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

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

Tex. Loc. Gov’t Code § 271.181(2)
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

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
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

Tex. Loc. Gov't Code § 271.185
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 RFQ

• 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 Formula
- 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

246 S.W.3d 711 (Tex. App.—Austin 2008)
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

246 S.W.3d 603 (Tex. 2008)
**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)

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**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

242 S.W.3d 1 (Tex. 2007)
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

<table>
<thead>
<tr>
<th>Insurance Proceeds, Settlement and Judgment:</th>
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<tbody>
<tr>
<td>- $150 K From GC</td>
</tr>
<tr>
<td>- $385 K From Tenant’s Policy</td>
</tr>
<tr>
<td>- $600 K Against Tenant’s Insurer</td>
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<tr>
<td>- Owner’s Property Value: $535 K</td>
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</tbody>
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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

245 S.W.3d 1 (Tex. App.—Waco 2007, pet. denied)
TA Operating v. 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