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Design and Construction Management Professional Reporter

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Inside this issue:

Note from the Editor

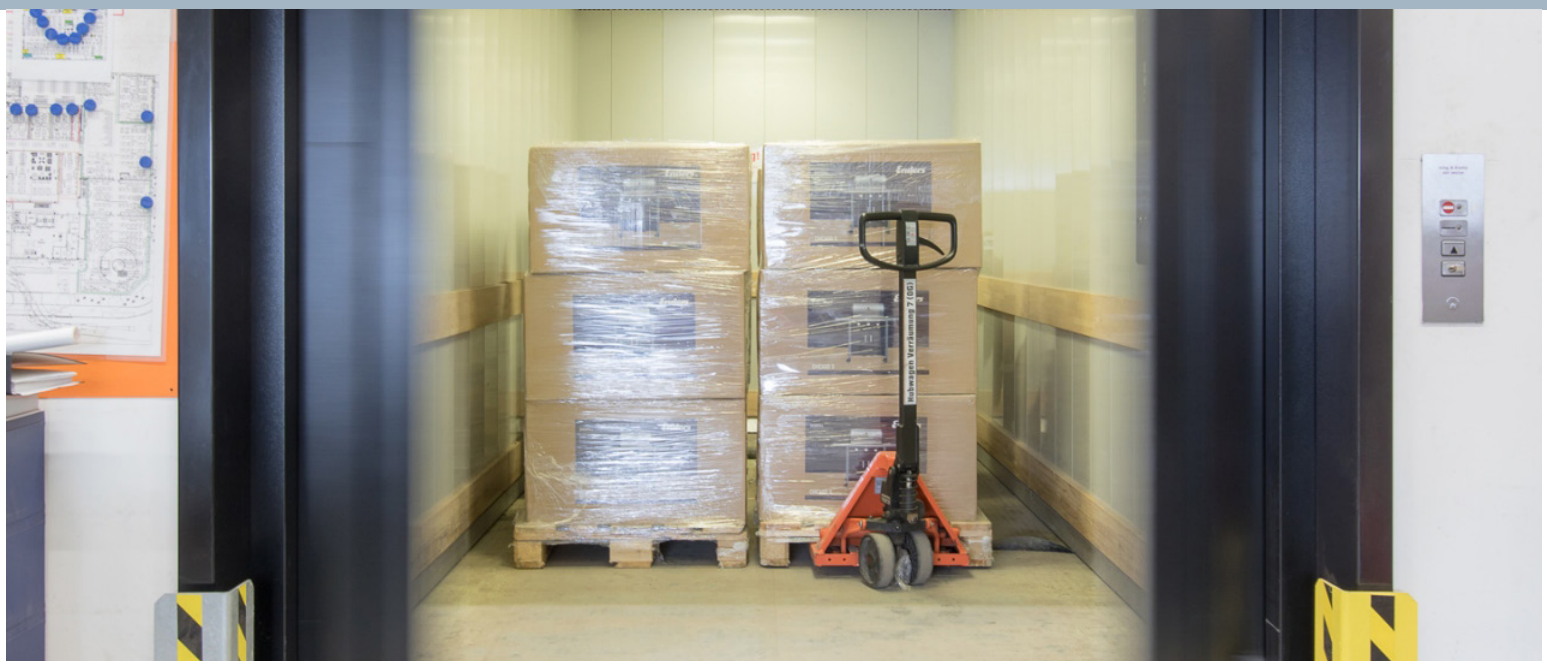
As summer is ending, we hope this finds you well and refreshed. We look forward to positive energy in the industry with new spending and ambitious programs underway.

In this edition of the Reporter we discuss a case where the Civilian Board of Contract Appeals awarded equitable adjustment to a GSA contractor for defective specification in an RFI, a Nevada decision holding breach of contract by an architect under state law is not preempted by the ADA, a discussion of New York's slow roll toward finally enacting a true statute of repose, and a Texas decision upholding the prerequisite of a certificate of merit to a suit against a design professional.

We hope you find these articles informative and helpful. If you have any questions or wish to discuss these articles or any issue impacting the design and construction industry, please reach out to us.

