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Only Firms Registered to Do Business in Nevada May Recover Fees

By Craig MacLellan, Esq.

THE SUPREME COURT OF THE STATE OF NEVADA ("the Supreme Court") recently held that an out-of-state architectural firm must be duly registered within Nevada in order to bring or maintain an action in Nevada for compensation for its professional services.

In *DTJ Design, Inc. v. First Republic Bank, A Nevada Corporation,* 318 P.3d 709 (2014), the Plaintiff, a Colorado-based architectural firm ("DTJ"), appealed the district court's entry of summary judgment in favor of the defendant, First Republic Bank ("First Republic"), dismissing DTJ's claims for lien priority and unjust enrichment. In dismissing DTJ's claims, the district court held that DTJ had failed to comply with Nevada's statutory registration and filing provisions, pursuant to NRS 623.349(2) and was, therefore, barred from maintaining an action in Nevada against First Republic.

The practice of architecture in Nevada is governed by NRS Chapter 623. NRS 623.357 provides [in relevant part] that "[n]o person [or] firm . . . may bring or maintain any action . . . for the collection of compensation" for architectural services without first "alleging and proving that such plaintiff was duly registered under this chapter at all times during the performance of such act or contract." Accordingly, an out-of-state architectural firm, such as DTJ, would first be required to plead and prove that it was a properly registered entity, pursuant to Chapter 623, to maintain an action for compensation for architectural services. The registration process is governed by NRS 623.349.

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Public-Private Partnership and Design-Build Subsurface Projects: Who is Actually Responsible for Design and Subsurface Conditions Risk? A Call for Guidelines

By David J. Hatem, PC

1 INTRODUCTION

Both Public-Private Partnership ("P3") and Design-Build ("D-B") projects depend upon a model in which a D-B Team is expected to be responsible for, and undertakes the risk of developing a conceptual design into a final design that adequately meets the owner's mandatory criteria and standards for the design of the permanent and completed project work.[1] The theory underlying the model is that the D-B Team assumes the pricing, performance and schedule responsibility and risk because it has control over, and the ability to exercise meaningful discretion and judgment in, the design development and construction processes. A corollary of that theory is that the Owner – in exchange for the D-B Team's assumption of that responsibility and risk – significantly relinquishes its traditional dominance and control over the design development process.

A fair and important question is whether that model and its assumptions, represent what occurs both contractually, and in actuality, in many contemporary P3 and D-B projects. A further, and equally important question, relates to whether in the application of those delivery approaches to major *subsurface* projects, it is realistically practicable to distinguish between the subjects of responsibility and risk allocation for (a) design and (b) unanticipated subsurface conditions. This article will explore both of these questions.[2]

The bottom line is that the answers to these questions may not be as clear or definitive as some may think or Contract Documents articulate, and the underground industry would be well-served by the development of contractual and practice guidelines that serve to inform, and more reliably and realistically predict and define criteria for risk assessment and allocation regarding these issues.

2. DESIGN-BID-BUILD: GENERAL AND BACKGROUND PRINCIPLES OF RISK ALLOCATION FOR DESIGN AND SUBSURFACE CONDITIONS

• *Design Risk Allocation*

In Design-Bid-Build ("D-B-B") projects, the Owner typically[3] furnishes the Contractor with a detailed and prescriptive design (prepared by the Owner's Consulting Engineer). The Contractor is obligated to construct in accordance with that design. Since the Owner controls the design development process, the law generally imposes an "implied warranty" obligation upon the Owner, which means that the Owner warrants to the Contractor that the design will be accurate, constructible and suitable for the project objective that it was furnished to achieve.[4]

In some instances, rather than furnish a detailed design, an Owner may simply provide the Contractor with a performance specification (or design criteria) and require that the Contractor (or, more precisely, a Consulting Engineer or other qualified professional retained by the Contractor) prepare and be professionally responsible for development of the design of a portion of the permanent project work, consistent with that performance specification.[5] In such circumstances, because the Contractor has responsibility for the final design of the specific project component, the Owner's otherwise applicable implied warranty obligation generally does not apply and is negated.

These general principles are easier to state than to apply in practice. In D-B-B, significant and frequent disputes have arisen over issues of risk allocation for design adequacy based on controversy over whether the design furnished by the Owner was a "design specification" (in which case the Owner has an implied warranty obligation for design adequacy) or merely a "performance specification" (in which case the Contractor has, or should have, control over and

responsibility for design adequacy).[6]

- ***Subsurface Conditions Risk Allocation***

Although there are many optional and differing approaches to risk allocation for subsurface conditions in D-B-B, most owners adopt (and should adopt) a differing site conditions ("DSC") risk allocation regime that includes (a) furnishing the Contractor as part of the Contract Documents with available subsurface conditions information relevant to the detailed design approach; and (b) sharing the risk of cost and time impacts not reasonably anticipated, and caused by subsurface conditions actually encountered that materially differ from the furnished information or other indications in the Contract Documents.[7]

In D-B-B subsurface projects, as in all subsurface projects, there is an interrelationship and interdependency between the nature and extent of subsurface investigation, the anticipated subsurface conditions, the design approach, the Contractor's chosen construction means and methods and selected equipment, the actual conditions encountered during construction, and the interaction and influence of all of the above factors on the ability to achieve design, construction, cost and schedule expectations. For that reason, Contractor equitable adjustment claims against the Owner based on DSCs in D-B-B are often combined with defective design claims. That is, the Contractor claims entitlement to an equitable adjustment alternately or conjunctively because subsurface conditions are materially different from those reasonably expected and/or are due to incompatibility, unconstructability, or other deficiencies of the project design relative to anticipated or encountered subsurface conditions.[8] Since in D-B-B the Owner typically furnishes the design, and has implied warranty obligations and is otherwise responsible for that design, the combination of DSC and defective design claims is considered by some Contractors as logical, consonant and harmonious.[9]

