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ARCHITECTS & ENGINEERS NEWSLETTER

OHIO CONSTRUCTION REFORM

BY DAVID T. PATTERSON

On June 30, 2011, Governor Kasich signed H.B. 153 which included the first changes in the State's delivery of public projects in over 134 years. The changes will allow for alternative delivery methods for public and private improvement projects. The goal was to allow for projects to be faster and more flexible and hopefully delivered at a lower cost. These reforms will affect delivery methods that pertain to colleges/universities, counties, townships, municipal corporations, school districts and other political subdivisions. It does not include Ohio turnpike or ODOT road construction. The Administrative Rules and contract documents are to be finalized no later than June 29, 2012.

The delivery methods that are allowed by the construction reform retain the multi-prime design/bid/build method, but also allow for:

- Single prime design/bid/build project delivery with a general contractor; and
- Allows design/build project delivery-single entity responsible to the owner; and
- Allows for construction manager-at-risk.

Under the multi-prime delivery method, the owner was responsible for coordinating the activities of all trades. Typically that responsibility was handed off to the construction manager. In many problem projects, the owner and the owner's representative (construction manager) were found at fault for failing to properly coordinate the activities of the trade contractors, thus exposing the public entity to miscellaneous claims by the contractors. The additional delivery methods that are now going to be permitted have been used for many decades in the private sector. Single prime (general contractor), design/build, construction manager-at-risk delivery systems allow the owner to avoid the claim of failing to coordinate.

Administrative rules are being adopted as well as the necessary contract documents for use by all public authorities. Those documents are to be finalized by June 29, 2012.

WHAT DOCUMENTS?

The state and state institutions of higher education are to use the contract forms developed by the Office of the State Architect. All other public authorities are to use contracts created by the Office of the State Architect or documents published by AIA, Consensus DOCS, Design Build Institute of America or EJCDC. For the designer, that means that as to state institutions of higher education (defined as any state university or college, community college, state community college or university branch as defined in Ohio Rev. Code §3345.011) new documents covering these different delivery systems have to be adopted. Drafts of those documents including the design/build agreement are available for review and comment. For public projects other than state and institutions of higher education, the following is a partial list of contract documents licensed by AIA, ConsensusDOCS, Design Build Institute of America or EJCDC that have been approved for use:

AIA Documents

- B101-2007 - Standard Form of Agreement Between Owner and Architect;
- B103-2007 - Standard Form of Agreement Between Owner and Architect for a Larger Complex Project;
- A141-2004 - Standard Form of Agreement Between Owner and Design Builder; and
- B143-2007 - Standard Form of Agreement between Design Builder and Architect.

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Consensus Documents

- Consensus Documents 240 - Standard Agreement Between Owner and Design Professional;
- Consensus Documents 410 - Standard Design/Build Agreement and General Conditions Between Owner and Design Builder (cost of the work plus a fee with a GMP);
- Consensus Documents 245 - Short Form Standard Agreement Between Owner and Design Professional.

Design Build Institute of America

- DBIA Document No. 501 - Contract for Design Build Consultant Services;
- DBIA Document No. 530 - Standard Form of Agreement Between Owner and Design Builder (costs plus a fee with an option for GMP);
- DBIA Document No. 540 - Standard Form of Agreement Between Design Builder and Design Consultant.

EJCDC

- EJCDC D-500 - Standard Form of Agreement Between Owner and Owner's Consultant for Design Professional Services on the Design Build Project;
- EJCDC D-505 - Standard Form of Sub Agreement Between Design Builder and Engineer for Design Professional Services;
- EJCDC D-525 - Suggested Form of Agreement between Owner and Design Builder on the basis of cost plus.

For projects that involve the state or institutions of higher education, ODAS released on April 26, 2012, the final design/build documents to be used. The ODAS design/build documents can be accessed on the www.Ohio.gov Ohio Construction Reform website.

