

Recent Case Law & Legislation Affecting The Design-Build Industry

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Public Contracting: HB 1886

“Alternative Project Delivery Methods For Certain Projects”

- Traditionally, Vertical Projects Only
- HB 1886 (9-1-2007) Adds “Subchapter J” to Tex. Loc. Gov’t. Code Chapter 271

What Do Subchapter J’s Design Build Provisions Cover?

Includes:

- Roads, Bridges, Airport & Transit Projects
- Utilities
- Water Distribution & Flood Control
- Water Treatment Plants
- Incidentally Related Structures

Who Will Use Subchapter "J"?

- Municipalities & Counties
- Municipally-Owned Water Utilities
- River Authorities
- Defense Base Development Authorities
- Metropolitan Transit Authorities
- Hospital Districts
- Authorized Special Districts / Authorities

Tex. Loc. Gov't Code § 271.181(6), 185

What Limitations Exist?

- Single, Integrated Projects Only
- Larger Entities With More Resources Will Implement Subchapter J First to Gain Experience and Create Examples for Smaller Entities, Who Will Use Subchapter In The Coming Years
- Each Entity Can Only Use APD Methods On A Few Projects Each Year
- Why? Who Knows

Tex. Loc. Gov't Code § 271.182

Phases of Design Build Procurement

- Phase 1: Process To Pre-Select DB Candidates
- Phase 2: Selection DB Candidates AND Request For Technical And Cost Proposals
- Phase 3: Negotiation With Highest Ranked Candidate

Phase 1: Best Value?

- Is Design Build the Best Value Method (over other forms of procurement)?
- Entity Must Determine If It Can:
 - Define Project Requirements
 - Ensure Price Is Competitive
 - Manage & Oversee Such A Project
 - Meet Time Constraints

Phase 1: RFQ & Project Criteria

- Site Info
- Project Scope
- Project Budget
- Project Schedule
- Selection Criteria & Weights
- Special Materials Requirements
- Known Utilities
- QA/QC Requirements
- Notice of Ordinances/rules
- Entity's goals related to HUB

Tex. Loc. Gov't Code § 271.189,190

Phase 1: Project Advertising

- Use Any Manner Prescribed By Law
- Must Publish Notice Of Time & Place Bid Proposals Or Requests For Qualifications Will Be Received & Opened

Tex. Loc. Gov't Code § 271.184

Phase 1: Design/Builder's Response

Must:

- Respond To Specific Questions In The RFO
- Designate Engineers Based On Demonstrated Competence & Qualifications, In The Manner Provided By The Professional Services Procurement Act at Sec. 2254.004 of Tex. Gov't Code
- Certify That Engineer Was Selected Based on PSPA

Tex. Loc. Gov't Code § 271.191

Phase 1: Responses Evaluated

- Experience
- Technical Competence
- Performance Capability
- Past Performance: Firm & Members
- Other Factors Submitted
- Price Not Considered At This Phase

Tex. Loc. Gov't Code § 271.191

Phase 1 (end): Selection Of Candidates

- Unlimited Candidates
- DB's Submit Additional Information
- Optional Interview For Final Selection

Phase 2 (begins): Request For Proposal

- Includes:
 - Design Criteria Package
 - Geo-Tech Report, If Available
 - Detailed Submission Instructions
 - Notifies Candidates Of Evaluation Formula For Final Selection

Phase 2: DB's Technical Proposal & Cost

- Project Approach
- Anticipated Problems & Solutions
- Scheduling
- Conceptual Engineering Design
- Other Requested Information

Tex. Loc. Gov't Code § 271.193

Phase 2(ends): Technical Proposals & Cost

- Due 180 Days from Request For Proposal
- Technical Proposal Opened & Scored Based On Previously Provided Forumula
- Cost Proposal Opened AFTER Scoring
- Ranking & Final Selection of DB

Tex. Loc. Gov't Code § 271.193

Phase 3 (begins): Negotiations

- Start With Top-Ranked Firm
- Try To Negotiate Satisfactory Contract
- If No Deal:
 - Entity Breaks Off Negotiation In Writing
 - Try To Negotiate Satisfactory Contract With 2nd-Ranked Firm...