Best regards,

Steve Willig



Equitable Adjustment Awarded To Contractor For Defective Specification In RFI

By Michael Robertson

On November 21, 2021, the Civilian Board of Contract Appeals (the "Board") (an independent tribunal within the General Services Administration ("GSA") that presides over contract disputes between government contractors and agencies under the Contract Disputes Act) issued a decision in *Wu & Associates v. General Services Administration.* Wu & Associates ("Wu") challenged of a denial by the GSA for additional funds for claimed expanded scope of work. Specifically, Wu sought additional funds to strengthen flooring in order to move heavy equipment for an elevator modernization project. GSA denied the claim, arguing that work was included in the scope of Wu's contract and Wu alone was responsible for its means and methods in moving equipment.

THE FACTS

In 2018, GSA awarded Wu a contract to provide construction services for the project, located at the Ted Weiss Federal Building in New York, NY. The project included providing all labor, materials, tools, and equipment to modernize ten elevators. In a pre-award Request for Information ("RFI"), a bidder requested guidance on moving heavy equipment down a 17th floor hallway as well as the type of floor protection recommended to distribute the weight. GSA responded:

> This would be "Means and Methods" by the contractor. It may be a challenge but requires careful planning. On 17th floor, proper skids are required over the raised floor to distribute the load. Freight elevators can take up to 8,000 lbs. but may require distributing the load evenly on the cabs.

Post-Award, Wu submitted a change order to protect the floor in the freight elevator lobby on the 17th floor in order to move new elevator machines over it and remove the existing ones. Wu would later question GSA's RFI response, specifically regarding the requirement for skids. In Wu's opinion, GSA's method was not feasible based on drawings received post-award. GSA denied the change order, stating: "Unless otherwise expressly stated in the Contract, the Contractor shall be responsible for all means and methods employed in the performance of the Contract." GSA also cited the Site Investigations and Conditions clause at FAR 52.236-3, which requires a contractor to give prompt notice of site conditions that materially differ from those indicated in the contract.

Ultimately, Wu solved the floor problem by hiring a structural engineer to provide the necessary engineering to reinforce floor stanchions. Wu sought reimbursement for the cost incurred to remedy the problem.

WU'S APPEAL

Wu filed its appeal after the GSA denial. Both parties filed for summary judgement. Wu argued it was entitled to recover based on the Changes clause of its contract as a result of GSA's failure to disclose vital information about the contract or, alternatively, under the theory of an implied warranty of the specifications in the contract. Wu argued GSA misrepresented the load capacity of the floor on the 17th

floor, resulting in Wu incurring additional costs. Wu argued:

> In this case, the GSA was not simply silent about the load capacity of the raised floor on the 17th floor, but in fact affirmatively misrepresented that capacity. Specifically, when asked in RFI #37 about this issue, the GSA responded (without performing any engineering calculations whatsoever!) that the elevator equipment could be moved across the raised floor if skids were used to distribute the loads, and provided that there was "careful planning."

First, the Board agreed with Wu's contention that the method it ultimately used to solve the floor issue, i.e. stanchions, differed from the method prescribed in RFI #37, i.e. skids. The Board noted that GSA language that "proper skids are required" did not provide Wu with any discretion regarding its means and methods. Instead, GSA set forth what was required to successfully distribute the load of the elevator equipment. Wu, and other bidders "would have no reason to believe that the language meant anything other than what it plainly stated." The Board noted it would interpret contract language in accordance with its plain and ordinary meaning, which in this matter would lead to an interpretation that skids were mandatory for the contractor. In contrast, GSA's position would require the Board to ignore the plain meaning of the language it used or to decide it to be meaningless or superfluous.

Next, the Board addressed whether Wu was entitled to an equitable adjustment for the increased cost it incurred due to GSA's misstatements in RFI #37 during the bidding process. The Board noted that "[a] contractor may recover an equitable adjustment under the [FAR's] Changes clause using the theory of constructive change for both a claim of misrepresentation and defective specification." Further, "to receive an equitable adjustment for a claim of misrepresentation, [a contractor] must show that the Government made an erroneous representation of a material fact that appellant honestly and reasonably relied upon to its detriment." Finally, ""to receive an equitable adjustment for a defective specification claim, [a contractor] must show that it was misled by an error in the specification." In previous matters, the Board found ""[w]hen the Government provides a contractor with design specifications, such that the contractor is bound by contract to build according to the specifications, the contract carries an implied warranty that the specifications are free from design defects."