SELECTION OF A DESIGN/BUILD FIRM

The administrative rules that have been developed indicate that the selection of a design/build firm is a two-step, best value selection process. The first step is a qualifications phase and the second step is the proposal phase. In the qualifications phase, the criteria are the following:

- Competence to perform the required design/build services;
- Ability in terms of workload and availability of qualified personnel;
- Past performance of the firm;
- Use of licensed design professionals for all design services;
- Financial responsibility;
- History of performance with meeting goals of any diversity and inclusion programs; and
- Other qualifications consistent with the needs of the project.

Once the responses to the requests for qualifications are received, an evaluation committee evaluates those responses and selects a minimum of three firms which are referred to as the "short listed firms."

The second phase, which is the proposal phase, consists of setting criteria as to fee and performance criteria. Once the evaluation committee has selected the short listed firm, pricing and technical proposals are then solicited. The pricing proposal includes a list of key personnel, schedule and pricing. The technical proposal includes a project-specific plan. As part of the second phase, the evaluation committee interviews each short listed firm to evaluate pricing and the technical proposal. Each short listed firm is then ranked to determine the best value.

RISKS OF DESIGN/BUILD FOR JOB SITE SAFETY

Many design builders who have typically focused their practice on public projects are not familiar with the design/build format. The design/build firm works under a single contract with the owner to provide design and construction services — one point of contact, one unified flow of work from initial concept through completion.

Designers have been taught to reduce their liability exposure by deliberately avoiding responsibility that arises on a construction project. The means, methods and techniques used for constructing a project have always been the responsibility of the contractor. Under the design/build format, this now becomes the responsibility of the design/build team. The design/build team is involved with the construction operations and, as a result, is exposed to OSHA citations and third-party liability that they do not normally assume in a design/bid/build format.

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The design builder takes responsibility for site safety, supervises and directs its subcontractors and manages the site safety programs. If an injury occurs, the design builder will be involved. When an injury occurs on a job site, the injured worker is entitled to workers' compensation benefits. Thus, the designer is going to be more involved in site safety and accident investigation than under the normal design/bid/build project.

Historically, pure design services do not trigger OSHA liability. However, OSHA has found that where a designer has accepted broad responsibilities over the project, it is responsible for site safety. Recent cases have made it clear that OSHA will attempt to impose site safety responsibility on designers involved in the construction process. Design/build firms are very likely to be subject to OSHA citations. Therefore, design builders' personnel should be knowledgeable with OSHA safety standards.

Design/build requires special attention to insurance coverage. Workers' compensation exposure and general liability exposure is far greater for contractors than designers. Taking on the role as contractor requires greater coverage and higher limits resulting in higher premiums.

RISKS OF DESIGN/BUILD FOR COST OVERRUNS

Cost overruns typically result from change orders or claims. Cost overruns usually come in three categories: 1) scope changes; 2) unforeseen conditions; 3) design problems. Regardless of whether the delivery system is traditional or design/build, the risk of the first two is generally on the owner. When the owner directs changes in scope, or conditions are different then the expectations of the parties, the owner generally bears responsibility. The risk of design changes in the traditional delivery system generally is the owner's unless the designer is said to have violated his standard of care. However, in design/build, there is no such analysis as to whether the designer violated its standard of care. When the designer and the contractor are one and the same, it is nonsensical for the design/build team to claim entitlement to additional time or cost when they are the result of design errors. These are costs that the design builder has to be prepared to accept.

WARRANTIES AND GUARANTEES

Express warranties and guarantees are nothing new to contractors, but they are totally foreign to the designer. Warranties and guarantees as to workmanship and materials are written throughout the contractors' contractual obligations. Those warranties and guarantees are now a part of the design builder's responsibility. It is not unusual in a design/build contract for the designer to be required to warrant that the completed structure will meet or exceed certain criteria. Designing a public utility that has as its criteria reaching and maintaining a certain output or specific level of processing, now becomes a warranty under the design/build system. Failure to obtain the criteria can expose the design builder to damages they have never been exposed to before, such as liquidated damages. Such a warranty is not possible under traditional delivery systems because the designer and contractor are responsible for different aspects of the construction process and not accountable for the other's work and the overall performance of the project.

