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Massachusetts Superior Court Holds Contractor Liable for Loss of Subcontractor Productivity

By Justin Twigg, Esq.

WHILE EFFECTING NO CHANGE in the law, the Superior Court's decision in *Central Ceilings, Inc. v Suffolk Construction Company, Inc.,* illustrated the importance of proper project management, both from the perspective of ensuring a project is completed in a timely, coordinated manner, and in assessing damages in the event that it is not.

Although also encompassing claims based on payment bonds and "pay when paid" provisions, the gravamen of the dispute arose in the context of a subcontract between the parties wherein Central Ceilings, Inc. ("Central") agreed to furnish labor and materials for the drywall and ceiling installation for new construction at Westfield State College now Westfield State University ("Project"), during the course of which numerous design deficiencies became obvious. Finding that Suffolk Construction Company, Inc. ("Suffolk") repeatedly failed to properly manage and coordinate the project, the Court held that the conduct led to Central's loss and damage, and that Central could successfully claim damages for loss of productivity.

In its defense, Suffolk relied upon a contractual exclusion for damages as a result of delay. The Court rebuffed Suffolk's reliance on two grounds. Firstly, the Court opined that the wording of the clause was to be interpreted narrowly to cover only losses directly attributable to delay and, accordingly, did not cover losses more appropriately assessed as "hindrances and interference." The Court defined the difference between the two as follows:

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Public-Private Partnerships and Design-Build Subsurface Projects: Consulting Engineer Professional Liability Risk

By David J. Hatem, PC[1]

SUBSURFACE PROJECTS ARE INHERENTLY MORE RISKY THAN vertical projects, the latter of which typically utilize more conventional design and construction approaches and are undertaken in the context of relatively ascertained and defined conditions. On subsurface projects, there are a host of special risk factors, including unknowns and uncertainties as to the physical and behavioral characteristics of anticipated subsurface conditions, the inextricable interdependence and necessary interaction of design decisions and construction means and methods (and equipment selections) with those subsurface conditions, and the manner in which risks are allocated among project participants for unanticipated subsurface conditions. These and other factors combine to render subsurface projects on the relatively high end of the professional liability risk spectrum for consulting engineers.

Public-Private Partnerships ("P3") project, in their own respects (and independent of any major subsurface work component) pose significant risk for all private sector participants, including the consulting engineers who are part of the design-build ("D-B") team.[2] This heightened risk derives from one of the primary reasons why public owners select the P3 and D-B approaches, i.e. the ability to transfer all, or substantially all, design and construction risk to the private sector consortium, including the D-B team. For an increasing and concerning number of those public owners, that risk transfer regime includes rather onerous and aggressive contractual terms which effectively allocate to the private sector participants substantially all risks associated with the encountering of unanticipated subsurface conditions. These aggressive risk allocation provisions, while directly impacting project participants upstream of the consulting engineer, have an indirect and corresponding risk-intensifying effect upon consulting engineer professional liability exposure.[3]

The combination of the risks inherent in subsurface projects with the significant risks otherwise characteristic of the P3 and D-B approaches represent and produce the potential for substantial professional liability risk exposure for the consulting engineer involved in P3 and D-B subsurface projects.[4]

There are many factors that result in increased professional liability exposure for consulting engineers involved in P3 and D-B projects. The more prominent and prevalent of those factors fall into the following categories:

1. Subsurface Conditions Risk Allocation: Increasingly, project owners on major D-B and P3 subsurface projects are seeking to transfer substantial risk for subsurface conditions to the private sector participants (i.e. the concessionaire and the design-builder). Subsurface conditions, beyond any doubt, are a significant source of risk exposure, disappointed expectations, default and claims; and, for those reasons, it has generally been recognized that in order to ameliorate those concerns, the principles of fairness and balance in risk allocation should be adopted and implemented in the specific context of subsurface conditions.[5] The trend toward aggressive risk allocation, and the extent to which project owners depart from those principles is problematic.

