Ongoing Caution for Future Design-Build Work: No Legislative Relief

While the 87th Legislative Session saw a number of bills signed into law that will significantly impact the construction industry, some important matters fell by the wayside. Among those was addressing the negative impact of the Texas certificate of merit process on design-builds as a means of project delivery.

Design-build offers many advantages, including a single source of accountability, enhanced communication among project participants, and faster project completion times. Yet Senate Bill 1928 in the 86th Legislative Session, signed into law by the Governor in 2019, led to concerns about unfair processes with respect to dispute resolution. While certainly not alone, I voiced these concerns in July 2019 in an article entitled "A Cautionary Tale for Future Design-Build Work," which discussed Texas's certificate of merit process concerning claims against design professionals as amended at the time by SB 1928:

> Previously, "the plaintiff" was required to obtain a certificate of merit—a pre-suit affidavit signed by an appropriately qualified person—in order to pursue a claim arising out of the provision of professional services against an architect, a professional engineer, a professional land surveyor, a landscape architect, or their respective firms. In 2014, the Texas Supreme Court held that a third-party plaintiff need not obtain a certificate of merit as it is not "the plaintiff" and, in any event, requiring such would be illogical….. In holding that a certificate of merit was **not** required in the context of a third-party claim, the Texas Supreme Court noted as follows:
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> > [M]any defendants … deny the existence of any design defect, but alternatively assert third-party claims against a design professional, seeking contribution and indemnity in the event that the plaintiff prevails. It would be far more "odd" to require such defendants to file an expert's certificate supporting the merits of the plaintiff's claim, thus requiring the defendants to abandon their denial of the merits.

With the above as the controlling law, where an owner sued a design-builder and the design-builder sought to join its subcontracted design professional, the design-builder would **not** have to obtain a certificate of merit. Stated differently, the design-builder would **not** have to obtain an affidavit that the design-builder, through its subcontracted design professional, did something wrong.

SB 1928 changes that. Of note, in SB 1928, references to "the plaintiff" were replaced with "Claimant," and "Claimant" became a defined term: "'Claimant' means a party, including a plaintiff or third-party plaintiff, seeking recovery for damages, contribution, or indemnification." Thus, with SB 1928 as the controlling law, where an owner sues a design-builder and the design-builder seeks to join its subcontracted design professional, the design-builder will have to obtain a certificate of merit. Stated differently, the design-builder will have to obtain an affidavit that the design-builder, through its subcontracted design professional, did something improperly.

The inequity of this is obvious, and seriously undermines design-build as a preferred project delivery method for any contractor. Fortunately, state representatives recognized the issue as well. Rep. Armando Martinez authored House Bill 3162, "relating to a certificate of merit in certain actions against certain licensed or registered professionals." The "Author's / Sponsor's Statement of Intent" for the engrossed version of the bill provided as follows:

> In 2019, the Texas Legislature enacted legislation that extended the certificate of merit requirement for plaintiffs who file suit against certain licensed or registered professionals to all claimants who file such suits. An unintended consequence of that legislation was that it created problems for design-build projects because it forced some parties to admit liability in order to deny liability and has led to insurance coverage issues. H.B. 3162 seeks to address this unintended consequence by exempting design-build projects from the certificate of merit requirements in certain suits.

To address the issues, HB 3162 sought to add a new subsection (i) to Section 150.002 of the Texas Civil Practice and Remedies Code:

> A third-party plaintiff that is a design-builder or design-build firm is not required to file an affidavit described by Subsection (a) [generally requiring a certificate of merit] in connection with filing a third-party claim or cross-claim against a licensed or registered professional if the action or arbitration proceeding arises out of a design-build project in which a governmental entity contracts with a single entity to provide both design and construction services for the construction, expansion, extension,

> rehabilitation, alteration, or repair of a facility, a building or associated structure, a civil works project, or a highway project.

While limited to design-build projects where a governmental entity was the upstream party, this was a significant step in the right direction to mitigate the negative impact of SB 1928 from 2019. Unfortunately, while HB 3162 was reported favorably out of the Senate Committee on State Affairs, it never made it to a vote by the Senate. Thus, the "unintended consequence" of SB 1928 remains in place with respect to design-build projects in Texas: Some design-builders will be forced "to admit liability in order to deny liability." This odd and absurd result will have to wait until a future legislative session, or other legal challenge, to be rectified.

Ultimately, despite laudable efforts from some legislators, my comments in July 2019 regarding the use of design-build still hold true in July 2021:

> [I]f an owner contends that a design-builder did something wrong that implicates the design, the design-builder will be placed in the uncomfortable position of either: (1) defending against such a claim without the design professional as a party (perhaps diminishing the chances of an early amicable resolution) or (2) having to obtain an affidavit that the design professional (and the design-builder by extension) did something wrong in order to join the design professional, and simultaneously providing evidence to the owner to support the claims against the design-builder. The appropriate approach in one matter may very well be inappropriate for another. Contractors utilizing design-build as a project delivery method should tread carefully in these uncharted waters.

For more information, please contact Carson Fisk.