The AIA A141-2004 (Standard Form of Agreement between Owner and Design Builder) warrants that materials and equipment will "…be of good quality…" and "…that the Work will be free from defects…" That obligation previously belonged to the contractor. Now they belong to the design builder. The draft documents of the Office of the State Architect have similar language.

CONCLUSION

With the advent of new delivery systems for public projects, there is new opportunity, but also accompanying new risk. It is critical that the designer work closely with its agent to make sure that, to the extent that new risk can be covered, it is being addressed. ■

WHERE IS THE *SPEARIN* DOCTRINE TODAY?

BY AMY K. SCHERMER

The *Spearin* doctrine. What is it and where is it today? At the turn of the 20th century, the United States Supreme Court decided a case known as *U.S. v. Spearin*, 248 U.S. 132 (1918). Since then, courts throughout the United States, including Ohio, have been asked to apply, limit, or even expand this doctrine, depending on who is citing the doctrine and what interests are looking to be served.

BACKGROUND/HISTORY

The *U.S. v. Spearin* case started out as joint appeals from the United States Court of Claims to the United States Supreme Court. Both the contractor (Spearin) and the United States government sought review of a judgment in favor of the contractor relating to its suit to recover the balance of payments for work that it performed under the contract to construct a dry dock and to also recover damages for the government's annulment of that contract. The contractor appealed the judgment on the basis that the award was too small, and the United States appealed the judgment on the basis that the award was too large.

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Factually, *U.S. v. Spearin* involved a government contract to build a dry dock. This dry dock ultimately required a change in the contract to allow for the relocation of a sewer. The contractor built the dry dock and moved the sewer in accordance with the government's plans and specifications, but before the dry dock was completed, the sewer broke and flooded the site. The United States government refused to pay for the damages and annulled the contract. The contractor subsequently filed suit to recover the balance due on its work and lost profits. The government took over the project and had the work completed by another contractor under revised plans. In finding in favor of the contractor, the United States Supreme Court held that the government, in providing the plans to the contractor, implicitly warranted that the plans and specifications were adequate–that if the contractor complied with the government's plans and specifications in relocating the sewer, the contractor's work would be adequate, relieving the contractor of any responsibility. The *key* determining fact in this case was that both the Court of Claims and the United States Supreme Court found that the government knew there was a defect with the sewer that it affirmatively did not disclose to the contractor. Two other key facts were that the relocation of the sewer constituted as much an integral part of the contract as did the construction of any part of the dry dock, and the relocation of the sewer did not involve a separate contract or separate consideration.

This implied warranty that the plans and specifications are adequate as prepared became known as the "*Spearin* doctrine." Sounds simple and clear cut, right? Wrong. Why is that? That is due in part because the government did not know of any defect per se–all it knew was that the sewer had overflowed from time to time. Questions, therefore, began to arise about how far does this doctrine expand? What constitutes "knowledge" of a defect? What if a disclaimer is used? Does this doctrine always place liability upon the owner and/or preparer of the plans and specifications? Does this implied warranty apply to both governmental and private projects? All of which lead to the ultimate question of: What do I need to do as a designer to protect myself from liability, or at least attempt to minimize it?

WHAT IS THE *SPEARIN* DOCTRINE?

The *Spearin* doctrine holds that, in cases involving government contracts, the government impliedly warrants the accuracy of its affirmative indications regarding job site conditions. *See, e.g., Sherman R. Smoot Co. v. State,* 136 Ohio App. 3d. 166, 176-178 (Franklin Cty. 2000).