Unfair risk allocation between the project owner and the concessionaire and/or design-builder will increase the risk of professional liability exposure for the consulting engineer.[6] There appears to be no published empirical data conclusively establishing that utilization of these types of aggressive risk allocation provisions and related contracting practices (such as disclaimers and non-reliance provisions as to accuracy of subsurface data furnished by the project owner) in D-B and P3 agreements increases the risk of professional liability exposure for the consulting engineer. However, logic (and the experience of the author) definitely supports the conclusion that a design-builder is more likely to pursue a professional liability claim against the consulting engineer – or perhaps more precisely, transform what would have been a contractual differing site conditions claim against the project owner into a third-party professional liability

claim – to recover costs incurred by the design-builder but not recoverable against the project owner due to aggressive risk allocation and disclaimer provisions that preclude recovery of any such costs from the owner. Put another way, the design-builder will pursue such claims against the consulting engineer because it "has no other place to go," given the contractual preclusion on recovery against the project owner.

The recent federal appellate court decision in *Metcalf Construction Co., Inc. v. United States* ("*Metcalf*")[7] is instructive on the subject of risk allocation for differing site conditions in the context of a D-B contract.

In *Metcalf* the government's D-B RFP included a "soil reconnaissance report" that stated that the soil at the site had a "slight expansion potential". The government made clear in the RFP that the latter report was "for preliminary information only". Prior to submission of proposals in response to the RFP, the government, in response to a bidder question, stated that the D-B Contract would be amended if the design-builder's post-award independent subsurface investigation demonstrated that subsurface conditions would be significantly different from those described in the "soil reconnaissance report".

The D-B Contract required the design-builder to conduct its own independent soils investigation, and incorporated a relatively standard differing site conditions provision, which would entitle the design-builder to an equitable adjustment if subsurface conditions encountered were materially different from those conditions indicated in the contract documents.[8]

Following award of the D-B Contract, the design-builder retained a geotechnical firm to investigate the soils. The latter firm reported that the soils swelling potential was "moderate to harsh" i.e. not "slight" as indicated in the "soil reconnaissance report".

The design-builder submitted a differing conditions claim. The government denied the claim on the basis that there was no material difference between the soils conditions indicated in the "soils reconnaissance report" and in the post-award report prepared by the design-builder's geotechnical firm and, therefore, no additional compensation was warranted. At trial, the Court ruled that the design-builder had failed to establish liability for differing site conditions due to lack of reasonable reliance upon the "soils reconnaissance report."

On appeal, the United States Court of Appeals for the Federal Circuit, on February 11, 2014 reversed the trial court's ruling. In its decision, the appellate court addressed the differing site conditions provision contained in the D-B Contract. In relevant part, the Court stated:

> "…The RFP and pre-bid documents set out an understanding of how [the differing site conditions] provision would be applied to soil conditions. For …. swelling potential … the RFP incorporated representations about the site: it invoked a report on expansive soils for 'site preparation, foundation support, footing, slab and reinforcement requirements'… [The Contract also indicated that [the design-builder] would test and investigate the soil in the process of performance. But a pre-bid question-and-answer stated in plain terms that material deviations from the government's report on swelling potential would be 'dealt with by change order…
>
> The trial court interpreted the pre-bid site representations and related RFP provisions to be nullified by [the design-builder's] investigative responsibilities during performance. With respect to expansive soils, the court held that a reasonable contractor reading the contract documents as a whole would not interpret them as making a representation as to the site conditions because 'the Contract required [the design-builder] to conduct an independent soil analysis [and so] [the design-builder] was on notice that it could not rely on the 'information only' report'… [The design-builder] was entitled to rely on the report 'for bidding purposes,' the court said, but not 'in performing the … project." The court thus treated the contract as placing on [the design-builder] the risk and costs of dealing with newly discovered conditions different from those stated by the government before the contract became binding.
>
> These rulings about an important allocation of risk were based on a misinterpretation of the contract. Nothing in the contract's general requirements that [the design-builder] checked the site as part of designing and building the housing units, after the contract was entered into, expressly or implicitly warned [the design-builder] that it could not rely on, and that instead it bore the risk of error in, the government's affirmative representations about the soil conditions. To the contrary, the government made those representations in the RFP and pre-bid