Turning to RFI #37, the Board first found it to be a design specification and GSA's statement regarding the requirement to use proper skids to be directional. Therefore, it was reasonable for Wu to assume proper skids would provide the required load capacity to move heavy equipment. Next,

the Board found that design specification to be defective, noting that GSA did not contest Wu's argument that skids were not a feasible solution. The Board further found there was no ambiguity in the contract that would have obligated Wu to seek clarification on RFI #37. As a result, the Board found that: "RFI #37 included a defective specification upon which Wu relied and, to the extent that Wu can prove that it incurred additional costs to remedy issues resulting from the defective specification, it is entitled to an equitable adjustment for these additional costs."

The decision reinforced the importance of contract language and giving plain meaning to unambiguous terms, as well as the importance of carefully examining RFIs and responses. Here the contractor was awarded the contractor "equitable adjustment" for additional costs incurred in conscientiously performing the work after a critical review of the content of the RFI.

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Nevada Supreme Court Finds Breach Of Contract Against Architect Under State Law Is Not Preempted By The ADA.

By Thomas D. Duquette

In December 2021, the Nevada Supreme Court held state law claims brought against an architect for failure to comply with ADA Guidelines were not preempted by the Americans with Disabilities in *Board of Regents of Nevada System of Higher Education on Behalf of the University of Nevada, Reno v. Worth Group Architects, P.C.,* 499 P.3d 1177 (Nev. 2021). Worth Group Architects, P.C. ("WG") was contracted to design renovations to Mackay Stadium, a 7,500-seat sports complex originally built in 1966 at the University of Nevada, Reno ("UNR"). After construction was completed, UNR found that the redesign did not comply with Americans with Disabilities Act Accessibility Guidelines ("ADA Guidelines"). Compliance with the ADA Guidelines had been specifically required by the contract, and UNR initiated both a redesign of the stadium and a lawsuit against WG for breach of contract.

The Nevada District Court granted summary judgment for WG and concluded UNR's claims were preempted by the ADA, and UNR was improperly attempting to delegate ADA compliance to WG contractually. The holding was in part based a prior Nevada District Court case titled *Rolf Jensen & Associates, Inc. v. Eighth Judicial District Court,* 128 Nev. 441 P. 3d 734 (2012). In *Rolf Jensen* the Nevada court had held a resort could not seek indemnity for the cost of retrofitting needed to comply with the ADA from a consultant, because allowing the indemnity claim would permit owners to contract out of their nondelegable ADA responsibility. That, the Court held, would frustrate the ADA's purpose to prevent and remedy discrimination against people with disabilities.

On appeal in *Board of Regents*, UNR argued *Rolf Jensen* was misapplied, and the Nevada Supreme Court agreed. The Court noted that WG had "allegedly failed to carry out its contractual duties and UNR is simply asking WG to pay for those shortcomings in its contractual performance." The Court distinguished the case from *Rolf Jensen*, where the plaintiff was seeking indemnification from its consultant to recuperate the costs associated with a retrofitting required to comply with a previous Department of Justice settlement. Here, there was no indemnification claim being pursued and indeed there was no prior judgment or settlement, a prerequisite for bringing a claim for indemnification or contribution.

Moreover, the Court found allowing "UNR to collect damages on the basis that WG signed a contract to perform certain services that happened to involve ADA-compliance, then allegedly failed to do so, does nothing to undermine those Congressional objectives" of the ADA. It found UNR was "not trying to abdicate its responsibility for ADA compliance" but rather "trying to hold WG accountable" for breaching contractual provisions calling specifically for the redesign to comply with the ADA Guidelines. Since UNR's claims would further, not frustrate the purposes of the ADA, the Court concluded that the claims were not preempted by the ADA.

Therefore, they reversed the summary judgment and the claims against WG were sent back to the District Court for further proceedings.

The ruling may signify a trend of courts allowing state law claims to proceed against architects and other design and building professionals for breach of contract and other state law claims arising out of alleged non-compliance with ADA Guidelines. Most owners often have no choice but to contract out the design and construction of their facilities. Allowing state law remedies when compliance with ADA Guidelines is contracted for and not delivered may not be seen as an impediment to the ADA's purposes.

