not always happen. Experienced, well-established, reputable general contractors and subcontractors might be able to get the project built, but that type of team might not be assembled for the project. A more reliable approach is to make sure the content in the permit set contains the information for a constructible building. The delta in content between a permit set and an issued for construction set should not be so great that the developer will perceive it to be cost-prohibitive.

Pitfall: Not Meeting the Applicable Standard of Care
The AIA’s The Architect’s Handbook of Professional Practice contains four parts. Part two is titled “Firm Management” and contains chapters five through eight. The first section of Chapter 5 is titled “5.1 Architects and the Law” and states: “The standard of care for an architect is generally defined as what a reasonably prudent architect would do in the same general locale, in the same time frame, given the same or similar facts and circumstances.” What does this mean with regard to a permit set? It means that the architect preparing the permit set needs to know what other architects are doing for permit sets, or, more importantly, what content their permit sets contain, when working on similar projects. This is especially important if the architect is not providing professional services after the permit set is issued. In this scenario, in addition to meeting the requirements of the building code, the permit set will need to contain a sufficient amount of detail that results in a building that is safe and habitable.

If the design professional provides a permit set and fails to avoid the above pitfalls, the design professional could be subject to significant liability.

Protection Against Liability for Permit Sets
If the design professional provides a permit set and fails to avoid the above pitfalls, the design professional could be subject to significant liability. If the developer uses an incomplete and not constructible permit set of drawings to construct its building, any problems with the building attributable to the design could impose liability on the design professional. It is likely that if severe enough problems arise during or after construction, the developer—or the end user of the project—may seek redress against the design professional to recover the cost of resolving such problems. Consider the following hypothetical.

A developer enters into a contract with a design professional for the design professional to provide a permit set. To save costs and meet the demands of the developer, the design professional provides drawings and a project manual that do not include sufficient information to construct a safe and habitable building. Specifically, the drawings (i) are insufficient and incomplete and the specifications are not thoroughly prepared and include blanket references to manufacturer’s recommendations that are not integrated with the specific needs of the project; (ii) inappropriately reference “selected by Owner”; and (iii) generally fail to meet the standard of care. The developer uses these incomplete documents to construct the building. Unsurprisingly, the building suffers extensive post-occupancy issues. When the end user of the building raises these issues with the developer, the developer will ultimately point at the design professional and the construction team. The construction team also will point at the design professional, seeking to shield its own liability by claiming that it merely followed the design. Unless the design professional has sufficiently protected itself in its contract, the design professional could face...
significant liability as a result of the deficient building, notwithstanding that it only prepared a permit set of drawings.

Design professionals should have their contracts reviewed by a construction attorney prior to execution to ensure that the design professional is properly protected.

To protect against this liability, it is critical that the design team (1) execute a contract with the developer that identifies the design team’s limited scope of work and (2) seek indemnification from the developer for any potential liability stemming from the misuse of the permit set of drawings beyond their intended purpose. In addition, the contract must include language setting out the specific documents the design professional will be providing—i.e., the scope of work—and clearly state that the documents are solely for the purpose of procuring permits from the authority having jurisdiction. See the language suggested earlier in this article as an example. Finally, the contract must include language that protects the design professional if the developer uses the permit set of documents beyond the intended purpose of procuring a permit. For example, consider the following indemnification clause:

To the fullest extent permitted by law, Developer agrees to defend, indemnify, and hold harmless Design Professional, its affiliates and all of its directors, officers, employees, agents, personnel, successors, and assigns from and against any and all expenses, damages, punitive damages, claims, actions, demands, losses, liabilities, fines, penalties, and causes of action, attorney’s fees, and expert witness fees caused by or arising out of or alleged to have been caused by or arising out of the use of the Permit Documents for any purpose beyond procurement of permits from the authority having jurisdiction.

Architects who fail to properly protect themselves with clear contract language setting out the specific scope of work, fail to strictly adhere to the agreed-to scope of work, and fail to provide for indemnification against the developer’s use of drawings beyond the stated intent can be exposed to liability. One such case arises from the design and construction of a condominium building in Chicago. In 1801 W. Irving, LLC v. Jonathan Splitt Architects, Ltd., the architect entered into a written agreement with the developer to provide certain architectural services, including providing limited design documents to procure a permit. The developer used the architect’s design documents to construct the building and, after the building suffered extensive defects, the developer sued the architect for breach of oral contract for the alleged faulty and incomplete design. Despite the existence of a written contract, the developer alleged that the architect performed services beyond the scope of the written contract, including reviewing and revising the architectural drawings for construction of the project and supervising the construction of the project. The architect testified that it did not perform any services beyond the written contract, it did not perform any design services during the construction phase, and its scope of work terminated at issuance of the permit set. In the initial appeal, the appellate court reversed the trial court’s order striking the developer’s claim for breach of contract implied-in-fact, holding that the developer had stated a claim. In the second appeal, the appellate court reversed the trial court’s dismissal based on the statute of limitations and again ruled that the developer stated a claim for breach of contract implied-in-fact. Despite the architect’s repeated attempts to avoid liability, the architect was ultimately subject to claims against it for its design work based on the developer’s allegations that the architect performed work beyond the scope of the written contract, including allegations that the architect prepared the construction drawings.