> questions-and-answers for bidders' use in estimating costs and therefore in submitting bids that, if accepted, would create a binding contract. The natural meaning of the representations was that [the design-builder] would investigate conditions once the work began, it did not bear the risk of significant errors in the pre-contract assertions by the government about the subsurface site conditions.
>
> FAR 52.236-2, incorporated into the contract, reinforces that meaning. It exists precisely in order to 'take at least some of the gamble on subsurface conditions out of bidding'; instead of requiring high prices that must insure against the risks inherent in unavoidable limited pre-bid knowledge, the provision allows the parties to deal with actual subsurface conditions once, when work begins, 'more accurate' information about them can reasonably be uncovered… For that reason, even requirements for pre-bid inspection by the contractor have been interpreted cautiously regarding conditions that are hard to identify accurately before work begins, 'so that the duty to make an inspection of the site does not negate the changed conditions clause by putting the contractor at peril to discover hidden subsurface conditions or those beyond the limits of an inspection appropriate to the time available'…
>
> The conclusion is not changed by the statement in a revised RFP that the expansive-soil report was 'for preliminary information only'… That statement nearly signals that the information might change (it is 'preliminary'). It does not say [the design-builder] bears the risk if the 'preliminary' information turns out to be inaccurate. We do not think that the language can fairly be taken to shift that risk to [the design-builder], especially when read together with the other government pronouncements, much less when read against the longstanding background presumption against finding broad disclaimers 'of liability for changed conditions.'

In the opinion of the author, *Metcalf* does not stand for the universal proposition that a design-builder will be entitled to an equitable adjustment for differing site conditions even when the contract includes a differing site conditions provision. Project owners are in a position to negate responsibility for differing site conditions through the non-inclusion of a differing site conditions provision, the articulation of specific disclaimers, and other more precise language than that utilized by the government in *Metcalf* intended to negate rights of reliance upon subsurface data or reports included with the D-B RFP. In addition, the government's explicit response to the question posed during the pre-proposal period – in essence, reassuring bidders of an entitlement to an equitable adjustment for differing site conditions in the event that post-award investigation revealed material or substantial differences from soil conditions indicated in the "soil reconnaissance report" – was a significant factor influencing the appellate court's decision. In addition, the government's answer to that question was certainly reinforced through the inclusion of the differing site conditions provision. Interestingly, the appellate court did not address the issue whether the "soil reconnaissance report" was specifically identified as a contract document for purposes of application of the differing site conditions provision. In addition, there were particular facts and circumstances in the court record in *Metcalf* relating to the government's maladministration of the contract and the claims process that likely influenced, in a broader context, the appellate court's disposition in favor of the design-builder.

2. Design Development Risk: For the consulting engineer, design development in D-B and P3 projects moves at an accelerated pace, and this schedule compression may often lead to liability exposures even prior to the start of construction due, for example, to late submission of deliverables; failure to coordinate and update design packages; and quality control lapses.[9] The schedule compression of the design process places special pressure on the geotechnical design discipline, as the latter design typically represents the initial, sequential design package, and uncertainty as to subsurface conditions – upon which that design inextricably depends – is highest at this early stage of design development. The consulting engineer may be under significant pressure to produce work product resulting in insufficient quality assurance/quality control or insufficient levels of completion or coordination (if produced in sequential packages) with other aspects of the design, thereby creating the risk of redesign during construction and the attendant increased costs and delays experienced in the construction process.