However, it is important to note that the *Board of Regents* Court distinguished but did not overturn *Rolf Jensen*. Therefore preemption, especially in the context of indemnification, may still provide a viable defense both in Nevada and other jurisdictions. The touchstone of preemption is whether allowing the claim to proceed would further or frustrate the purposes of the ADA. That determination will depend on the facts of the case and the nature of the claim being made. *See, Rolf Jensen*, 128 Nev. at 448–49, 282 P.3d at 748 (and cases cited therein); *City of Los Angeles v. AECOM Services, Inc.*, 854 F.3d 1149 (9th Cir. 2017), opinion amended on other grounds, 864 F.3d 1010 (9th Cir. 2017) and cert. denied, 138 S. Ct. 381, 199 L. Ed. 2d 279 (2017) (holding neither the ADA nor Rehabilitation Act preempted claims against the contractor); but *see, Access 4 All Inc. v. Trump Intern. Hotel and Tower Condominium*, 2007 WL 633951 (S.D. N.Y. 2007) (holding common law indemnity claim against the architect, if they exist, to be preempted by the ADA).

Statute Of Repose: New York May Finally Be Joining The Rest Of The Country

By Andrew Radespiel

A Statute of Repose, for purposes of this discussion, bars a claim against design professionals and contractors after passage of a certain amount of time from project completion. This is similar to but different than a Statute of Limitations, which sets a deadline to commence a lawsuit measured from the time an injury occurs or when a professional engagement, if injury occurred during that engagement, ends. The rationale behind the former is to allow design professionals and contractors to put a project to rest, at some point. If windows start to leak 20 years after construction, for example, the owner ought not to be able to make a claim against those responsible for design and construction of the building shell and façade. 48 States have a Statute of Repose, and New York may finally be joining those ranks with two pending pieces of legislation. That would leave Vermont as the only State without a Statute of Repose.

Currently in New York, contractors and design professionals have exposure to bodily injury and property damage claims resulting from construction defects for an unlimited number of years after completion of a project. The only restriction in place in terms of repose is Section 214-d of the New York Civil Practice Law and Rules ("CPLR"). That requires wrongful death, personal injury and property damage

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claimants to provide design professionals with a written notice of claim, at least ninety days prior to commencing suit, when the conduct at issue occurred more than ten years prior to the date of the claim. Failure to follow this notice requirement opens the door to a motion to dismiss pursuant to CPLR § 3211(h) and/or CPLR § 3212(i). As long as the defendant can show that more than ten years has elapsed since project completion and notice was not served, the case will be dismissed. See, Rogan v. Sear-Brown Group, 183 Misc. 2d 364, 702 N.Y.S.2d 795 (Sup. Ct. Monroe Co. 2000). While often colloquially referred to as the "statute of repose" for New York, CPLR §214-d does not have nearly the same effect as a true Statutes of Repose. Among other things, even if a claim is dismissed for failure to serve the ninety day notice, all a claimant need do is serve the notice and start the action over again.

Although New York portrays a forward thinking image and its motto of Excelsior translates to "ever upward," in this realm it is not only behind but nearly dead last. Under the current law, design professionals practicing in New York are subject to claims for an indefinite period of time. As long as a notice is served, they could be sued 20 or 30 years after completing a project. Not only does the passage of time make such claims more difficult to defend (witnesses and documents may no longer be available), but professionals have to consider liability insurance that covers these potential claims for work completed in years past.

As a result, the design and construction communities in New York have been advocating for a meaningful Statute of Repose for years, and now there seems to be a light at the end of that tunnel. Due in significant part to lobbying efforts, the New York Legislature is considering whether to repeal CPLR § 214-d in its current form and provide a true 10-year statute of repose for wrongful death, personal injury, and real property damage claims asserted against design and construction professionals. In this regard, the Assembly's Standing Committee on Higher Education and the Senate's Judiciary Committee, are each considering a bill (Assembly Bill A3595[1] and Senate Bill S4127[2]) which provides a limitations period of ten years after the completion of improvements to real property. In addressing the concerns and previous issues raised, the New York Legislature's cited purpose of the proposed bills is to curb the continuing rise in insurance premiums by bringing certainty to the scope of post-operational risk to which design professionals and contractors are exposed. In the interest of fairness, each bill provides for a one-year extension to assert a claim which accrues during the tenth year after the completion of the improvements. At the time of this article, Assembly Bill A3595 is "in Assembly Committee" and Senate Bill S5158 is "in Senate Committee – Judiciary Committee." Hopefully once out of committee, both bills will be put on the Floor Calendar, pass the Senate and Assembly, and then be delivered to the governor to be signed into law without issue.