3. DESIGN-BUILD: GENERAL PRINCIPLES OF RISK ALLOCATION FOR DESIGN AND SUBSURFACE CONDITIONS

- ***Design Risk Allocation***

The general intent of most Owners in D-B projects is to allocate virtually all design risk to the D-B Team. The Owner typically seeks to effectuate this intent through contract provisions that:

- Disclaim any responsibility of the Owner for Owner-furnished design, information, reports, or reference materials ("Owner-furnished materials").
- Negate any right of the D-B Team to rely upon any Owner-furnished materials.
- Mandate that the D-B Team conduct pre-award due diligence investigations and evaluations to independently verify and validate the suitability and appropriateness of Owner-furnished materials.
- Require that the D-B Team conduct any supplemental subsurface investigation considered advisable to support the contemplated final design approach.
- Obligate the D-B Team to be fully responsible for the adequacy and constructability of the final project design.
- Require that the D-B Team defend, indemnify, release and hold harmless the Owner for any claims, liabilities or losses due to the D-B Team's use of or reliance upon any Owner-furnished materials in the final design, or otherwise.
- Represent and warrant that the D-B Team has independently determined that the Owner-furnished materials provide a feasible concept for the design and construction of the project.
- Reserve for the Owner (and its consultants) a broad right to review and reject the D-B Team's design submittals. (i.e., a right not limited to conformance with mandated design criteria or standards).
- Agree that any review or acceptance by the Owner of the D-B Team's design submittals shall not relieve or diminish the D-B's Team's exclusive responsibility for the design of the project.

Notwithstanding these types of contractual provisions intending to allocate absolute risk and responsibility to the D-B Team for design adequacy, recent legal cases establish that, in practice, risk allocation in D-B may not be so clear and definitive as articulated in such provisions.[10] More specifically, those cases demonstrate that design risk may, at a minimum, be shared between the Owner and the D-B Team in one or more of the following circumstances:

– The Owner furnishes detailed design or prescriptive specifications which are developed and mandated to a degree that the D-B Team is deprived of any meaningful ability to exercise independent professional judgment and discretion in the development and finalization of the design.

– The Owner contractually retains or exercises a dominant and plenary right of control over review or rejection of the D-B Team's proposed design submittals.

– The Owner imposes (arbitrarily or otherwise) its preferences and judgments upon the D-B Team in a manner that exceeds its rights and authority under the Contract Documents.[11]

– The Owner unduly restricts or constrains the D-B Team's ability to exercise independent professional judgment, discretion and potentially innovation in the design development process.

– The Owner controls or limits the D-B Team's ability to conduct subsurface investigations and studies considered necessary or advisable by the D-B Team to support its design approach.

The occurrence of one or more of these circumstances may result in otherwise absolute and clear contractual risk allocation provisions being "modified" or even effectively disregarded in the determination of design risk and responsibility on P3 and D-B projects.

There are important questions in D-B and P3 projects relating to the permissible scope of owner review of design submittals of the D-B Team. What are and should be the bounds of that review scope and comments? When can it reasonably be stated that the owner has exceeded the permissible scope of review and comment role, and/or has unwarrantably interfered with, intervened or intruded upon the design judgment and discretion of the D-B Team? Certainly, answers to these questions may be derived and defined by the terms of the D-B Contract. That said, the answers as well as the development of relevant contract terms should be informed by sound and reasonable practice that is consistent with the transfer of design responsibility to the D-B Team on D-B and P3 projects.

As a general matter, the scope of owner review of and comments upon design submissions of the D-B Team should be limited to evaluating for compliance of the latter with contractually-mandated standards and criteria. Review comments should be clearly and directly linked to specific compliance standards mandated in the Contract Documents. Owner comments beyond that scope may fairly and reasonably be characterized as preferential and discretionary – i.e., beyond the scope of permissible review and comment. In this regard, contractual standards for owner acceptance of design submittals should not be based on subjective notions such as owner "satisfaction" as such standards are subject to abuse in the D-B and P3 context.

Simply put, owners should not have unfettered discretion in reviewing and commenting upon design submissions of the D-B Team, or otherwise be allowed to usurp or invade the prerogatives, judgment and discretion of the D-B Team. When that occurs, the owner may rightfully be found, as a legal matter, to have assumed risk and responsibility to the design-builder for the cost or time impacts of such impermissible conduct.

- ***Subsurface Conditions Risk Allocation***

It is challenging to state *generally* accepted or prevailing risk allocation practices for subsurface conditions in P3 and D-B.[12] The spectrum of optional risk allocation approaches includes, on the one end, Owners who provide no subsurface data and allocate all subsurface conditions risk to the D-B Team to, on the other end, Owners who provide in the RFP relevant available data (and any supplementary data requested by the D-B Team), confer upon the D-B Team reliance rights regarding the latter, and agree to share risk based upon a DSC clause, and/or a Geotechnical Baseline Report, or other risk allocation mechanism.[13]

4. SUBSURFACE PROJECTS: RISK ALLOCATION FOR DESIGN AND SUBSURFACE CONDITIONS

As should be evident from the preceding discussion, it is not possible to state with certainty the risk allocation principles for design and subsurface conditions on P3 and D-B projects. While the principles are more established and understood in D-B-B, even in that delivery method there are variations on generally applicable risk allocation principles that dislocate or displace them.[14] The risk allocation terrain in P3 and D-B is even significantly less established and more uncertain, i.e., risky and unpredictable based upon a variety of *contractual* and project participant *actual performance*

factors. In addition, legal precedent in P3 and D-B is significantly less developed than in D-B-B.