As you can imagine, attorneys and contractors alike have cited to this doctrine over the last several decades, using it as both a sword and a shield. As a sword to point fingers at the owner and/or designer or to affirmatively recover monies to which the contractor believes it is entitled in the event additional expenses are incurred or its contract is annulled. As a shield in the attempt to protect the contractor from any liability flowing from its work. For decades, attorneys have been either attempting to expand this doctrine, or circumvent it, depending on who their client is. This brings us to the next section, which is, “Where is this doctrine today?”

WHERE IS THIS DOCTRINE TODAY?

Here is an overview of the *Spearin* doctrine as it exists today.

- **Does not apply to private entities:** Courts have consistently refused to apply the *Spearin* doctrine to contracts between private entities, instead limiting its application to only government contracts.

- **Only applies to *affirmative* representations or the affirmative withholding of information:** In order for the *Spearin* doctrine to apply, there must be an affirmative representation or the affirmative withholding of information. Courts have generally held that if the information provided by the government is accurate, but the conclusions drawn therefrom by the contractor differs from the actual site conditions, this is insufficient to allow a contractor to avail itself of the *Spearin* doctrine. Also generally held to be insufficient are affirmative statements about the estimated cost of performing certain work.

- **Implied warranties relating to job site conditions will generally prevail over general disclaimers:** Courts have refused to *carte blanche* find that disclaimers in government contracts where the government attempts to disclaim any responsibility for the accuracy of information provided to contractors, instead requiring the contractors to examine the site and check the plans, relieves the government from liability. The governmental entity will still be found to have impliedly warranted the accuracy of any *affirmative* indications it has made regarding job site conditions even if the contract contains a general disclaimer to the contrary.

- **Does not apply to site conditions that would have been revealed by a reasonable inspection of the job site:** Courts generally will not allow a contractor to use the *Spearin* doctrine as a sword to recover additional monies it believes are due and owing it or to point blame at an owner or designer if a reasonable inspection of the job site by the contractor would have revealed the actual site conditions. What constitutes a "reasonable inspection" is generally an issue for the experts.

- **Does not apply to delays resulting from plan changes:** Courts have refused to extend the *Spearin* doctrine to delays resulting from plan changes, instead holding that the *Spearin* doctrine is limited to "job site conditions" which preclude completion of the construction project. Note that no-damages-for-delay clauses are void and unenforceable in Ohio, pursuant to R.C. §4113.62, if the cause of the delay is a proximate result of the owner's act or failure to act. ■

HIGHLIGHTS OF OHIO'S CONDOMINIUM LAW

BY DAVID T. PATTERSON AND AMY K. SCHERMER

The purpose of this article is to provide an overview of Ohio's Condominium Law, as the law has been interpreted by David Patterson and Amy Schermer of Weston Hurd LLP, with a focus on designer-related issues. As the name of this article suggests, this article only addresses the highlights of Ohio's Condominium Law and is not meant to be all inclusive.

1. **Where is Ohio's Condominium Law Located?** **Answer:** That depends. Sounds like a typical attorney answer right? That is because Ohio's Condominium Act is set forth in Chapter 5311 of the Ohio Revised Code (R.C. §§5311.01, *et seq.*), but it is the case law (not Ohio's statute) that has "clarified" the issue of whether a Condominium Association (referred to in Ohio's statute as a "Unit Owners Association") may file suit directly against a designer. See item 7. below. As such, while the Act is a starting place, the surrounding case law must also be examined.

2. **When was Ohio's Condominium Law Enacted?** **Answer:** The Act was originally enacted in 1963, amended in 1978, and amended again in 2004 pursuant to HB 135 which went into effect July 20, 2004. No amendments to the Act have been made since 2004.