This article describes some of the common pitfalls of permitting a permit set that ultimately can lead to liability for the design professional. A design professional who wishes to avoid that potential liability would be well served by taking the protective measures described in this article. Additionally, design professionals should have their contracts reviewed by a construction attorney prior to execution to ensure that the design professional is properly protected.

Endnotes

2. Id. at 668.
4. Id.
5. AIA, supra note 1.
6. Id. at 168.
8. Id. ¶ 5, 15.
9. Id. ¶ 14.
10. Id. ¶ 11.
2018: This Is Happening, People

California Requires General Contractors to Pay Subcontractors Unpaid Wages

Signed into law on October 14, 2017, and effective January 1, 2018, California’s Assembly Bill 1701 requires general contractors on private works projects to pay the unpaid wages of project subcontractors at any tier.

Under the law, codified in the Labor Code § 218.7, all contracts for the erection, construction, alteration, or repair of a building, structure, or other work entered into on or after January 1, 2018, must include a provision that requires the direct contractor, defined as a “contractor that has a direct contractual relationship with an owner,” to assume joint liability for the unpaid wages, fringe benefits, and other benefit payments or contributions, plus interest, of all subcontractors on the project—at any tier. Benefit payments include payments for workers’ compensation, pension, and insurance. It is unclear whether “wages” could be interpreted to include payments for per diem meals or rest periods. The bill is clear that general contractors are not liable for penalties or liquidated damages assessed after a subcontractor’s nonpayment. Similar to construction liens, the law applies even if the general contractor already has paid the subcontractor in full. By requiring such payments, the new law also is intended to address the misclassification of subcontractor laborers as independent contractors rather than employees with benefits in an effort to avoid paying overtime, workers’ compensation, and pension and insurance benefits.

The law permits general contractors to monitor payments by requiring first-tier subcontractors to provide a specific list of payroll and employee records and identify sub-subcontractors upon request. If a subcontractor fails to provide the information, the general contractor is permitted by law to withhold payment for undocumented amounts. Although no right exists under the law for a general contractor to request sub-subcontractor payroll information, given the potential liability for wages of workers of any tier subcontractor, it is anticipated that general contractors will require sub-subcontractor disclosures through contract terms and flow-down provisions.

No private right of action exists for an individual employee to bring an action to collect unpaid wages or benefits. For enforcement, the law authorizes the state’s Labor Commissioner to bring an administrative action, issue a citation, or bring a civil lawsuit against the general contractor for violations. Union trust funds, joint labor-management cooperation committees, and other third parties owed fringe benefit payments or contributions on behalf of workers also may bring a civil action to collect benefits of the subcontractors’ employees. These third-party entities can recover their reasonable attorneys’ fees and costs, including expert fees, in such actions. Suit must be brought within one year of the earlier of the following:

1. Recordation of a notice of completion,
2. Recordation of a notice of cessation, and
3. Actual completion of the work covered by the direct contract.

At least thirty days prior to bringing a civil action, notice by first-class mail must be provided to the general contractor. Upon judgment, the law allows the general contractor’s property to be attached to secure payment.

According to Assemblymember Tony Thurmond, the author of the bill, “This measure incentivizes the use of responsible subcontractors and helps to ensure the economic vitality of the construction industry and its role in the creation of good paying middle class jobs.” Others worry that the bill will be bad for consumers, resulting in higher prices in an already expensive California housing market. Further, the liability exposure as a result of undercapitalized subcontractors may result in general contractors avoiding the use of smaller subcontractors, hurting the very workers the law is intended to protect.

What is inevitable is that general contractors will

(Continued on page 38)
Seventh Circuit Court of Appeals Shuts Down Internet Trolls Seeking to EstablishCopyright Infringement of Single-Family Home Architectural Designs

This case concerned claims of copyright infringement of single-family home floor plans. The plaintiffs Design Basics, LLC; Prime Designs, Inc; and Plan Pro, Inc. (Design Basics) and their affiliates claim rights to some 2,700 home designs. They sued defendants Lexington Homes, Inc., and related parties (collectively, Lexington) for copyright infringement, contending that Lexington built homes that infringed four of Design Basics’ designs.

Design Basics filed a complaint alleging that four Lexington home plans—the Carlisle, Oakridge, Ashwood, and Easton—infringed four Design Basics plans: the Aspen, Kendrick, Taylor, and Womack, respectively. Lexington chose not to settle. After discovery, Lexington moved for summary judgment, which, in this author’s opinion, was properly granted by the district court and affirmed by the Seventh Circuit.

