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# Key Legal Concerns for Design Professionals in the Pile Driving Industry

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# Mitigating Design Risk in Contracts

When providing any level of design work on a project, it's pertinent that you identify and mitigate risks through the negotiation and drafting of the construction agreement.



# Spearin Doctrine

- Implied warranty by the Owner to the Contractor, that Contractor can rely on the accuracy of the plans and specifications; so long as Contractor follows the plans and specifications, the results will be acceptable and Contractor will not be liable for any loss or damage deficiencies resulting from the defective plans or failures of its Work.
- Applicable in most jurisdictions when utilizing a traditional project delivery, especially in public works contracts, wherein Owner or a third party architect or engineer assumes ownership over the design specifications of the project.



# Design-Build Delivery Method

- Design-Builder's responsibility for the accuracy and sufficiency of the design and construction vs designs provided by third party.
- Owners attempt to shift all risk and liability to others under the Design-Build delivery method, however, Owners cannot completely insulate themselves.
- “[T]ypical ‘performance’ type specifications 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.” *J.L. Simmons Company, Inc. v. United States*, 412 F.2d 1360 (Ct. Cl., 1969) .
- With Contractor’s use of its ingenuity or discretion, Contractor shares in some risk.



# Design-Build Delivery Method, *cont'd*

- However, it is inherent that some aspect(s) of the project will be predicated on Owner supplied information such as overall program or performance goals of the project.
- Spearin liability can also be found based on Owner supplied design information provided as part of the bidding process.



# Spearin Doctrine Protection Remains Under Certain Circumstances

- Beware of contractual provisions that shift all design costs and liabilities to the Design-Builder even wherein the Owner provides detailed designs or instructions.
  - If the Owner provides faulty information on which the design is based, the Owner may be liable to the Design-Builder for additional costs incurred due to a defective design that was provided by the Owner.
- The risks can be mitigated through contract revisions and negotiations.
- Owners will often present and identify design documents as being for informational purposes only and then require that the Design-Builder verify the accuracy of the Owner's design.



# Case Law Examples

- Ability to make a Type I Differing Site Condition claim is often unknowingly forfeited by Design-Builders. In order to be able to maintain a Type I claim, the Owner must clearly relieve the design builder of its design obligations. Preliminary drawings that must be verified by Design-Builder prior to development of the final design by the Design-Builder eliminated the possibility of a claim. *Lovering-Johnson*, ASBCA No. 53902 (2005).
- Defense of impossibility of construction is not available to a design builder which assumes the risk of impossibility of construction when it expressly warrants that it can build a compliant project. *Colorado-Ute Electric Ass'n v. Envirotech*, 524 F. Supp. 1152 (D. Co. 1981).
- Alterations to design profile provided by Owner by Design-Builder results in an assumption of risk by the Design-Builder if its revised design fails even if the Owner's original design was impossible to build. *Aleutian Constructors v. U.S.*, 24 Cl. Ct. 372 (1991).



# Design Specs: Correct vs Complete

- *United States ex rel. Bonita Pipeline, Inc. v. Balfour Beatty Constr. LLC*, 2017 U.S. Dist. LEXIS 222221 (S.D. Cali. May 19, 2017):
  - BBC had \$35mil Design-Build contract to construct a replacement hangar at Camp Pendleton; Bonita was a structural steel and metal decking subcontractor with a \$4.7million subcontract
  - Bonita sued for additional compensation related to design errors and changes
  - BBC argued that Spearin could not apply as in Design-Build the plans and specs are expressly incomplete at time of contracting
  - The design docs stated they were “incomplete” when given to Bonita and the Subcontract did state that the plans and specs were subject to further refinement



# *Bonita Pipeline, Inc. v. Balfour Beatty Constr, cont'd*

- However, the basis of Spearin is whether the plans and design specs are correct, not whether they are complete
- Bonita accepted the risk that the plans and specs would be refined – not that they would be defective
- Court agreed that in this instance Spearin may apply to Design-Build projects:
  - the responsibility to provide correct plans and specifications is not overcome by the general clauses requiring the contractor, to examine the site, to check the plans, and to assume responsibility for the work



# *Metcalfe Const. Co. v. United States*, 742 F.3d 984 (1st Cir. 2014)

- Government issued a soils report marked “for preliminary information only” however soil conditions were "materially different" than indicated
- Government rejected Metcalfe’s claim for \$25million in additional costs
- The Contract required Metcalfe to conduct an independent soil analysis; Government argued its report was for bidding purposes only
- Although contract did contain a differing site conditions clause, the Court reasoned that Metcalfe bore the risk of the “preliminary information” in the soils report might change, it did not mean Metcalfe bore the risk that the information would be completely inaccurate
- This holding prevents Owners from shifting the risk of unforeseen site conditions or incorrect plans onto the Design-Builder – Government can no longer rely on its broad disclaimers of liability for differing site conditions in the contract
- Court also held the Government violated the duty of good faith and fair dealing - a breach of the implied duty of good faith and fair dealing does not require a violation of an express provision in the contract