Notwithstanding the distinctions between the D-B-B, P3, and D-B delivery approaches, all subsurface projects regardless of delivery approach share the common characteristic that the suitability, efficacy and constructability of permanent project work is interrelated with and dependent upon the subsurface conditions actually encountered, and considered and evaluated in conjunction with the means and methods (including equipment selections to be employed) utilized in the construction of the project.[15]

For a number of valid and understandable reasons, risk allocation for design and subsurface conditions is even more variable, subjective and unpredictable – notwithstanding apparently clear Owner intent articulated in the Contract Documents – in P3 and D-B subsurface projects.[16] Given the relatively wide spectrum of risk allocation options and variable factors influencing risk for design responsibility and subsurface conditions in P3 and D-B, we will focus our attention on two such options.

In the first option, assume that the Owner has furnished the D-B Team with minimal conceptual design, limited mandatory performance standards and design criteria, little (if any) subsurface data, has disclaimed any right to rely upon the suitability or accuracy of the foregoing, and allocated all risk of subsurface conditions to the D-B Team. In this option – assuming (a) no legal enforceability issues (which are not likely to be an impediment for the Owner in virtually all states) and (b) that the Owner conducts itself within contractual bounds (such as limiting design review standards to conformance with minimal and defined mandatory performance standards and design criteria) – it is probable that the D-B Team will as a legal matter be allocated all – or virtually all – risk and responsibility for design and subsurface conditions.[17]

A second risk allocation option is more complicated and less predictable in terms of the effectiveness and/or enforceability of contractually-contemplated allocation of risk for design defects and subsurface conditions. In this option, the Owner (a) furnishes the D-B Team with relatively highly detailed design and/or prescriptive performance standards and (b) agrees to share risk for materially different subsurface conditions in accordance with a DSC provision, potentially as facilitated by a Geotechnical Baseline Report. Assume also that in the implementation of this optional approach, during the design review process, the Owner imposed its design preferences and judgments upon the D-B Team in a manner that is arbitrary and results in the final design and construction approaches significantly deviating from the contractually-mandated performance standards and design criteria, and significantly curtailed the ability of the D-B Team to exercise meaningful judgment, discretion, and innovation in the development of the design.

For several reasons, predicting the determination of risk and responsibility for design adequacy and subsurface conditions in the second option is both complex and uncertain, and the ultimate determination is likely to be significantly influenced by factors beyond the explicit contractual terms, including the degree of the Owner-furnished materials and mandated design, and the actual conduct of the Owner in the design review process.

Further analysis of this second option requires a focus on what is special about and distinguishes design and subsurface risk allocation in P3 and D-B subsurface projects from that same subject in above-ground or vertical projects. Risk for design and subsurface conditions on subsurface projects involves a significant degree of interrelationships and interdependencies among (a) the scope, extent, nature and quality of subsurface investigation relevant to the designated design approach; (b) the extent to which the Owner and/or the D-B Team has responsibility to perform that investigation; (c) the extent to which the Owner has issued mandatory specifications, standards or criteria of a detailed and prescriptive character; (d) the extent to which the Owner disclaims the accuracy of any data or reports relating to subsurface investigation, and/or denies the D-B Team any right to rely upon any such Owner-furnished materials; (e) the extent to which the detailed design as developed by the D-B Team impacts physical subsurface conditions, or the behavior thereof; (f) the degree to which the Owner has imposed its preferences and judgments on the D-B Team during the design review process, especially if done in a manner that exceeds the Owner's contractual authority; and (g) whether the Contract Documents include a differing site conditions clause, or other mechanism for the sharing of subsurface conditions risk.[18]

The point, of course, is that it is virtually impossible to evaluate design and subsurface conditions risk in P3 and D-B projects absent a holistic consideration of all the preceding

interrelated and interdependent factors. Due to the dual role of the Owner and D-B Team, to potentially varying degrees, in the investigation of subsurface conditions and in the design development process and the foregoing interrelationship and interdependency considerations, allocation of risk for design and subsurface conditions in P3 and D-B is complex and variable. In this respect, the ultimate pragmatic and legal determination of risk allocation for defective design and subsurface conditions in P-3 and D-B *subsurface* projects is far more complicated and unpredictable than on vertical P3 and D-B projects.[19]

Certainly, overly prescriptive design requirements imposed by the Owner not only may result in the Owner assuming design responsibility in D-B, but may also serve to constrain innovation of the D-B Team. Similarly, when the Owner (or its consultant) exercises a plenary scope of review of the D-B Team's design submittals – that is, a review role that exceeds the more limited scope of evaluating whether that design comports with contractually-mandated performance specifications, design standards or criteria – such an embracing review role may well (and probably should) result in the Owner's assumption (or reassumption) of potentially significant design risk as well as responsibility for claims from the D-B Team based on unreasonable interference.[20] In some situations, an Owner may perform such an expansive review role because "[i]t is difficult culturally for government entities to overcome the design-bid-build behavior patterns that have been reinforced over many years, wherein the design and bid packages do not go out without extensive review and comment by government engineers and/or consultants".[21] On subsurface projects, this problem is yet further exacerbated when the Owner (or its geotechnical consultant) imposes on the D-B Team its judgments as to characterization of ground conditions and/or specifies "design values for soil parameters; this usurps the design-build contractor's geotechnical engineer's design responsibility and shifts considerable risk, and potential cost, to the Owner."[22]

In other circumstances, the Owner may deny a DSC claim on the basis that it was the D-B Team's design approach, or chosen construction means and methods, or equipment selections, that caused unanticipated problems (or claimed increased cost or delay) in interacting with physical or behavioral aspects of the subsurface conditions, rather than any material difference between the inherent or intrinsic subsurface conditions indicated in the Contract Documents and from those actually encountered. The extent to which the D-B Team appropriately is assigned risk and responsibility for design adequacy certainly may (and potentially should) influence risk and responsibility for subsurface conditions. There is a definite correlation between those two sets of risks that must be taken into account and balanced in the development of an effective and realistic risk allocation regime on P3 and D-B projects. The definition of *contractual* risk and responsibility allocation should be as clear as reasonably achievable and all principal project participants should *actually perform* in a manner consistent with those contractual definitions.