According to the case background, Design Basics has been in the business of producing market-ready designs for modest single-family homes for several decades. Proceeds from litigation were a principal revenue stream for Design Basics. Indeed, Design Basics had been party to over 100 federal lawsuits, which nearly all involved copyright claims asserted by Design Basics. Design Basics employees were apparently incentivized to scout out potential copyright infringement cases, paying its employees a finder’s fee in the form of a percentage of the net recovery relating to any home plans that they located. Design Basics filed this lawsuit after identifying Lexington home plans similar to those of Design Basics.

The Seventh Circuit acknowledged that Design Basics’ business model of trawling the Internet for intellectual property treasures “is not unique.” “In recent years, opportunistic holders of copyrights, patents, and other intellectual property have developed unsavory reputations for ‘trolling,’ bringing strategic infringement claims of dubious merit in the hope of arranging prompt settlements with defendants who would prefer to pay modest or nuisance settlements rather than be tied up in expensive litigation. Like the proverbial troll under the bridge, these firms try to extract rents from market participants who must choose between the cost of settlement and the costs and risks of litigation.”

The Copyright Act of 1976 extends copyright protection to “architectural works,” defined as building designs “embodied in any tangible medium of expression, including a building, architectural plans, or drawings.” A protected architectural work “includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features.” To establish copyright infringement, a plaintiff must prove two elements: “(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.” Once a plaintiff establishes that a defendant could have copied the work, he must separately prove that the allegedly infringing work is indeed a copy of the original by pointing to similarities between the two works. In order to establish copying, however, a plaintiff also must show access.

In upholding the district court, the Seventh Circuit acknowledged that Design Basics’ claims of copyright infringement were properly granted by the district court and affirmed by the Seventh Circuit.

In granting summary judgment for Lexington, the district court focused on the question of “access.” The court observed that there was no evidence Lexington or its agents received or reviewed any of the plans at issue. Also, the accused’s plans and Design Basics’ plans were not so “strikingly similar” as to permit an inference of copying without separate proof of access. There was evidence that Lexington’s employees were generally familiar with Design Basics and may have seen some of its other designs. But the court found the evidence of access to other designs was not sufficient to infer access to the designs claimed in this case. The court entered judgment for Lexington. Design Basics appeals.

In upholding the district court, the Seventh Circuit gauged substantial similarity on “whether the accused work is so similar to the plaintiff’s work that an ordinary reasonable person would conclude that the defendant unlawfully appropriated the plaintiff’s protectible expression by taking material of substance and value.” The court acknowledged that the market for affordable home designs is crowded because opportunities for originality are tightly constrained by functional requirements,
consumer demands, and the vast body of similar designs already available. “In this field, the substantial similarity requirement is particularly hard to satisfy.”

“The challenge of proving substantial similarity is heightened where the field is crowded or where aesthetic choices may be secondary to consumer demands or functional requirements. The challenge is particularly acute in the market for affordable designs for single-family homes, where form follows function so closely. Blueprints drafted by companies like Design Basics and Lexington are meant to appeal to home builders and buyers who want to build, sell, and buy homes that will hold their value. While it is possible to design a home that is a one-of-a-kind work of art, the home designs here do not fit that description. They resemble familiar configurations of spaces and features, having less in common with the work of Frank Gehry or Frank Lloyd Wright and more with that of William Levitt.”

The court noted that Lexington’s accused plans resemble Design Basics’ plans, but only because both sets resemble common home designs one might observe throughout the suburbs of Milwaukee, Chicago, Indianapolis, or many other communities. There are only so many ways to arrange a few bedrooms, a kitchen, some common areas, and an attached garage, so “not every nook and cranny of an architectural floor plan enjoys copyright protection.” We wonder whether there is any blueprint for a single-family home anywhere in the country that Design Basics could not match to one of its own designs by applying the loose standard of similarity it relies upon here. An infringement doctrine that would enable an aggressive designer to sue all of its competitors and bring those claims before a jury would turn the law of copyright on its head. Far from promoting the “Progress of Science and useful Arts,” such a doctrine would chill the market.

In addition to a lack of substantial similarity, the court also found Lexington did not access the plans, notwithstanding their access over the Internet. “We do not draw here a bright line as to the quantity or quality of evidence, in addition to a web presence, a plaintiff must offer to raise a genuine issue of fact concerning access. We decide only that the existence of the plaintiff’s copyrighted materials on the Internet, even on a public and ‘user-friendly’ site, cannot by itself justify an inference that the defendant accessed those materials. It follows that a plaintiff who cannot show striking similarity and whose evidence of access reduces to the mere existence of a website cannot survive summary judgment on a copyright infringement claim. The district court correctly granted summary judgment to Lexington.”