It appears that the time will soon come for New York to join the ranks of the other 48 States and level the playing field by adopting a Statute of Repose that will shield design professionals and contractors from being haunted by claims derived from work in the distant past.

1. *The text of the proposed Assembly Bill can be found here: https://legislation.nysenate.gov/pdf/bills/2021/A3595.*
2. *The text of the proposed Senate Bill can be found here: https://legislation.nysenate.gov/pdf/bills/2021/S4127.*

Texas Appellate Court Holds Certificate Of Merit Against One Design Professional Does Not Apply To Sub Consultant By Mere Reference To Such In A Pleading.

By: Stephen F. Willig

The Texas Court of Appeal (14th District) issued an April 2022 opinion in *Thompson Hancock Witte & Associates v. Stanley Spurling & Hamilton*, 2022 WL 1010270, affirming that state's requirement for a certificate of merit in a suit against a design professional. In particular, the Court held a certificate of merit directed toward one professional would not, through simple reference in a pleading, apply to another professional even though the alleged breach of the standard of care is the same for both.

The case involved a construction project to expand a senior living community owned by Brazos Presbyterian Homes. Brazos hired architect Thompson Hancock to design the addition and Lendlease as the general contractor. Issues arose on the project, and Brazos sued Lendlease. After commencing the suit, flooding from a hurricane caused damage at the project. It was asserted that the flooding resulted from improper design by Thompson Hancock of a retaining wall. Brazos amended its pleading to add Thompson Hancock to the suit. Along with the amendment, Brazos filed certificates of merit by an engineer and an architect to support the claim against the architect. Thompson Hancock then filed a third-party action against Stanley Spurling, amother design professional, alleging it was responsible for design of the retaining wall. The third-party pleading noted the previously filed certificates of merit, but Thompson Hancock did not submit a certificate of merit directed toward Stanley Spurling. A counterclaim was filed against Thompson Hancock. Following some discovery, Thompson Hancock's third-party claim and the counterclaim were voluntarily discontinued.

Sometime later, Thompson Hancock recommenced the third party action. Stanley Spurling sought to dismiss by enforcing the prior agreement to discontinue the claim and also due to the failure to submit a certificate of merit. The trial Court granted the motion on both counts.

The Court of Appeals looked at the issue of the required certificate of merit and noted a change in the law that occurred after commencement of the first third-party action. The law applicable when Thompson Hancock brought the first third-party action required a "plaintiff' to submit a certificate of merit when suing a professional. The law that applied when the second third-party action was commenced required a "claimant" to submit a certificate of merit. It was determined that the new law would apply, as the third-party claim would not relate back to the time of the prior action for these purposes. Therefore, Thompson Hancock was a "claimant" that was required to submit a certificate of merit when bringing an action against a professional.

Most significantly, the Court considered Thompson Hancock's argument it satisfied the certificate of merit requirements by making reference to a certificate of merit that was applied against it (the pleading did not specify to which of the two certificated filed against Thompson Hancock it was referring). It suggested that since the

certificate of merit opined Thompson Hancock's design of the retaining wall had breached the standard of care of a design professional, such would apply to Stanley Spurling, who Thompson Hancock alleged was responsible for the design. The Court did not accept the argument and affirmed dismissal of the third-party action for failure to meet the certificate of merit requirement. The opinion noted the third-party complaint did not attach the certificates of merit, did not affirmatively state it was incorporating the certificates by reference and did not identify which of the two certificates it meant to apply. Thus, the Court left open the possibility of satisfying the certificate of merit requirement if those elements are met. Left unstated, by logically implied, would be the necessity that the alleged breach must be the same in such a circumstance.

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