5. OBSERVATIONS AND CALL FOR GUIDELINES

As the P3 and D-B delivery methods continue to be increasingly and more prevalently utilized by Owners on major subsurface projects, it is important that the D-B Team be attentive to factors that have the potential for significantly influencing and impacting the ultimate determination of risk and responsibility for design adequacy and subsurface conditions, such as contractual terms and dynamic or pragmatic considerations, such as the actual performance of project participants.

A number of factors must be conscientiously understood and evaluated in assessing and determining risk and responsibility for design and subsurface conditions on D-B and P3 projects, such as: the interrelationships and interdependencies among anticipated subsurface conditions; the nature, extent and quality of subsurface investigation relevant to the designated design approach; the nature and extent of Owner-furnished design criteria and standards; and the nature and extent of the Owner's contractually-defined and actual conduct in the design review process. This is a complicated evaluative process and, in many instances, the ultimate determination of risk and responsibility may well depend upon, or be influenced by, factors and considerations beyond the literal and precise terms of the Contract Documents. Put another way, those determinations may not necessarily be predictable with any reasonable degree of certainty at the points of either tender or contract formation. The mere inclusion of a DSC provision may not necessarily be determinative of these risk allocation and responsibilities issues. Exclusive reliance upon contract terms as the ultimate determinant of risk allocation may be misplaced or illusory.

The lines of demarcation for respective Owner and D-B Team risk for design adequacy and subsurface conditions may not

be as clear and definitive as some Owners intend or expect based purely on contractual terms. That blurriness may result in disputes that otherwise could be avoided or mitigated through more balanced contractual terms and, subsequently, through the development and implementation of guidelines for performance and management of roles and responsibilities of project participants in the design development process.

• *A Call for Guidelines*

We are at a critically important stage in the conceptual deliberation and development of sound risk allocation practices for design and subsurface conditions on P3 and D-B projects. The hallmark and conjunctive principles of prudent risk allocation – fairness, clarity, predictability, and consistency in contractual terms and actual conduct – should be adopted and applied in the context of design and subsurface conditions risks on P3 and D-B projects.

In a recent paper, Tim Smirnoff, of PB, aptly evaluated the status and future direction of contracting and related practices in D-B (and other alternative delivery methods) subsurface projects as follows:

> "Design/Build was a much sought after prescription for the aches and pains of contracting and often when used with alternative contracting means to provide a means of financing design and construction with limited public funding. The experience of the last few years has shown that with every pill there are side effects and the outcome may not be as it was thought. Many of the same problems and complaints still exist and do not generally have easy or rapidly evolving solutions with the industry…
>
> The jury is still out and with more projects slated to use DB and its alternatives, the processes and the records of performance and successes will be better defined and will certainly evolve to clarify and improve DB, as have most contracting practices in the past.
>
> Owners, Engineers and Contractors must work together to develop a more efficient, effective and more equitable form of DB contracting and developing better models for both conceiving and delivering the infrastructure needed."[23]

There are different ways to move forward in addressing design and subsurface conditions risk allocation in D-B and P3. The basic choice for the underground industry is whether to lead or be led in the process.

Given the uncertainty that surrounds these issues, there should be little doubt that courts and arbitrators will be summonsed to resolve – with protraction and expenditure of legal fees – these issues in the context of contentious and high stakes disputes. They will be ready, willing and able to serve in that capacity, and to lead the path forward, with results that potentially further increase the risk and disappoint cost and schedule expectations of some or all participants in P3 and D-B projects. Resolution of disputes involving these risk allocation issues is likely to be predominantly fact and circumstance dependent, and, therefore, risky and unpredictable, with adjudication occurring in the relatively unchartered context of legal precedent that is significantly less developed in D-B and P3 than in D-B-B.

The path forward is to lead. The underground design and construction industry would be well-served by the formation of a committee to study and report on, and thereby intelligently and realistically inform, the development of sensible and pragmatic guidelines that improve predictability, clarity, consistency, and fairness in these risk allocation issues on P3 and D-B projects.*

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[1] Because both P3 and D-B projects utilize the D-B approach in which a single entity is responsible for both design and construction, the comments in this article are equally applicable to both the P3 and D-B approaches. Special design and construction risk allocation issues in P3 projects, however, may intensify the issues and concerns addressed herein, especially in the specific context of P3 subsurface projects. D.J. Hatem, "Risk Allocation and Professional Liability Issues for Consulting Engineers on P3 Projects," in *Public-Private Partnerships: Opportunities and Risks for Consulting Engineers,* eds. D.J. Hatem and Patricia B. Gary (Washington, D.C.: American Council of Engineering Companies, 2013), 268-83 (hereinafter "*Public-Private Partnerships*").

[2] These and related questions are discussed in more depth in D.J. Hatem, "Risk Allocation," in *Megaprojects: Challenges and Recommended Practices,* eds. D.J. Hatem and David H. Corkum (Washington, D.C.: American Council of Engineering Companies, 2010), 327-421 (hereinafter "*Megaprojects,* Chapter 15"); D.J. Hatem, "Subsurface Megaprojects," in *Megaprojects: Challenges and Recommended Practices,* eds. D.J. Hatem and David H. Corkum (Washington, D.C.: American Council of Engineering Companies, 2010), 481-588 (hereinafter "*Megaprojects,* Chapter 17"); and Hatem, *Public-Private Partnerships,* 268-83.

[3] This and other statements in the text reflect general principles and practices and, by no means, represent the only approaches to these issues. For more detailed discussion, see Hatem, *Megaprojects,* Chapter 15, 327-421; and Hatem, *Megaprojects,* Chapter 17, 481-588.