Author Comments: It is expected that architectural copyright infringement claims are seldom pursued and are not common practice in a construction lawyer’s day-to-day activities. This author has been involved in one such case in the last fifteen years in a practice that is 100% construction related. That case, however, still sits fresh in the mind. It is not entirely a surprise that Internet trolls would add this field to their business portfolio. There are obviously several other components of the claim and related damages that require analysis. Substantial similarity, however, is a significant hurdle, as there are only so many ways to lay out a home, especially if the geographical region drives the structural and aesthetic design. If these types of cases are becoming more commonplace, builders and their lawyers are well advised to be diligent in knowing the source of the design and ensuring copyright indemnity provisions remain a material term in their contractor/owner/architect contracts.

Design Basics, LLC v. Lexington Homes, Inc., 858 F.3d 1093 (7th Cir. 2017).

Maryland Holds That General Contractors Owe Subsequent Homeowners a Nondelegable Duty of Care to Comply with Building Code in the Construction of Homes

This case arose from a personal injury action brought by Adam Rutkowski and Sara Mastropole, appellants, husband and wife, subsequent purchasers of a home constructed by developer/general contractor Marrick Properties, Inc. (Marrick).

Marrick completed construction of the home in 2005. Marrick entered into a contract with Creative Trim to perform certain trim work on the home, including the construction and installation of guardrails. The home was constructed with a sliding glass door in the kitchen to allow access to a potential future deck. Although the kitchen was located on the first story of the home, the sliding door opening was approximately twelve to thirteen feet above the ground due to the slope of the lot. The home did not have a deck at the time it was constructed, so a safety guardrail was installed on the exterior of the house outside of the sliding glass door. After the house was completed, the prior owners moved into the home in 2005 and lived in it for approximately seven years.

In 2012, the appellants purchased the home. Later that year, Rutkowski opened the sliding glass door in order to shake out a kitchen mat. He extended his arms over the guardrail while holding the mat and his body pushed against the guardrail. The guardrail gave way, causing Rutkowski to fall twelve to thirteen feet onto the concrete patio below. Rutkowski suffered multiple broken bones and a traumatic brain injury as a result of the fall.

The appellants filed suit against Marrick and Creative Trim. A jury returned a verdict in favor of the appellants and against Marrick, awarding $1,306,700 in damages. Merrick appealed. On appeal, the Maryland Court of Special Appeals was asked to determine, inter alia, whether, under Maryland law, a general contractor/builder bears a nondelegable duty to comply with the relevant provisions of the building code. Marrick argued that such a duty only exists as a nondelegable duty owed by the developer or owner. Marrick, of course, contends that the duty to comply with the building code was delegated...
to Creative Trim as the subcontractor performing the work. The court ultimately affirmed the circuit court verdict, finding that such a duty exists under Maryland law.

The court began with recalling the extent to which general contractors and owners, over the past several decades, were held liable for the negligence of subcontractors due to a violation of the building code. This case was distinguishable in that it concerned injuries sustained by subsequent purchasers. Maryland follows the general rule that the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his employees; however, that exception “is riddled with a number of common-law exceptions that have practically subsumed the rule.” The exceptions to the general rule fall into three broad categories: (1) negligence of the employer in selecting, instructing, or supervising the contractor; (2) nondelegable duties of the employer; arising out of some relation toward the public or the particular plaintiff; and (3) work that is specially, peculiarly, or inherently dangerous.

In reaching its opinion, the Maryland Court of Special Appeals considered “whether social policy and fairness will allow an imposition of liability on the [owner and general contractor/permit holder] where their negligence was passive when opposed to the negligence of the subcontractor.” The court acknowledged that in prior cases it was noted that “[i]ff the statute imposes a strict liability on the owner and permit holder, then there is no distinction between active and passive negligence” and “liability attaches if the violation of the building code was the cause of the injury.” Relying on Restatement (Second) of Torts § 424, the court held in prior cases that “the Building Code places a nondelegable, affirmative duty on the owner-permit holder at the time of construction, to insure compliance with the Code.” The Restatement provides:

One who by statute or by administrative regulation is under a duty to provide specified safeguards or precautions for the safety of others is subject to liability to the others for whose protection the duty is imposed for harm caused by the failure of a subcontractor employed by him to provide such safeguards or precautions.

In response to Marrick’s position that a duty imposed by a building code is only nondelegable by the owner or developer, not by a general contractor, the court countered that this is an unreasonably narrow reading of prior Maryland caselaw and the Restatement. “To be sure, as the general contractor, Marrick was required to comply with the building code, and it is unassailable that the code provisions alleged to have been violated in this case were intended as safety measures. Pursuant to § 424 of the Restatement (Second) of Torts, [o]ne who by statute or by administrative regulation is under a duty to provide specified safeguards or precautions for the safety of others is subject to liability to the others for whose protection the duty is imposed for harm caused by the failure of a contractor employed by him to provide such safeguards or precautions.” In this case, Marrick, the general contractor responsible for the construction of the appellees’ home, bore the statutory duty to provide specified safeguards or precautions. “Marrick, therefore, is subject to liability to the appellees for harm caused by the failure of its employee Creative Trim to provide such safeguards.”