In addition, prior to contract award, the design-builder may look to the consulting engineer to provide cost or quantity estimates and may seek to hold the consulting engineer accountable (independent of a professional negligence standard) for overruns in cost or quantities. Although the concessionaire and the design-builder each assume (directly,

or ultimately, to the project owner) the contractual risk and financial obligations associated with cost overruns due to "excess" quantities or other consequences of the post-award design development process, in many instances those parties regard the consulting engineer as a "de facto risk partner[s]; [the design-builder] may believe risk sharing is implied because the Team is proposing a lump-sum price for an incompletely defined project."[10]

There is a further risk that the public owner may attempt to dominate the design review process, thereby resulting in delay and in the imposition of owner design preferences (and the potential for compromise of the consulting engineer's independent judgment). Owner domination and imposition of preferences and judgments in the design development process in P3 and D-B projects is especially problematic in subsurface projects in which the ability of the consulting engineer (in particular, a geotechnical engineer) to make appropriate judgments and exercise discretion are critically important.[11] The scope of project owner review of design submittals should be limited to evaluation and acceptance or rejection based solely on conformance with mandatory requirements, criteria or standards and, especially in subsurface design, use of overly prescriptive design requirements should be minimized.[12]

In a related vein, it should be noted that statements or descriptions of anticipated or assumed subsurface conditions, characteristics, or parameters in a Geotechnical Baseline Report ("GBR"), as a general matter, are provided for the purpose of facilitating the allocation of risk between the project owner and the concessionaire and/or the design-builder. These types of statements or descriptions should not be understood by the consulting engineer as constraining, defining, prescribing or otherwise limiting (or, worse yet relieving or substituting for) the engineer's obligation to exercise sound and independent judgment in the development of the design.

D-B and P3 "design optimization" and "value engineering" contractual terms typically allow for input and collaboration from non-registered professionals with the design engineer in the design development process in order to reduce project cost and/or to facilitate the construction process. While those are salutary objectives, the engineer should be careful not to allow such input or collaboration to intrude upon its exercise of independent and sound professional judgment in the design process.

A potential major source of professional liability claims by design-builders against consulting engineers in D-B and P3 projects arises out of cost growth (above the guaranteed maximum price) due to the design development process.

Typically, this type of claim arises when there are material differences between (a) the design-builder's pre-award bid estimate assumptions ("bid estimate") and (b) the actual cost ("actual cost") of designing and constructing the project based on owner-approved or issued for construction set of final design documents.

A = Bid Estimate
B = Actual Cost
C = Difference Between A and B
B – A = C

As a general observation the design-builder's professional liability claims against the consulting engineer often seek recovery for some or all of "C".

What are the reasons for "C"?

A typical claim scenario involves some or all of the following factors:

- Aggressive, unrealistic, and opportunistic pre-award cost estimating or bidding by the design-builder;
- Inadequate information or design definition prior to the submission of the bid;
- Consulting engineer's errors in understanding the project owner's design criteria or requirements in the pre-bid preparation of conceptual design, or in the post-award development of design;
- Imposition of the project owner's design preferences that exceed contractually mandated design criteria or standards;
- Project owner's unwarranted (i.e., beyond its authority or contractually mandated design requirements or standards) intrusion into/restriction of the design-build team's discretion, judgment, or innovation or design responsibility (as engineer of record);
- Unanticipated or unreasonable application or enforcement of code or other public regulatory requirements or standards in the design development process;
- Inadequate design-builder contingency for cost growth due to design development.

Most of these factors have nothing to do with deficient service performance of the consulting engineer but, rather, are the result of actions or failures of others which or who are beyond the control of the consulting engineer.

Depending upon the terms of the prime D-B agreement, the design-builder may have limited—or no—opportunity to obtain an equitable cost or time adjustment from the project owner when some or all of these factors occurs. When the claim, "C", represents a material increase in the design-builder's cost/schedule contractual/commercial expectations, and especially when the design-builder has no opportunity to secure an upstream equitable adjustment, "C" often leads to a professional liability claim by the design-builder against the consulting engineer.