3. **What does R.C. Chapter 5311 (aka Ohio's Condominium Act) Include?** **Answer:** In its simplest sense, it promulgates the rights, powers, and duties of the Condominium Association Board (and in many instances, the statute will defer to the declaration filed by the developer that created the Board, with the statutory provision only applying if the declaration of condominium property is silent on a particular issue) and it sets forth the rights of the Condominium Association's members (unit owners), including their right to vote and their right to review certain books, records and minutes. The Act further tells a developer what it can and cannot do, including what it must do and when, in connection, for example, with its creation of a condominium development and its creation of a condominium association, inclusive of turning the condominium association over to the unit owners. Examples include: R.C. §5311.05, which dictates what a developer must include in its declaration of condominium property; R.C. §5311.06, which instructs the developer where the declaration of condominium property must be filed and recorded in addition to identifying what documents must be filed in conjunction with the declaration (set of drawings as provided for in R.C. §5311.07 and bylaws as required by R.C. §5311.08); and R.C. §5311.08, which further dictates when the Condominium Association must be established and when it must be turned over to the unit owners. *See also* R.C. §§5311.25 and 5311.26.

4. **When is a Condominium Association Created?** **Answer:** When the first unit is sold. *See DiPasquale v. Costas*, 186 Ohio App.3d 121 (2010). More specifically, the Condominium Association is created once the declaration of condominium property is filed and recorded with the recorder's office in the county or counties in which the property sits, inclusive of the bylaws (as set forth in R.C. §5311.08) and condominium drawings (as required by R.C. §5311.07). Pursuant to R.C. §5311.08(C)(1), this filing and establishment of the Condominium Association must occur no later than "the date that the deed or other evidence of ownership is filed for record following the first sale of a condominium ownership interest in a condominium development." (emphasis added).

Prior to the Condominium Association being established, the developer controls the property. Ohio's Condominium Act contemplates a period of time when the property is developed and controlled by the developer, not the unit owners. However, the Act also contemplates (and in fact mandates) when control of the property is to be turned over to the unit owners by way of the Condominium Association. Provisions (C)(2)(a) and (D)(1) of R.C. §5311.08 address this issue of when the Condominium Association is to take over control of the property and the circumstances under which a developer's control may be extended. Pursuant to R.C. §5311.08(D)(1), however, under no circumstances may a developer maintain control of the property for more than three years after the Condominium Association is established (if the declaration does not include expandable condominium property) or five years after the Condominium Association is established (if the declaration does include expandable condominium property).

5. **Can a Condominium Association Sue or Be Sued?** **Answer:** Yes, but it depends on what is included in the suit/what the suit involves. A Condominium Association may sue or be sued in relation to any "common elements" or any right, duty or obligation possessed or imposed upon it by statute or otherwise. With respect to non-common elements (*i.e.,* items constituting a part of the "unit" itself as that term is defined by R.C. §5311.01(BB), such as the exclusive possession, use and enjoyment of interior surfaces of perimeter walls, floors, ceilings and of the supporting walls, fixtures, and other parts of the building within the unit's boundaries, as contrasted with the term "common elements" which is defined at R.C. §5311.01(F)), the Condominium Association has no such standing to sue. *See* R.C. §5311.20; *see also*, R.C. §5311.03(D)(3), which provides that supporting walls, fixtures, and other parts of the building that are within the boundaries of the unit but are necessary for the "existence, support, maintenance, safety or comfort of any other part of the condominium property" are not part of the unit, and §5311.03(E)(1), which provides that ownership of a residential unit includes the right to exclusive possession, use, and enjoyment of interior surfaces of perimeter walls, floors, ceilings and of the supporting walls, fixtures, and other parts of the building within the unit's boundaries. Additionally, any action brought by or on behalf of the Condominium Association must be brought pursuant to authority granted to it by the Board of Directors. *See* R.C. §5311.20.