Author Comments: The issue of nondelegable duty is alive and well throughout the country. It is expected some state legislatures have now expressly dealt with this issue. The outcome is an important one, as it impacts risk-shifting provisions in the owner/contractor/subcontractor contracts, dismantles economic loss doctrine defenses, and is a dominant force in pretrial motion practice and back-end settlement discussions. If not already published, it would be a good topic for a fifty-state survey. Perhaps one of the ABA divisions is ready for a new project.


In a Case of First Impression, Nevada Supreme Court Invalidates Design Professional’s Lien

The disputes in Iliescu v. Steppan arose when Iliescu, as property owner, agreed to sell four unimproved lots to Consolidated Pacific Development (CPD) for $7 million under a land purchase agreement. CPD intended to develop the land and construct a high-rise, mixed-use project that would be named Wingfield Towers (Project). CPD assigned its land purchase agreement to an affiliate, BSC Investments, LLC (BSC). BSC then negotiated with an architectural firm named Fisher Friedman Associates to design Wingfield Towers. The architect of record, licensed in Nevada to perform the work, was Mark Steppan, an employee of Fisher Friedman Associates.

Steppan sent an initial proposal to BCS that outlined the design services and compensation would be equal to 5.75 percent of the total construction costs, which were estimated to be $180 million. In the interest of beginning design work, Steppan entered into a “stop-gap” agreement with BSC where he would bill hourly until an American Institute of Architects (AIA) agreement could be signed for the Project. The AIA agreement between Steppan and BSC was signed for approximately $10 million, which based the progressive billings on a percentage of completion of five phases of the design work. Steppan was to receive twenty percent of the total fee upon completion of the schematic design phase (over $2 million).

Steppan completed the schematic design phase and Wingfield Towers was able to secure the required entitlements and project approval from the Reno Planning Commission and the Reno City Council. When BSC failed to pay him, Steppan recorded a mechanic’s lien on Iliescu’s property. However, Steppan did not provide Iliescu with a pre-lien notice of nonpayment or intent to file a lien.

The Project was never completed as the financing was...
not obtained, the escrow never closed, and there were no onsite improvements made to the property. The only work performed was Steppan’s architectural services, but the work was substantial—approximately $2 million. When Iliescu sought to have the lien released, Steppan filed a complaint to enforce the lien. Iliescu filed a motion for partial summary judgment seeking to invalidate the lien for Steppan’s failure to send a notice prior to filing the lien. Steppan filed its own motion for partial summary judgment arguing that the pre-lien notice was not required under the “actual notice” exception recognized in Nevada.

The district court denied Iliescu’s motion because Iliescu had viewed the architectural drawings and attended meetings where the design team presented the drawings. Even though Iliescu claimed to not know the actual identity of the architect of record, the court found Iliescu had “actual notice” that architectural services were being performed on the project. The district court subsequently entered an order granting Steppan’s mechanic’s lien, and Iliescu appealed to the Nevada Supreme Court.

On appeal, the Nevada Supreme Court was asked to determine whether the actual notice exception for pre-lien notices should be extended to offsite work and services performed by an architect for a prospective buyer of the property. The Nevada Supreme Court reviewed the appeal de novo.

The court began its analysis by explaining that Nevada’s state statute requires that all lien claimants deliver a notice of a right to lien the property to the owner. The court acknowledged, however, that the statute is liberally interpreted and most cases allow lien claimants to show “substantial compliance” with the statute, so long as the property owner is not prejudiced. In this instance, however, no construction activities took place on the property.

As such, the court had not previously had occasion to address whether the actual notice exception applies to offsite work and services performed by an architect. In reviewing prior case law, the court noted that in cases where actual notice sufficed, as opposed to a pre-lien written notice, the owner was aware that physical work was being done on the property and that labor and materials were being incorporated into the project. The court then determined that the actual notice exception should not and does not extend to offsite work when no work has been performed on the property.

The court was particularly persuaded by the potential prejudice owners would face in the absence of a written notice from lien claimants performing work offsite. First, property owners would assume the risk for payment of a prospective buyer’s architectural services that may never be constructed on the property. Second, because the agreement between Iliescu and BSC was contingent on the purchase of the property, which never occurred, Iliescu was not able to give a notice of nonresponsibility to protect himself from mechanic’s liens. As such, a current property owner should not bear the risk that a prospective buyer will not pay its architect for services performed on a project that may never be constructed. The court reversed the district court’s decision that Steppan had substantially complied with the mechanic’s lien statute.