The bottom line is that unless the design-builder plans for and is prepared to fund contingency for design development, there will be gaps between pricing or bid assumptions and available financial resources required to address cost growth due to design development. The project owner will likely have limited (if any) exposure for cost growth due to design development. The consulting engineer potentially will be exposed to significantly increased risk in D-B and P3 projects due to design development cost growth than in design-bid-build. In the contractual negotiation process, the design-builder may proffer or "flow down" various terms, the effect of which would be to transfer design development risk to the consulting engineer. These terms typically provide that (a) the design-builder has the right to rely upon the "accuracy" or "completeness" of conceptual or preliminary design and any quantity surveys, cost estimates, or other work product prepared by the consulting engineer in connection with the design-builder's response to the RFP or in its negotiation of price or other terms of the prime design-build agreement; (b) the consulting engineer will share in cost growth due to variations between pre-bid cost and quantity estimates and post-award actual costs and quantities based on the final design; and (c) the design-builder has the opportunity to influence or constrain design development cost through "design to cost," "design optimization," "collaborative design processes," and "value engineering" approaches.

The consulting engineer certainly should endeavor to manage its liability risk exposure for design development cost growth through provisions in its subconsultant agreement with the design-builder, such as those excluding or limiting responsibility for cost or quantity estimates. While these provisions, if contractually accepted, will likely provide the basis for an effective defense to professional liability claims arising out of design development risk, the reality is that many design-builders, especially in current economic conditions and competitive market, do not agree to such provisions. As a general matter, efforts to address and manage design development risk through contractual provisions do not adequately limit professional liability exposure.

An alternative approach to managing design development risk is for project owners and design-builders (and/or concessionaires) to each carry adequate contingency for cost growth due to design development. In many respects, the Port of Miami P3 project represents a model of prudent risk allocation for subsurface conditions, demonstrated by its utilization of both a GBR and a contingency funding plan for the subsidization of unanticipated subsurface conditions.[13]

3. Heightened Performance Standards: On most projects, a consulting engineer is required to perform its services in accordance with reasonable skill and care required under the circumstances.[14] However, in many P3 and D-B procurement and contract documents, the design-builder and consulting engineer are obligated to provide certain services in accordance with a "fitness for purpose" obligation.[15] Under the latter obligation, the engineer is required to produce a design that meets specific client requirements, and adherence to reasonable skill and care will not necessarily provide a defense or justification for failing to meet those requirements. In addition, "fitness for purpose" performance standards raise issues as to whether liability determined to exist under such a standard falls within the scope of coverage afforded under standard professional liability insurance policies.

Conclusion

P3 and D-B projects represent the potential for substantial risk for consulting engineers. The same salutary principles of fairness and balance in risk allocation should apply in the context of P3 and D-B projects.

[1] A shorter version of this article (co-authored with Nasri Munfah, P.E., HNTB Corporation) will be published in the June 2014 edition of *Tunneling and Underground Construction*.

[2] P3 projects are undertaken by a public owner which, in turn, engages a private sector concessionaire (or development company) to finance, design, construct and, potentially, operate and maintain completed project. The concessionaire, in turn, engages a Design-Builder to undertake the design and construction portion of the P3 engagement.

[3] D. Hatem & D. Corkum eds., *Megaprojects: Challenges and Recommended Practices,* Chapters 15, 17 (ACEC 2010); D. Hatem & P. Gary eds., *Public-Private Partnerships: Opportunities and Risks for Consulting Engineers,* Chapter 8, §8.3 (ACEC 2013).

[4] D. Hatem & P. Gary eds., *Public-Private Partnerships: Opportunities and Risks for Consulting Engineers,* Chapter 8, §§8.3, 8.4 (ACEC 2013); G. Brierley, D. Corkum and D. Hatem, eds. *Design-Build Subsurface Projects,* Second Edition, Chapter 3 (Society for Mining, Metallurgy and Exploration, Inc. 2010).

[5] D. Hatem, R. Essex, Subsurface Public-Private Partnership Projects: Brave New World of Risk Allocation, RETC 2013; D. Hatem & P. Gary eds., *Public-Private Partnerships: Opportunities and Risks for Consulting Engineers,* Chapter 8, §8.3.2 (ACEC 2013); D. Hatem & D. Corkum eds., *Megaprojects: Challenges and Recommended Practices,* Chapter 17 (ACEC 2010); D. Hatem and D. Corkum, Purpose and Preparation of Geotechnical Baseline Reports in Design-Build and Public-Private Partnership Subsurface Projects, Geo-Congress 2014; D. Hatem, Design-Build and Public-Private Partnerships: Subsurface Conditions Risk Allocation, Geo-Strata 2014; E. Smith, Managing Risk in Design-Build: Lessons for Geotechnical Professionals, GSP137 Legal and Liability Issues in Geotechnical Engineering, ASCE 2005; E. Dwyre, J. Jenkins, R. Castelli, "Development and Interpretation of Geotechnical Contract Provisions for Design-Build Projects: Success Strategies for Owners and Contractors, GeoCongress 2012, ASCE (2012).

