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Special Focus: Legal Issues in the Construction Industry

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New Civic Center P3 Project Rapidly Reshaping Downtown Long Beach

New Limits on Design Professionals' Duty to Defend and Indemnify

By Mary Salamone and Dan Bulfer,
Atkinson, Andelson, Loya, Ruud & Romo

In recent years, the State of California has made substantial progress in making design-build available to public agencies for public works of improvement.

Contractors using the design-build delivery method have been able to limit their liability for design errors and omissions through favorable indemnity laws in California, which generally provided for an immediate duty to defend unless a different intent was stated expressly in a design professional's contract. Under this framework, the design professional could have been required to defend another party (such as the owner or a design-builder) against claims arising from design errors and omissions, even if the design professional was ultimately cleared of any professional negligence.

This has now changed for contracts entered into on or after January 1, 2018.

On April 28, 2017, Governor Jerry Brown signed Senate Bill 496 (SB 496) into law, which will impact claims against design professionals for both public and private works of improvement. Under the bill, a design professional's obligation to indemnify and defend will be limited to a proportionate percentage of attorney's fees and costs if the design professional is found at fault.

For the purposes of the new law, a "design professional" includes licensed architects, landscape architects, registered professional engineers, and licensed professional land surveyors.

Background

Under the California Supreme Court's decision in *Crawford v. Weather Shield* (2008) 44 Cal.4th 541 and

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the Court of Appeal's application of *Crawford* in *UDC-Universal Development, L.P. v. CH2M Hill* (2010) 181 Cal.App.4th 10, a design professional who contracted to defend and indemnify its client for negligence was responsible for providing a defense to the client regardless of whether the design professional was found liable for the underlying claims. These court rulings provided contractors and public agencies alike with a mechanism to shift and mitigate risk arising from design errors and omissions, which undoubtedly enhanced the attractiveness of the design-build delivery method to both owners and general contractors.

With respect to public works of improvement, existing law also provided that if a public agency's contract with a design professional imposed duties of defense or indemnity, those duties were only enforceable as to claims arising out of the negligence, recklessness, or willful misconduct of the design professional. However, this rule had not been applied to private works of improvement, allowing contractors and owners to shift their risk associated with design errors and omissions without restriction on those projects.

Changes Made by SB 496

SB 496 changes the law in several notable respects. Most importantly, SB 496 limits a design professional's obligation to defend and indemnify another party on any work of improvement, public or private, to the design professional's proportionate percentage of fault. Therefore, if the design professional is found to be 20 percent at fault, it will only be responsible for 20 percent of a contractor's defense costs and damages. This means a design professional can only be required to reimburse a contractor for defense costs and damages attributable to the design professional's negligence.

By contrast, prior law allowed a general contractor to shift all of its legal expenses and exposure to a design professional for claims arising from design errors and omissions, without regard to fault. This new limitation cannot be waived by contract or by the conduct of the parties.

The statute does not apply when a project-specific general liability policy insures all project participants on a primary basis and covers all design professionals for professional negligence on a primary basis. Also, the statute does not apply to design professionals who are parties to a written design-build joint venture agreement.

The other "exception" to this rule is remarkably toothless. In the event that the design professional is not found to be fully at fault, and another party to litigation is unable to pay its share of defense costs due to bankruptcy or dissolution, the design professional must "meet and confer" with other parties regarding the unpaid defense costs.

The statute does not provide any guidance regarding the content of the meet and confer effort or the consequences of failing to meet and confer. Indeed, the statute does not appear to impose any other obligation on the

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Building Workplace Culture on a Solid Foundation in the #MeToo Era

By Collin D. Cook and Bailey K. Bifoss, Fisher & Phillips LLP

After *The New York Times* published its October 2017 exposé detailing decades of sexual harassment and assault allegations against Harvey Weinstein, countless women and men have been empowered to come forward with their own stories of workplace misconduct.

In Weinstein's case, justice has been swift and biting; within a week, he was fired from his company and kicked out of the Academy of Motion Picture Arts and Sciences. The social movement kicked off by Weinstein's downfall blossomed into a legion of accusations against celebrities and non-celebrities alike. Claims levied against actors, politicians, executives and employees have yielded varying degrees of fallout for the accused.

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As many know, the conduct itself is nothing new. In fact, according to a 2016 Equal Employment Opportunity Commission report, 85 percent of women report they have experienced sexual harassment at work. However, now that the issue is front and center, many contractors find themselves reflecting on their own workplace culture and searching for concrete steps they can take to prevent harassment and foster gender equality.

These issues are of particular importance for the construction industry, where a 2014 report from the National Women's Law Center reported that women experience more than three times as much harassment as their non-construction industry counterparts. However, despite the perceived obstacles, the issue is not as intractable as it may seem. Contractors can take simple steps such as creating and enforcing anti-harassment policies, providing real world training, and investigating complaints to reduce incidents of harassment and create a more inclusive workplace culture.

Create, Implement and Enforce Policies

Company policies provide the foundation for governing workplace behavior. However, even when other

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design professional in this situation, other than discussing the unpaid fees with other parties. Needless to say, this is hardly an "exception" to SB 496's general rule of non-liability for defense costs beyond the design professional's proportionate percentage of fault.

Finally, all contracts and solicitation documents (such as requests for proposal, invitations for bid) issued after January 1, 2018 for design services are deemed to incorporate the terms of SB 496.

Impact on Contractors

The most significant impact of SB 496 is that it alters the design professional's duty to defend a contractor or owner against claims for design errors and omissions. Prior to SB 496, design professionals who had contracted for indemnity had an immediate duty to defend against such claims and there was no limit to the defense costs a design professional could be required to pay, which provided contractors and owners with a useful bargaining chip in settlement negotiations.

Unless an exception applies, SB 496 removes any immediate duty to defend or indemnify, and instead essentially creates a requirement that there be a determination of a design professional's proportional share of liability before any such duty arises. This reverses the advantage previously enjoyed by contractors and allows design professionals to refuse to commit any resources to the defense of a contractor against claims for design errors and omissions, unless and until they are found to be at fault.

Accordingly, contractors and owners alike will no longer be able to fully shift the cost of defending against claims arising from design errors and omissions, and they will face increased exposure to defense costs unless one of the exceptions above applies. Many existing design-build teams are not structured as joint ventures between the contractor and designer; instead, many design-builders retain design professionals under a consulting contract after being awarded a design-build project.

Contractors wishing to avoid the impact of SB 496 will need to structure their future design-build relationships within one or both of the above exceptions, such as forming joint ventures with design professionals for specific projects. ■

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