[4] This implied warranty obligation is discussed in greater detail Hatem, *Megaprojects,* Chapter 15, 327-421; and Hatem *Public-Private Partnerships,* 268-83.

[5] Hatem, Megaprojects, Chapter 15, 327-421.

[6] Ibid.

[7] Hatem, *Megaprojects,* Chapter 15, 327-421; Hatem, *Megaprojects,* Chapter 17, 481-588; and Hatem, *Public-Private Partnerships,* 268-83.

[8] Hatem, *Megaprojects,* Chapter 17, 502-506; and Hatem, *Public-Private Partnerships,* 299-307.

[9] That said, many courts reject such combined claims on the basis that the contractual and specific equitable adjustment relief provided in a DSC provision should be the exclusive remedy, and thereby dismiss conjunctive defective design claims. Hatem, *Megaprojects,* Chapter 17, 502-506; and Hatem, *Public-Private Partnerships,* 299-307.

[10] Harold E. Hamersmith and Edward B Lozowicki, "Can the Spearin Doctrine Survive in a Design-Build World: Who Bears Responsibility for Hybrid Specifications?," *The American College of Construction Lawyers Journal* 2, No. 1 (Winter 2008): 123-43; Edward B. Lozowicki and Mara S. Turiads, "Design-Build Projects: Who Bears the Risk for Defective Specifications?," *New York Law Journal* 225 (2001): 1; Zack Peterson, "One Small Step in the Mindset, One Giant Leap for the Construction Law Industry: How the Judicial State is set for IPD and the Only Thing Missing is Willing Participants," *Northern Kentucky Law Review,* 39 (2012): 557; Joseph A. Cleves and Richard G. Meyer, "No-Fault Construction's Time Has Arrived," *The Construction Lawyer* 31, no. 3 (Summer 2011). Even in some instances in which the Owner furnishes preliminary design in the D-B RFP and requires that the D-B Team verify and validate the accuracy and/or suitability of that design, the Owner may not be able to disavow or legally disclaim responsibility for that design. Patrick O'Connor and Philip Bruner, *Bruner & O'Conner on Construction Law,* Vol. 2 (New York, NY: Thomson Reuters, 2014), ¶ 6.32.

[11] Hatem, *Public-Private Partnerships,* 259-268, 287-294; and Lewis J. Baker, "Defining the Fair Allocation of Risk in Public/Private Partnerships," in *Building Better Construction Contracts 2012,* eds. Patrick J. O'Conner, Jr. and Timothy R. Twomey (New York, NY: Practising Law Institute, 2012), 161-92.

[12] For more detailed discussion, see Hatem, *Megaprojects,* Chapter 17, 481-588; Hatem, *Public-Private Partnerships,* 268-83; D.J. Hatem and Randall J. Essex, "Subsurface Public-Private Partnership Projects: Brave New World for Risk Allocation," *Mining Engineering* 66, no. 3 (March 2014): 148; D.J. Hatem and David H. Corkum, "Purpose and Preparation of Geotechnical Baseline Reports in Design-Build and Public-Private Partnership Subsurface Projects," in *Geo-Congress 2014 Technical Papers: Geo-Characterization and Modeling for Sustainability,* eds. Murad Abu-Farsakh and Laureano R. Hoyos (Atlanta, GA: American Society of Civil Engineers, 2014), 2314-21. For an excellent review of contracting practices on D-B subsurface projects, see Douglas D. Gransberg and Michael C. Loulakis, *Geotechnical Information Practices in Design-Build Projects* (Washington, D.C.: Transportation Research Board, 2012); D.J. Hatem and David Corkum, "A Contracting Strategy for Managing Risk on Subsurface Projects Delivered Using Design-Build," in *Rapid Excavation and Tunneling Conference Proceedings* (Englewood, CO: Society for Mining, Metallurgy and Exploration, 2003), ch. 70; "TBM Roundtable: Design-Build," *Tunnel Business Magazine,* August 2008, 16-23; R. Robinson, M. Kucker and J. Gildner, "Levels of Geotechnical Input for Design-Build Contracts," in *Rapid Excavation and Tunneling Conference Proceedings* (Englewood, CO: Society for Mining, Metallurgy and Excavation, 2001), 829, 836-37.

[13] Hatem, "Purpose and Preparation of Geotechnical Baseline Reports in Design-Build and Public-Private Partnership Subsurface Projects," 2314-21. A recent court decision, Metcalf Constr. Co., Inc. v. United States, 742 F.3d 984 (Fed. Cir. 2014) allowed recovery for a Design-Builder on a differing site conditions claim notwithstanding the latter's obligation to independently investigate subsurface conditions and the government's inclusion of qualifying language that the subsurface information that it furnished with the RFP was "for preliminary information only. The Metcalf decision is discussed in more detail in D.J. Hatem, "Public-Private Partnerships and Design-Build Subsurface Projects: Consulting Engineer Professional Liability Risk," *Design and Construction Management Professional Reporter* (April 2014): 2-7.

[14] Hatem, *Megaprojects,* Chapter 15, 327-421.

[15] Hatem, *Megaprojects,* Chapter 17, 481-588; and Hatem, *Public-Private Partnerships,* 268-83.

[16] These issues are discussed in greater detail in Hatem, *Megaprojects,* Chapter 17, 481-588; and Hatem, *Public-Private Partnerships,* 268-283.

[17] By no means does the author advocate this option as a sensible risk allocation model for reasons discussed in detail elsewhere; Gary S. Brierley, D.J. Hatem and David Corkum, eds., *Design-Build Subsurface Projects,* 2nd ed. (Englewood, CO: Society for Mining, Metallurgy & Exploration, 2010); Hatem, *Public-Private Partnerships,* 268-83; Hatem, "Brave New World," 148; and Hatem, "Purpose and Preparation of Geotechnical Baseline Reports in Design-Build and Public-Private Partnership Subsurface Projects," 2314-21.