# Key Design-Build Contractual Provisions

- Site Inspection
- Differing Site Conditions
- Geotechnical Investigations
- Conflicts and Errors in Contract Documents
- Inclusion of Owner provided design and program documents
  - Ownership of and liability for Owner provided information



# Design Build Claims

- Notice, Notice, Notice!
- Everyone on team needs to know what the notice clause provides regarding timing, form, and delivery method of notice.
- Notice #1: Delay because of defective plans and specifications/unforeseen conditions, anticipate the following possible categories of damages.
- Notice #2: Preliminary update re delays and costs a few days later, when mobilization occurs and/or per contract
- Notice #3: Substantiate and Calculate Damages with daily logs, signed labor and material sheets, and segregated costs categories.



# Key Components of an Initial Delay Notice Email

Pursuant to Article \_\_\_\_ of the Subcontract, Subcontractor has been delayed since \_\_\_\_\_, 2018 because it is unable to begin its work due to the Contractor's failure to provide Subcontractor with proper access to its work, including, but not limited to, a failure to provide a safe working platform (provide a detailed chronology of the sequence of events).

Subcontractor will continue to sustain damages, including but not limited to costs for idle labor and equipment, as well as for extended general conditions until the Contractor fully and successfully addresses this situation.

Subcontractor will require an extension of time in the amount of \_\_\_ days, which is currently commensurate with the delay incurred by Subcontractor due to no fault of Subcontractor.

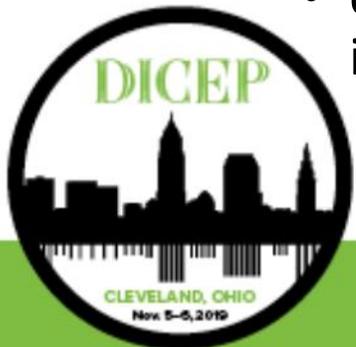
Subcontractor will regularly provide updated quantifications of damages and delays once available. (Must include extension of time in final C.O.)

- In the event of a DSC, request on-site participation.



# Direct Claims against Design Professionals

- In recent years, more and more states have expanded the remedies for a contractor or subcontractor who desires to make a direct claim against a design professional for a defective design, despite the lack of privity between them.
- These claims have been particularly successful in states such as New Jersey, Pennsylvania, and West Virginia, as well as in Ohio, Florida, and Texas under certain circumstances.
- Direct claims allow:
  - contractors to evade contractual no damages for delay, notice, and claims procedure clauses;
  - contractors to reach lower tier designers such as structural engineers who are not involved in supervision but who know that the contractor will rely on its design.



# *Suffolk Constr. Co. v. Rodriguez & Quiroga Architects Chartered*, 2018 WL 1335185 (S.D. Fla. Mar. 15, 2018)

- Florida Federal Court held that Contractor may pursue a designer for its alleged negligence so long as the designer created a "foreseeable zone of risk."
- Both concrete contractors, Suffolk and Baker, brought negligence actions against the project's designers and architects alleging that the design documents were flawed, which caused increased costs and delays to the project.



# *Suffolk Constr., cont'd*

- Foreseeable Zone of Risk:
  - A designer has to exercise some control over the contractor or the project by either maintaining a supervisory role OR preparing designs that it knows will be relied on by the contractor.
    - The Court found that the prime designers exerted control through their supervisory role on the project, which included determining if the Suffolk and Baker complied with the design specifications.
    - The Court also found that the lower-tier designers – who only participated in preparing the designs and had no supervisory role – also exercised control over Suffolk and Baker. The Court reasoned that the lower-tier designers created a foreseeable zone of risk because they knew Suffolk and Baker would rely on the information contained in the design and structural documents that they prepared.



## *Suffolk Constr., cont'd*

- The foreseeable zone of risk standard and the potential resulting liability extends to lower tier designers such as structural engineers who are not involved in supervision but who know that the contractor will rely on its design.



# *Suffolk Constr., cont'd*

- Defense Implications
  - In ruling, the Court rejected arguments raised by the project's designers and architects regarding Suffolk's and Baker's alleged breach of the notice and claim procedures contained in their respective contracts with the Owner.
  - Timing:
    - Because of the lack of privity, claims against the design professional brought by Contractors are not limited by the timing provisions and requirements of the underlying Contract Documents
    - Notice and Claims Procedure clauses.



# *Balfour Beatty Infrastructure, Inc. v. Rummel Klepper & Kahl, LLP, 155 A. 3d 445 (Ct. App. MD. 2017)*

- Contrary result:
  - The Court of Appeals of Maryland held that a contractor could not bring a lawsuit directly against the engineer for alleged deficiencies in the engineer's design that caused economic losses to the contractor on a government project in the absence of a direct contract, property damage, or personal injury.





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