[6] D. Hatem & P. Gary eds., *Public-Private Partnerships: Opportunities and Risks for Consulting Engineers,* Chapter 8 (ACEC 2013); D. Hatem, The Relevance and Potential Impact of Risk Allocation Provisions in Owner-Contractor Agreements on Professional Liability Exposure of Design Professionals, *Design and Construction Management Professional Reporter* (October 2003); D. Hatem, "Public-Private Partnerships: Opportunities and Risks for Consulting Engineers Involved in Subsurface Projects", *GeoHalifax Conference,* September 23, 2009.

[7] *Metcalf Construction Co., Inc. v. United States,* United States Court of Appeals for the Federal Circuit, Case No. 2013-5041 (February 11, 2014).

[8] Federal Acquisition Regulation, 52.236-2, 48 C.F.R. §52.236.2.

[9] *GeoTechnical Information Practices in Design-Build Projects* NCHRP, Synthesis 429, Transportation Research Board (2012); *E. Smith, Managing Risk in Design-Build: Lessons for Geotechnical Professionals, GSP137 Legal and Liability Issues in Geotechnical Engineering, ASCE 2005.*

[10] E. Smith, Managing Risk in Design-Build: Lessons for Geotechnical Professionals, GSP137 Legal and Liability Issues in Geotechnical Engineering, ASCE 2005.

[11] D. Hatem & P. Gary eds., *Public-Private Partnerships: Opportunities and Risks for Consulting Engineers,* Chapter 8, §8.3.1 (ACEC 2013).

[12] D. Hatem & P. Gary eds., *Public-Private Partnerships: Opportunities and Risks for Consulting Engineers,* Chapter 8, §8.3.1 (ACEC 2013); *E. Dwyre, J. Jenkins, R. Castelli, "Development and Interpretation of Geotechnical Contract Provisions for Design-Build Projects: Success Strategies for Owners and Contractors, GeoCongress 2012, ASCE (2012).*

[13] D. Hatem & P. Gary eds., *Public-Private Partnerships: Opportunities and Risks for Consulting Engineers,* Chapter 8, §8.3.2 (ACEC 2013); Wern-Ping Chen, Port of Miami Tunnel Update – A View from Design Builder's Engineer, *RETC Proceedings* (2009), p. 687.

[14] D. Hatem & D. Corkum eds., *Megaprojects: Challenges and Recommended Practices,* Chapters 15, 16 (ACEC 2010).

[15] D. Hatem & P. Gary eds., *Public-Private Partnerships: Opportunities and Risks for Consulting Engineers,* Chapter 8, §8.4.2 (ACEC 2013).

New Jersey Supreme Court Requires Written Agreement to Enforce Settlement Reached Through Mediation

By Kristin A. Hartman, Esq.

ON AUGUST 15, 2013, THE SUPREME COURT OF NEW JERSEY addressed the following issues on appeal: (1) whether Rule 1:40-4(i) requires settlement agreement reached at mediation to be reduced to writing and signed at the time of mediation and (2) whether plaintiff waived the privilege protecting communications made during the course of mediation from disclosure.[1]

In Willingboro Mall, LTD. v. 240/242 Franklin Avenue LLC, Willingboro Mall, LTD ("Willingboro") sold the property and, to secure part of 240/242 Franklin Avenue LLC's ("Franklin") obligation, Franklin gave the Mall a mortgage on the property. Claiming that Franklin defaulted, Willingboro filed a foreclosure action. Franklin denied that it had defaulted and moved to dismiss the complaint. The parties were ordered to participate in non-binding mediation.