[18] These interrelationships and interdependencies are explored in more depth in Hatem, *Public-Private Partnerships,* 268-283.

[19] For more detailed discussion of these interrelationships and interdependencies and their impact and significance on allocation of risk in subsurface projects, see Hatem, *Megaprojects,* Chapter 15, 327-421; Hatem, *Megaprojects,* Chapter 17, 481-588; Hatem, *Public-Private Partnerships,* 268-283; Elizabeth M. Dwyre, John Jenkins and Raymon J. Castelli, "Development and Interpretation of Geotechnical Contract Provisions for Design-Build Projects: Success Strategies for Owners and Contractors," in *GeoCongress 2012: State of the Art and Practice in Geotechnical Engineering,* eds. Roman D. Hryciw et al. (Oakland, CA: American Society of Civil Engineers, 2012), 145-54; James B. Higbee, "Geotechnical Issues with Large Design-Build Highway Projects," *Journal of the Transportation Research Board* 1808 (2002): 144-152; Kevin McLain, Douglass D. Gransberg and Michael Loulakis, "Managing Geotechnical Risk on U.S. Design-Build Transport Projects," *Australasion Journal of Construction Economics and Building* 14, no. 12 (2014) 1-19.

[20] See, Baker, "Defining the Fair Allocation of Risk in Public-Private Partnerships," 161-92; Hatem, *Public-Private Partnerships,* 259-68, 293-96; Michael C. Loulakis, "Legal Aspects of Performance-Based Specifications for Highway Construction and Maintenance Contracts," *National Cooperative Highway Research Program Legal Research* Digest 61 (July 2013). It has been observed that there are positive aspects of Owner design reviews in that "they represent an additional layer of 'error checks', provide local practice consideration, and agency perspective" Elizabeth M. Smith, "Managing Risk in Design-Build: Lessons for Geotechnical Professionals," in *Legal and Liability Issues in Geotechnical Engineering,* eds. Richard J. Fragaszy and Timothy D. Stark (Texas: American Society for Civil Engineers, 2005), 1-11.

[21] Baker, "Defining the Fair Allocation of Risk in Public-Private Partnerships," 161-92.

[22] Dwyre, "Development and Interpretation of Geotechnical Contract Provisions for Design-Build Projects: Success Strategies for Owners and Contractors," 145-54.

[23] Timothy P. Smirnoff, "Design/Build a Panacea? – No," in *North American Tunneling: 2014 Proceedings,* eds. Gregg Davidson et al., (Englewood, CO: Society for Mining, Metallurgy & Exploration Inc., 2014), 807-25.

* A shorter version of this article was published in the September 2014 issue of the *North American Tunneling Journal*

Arbitration Finding that Owner Deviated from Architect's Design Precluded Owner from Suing Architect in Subsequent Litigation

By Pamela C. Rutkowski, Esq.

THE COURT IN *CASA DEL MAR ASS'N, INC. V. GOSSEN LIVINGSTON ASSOCIATES, INC.,* 2014 WL 1394884 (Tex. App. Houston 1st Dist. 2014) affirmed summary judgment for an architecture firm in a construction defect case, holding that a prior arbitration finding that an Owner deviated from the architect's design barred the Owner's subsequent claims against the architecture firm.

Casa del Mar Association, Inc. ("Casa del Mar"), the governing association for a group of condominiums in Texas, brought suit against an architecture firm which provided services to Casa del Mar for condominium renovations.

As part of its services, the architecture firm recommended a balcony design that included an integrated drainage plan to remove water from the balcony; it utilized a stainless steel counter flashing on the outside perimeter of the balconies. The owner's representative rejected the architecture firm's design as too complicated and expensive, and it was instructed to develop a less expensive design. Accordingly, the architecture firm submitted a sloped balcony design referred to as the "bath tub" design, which Casa del Mar chose to use. Subsequently, however, Casa del Mar ordered the contractor, Jamail Construction ("Jamail"), to disregard the architecture firm's design, and approved construction of the balconies based on a "mock up" constructed by Jamail, despite the architecture firm's strong discouragement of the modification. The mock up replaced the stainless steel "counter flashing" specified by GLA with lesser grade steel consisting of two pieces resulting in an overlap.

Casa del Mar subsequently filed a demand for arbitration against the architecture firm and Jamail in November of 2001, alleging design and construction defects, including lack of a proper drainage mechanism for the balcony bath tub design. The arbitration panel found that: (1) Casa del Mar rejected the architecture firm's original balcony design incorporating a drainage system, sought the higher risk bath tub design and disregarded the architecture firm's advice regarding the type of flashing to be employed; (2) the balconies were not built according to the bath tub design provided by the architecture firm because, instead, Casa del Mar approved construction according to Jamail's mock up; and (3) none of the alleged construction defects identified by Casa del Mar were shown to have caused its alleged damages, nor did they rise to the level a material breach of contract.

Casa del Mar then brought claims in Texas district court against the architecture firm for breach of contract, breach of express warranty for services, breach of implied warranty of good and workmanlike conduct, negligence, negligent misrepresentation and violations of the Texas Deceptive Trade Practices Act (DTPA), all alleging that the architecture firm's design of the balcony waterproofing system was deficient, incomplete, and failed to provide proper drainage for the balconies.

The architecture firm moved for summary judgment, arguing that Casa Del Mar was precluded from asserting its claims in court against the architecture firm in light of the prior arbitration finding against Casa Del Mar. The trial court granted the architecture firm's motion for summary judgment and dismissed Casa del Mar's case and the appeals court affirmed that dismissal.