Author’s comments: Under Nevada’s lien statute, the door is now closed to all design professionals who rely on the “actual notice” exception. The result may seem especially harsh because the design professional had invested substantial time and effort in developing a schematic design phase and had properly contracted under an AIA agreement for its fees and the owner of record knew that the schematic design was being developed. Mechanic’s lien statutes, however, require strict compliance.


Notes from the Editor
(Continued from page 3)

that will allow for the attainment of a building permit. Perhaps stating the obvious, design professional are not supporters of this approach to a project. Kendall and Lance summarize the potential pitfalls: failing to prepare and provide a project manual, omitting specification sections, the inappropriate use of “selected by Owner” within the drawings, and not including sufficient detail in the drawings. These pitfalls not only increase the potential liability of the design professional, but also jeopardize the success of the project.

The Misadventures of Shared Design Risk Build World
(Continued from page 13)

Material and Workmanship; FAR 52.236-15, Schedules for Construction Contracts; FAR 52.236-21, Specifications and Drawings for Construction; FAR 52.236-22, Design Within Funding Limitations. In addition, FAR clauses governing liquidated damages, bonding, changes, value engineering, and terminations may be incorporated into the D/B agreement. The Christian Doctrine (G. L. Christian & Assocs. v. United States, 312 F.2d 418 (Ct. Cl. 1963)) will read into a government contract by operation of law the FAR clauses that are mandatory, even if they are not expressly included in a particular contract.

35. FAR 52.236-21.
39. FAR 52.236-21.
40. FAR 52.236-21(f).
41. FAR 52.236-21(g).
42. FAR 52.236-23(a).
43. FAR 52.246-21(a), (b).
44. FAR 52.246-21(c).
45. FAR 52.236-23(b).
46. ASBCA No. 41201, 94-2 B.C.A. (CCH) ¶ 26936 (May 18, 1994).
47. FAR 36.302.
49. Id.
52. Id.
54. J. L. Simmons Co., 412 F.2d at 1362.
55. 07-1 B.C.A. (CCH) ¶ 33576 (May 9, 2007).
56. GSBCA No. 14477, 00-1 B.C.A. (CCH) ¶ 30806 (Mar. 2, 2000).
60. HPI/GSA 3C, LLC v. Perry, 364 F.3d 1327, 1334 (Fed. Cir. 2004).
62. See, e.g., E. L. Hamm & Assocs., Inc. v. England, 379 F.3d 1334, 1339 (Fed. Cir. 2004) (“To demonstrate that it was misled, the contractor-claimant must show both that it relied on the defect and that the defect was not an obvious omission, inconsistency or discrepancy of significance—in other words, a patent defect—that would have made such reliance unreasonable.”); NVT Techs., Inc. v. United States, 370 F.3d 1153, 1162 (Fed. Cir. 2004) (“If the ambiguity is patent, it triggers a duty to inquire. A patent ambiguity is one that is obvious, gross, or glaring, so that plaintiff contractor had a duty to inquire about it at the start.”); W. Bay Builders, Inc. v. United States, 85 Fed. Cl. 1, 31 (2008) (holding that ambiguities in specifications in government contract pertaining to the application of concrete floor moisture sealant were glaring and were apparent on the face of the contract itself, they were patent, and therefore contractor had an affirmative obligation to inquire of the government as to the meaning of those patent ambiguities); Metric Constr. Co. v. United States, 80 Fed. Cl. 178, 186 (2008) (design specification for steel framework of warehouse was defective, rendering government liable for additional costs); Space Corp. v. United States, 470 F.2d 536, 538 (Ct. Cl. 1972) (stating that “when a contractor is faced with an obvious omission, inconsistency or discrepancy of significance, he is obligated to bring the situation to the government’s attention if he intends subsequently to resolve the issue in his own favor”).
63. 4 C.F.R. § 21.2(a)(1); see also MVM, Inc. v. United States, 46 Fed. Cl. 126 (2000) (challenges to the facial terms of a solicitation should be made before the award of a contract; the failure to do so until after award may waive the challenge); Innovative Techs. Corp., Comp. Gen. Dec. B-401689, B-401689.2, B-401689.3, 2009 CPD ¶ 235 (Nov. 9, 2009) (a protest of alleged improprieties apparent on face of task order solicitation, filed after issuance of the task order, is dismissed as untimely under GAO’s Bid Protest Regulations); Smart Innovative Solutions, Comp. Gen. Dec. B-400323.3, 2008 CPD ¶ 220 (Nov. 19, 2008) (GAO’s rule that protests of patent ambiguities must be filed prior to responsive submissions is intended to facilitate clarification of legitimate questions before the preparation of submissions); In re Harrington, Moran, Barksdale, Inc., Comp. Gen. Dec. B-401934.2, B-401934.3, 2010 CPD ¶ 231 (Sept. 10, 2010) (conflicts between the requirement as described in the agency’s discussions letter (as interpreted by the protester) and the particular solicitation requirement created a patent ambiguity that should have been filed under prior to the submission deadline for revised proposals).
66. FAR 52.236-21(a).
67. Id.
68. ASBCA No. 59157, 17-1 B.C.A. (CCH) ¶ 36626 (Jan. 4, 2017).
69. Gov't & Military Cert. Sys., Inc., B-413875, 2016 CPD ¶ 375, 2016 WL 7425332, at *5 (Dec. 22, 2016) (protest of solicitation terms filed after the deadline for the submission of quotations is untimely and will not be considered by the GAO).
70. S. S. Mullen, Inc. v. United States, 389 F.2d 390, 393 (Ct. Cl. 1968).
73. Id.
74. CBCA 3350 et al., 17-1 B.C.A. (CCH) ¶ 36870, 179,687 (Sept. 19, 2017).
KEY CONSIDERATIONS FOR THE USE OF PEER REVIEWS