6. **What is a "Common Element"?** **Answer:** The term "common element" is expressly defined by statute at R.C. §5311.01(F)(1) and (2)(a) through (g). It includes the land described in the declaration of condominium property and all other areas, facilities, places, and structures that are "not part of a unit." R.C. §5311.01(F)(2)(a) through (g) provides a list of examples. This list, however, is written as an "including but not limited to" list. Examples of "common elements" may include such things as foundations, columns, girders, beams, supports, supporting walls, roofs, halls, corridors, lobbies, stairs, stair ways, fire escapes, entrances and exits of a building, basements, yards, gardens, parking areas, garages, storage spaces, installations of central services such as power, light, gas, hot and cold water, refrigeration, air conditioning,

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and incinerating, and such things as elevators, tanks, pumps, ducts, motors, fans, and compressors. Provisions 2(g) and (f) are essentially catch-all provisions in that they include as "common elements" those items that have been designated in either the declaration or drawings as a "common element." Of additional guidance is R.C. §5311.01(BB), which defines a "unit" as "the part of the condominium property that is designated as a unit in the declaration, is delineated as a unit on the drawings prepared pursuant to section 5311.07" and is either a residential unit, a water slip unit or a commercial unit as those terms are defined at R.C. §5311.01(BB)(1) through (3). Additionally, according to the express language of R.C. §5311.01(BB)(1), a "residential unit," may also include "exterior portions of the building, spaces in a carport, and parking spaces as described and designated in the declaration and drawings." What is the bottom line? It is important to examine whether each of the alleged construction/design "defects" relate to "common elements," because if they do not, then the Condominium Association may lack the standing to assert such claims and such claims may be dismissed as a matter of law on this basis.

7. **Can a Condominium Association Bring Suit Directly Against a Designer? Does it Matter if the Developer is No Longer in Business? Answer:** No, a Condominium Association may not bring suit directly against a designer if the claim is for purely economic damages. Any such claim would be barred by the economic loss doctrine due to the lack of privity of contract between the Condominium Association and the designer. *See, e.g., Spring Creek Condominium Assoc. v. Colony Development Corp.*, 2008 Ohio 1420 (10th Dist. Mar. 27, 2008), where the Condominium Association and five individual unit owners sued the architect directly under the theory that she "did not use reasonable care in the design, supervision and inspection of the condominiums and appurtenant common elements." In particular, the architect was alleged to have been negligent in tort for failing to hire a civil engineer and/or geotechnical engineer to assist her in designing the foundation for the condominiums. Little to no detail of the issues with the condominiums was provided in the case, other than an indication that the alleged damages were all economic damages. The trial court granted the architect's motion to dismiss pursuant to the economic loss doctrine on the basis that there was no privity of contract between the architect and the Condominium Association or the ultimate purchasers of the condominiums. This grant of the architect's motion to dismiss was upheld by the 10th Appellate District.

Regarding the second part of the question, it does not matter if the developer is no longer in business and the architect is the only possible source of recovery. As the 10th Appellate District astutely stated in its *Spring Creek Condominium Assoc.* decision: "The Ohio Constitution does not guarantee recoverable defendants, only the right to pursue defendants through the court system."

Of some note is that an Ohio state court has held that the economic loss rule does not bar claims for "negligent misrepresentation." *See, e.g., Potts v. Safeco Ins. Co.*, 2010 Ohio 2042, ¶¶21-27 (5th Dist. May 3, 2010) ("However, the economic loss rule does not apply to claims for negligent misrepresentation."). Notably, *Potts* dealt with an insurance coverage issue between a homeowner and an insurance agent who allegedly negligently misrepresented to the homeowners that their policy contained certain coverage when it did not. The federal district court cases cited therein also related to negligence misrepresentation claims by insureds against insurance brokers. While the insureds' claims for allegedly negligently failing to procure insurance were barred by the economic loss doctrine, the respective courts held that the negligent misrepresentation claims against the respective brokers were not. We have not seen any Ohio case law where this "negligent misrepresentation" exception has been applied to a design professional. It is our opinion and belief that the overwhelming majority, if not all, of Ohio courts would refuse to extend this so-called "negligent misrepresentation" exception to architects and engineers given the strong, favorable history of the economic loss doctrine in Ohio. ■

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Combined, Amy K. Schermer and David T. Patterson have more than 40 years of experience representing design professionals.

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