Revised Kansas Professional Statute Creates Ambiguity in Engineering Practice

By Peter M. Vetere, Esq.* and Jesse R. Taylor †

A REVISION TO THE KANSAS STATUTE GOVERNING THE TECHNICAL PROFESSIONS‡ within the state has created ambiguity for professional engineers.

The new law, SB349, excludes from the definition of the practice of engineering certain services specifically defined as architectural services, such as the ability to prepare or provide designs, drawings, specifications, or other technical submissions. *Compare* KAN. SESS. LAWS. § 6(p)(1)-(3) (amending definition of "practice of engineering" in K.S.A. § 74-7003(i) (2014)) *with* KAN. SESS. LAWS § 6(c)(1)(3) (amending definition of "practice of architecture"). As a result, some practitioners are concerned that the revised definition may unintentionally inhibit licensed professional engineers from sealing documents that are within their area of expertise.

Since Kansas law prohibits licensed professional engineers—and their colleagues in the other technical professions—from affixing their seal to any plan or document dealing with a subject matter that is outside of their field of practice, the new law may prevent engineers from preparing designs, drawings, specifications, and other technical submissions related to the practice of architecture, regardless of whether the engineer is qualified by his or her education and experience to do so.

In response to this potential conflict, the Kansas State Board of Technical Professions ("KSBTP") released a statement that it "will not pursue any properly Kansas licensed Architect, Landscape Architect, Professional Engineer, Professional Geologist, or Professional Surveyor for preparing, sealing, and submitting any plan, drawings, specifications and/or technical submittals resulting from professional services within their individual area of expertise." As the organization in charge of licensing, monitoring, and disciplining architects and engineers, KSBTP's position lessens the ambiguity that exists within the new law by emphasizing the engineer's individual area of expertise.

Further, KSBTP's position comports with Kansas Supreme Court precedent. The Court has held that it was permissible for an engineer to seal documents that, although related to the field of architecture, were still within the engineer's realm of engineering education, training, and experience. *Schmidt v. Kansas State Board of Technical Professions,* 21 P.3d 542, 546 (Kan. 2001). The Court specifically acknowledged that "it is not uncommon for individuals within the field of civil engineering and the field of architecture to have expertise and education that might overlap in any given portion of a project." *Id.*

The KSBTP recently adopted new rules and regulations that will become effective on September 26, 2014, but they do not clarify the ambiguity surrounding the new law. Practitioners must now wait for the Kansas State Legislature to act in 2015 if there is any hope of remedying the situation. Until that happens, practitioners will need to rely on Schmidt and the KSBTP's policy if they are to avoid liability for work that does not fall within the narrowly-defined subject matters of their profession.

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‡ Kansas law defines the "technical professions" as the disciplines of engineering, architecture, landscape architecture, land surveying, and geology. K.S.A. 74-7001(a).

Massachusetts Superior Court Draws Distinction between Construction Manager at Risk Contracts and Traditional Design-Bid-Build Contracts in Allocating Project Risk and Responsibility for Design Adequacy and Cost Overruns

By Kristin A. Hartman, Esq.

ON JUNE 24, 2014, THE WORCESTER SUPERIOR COURT granted a Motion to Dismiss claim filed by a Construction Manager at Risk ("CMR") against the Massachusetts Division of Capital Asset Management ("DCAM"), the owner of a public construction contract. The Court ruled that the CMR contract provision trumped the long-standing Massachusetts common law of owner implied warranty, or the Spearin obligation, in which an owner that furnishes plans and specifications retains the risks associated with the design of the project.[1] An appeal is pending concerning this decision. Should this approach be adopted in Massachusetts and other jurisdictions it will have a significant impact on risk allocation for design deficiencies and cost overruns on CRM projects.

In 2007, Gilbane Building Company ("Gilbane"), entered into a public construction contract with DCAM to serve as Construction Manager on a state psychiatric facility for the Massachusetts Department of Mental Health ("DMH Project") for the contract price of approximately $237 million. The contract consisted of two parts – the twenty-three page main contract and fifty-nine page General Conditions to the CMR contract – and delineated Gilbane's obligations as Construction Manager. Gilbane's obligations included: pre-construction and construction planning; creation and maintenance of the "Baseline Critical Path Method Schedule;" development of a detailed, construction cost estimate; selection and oversight of the subcontractors; obtaining all permits, user fees, approvals and licenses for construction, use and occupancy; and management, coordination and supervision of all aspects of the work described in the construction documents.

In addition, Gilbane had extensive design review responsibilities. Specifically, the contract provided:

> [t]he CM [i.e., Construction Manager] shall review, on a continuous basis, development of the Drawings, Specifications and other design documents produced by the Designer. The design reviews shall be performed with a group of Architect and Engineers, who are either employees of the CM or independent consultants under contract with the CM. Review of the document is to discover inconsistencies, errors and omissions between and within design disciplines. The CM shall consult with DCAM and the Designer regarding the selection of materials, building systems and equipment, and shall recommend alternative solutions whenever design details affect construction feasibility, schedules, cost or quality (without, however, assume the Designer's responsibility for design) and shall provide other value engineering services to DCAM. Without limitation, the CM shall review the design documents for clarity, consistency, constructability, maintainability/operability and coordination among the trades, coordination between the specifications and drawings, compliance with M.G.L. c. 149A for procurement, installation and construction, and sequence of construction, including recommendations designed to minimize adverse affects [sic] of labor or material shortages.

Article II.6 of the General Conditions. Further, any adjustment first must be preceded by the issuance of a formal 'Change Order or written directive' by DCAM." General Conditions, Article VII.1.