(Continued from page 24)

7. See, e.g., Jeffrey D. Masters & John R. Mustano Jr., Managing Liability Risks in Green Construction, 30 L.A. Law. 17, 20 (December 2007) (“Peer review is even more critical on green projects because of the varying levels of green experience and expertise among design professionals. This is particularly true regarding selection and specification of green products and components”).
8. 2 PHILIP L. BRUNER & PATRIC J. O’CONNOR, BRUNER & O’CONNOR ON CONSTRUCTION LAW § 7:133, Project risks—Communication risks—Poorly coordinated contract documents (citing WILLIAM T. NIGRO & MARTHA W. NIGRO, REDCHECK INTERDISCIPLINARY COORDINATION 4 (1987) (“An average project contains five coordination errors per contract drawing. The number of coordination errors can be staggering on a large project. A project of 500 drawings will typically contain 2,500 coordination errors.”)).
9. Id.
11. 845 So. 2d 161, 163 (Fla. 2003).
12. Id.
14. Id. at 1381.
16. 530 E. 89 Corp. v. Unger, 388 N.Y.S. 2d 284, 285 (N.Y. App. Div. 1st Dep’t 1976), aff’d, 373 N.E.2d 276 (N.Y. 1977) (architects, like other professionals, must meet the test of ordinary and reasonable skill usually exercised by one of that profession); Bayshore Dev. Co. v. Bonfoey, 75 Fla. 455, 463, 78 So. 507, 510 (1918) (applying Florida common law, an architect’s undertaking does not imply or guarantee a perfect plan or satisfactory result).
17. KAN. STAT. ANN. § 74-7047 (2016).
21. Id.
22. Id.
23. Note that design professionals may have personal liability arising from their professional services due to statutory requirements. As such, provisions eliminating personal liability may not be applicable in all circumstances. Notwithstanding this caveat, it is recommended that they be included within the professional service agreements.
26. See Prieto v. Malgor, 361 F.3d 1313, 1318 (11th Cir. 2004) (defining a “hybrid” witness as one who is “called upon to testify to both factual and expert matters”).
27. 137 So. 3d 1059, 1062 (Fla. 4th Dist. App. 2014).
28. Id.
29. Id. at 1065.
30. Id. at 1062.
31. See Fed. R. Civ. P. 26; Meredith v. Int’l Marine Underwriters, CIV.A.JKB-10-837, 2011 WL 1466436, at *4 (D. Md. Apr. 18, 2011) (these criteria also define a category of expert witnesses who are not required to file reports: i.e., those who are or have been employed by the party in some capacity but not specially for the purpose of giving expert testimony).
34. Miller v. L.A. Cnty. Flood Control Dist., 505 P.2d 193, 202 (Cal. 1973) (competent expert testimony is required to establish that a contractor deviated from the standards prescribed by law or prevailing in the industry).
35. Nat’l R.R. Passenger Corp., 268 F.R.D. at 216–17 (in discussing discovery obligations for hybrid witnesses, the district court opined that “a party may not circumvent the requirements of Rule 26 by employing a witness, like a treating physician who treated an injured party, to provide testimony extending into classic expert opinion regarding causation and prognosis”); see also Thomas v. Consolidated Rail Corp., 169 F.R.D. 1, 2 (D. Mass. 1996) (requiring expert reports from plaintiff’s treating...
Construction Bills: Recent Changes to Construction Laws
(Continued from page 31)

look to change their subcontract terms and procedures. Although general contractors cannot contract around A.B. 1701, they can contractually require (1) payroll information of the subcontractor and sub-subcontractor with each application for payment; (2) a right to audit subcontractors’ payroll records; (3) periodic confirmation of financial health of the subcontractor; (4) stronger indemnity provisions; (5) payment bonds or letters of credit at all tiers; and (6) personal guarantees by the owners, shareholders, and members of subcontractors. General contractors also would be free to contract for the withholding of retention until after the one-year statutory deadline.

