skellengerbender

ATTORNEYS

Legal Alert

Halcrow Rolls Dice In Nevada Supreme Court and the ELD Wins Big

Courts around the country continue to struggle with a fundamental issue of great importance to design professionals: Can a design professional be sued for purely economic losses by parties with whom the design professional does not have a contract? This issue often arises when contractors try to sue design professionals to recover economic losses on a project. This seemingly simple proposition has received conflicting treatment in different jurisdictions.

Most recently, the Nevada Supreme Court has addressed this issue in a decision providing strong protections for the design professional defendants. The court held that "the economic loss doctrine bars negligent misrepresentation claims against commercial construction design professionals where the recovery sought is solely for economic damages." The *Halcrow Inc. v. District Court* decision (available here) arises from a massive lawsuit over the construction of the Harmon Tower at CityCenter on the Las Vegas Strip.

The Nevada Supreme Court agreed to consider the case, "because the legal issue of whether a negligent misrepresentation tort claim may be maintained against a design professional in a commercial construction setting is one of first impression in Nevada and the issue has resulted in split decisions in Nevada state and federal district courts such that our clarification of this important issue now will promote sound judicial economy and administration."

The court went on to rule that the trial court erred when after dismissing negligence claims brought against Halcrow, the structural engineer, by the contractor's steel installation subcontractors, it allowed them to bring negligent misrepresentation claims instead. Such claims are impermissible under Nevada law the court said. The court referred back to its decision in *Terracon Consultants Western, Inc. v. Mandalay Bay Resort Group*, in which it held that the economic loss doctrine ("ELD") precluded a plaintiff, in that case the owner, from asserting professional negligence-based claims against a design professional for purely economic losses in a commercial construction dispute. While the *Terracon* decision recognized that exceptions to the ELD exist, it did not address whether negligent misrepresentation claims constitute such an exception. In *Terracon*, the

court left open the possibility that negligent misrepresentation claims could be an exception to the ELD "in cases where there is significant risk that the 'law would not exert significant financial pressures to avoid such negligence.'"

But the court in the *Halcrow* opinion reasoned that "in the context of commercial construction design professionals, negligent misrepresentation claims do not fall into such a category because 'contract law is better suited' for resolving such claims." The financial pressure to avoid negligence that the *Terracon* court referenced came from the "highly interconnected network of contracts" present in commercial construction disputes that delineate each party's risks and liabilities in the event of negligence. Such contracts typically address economic losses as well, noted the court. This led the court to conclude that complex construction project parties' "'disappointed economic expectations' are better determined by looking to the parties' intentions expressed in their agreements." Requiring parties that don't have contracts with each other to rely on the network of interrelated contracts ensures all have a remedy and "maintains the important distinction between contract and tort law" the court noted.

The court then went on to opine that it saw no reason to impose a duty that arises outside the contractual relationship, such as negligent misrepresentation. If the court were to hold that such an extracontractual duty existed to any entity that must rely on a design professional's plans, it would allow any party to simply bring their negligence claim, which is expressly barred under the ELD, as a negligent misrepresentation claim. This would create the exception that swallows the rule, essentially causing "the economic loss doctrine to be nullified by negligent misrepresentation claims."

"Negligent misrepresentation is an unintentional tort and cannot form the basis of liability solely for economic damages in claims against commercial construction design professionals," the court concluded. The court ultimately threw out the equitable claims for contribution, indemnity and apportionment against Halcrow as well, stating that such claims must fail because the negligent misrepresentation and professional negligence claims could not form a basis for liability.

This is an excellent decision for design professionals and validates the ELD, which has unfortunately suffered some recent setbacks in other jurisdictions, including Washington (read Terry Scanlan's article on the Washington Supreme Court's decisions purportedly eliminating the ELD in Washington here). Although we normally agree with the maxim "What happens in Vegas, stays in Vegas," in this instance we hope that other jurisdictions will take notice and follow suit.

Legislature Affirms its Support for Alternative Delivery

Last month, the Washington Legislature renewed the Alternative Public Works Contracting statutes, which were set to expire at the end of this year. Not only did the Legislature renew the statutes through the year 2021, it also amended many of the statutes to allow for broader utilization of alternative contracting on public projects. The following is a brief synopsis of the changes to Washington Revised Code Chapter 39.10, which took effect June 30, 2013.

By way of background, public agencies were granted leave by the Legislature to utilize three "alternative" delivery methods in the early 2000's. Those three alternate delivery methods are: Design-Build, General Contractor/Contract Manager (GCCM), and Job Order Contracting. One of

the most significant components of the legislation was its impact on the responsive bidder selection process. Public agencies were given the ability to determine the responsiveness of bids not based solely on the price of the bid, but also on the qualifications of the bidder, including the bidder's technical approach, design concept, experience, ability of the bidder's professional personnel (including past experience), and the bidder's success on similar projects.

Because of the perceived complexities associated with alternate delivery methods, the Legislature imposes specific criteria and procedural safeguards with which public agencies and bidders have to comply before they are granted leave to engage in an alternative public project. Prior to the recent changes, public agencies seeking to do a Design-Build project had to demonstrate that the "design and construction activities, technologies or schedule to be used [were] highly specialized and a design-build approach [was] critical in developing the construction methodology or implementing the proposed technology." Public agencies seeking to utilize GCCM delivery had to demonstrate that the proposed project involved "complex scheduling, phasing or coordination" and it involved construction at an "occupied facility which must continue to operate during construction." Before any public entity could move forward utilizing either of these models, it also had to submit the project for consideration and approval to the Public Review Committee (Committee), which is constituted by the Capital Projects Advisory Review Board (CPARB). This could be an onerous process.

The recent changes to the Alternative Public Works statutes have moved toward a more streamlined process, and also broadened the criteria for approving a public project for alternative delivery. For example, the Legislature will now allow public projects to be considered for Design-Build delivery not only if they are "highly specialized," as before, but also if the public agency can demonstrate that utilizing a Design-Build team would provide an opportunity for greater innovation or efficiencies between the designer and builder, or significant savings in the project schedule. Substitute House Bill (SHB) 1466 appears to affirm the Legislature's recognition of the benefits public agencies can and have realized through alternative delivery, including better teaming options based on "qualified" bidder selection, better end products based on design collaboration, and an enhanced ability to consider the full costs associated with a project, including the costs of schedule delays.

The recent changes to the statute also evince an understanding that the benefits of alternative delivery may be realized on projects with smaller budgets. With these changes, the Legislature eliminated the $10 million minimum project budget previously required for pubic Design-Build projects, and also loosened the reins on smaller GCCM projects, eliminating the need for Committee approval on GCCM projects with a project cost of less than $10 million.

Finally, and perhaps most significantly, the Legislature appears to be signaling a greater interest in the performance of newly constructed buildings, and the potential for alternative delivery to leverage sustainable design and construction practices, minimizing life-cycle maintenance, costs, and increasing performance. The amended statutes allow bidders to include for consideration their past successes in achieving life-cycle or energy performance goals on alternative delivery projects. They also allow public agencies to consider operation costs and other "price-related factors" of the finished building, in addition to bidder proposal prices. These changes are likely intended to coincide with an anticipated increase in performance-based code amendments in the future.

For additional changes to the statutes, including utilization of small or disadvantaged businesses, changes to Job Order Contracting requirements, and more specific protest procedures, you can read SHB 1466 here.

For questions regarding this Alert, or additional questions regarding the economic loss doctrine, please contact Alan Schuchman at aschuchman@skellengerbender.com or 206-623-6501.