While the DMH Project was still underway, a subcontractor, Coghlin Electrical Contractors ("Coghlin"), requested a multi-million dollar increase in its electrical subcontract which it

attributed to Gilbane's management and design deficiencies. Gilbane submitted the request to DCAM, which rejected it. All subsequent negotiations among the parties were unsuccessful, and Coghlin filed a lawsuit in July 2013 seeking compensation from Gilbane for increased project costs. Gilbane subsequently filed a Third-Party Complaint against DCAM citing DCAM's alleged responsibility as owner under Massachusetts common law implied warranty for increased project costs resulting from "design changes and design errors and omissions."

DCAM moved to dismiss Gilbane's claim against it, and the Court granted the motion for the following reasons.

First, and most significantly, while Massachusetts common law has traditionally protected contractors in Design-Bid-Build construction projects where plans and specifications are owner-supplied the language of the CMR Contract between Gilbane and DCAM was unambiguous, and the contracting parties voluntarily modified their roles and responsibilities. Here, instead of a traditional Design-Bid-Build project, it was an alternative delivery method project with the CMR assuming additional duties, responsibilities and financial risks. The Court noted that since, under a CMR contract, the CMR "takes on additional duties and responsibilities," here the "ongoing duty to review the design documents for clarity, consistency, constructability, maintainability…. The CMR simultaneously takes on additional financial exposure." The Court held that the protections generally provided to construction contractors in the design-bid-build context (specifically assigning liability for design deficiencies to project owners) are not applicable in the context of a CMR contract.

Second, while Gilbane argued that DCAM was contractually bound to issue the change order to cover Coghlin's increased costs because the increased costs resulted from a change in the project scope, there was no evidence of a scope change to support Gilbane's defense. As the court noted, "the DMH Project, as initially designed and planned, included walls and ceilings, thereby rendering those items undeniably within the original 'scope' of the project."

This decision is important in demonstrating that alternative delivery methods involving more integration, involvement, and collaboration among multiple project participants in the design development process may well result in fundamental changes to the traditional risk allocation principles and responsibility for cost and schedule impacts due to alleged, or actual, design inadequacies.[2]

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[1] *Coghlin Electrical Contractors, Inc. v. Gilbane Building Company at al.,* No. WOCV2013-01300-D (D. Mass. June 26, 2014). An appeal is pending concerning this decision.

[2] This topic is explored in more detail in D.J. Hatem, "The Pendulum Begins to Swing Back: Recent Judicial Limitations on the Negligent Misrepresentation Exception to the Economic Loss and the Spearin Implied Warranty Doctrines," *Design and Construction Management Professional Reporter,* Donovan Hatem LLP (January 2008) and D.J. Hatem, "Design Responsibilities in Integrated Project Delivery: Looking Back and Moving Forward," *Donovan Hatem LLP Whitepaper* (January 2008).

Only Firms Registered to Do Business in Nevada May Recover Fees *continued from page 1…*

NRS 623.349 essentially provides that, for a foreign business to operate as a separate entity in Nevada, it must be able to demonstrate; (1) two-thirds ownership by persons registered or licensed in Nevada; (2) payment of applicable registration fees; and (3) it is qualified to do business in Nevada.

Here, DTJ contracted with a Nevada developer to provide architectural services for a Las Vegas subdivision owned by Prima Condominiums, LLC ("Prima"). Prima had procured a $14 million loan from First Republic for the development of the subdivision. As part of the security on the loan, DTJ consented to the assignment of its architectural drawings to First Republic in exchange for $350,000 of the loan proceeds. The parties further agreed that, in the event of foreclosure, First Republic's access to DTJ's drawings would be conditioned upon DTJ being paid in full for service completed to date. Prima subsequently defaulted on its payments.

Following the default, DTJ recorded a notice of mechanic's lien against the property for unpaid services. Shortly thereafter, First Republic foreclosed on the property and DTJ brought its action against First Republic in the district court. During the second part of a bifurcated trial in that matter, First Republic moved for summary judgment, arguing that DTJ had not been properly registered as a foreign corporation in Nevada and was, therefore, barred from maintaining any action against First Republic. The court agreed, concluding that DTJ had failed to comply with the requirements set forth in NRS 623, outlined above, and allowed First Republic's motion. DTJ appealed and the Supreme Court of affirmed the judgment of the district court.

In affirming the district court's entry of summary judgment in favor of First Republic, the Supreme Court held that "NRS 623.357 expressly provides that business organizations must allege and prove that they have registered with the Board in order to maintain any action for collecting compensation for their services." The Supreme Court concluded that a foreign corporation, such as DTJ, is required to prove its registration status and that a defendant, like First Republic, is not required to plead DTJ's failure to register as an affirmative defense. Because DTJ failed to comply with the provisions of NRS 623.349(2), NRS 623.357 prohibited it from bringing or maintaining an action in Nevada for compensation for its architectural services.

In light of this important Nevada decision, it is crucial that any non-resident design professional seeking to engage in work in Nevada first register to do business as required by Nevada statute. Unless that has been accomplished prior to entering into a contract, the design professional will have no right to bring an action to recover fees to which it may be contractually entitled for the work performed.

Notes:

About Donovan Hatem

Donovan Hatem LLP is a multi-practice law firm with offices in Boston, New York and New Jersey. We serve a diverse clientele of private companies, nonprofit organizations, government entities and individuals. Our clients rely on our experience and expertise for focused advice and counsel that can minimize risk exposure.

The Professional Practices Group at Donovan Hatem includes more than 40 attorneys who provide highly-specialized counsel to architects, engineers, and construction managers. Our experienced trial lawyers represent design professionals in jury and non-jury cases in the northeast and nationwide, and at mediations, arbitrations, and other dispute resolution forums. In addition to professional liability claims defense, Donovan Hatem's scope of construction law expertise encompasses risk management, contract review, and general business matters.

To learn more, to register for an upcoming roundtable, and to join our Design Professional Roundtables mailing list, please email us at roundtable@donovanhatem.com or visit our website at donovanhatem.com.

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