In Response to Hurricane Harvey, Harris County, Texas Enacts New Building Regulations
Still recovering from $180 billion in damages caused by Hurricane Harvey, quite possibly the costliest natural disaster in U.S. history, the Harris County Commissioners Court unanimously approved more stringent regulations for development within floodplains.

Beginning January 1, 2018, residents will have to build to current 500-year floodplain level rather than the previously required 100-year floodplain level. The regulations will affect all new construction permits.

Specifically, the regulations require those in the 100-year floodplain to construct or reconstruct at least two feet above the 500-year floodplain level. New houses must be built on piers, rather than the more common slab on grade, to allow water to flow through the structure. For wind protection, homes must be able to withstand a three-second gust basic wind speed of 120 miles per hour. This may require reinforcing straps to connect rafters and walls.

Despite the new regulations appearing extreme, Harris County has experienced a 500-year flood three times since 2015. During Hurricane Harvey, up to thirty percent of Harris County was underwater and it is estimated that over one trillion gallons of water fell during the four days that Harvey sat over Harris County. The County analyzed how and where over 30,600 homes flooded in its unincorporated jurisdiction. The commissioners believe that had the new regulations been in place, they would have protected a vast majority of the homes that flooded.

There are worries that these regulations could impact growth in Harris County, which has added nearly one million people since 2000, by making construction more expensive. The Greater Houston Builders Association, Houston Real Estate Council, American Council of Engineering Companies of Houston, Houston Apartment Association, and Houston chapter of the American Institute of Architects, however, all wrote letters supporting the new regulations.

The regulations only apply to the unincorporated areas of Harris County, Texas, meaning that it does not apply to the City of Houston or other incorporated areas such as Tomball or Jersey Village.

Endnotes


THE 2017 A201 DESKBOOK
EDITORS: PETER W. HAHN, JOSEPH C. KOVARS, AND AMANDA S. MACVEY

The American Institute of Architects (AIA) has completed a total reexamination of its core contracts and issued a new form A201 General Conditions of the Contract for Construction. The A201 is the most frequently used document of all construction agreements, and virtually all AIA contracts are intended to work with it. To help construction lawyers understand and work with the sweeping changes of these widely used general conditions, The 2017 A201 Deskbook identifies and analyzes every significant change made to the A201 document, and also includes for the first time a section-by-section critical analysis of the A201, with case law interpretations and practice tips.

STATE AND LOCAL CONSTRUCTION PROJECTS: AN ATTORNEY’S HANDBOOK
EDITOR: DANIEL D. McMILLAN

This handbook highlights the critical differences that frequently exist between the law applicable to state and local public works versus private works so that owners, contractors, subcontractors and design professionals can avoid the many pitfalls and surprises that can arise due to such differences. Although the law of each state or local jurisdiction may vary in its particulars, there are a number of common differences between the law applicable to public and private projects. Familiarity with such differences enables those providing legal advice to participants on public projects and the participants themselves to better understand and discern the particular requirements of their state or local jurisdiction and how it differs from those applicable to private construction projects.

Calling All Forum Members: Come to New Orleans for the ABA Forum on Construction Law 2018 Annual Meeting!

This year, we’re… “Taking Care of Business: A Mini-MBA Program for the Construction Lawyer.” As the Meeting title suggests, during the 2018 Annual’s sessions, you will be immersed in topics focused on the business aspects of the construction industry.

Join us on April 11-13, 2018 at The Roosevelt New Orleans-a Waldorf Astoria hotel, for three days of networking, education from leaders in the construction industry and the construction law community, collaboration and all the food, fun and flourishes you would expect in the Crescent City.

Attend the Advocacy Practicum, a half-day session focused on understanding and presenting an effective case on delay damages. Sign up for the Diversity Luncheon, featuring a Former Forum Leadership Panel comprised of five diverse Chairs Emeriti of the Forum, who will share their experiences with growing diversity in the construction industry and within the Forum.

March with us, NOLA-Style, in our own Forum Parade to the Welcome Reception being held at the House of Blues. After that, plan to revel with fellow Forum night-owls at Bourbon Heat on Bourbon Street before your next day of Forum activities and sessions. Then, make sure to stay the weekend for the French Quarter Festival. This year marks the 35th Anniversary of the largest free music festival in the South, showcasing local music on multiple stages throughout the City of New Orleans.

The Forum on Construction Law Annual Meeting and the French Quarter Festival all await you in New Orleans!

Registration Opening Soon

Program Team: Tamara Lindsay, Program Co-Chair; Carson Fisk, Program Co-Chair; and Dan King, GC Liaison