During mediation, Franklin offered Willingboro $100,000 to settle all claims and to discharge the mortgage. Willingboro's manager orally accepted the offer in the presence of the mediator, but the settlement was not reduced to writing before the mediation session ended. Thereafter, when Franklin sent a letter to the judge and Willingboro containing the purported terms of the settlement, Willingboro rejected the terms, refused to sign a release or to discharge the mortgage.

Franklin moved to enforce the settlement, attaching certifications from its attorney and the mediator revealing communications between the parties during mediation including, but not limited to, the mediator's statement that the settlement had been accurately memorialized in Franklin's letter Instead of moving to strike the motion or the certifications based on violation of the mediation-communication privilege, Willingboro requested an evidentiary hearing and discovery on the issue. The court granted Willingboro's request and conducted an evidentiary hearing.

Although, initially, the mediator refused to testify as to events that transpired at mediation without a court order, the court ultimately issued that order once Willingboro's counsel agreed to the disclosure, thereby enabling the mediator to testify to confidential mediation communications.

On the first day of testimony, the mediator began to testify to communications that transpired between the parties during the mediation. On the second day, Willingboro moved to expunge "all confidential communications" disclosed, and to bar any further mediation communications. In support of its motion, Willingboro cited the privilege under the New Jersey Uniform Mediation Act and Rule 1:40-4. The court denied the motion on the grounds that the privilege had been waived, and permitted the hearing to continue. Upon completion of the hearing, the court ruled that the parties had entered into a binding settlement, and granted Franklin's motion to enforce the settlement.

After the Appellate Division affirmed the decision, Willingboro's petition for certification to the New Jersey Supreme Court was granted. Willingboro urged the New Jersey Supreme Court to hold that, under Rule 1:40-4(i), a settlement reached at mediation is not enforceable unless reduced to writing during the mediation and signed by the parties. Willingboro also sought reversal of the lower court's decision as to the mediation-privilege.

Upon review, the New Jersey Supreme Court held that the Defendant expressly waived the mediation privilege as to confidential communication, and that the parties' oral settlement was enforceable. That said, the Court held that, prospectively, the terms of a settlement reached at mediation must be reduced to writing and signed by the parties before the mediation closes. To the extent that terms of a settlement are complex and cannot be finalized by the end of the mediation session, the mediation should be continued for a brief, albeit reasonable, period of time to enable the parties to finalize the agreement and execute the document. Further, audio or video-recorded agreements will fulfill the

requirement of a writing signed by all parties Finally, the New Jersey Supreme Court held that a party that expressly waives the mediation communication privilege and discloses privileged communications cannot later argue that it has lost the benefit of the privilege.

As noted in the Willingboro decision, not all mediation communications will remain privileged. Two exceptions were relevant in the context of the Willingboro matter. The first pertains to the requirement that the agreement reached during mediation be in writing and signed by the parties. The agreement contains the terms of the parties' agreement, and may be admitted into evidence to prove the validity of the agreement. Rule 1:40-4(i) specifies the manner in which settlements are to be memorialized, but does not expressly state that a written agreement must be signed by the parties. However, N.J.S.A. 2A:23C-6(a)(1) and N.J.R.E. 519(c)(a)(1) both provide that "an agreement evidenced by a record signed by all parties to the agreement" is an exception to the mediation communication privilege.

The second exception pertains to a party's waiver of the privilege. The privilege may be expressly, and knowingly, waived by all parties to the mediation.

To further the public policy favoring settlement, courts encourage mediation as an important means of settling disputes. To ensure that the parties to mediation freely and fully negotiate their disputes, they must be able to rely on two propositions: 1) that their communication during mediation will remain privileged; and 2) that any settlement they reach will be upheld. As noted above, in New Jersey, and in many other jurisdictions, there are limits to both of the foregoing, and all entites that engage in mediation must make sure they are familiar with the applicable rules to ensure a successful outcome.