Tex. Loc. Gov't Code § 271.194

HB 1886: Final Comments (Stipends)

- If Design-Builder Accepts Stipend:
 - .5% Contract Amount
 - Must Be Specified In Request For Proposals
 - Entity May Use Builder's Work Product
 - No Liability For Design-Builder
- If Design-Builder Doesn't Accept Stipend:
 - Design-Builder's Proposal Is Confidential
 - Design-Builder Retains Rights To Design, Techniques, Etc.
- Violation:
 - Voids Project Contract
 - Entity Liable For ½ Cost Savings
 - Injunction, Damages & Attorney Fees

Tex. Loc. Gov't Code § 271.196

HB 1886: Final Comments (Modular Construction)

Sec. 46.008 Education Code: portable buildings used by schools must be inspected to ensure compliance with building codes

TXDOT v. Mid-South Pavers: I Haven't Seen A Rule Book...



I Refuse To Accept Your Judgment And Will Substitute My Own



TXDOT v. Mid-South Pavers

- Must Give Reasons For Revision
- Cannot Be Arbitrary Or Capricious
 - Ex: Changing Credibility Determinations
- Supported By Substantial Evidence
- Free of Legal Error

Insurance Developments

Nat'l Union Ins. v. Crocker

- No Duty To Defend Until Proper Notice
 - Even If:
 - Insurer Has Actual Knowledge Of Suit
- No Implied Duty To Inform Insured
 - Even If:
 - Insured Doesn't Know Policy Exists

PAJ, Inc. v. Hanover Ins.:

- Insurer Can Only Deny Coverage If Insured Fails To Give Timely Notice AND The Insurer Proves It Is Prejudiced By Lack of Notice
- Delay Did Not Prejudice The Insurer In This Case, So Insurer Had To Defend

243 S.W.3d 630 (Tex. 2008)

Evanston Ins. v. ATOFINA

- Indemnity Agreements Do Not Limit Additional Insured Coverage
- Insurer Who Breaches Duty To Defend Cannot Contest:
 - Liability
 - Settlement Or Judgment Amount

51 Tex. Sup. J. 460 (Tex. 2008) (Publication Pending)

Lamar Homes v. Mid-Continent Casualty

Three Questions:

1. When a home buyer sues its builder for construction defects and alleges only damage to the home itself, does such a claim allege an "accident" or "occurrence" sufficient to trigger the duty to defend or indemnify under a CGL policy? – YES!

Lamar Homes v. Mid-Continent Casualty

Three Questions:

2. When a home buyer sues its builder for construction defects and alleges only damage to the home itself, does such a claim allege "property damage" sufficient to trigger the duty to defend or indemnify under a CGL policy? – YES!

Lamar Homes v. Mid-Continent Casualty

Three Questions:

3. If the answers to the first two questions are YES, does Article 21.55 (re-codified as 542.051-061 of the Tex. Ins. Code) apply to a CGL insurer's breach of the duty to defend?
– YES!

Lamar Homes v. Mid-Continent Casualty

- Construction Defects Can Give Rise To Coverage Under CGL Policies
- Breach Of Duty To Defend = 18% Interest

Texas C.C., Inc. v. Wilson/Barnes

Where:

1. Waiver Of Subrogation Is Enforceable During Construction &
2. Owner Insures After Construction
(otherwise, contractor's policy will pay)

Waiver Precludes Recovery Of Proceeds Against Contractor For Post-Construction Losses

233 S.W.3d 562 (Tex. App.—Dallas 2007, pet. denied)

Imperial Lofts v. Imperial Woodworks: High-Rise Lofts

Imperial Lofts v. Imperial Woodworks: One Punishment Is Enough

Insurance Proceeds, Settlement and Judgment:



- \$150 K From GC



- \$385 K From Tenant's Policy

- \$600 K Against Tenant's Insurer



- Owner's Property Value: \$535 K

Still Seeking:



- \$800 K from Tenant

Imperial Lofts v. Imperial Woodworks

- Generally, Proceeds Paid Pursuant To Insurance Obtained For Owner Along With Other Settlement Amounts Count As An Offset Against Judgment
- Owner Won Case On Liability But Was Awarded \$0 Because It Already Recovered

**TA Operating v.
Solar Applications Engineering:
Condition Precedent v. Substantial Performance**



Stipulations:

- Project Was Substantially Complete
- Lien Releases Were A Condition Of Final Payment
- GC & Others Filed Liens On Project

Litigation

- Trial Court:
 - Substantial Performance (completion) Is Enough And Ordered The Owner To Pay The Unpaid Balance Minus Value Of Incomplete Punch Work
- Appellate Court:
 - Not Enough; Conditions Must be Fulfilled No Matter The Harshness Of The Result
- Supreme Court:
 - ? – Pending

Texas Contingent Payment Law

Restrictions:

- Statute Cannot be Waived
- Owner Cannot forbid Clause's Use
- Statute Does Not Prevent Filing of Liens
- Clause Unenforceable If "Sham Contract"
- No Effect On "Pay-When-Paid" Clauses If Payment Made In Reasonable Time

Inapplicable to:

- Contracts Solely For Design Services
- Construction & Maintenance Of Some Civil Projects
- Some Residential Projects

Private Projects

GC Must Request, Owner Must Provide:

- Owners Contact Info
- Legal Property Description
- Payment Bond Surety's Contact Info, If Applicable

Private Projects

- If Owner Has A Loan, Statement & Evidence Of
 - Loan Amount
 - Summary Of Terms
 - Foreseeability Of Default &
 - Lenders & Borrowers' Contact Info

Private Projects

- If The Loan Is Insufficient To Pay Construction Costs, Owner Must Provide Statement, Supported By Bank Evidence, Of The Amount, Source & Location Of Funds Available To Pay The Contract Balance

Federal Projects

GC Requests, Owner Provides:

- Government Agency's Contact Info
- Surety's Contact Info
- Contracting Officer's Contact Info

State Projects

GC Requests, Owner Provides:

- Government Agency's Contact Info
- Surety's Contact Info
- Government Statement that Contract Amount Is Available / Authorized

Timing:

- SC Must Receive Info In Previous Slides Before Subcontract Becomes Enforceable (execution)
- If Owner Or GC Fails To Furnish Info Within 30 Days, GC & SC Relieved Of Performance Obligations

Subcontractor's Duties

- Object To Clause's Enforcement
45 Days After Pay. App. Submitted
- Notice:
 - SC Received No Payment
 - GC Cannot Withhold Payment
- If Payment Received, New Notice
Required

GC's Response

To Keep Clause Enforceable, Send
Statement:

- Owner Isn't Paying Because SC
Breached Obligations, Or
- On State Project, Government Has
Asserted Sovereign Immunity & GC
Has Exhausted All Remedies

GC: Maintaining Enforceability

- Withholding Cannot be GC's Fault
- Avoid Acting Unconscionably:
 - GC Must Try To Collect &/Or Offer To Assign Right To Collect To SC & Cooperate AND
 - GC Must Have Previously Provided Owner's Financing Information

Last but not least . . .

Reliance Indemnity v. Advanced Temporaries

- Temporary Employment Agencies Which Retain Control Of Their Employees May Lien A Project

227 S.W.3d 46 (Tex. 2007)

“Providing Labor” Factors:

Retaining Control:

- Notice Of Injury & Hazardous Duties
- Set Pay, Paid Payroll Taxes
- Required Minimum Work Hours
- Hiring / Firing Rights
- Obtained Insurance
- Verified Legal Status

Questions?



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