However, the certifications filed by Franklin's attorney and the mediator in support of Franklin's motion to enforce the oral agreement clearly disclosed privileged mediation communications. The Mediation Act and the rules of evidence generally prohibit a mediator from making an "oral or written communication" to a court other than to inform the court whether a settlement was reached. Here, the mediator went far beyond that and breached the privilege.

Despite Franklin's violation of the privilege, Willingboro did not timely move to strike or suppress the disclosures of the mediation communications. Instead, it expressly waived the privilege in responding to the motion to enforce the oral settlement and engaged in unrestricted litigation over the validity of the oral agreement, which involved its own wholesale disclosures of mediation communications. It cannot now find shelter in N.J.S.A 2A:23C-5(b) and N.J.R.E. 519.

With regard to the waiver exception, the court noted that only after filing a certification in opposition to enforcement of the oral agreement, participating in five discovery depositions, and one day of an evidentiary hearing and a myriad of breaches of the mediation-communication privilege did Willingboro attempt to invoke the privilege. However, the Court deemed Willingboro's objection to be untimely and found that Willingboro expressly waived the privilege.

[1] Willingboro Mall Ltd. v. 240/242 Franklin Avenue LLC, A-62 September Term 2011; Supreme Court; opinion by Albin, J.; decided August 15, 2013. On certification to the Appellate Division (421 N.J. Super. 445 (App. Div. 2011)). D.D.S. No. 03-1-1016 [33 pp.]

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> *Unlike the delay claim, the disruption claim is intended not to redress the [plaintiff's] loss from being unable to work, but to compensate [plaintiff] for the damages it suffered from [defendant's] actions that made its work more difficult and expensive than [plaintiff] anticipated and than it should have been.*

In support, the Court found that, although Central completed its work in accordance with the contractual timelines, it did so only as a result of employing additional labor and supervision. Secondly, the Court considered that, even if Suffolk's interpretation of the clause were preferred, Suffolk breached the terms of the clause by failing to grant an appropriate extension of time. The Court's reasoning under this theory of breach shifted the cause of the loss away from Suffolk's contractual failings in design and coordination leading to the delay or hindrance, and focused upon the denial of a legitimate and compelled contractual concession to Central as causing increased cost.

Having found a breach, the Court turned to the issue of damages. Central convinced the Court that, as a result of Suffolk's extensive failures in terms of design flaws, delayed deliveries and incomplete work leading to exposure of Central's work to winter temperatures, requiring "do overs", the preferred measure of damages, the measured mile approach, was inappropriate due to the impossibility of determining a baseline. The Court was left to employ the total cost method to evaluate Central's damages.

It was in the assessment of damages under the total cost method that the value of Central's Project management stood out. By accurately producing a pre-contractual estimate, which the Court noted was itemized to the last screw, and keeping detailed work and financial records concerning the extra costs concerned, Central convinced the Court of the reasonableness of its assessment of damages.

As an additional note, under the prime construction contract, Suffolk was to be awarded a bonus of $200,000 for on-time completion of the Project. While it was not referenced in the decision, it is likely that Suffolk received this bonus. Given the outcome, the case is also a lesson for project managers to properly assess whether the cost of granting extensions of time to complete a Project are exceeded by the likely rewards, or penalties, for completing on time - or late.

Notes:

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Donovan Hatem LLP is a multi-practice law firm with offices in Boston, New York and New Jersey. We serve a diverse clientele of private companies, nonprofit organizations, government entities and individuals. Our clients rely on our experience and expertise for focused advice and counsel that can minimize risk exposure.

The Professional Practices Group at Donovan Hatem includes more than 40 attorneys who provide highly-specialized counsel to architects, engineers, and construction managers. Our experienced trial lawyers represent design professionals in jury and non-jury cases in the northeast and nationwide, and at mediations, arbitrations, and other dispute resolution forums. In addition to professional liability claims defense, Donovan Hatem's scope of construction law expertise encompasses risk management, contract review, and general business matters.

To learn more, to register for an upcoming roundtable, and to join our Design Professional Roundtables mailing list, please email us at roundtable@donovanhatem.com or visit our website at donovanhatem.com.

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