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## Litigation Update - Liability of Construction Manager to Project Architect

A recent California case discussed the duty owed by a construction manager to the project architect. Although this case must be viewed in light of the particular contract language employed, a review of the case is instructive. In March, 1994, a school district ("BUSD") hired the architect to provide architectural services related to the rebuilding of a elementary school. The following year, BUSD hired a construction manager. The construction manager contract contained the following indemnification language:

"Construction Manager shall indemnify and save harmless BUSD, and its officers, agents, representatives, and employees from and against any and all loss, cost, damage, expense, liability, and claims including attorneys' fees or consultant's costs thereof, for solely economic loss arising out of or connected to the Facilities Construction Plan and the individual Projects comprising the Plan (as those terms are defined in Appendix 'A'), including but not limited to contractor claims, architect claims, engineer claims, neighborhood claims, or claims from any other party, entity or person, resulting directly or indirectly from Construction Manager's performance of this Agreement, to the extent of Construction-Manager's fault, negligence or failure to perform this Agreement caused, contributed to or resulted in the loss, cost, damage, injury, liability or claim."

The contract also contained two other relevant provisions: paragraph 10.7 specified, "Nothing in this Agreement shall operate to confer rights or benefits on persons or entities not party to this Agreement." Near the end of the contract, paragraph 26.4 stated, "This Agreement shall not create any rights in persons not party to this Agreement, whether third party beneficiary, or otherwise."

In 1998, BUSD sued the architect and construction manager, alleging that each had contributed to a cost overrun of almost \$2 mil-

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lion. The construction manager settled with BUSD for about \$300,000, including a good faith finding confirmed by the court that released the construction manager from all claims. The architect then filed a cross-complaint against the construction manager based on, among other things, negligence, express contractual indemnity and breach of contract by third-party beneficiary. The architect's claims were dismissed and the appellate court affirmed.

In considering the negligence action, the court first held that the good faith finding precluded that action. The court went on to refuse to expand tort liability to include a duty of care from a construction manager to the project architect, finding policy considerations overwhelmingly weigh against creating such a duty. Since the damages were economic, the economic loss rule would apply. “. . . courts have refused to impose a duty to protect third parties to a contract for professional services from economic loss where such a duty would subject the professional service provider to a conflict in loyalties.” Since the construction manager was expected to negotiate on behalf of the owner with other parties, including the architect, there could be a potential conflict of interest if the construction manager could be held liable for such negligence to the architect.

As to the contract issues, the court also found in favor of the construction manager. The architect argued that it was entitled to indemnification under the above language. Unlike the language found in the AIA A201 General Conditions, which specifically names the architect as an indemnified party, this language did not do so. The architect argued that it was an “agent” of the owner (citing a 1912 case that held that an architect is the owner's agent) under that language and deserved to be covered by the indemnity. The court was not persuaded by this argument, but found that even if the architect were an agent of the owner, the language in the contract, taken as a whole, indicates that the parties intended to limit the rights under the contract to the parties of the contract. In other words, both paragraphs 10.7 and 26.4 indicated that the architect had no rights under this contract, and did not have any rights to enforce the indemnity provisions. Note that, under standard AIA language, an architect is not an agent of the owner, since the architect is not empowered to act on behalf of the owner, such as by unilaterally authorizing change orders.

What does this case mean to construction professionals? First, that contracts are important. For instance, if the indemnification language in this case had been the standard AIA language, the result

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might have been different. Certainly, the court could not have so easily brushed off the architect's claim for indemnification from the construction manager. Contracts are the means by which risks are allocated. When you sign a contract, you agree to take on certain risks. If you agree to indemnify someone, you are taking on additional risks that you would not otherwise have. Conversely, if someone else indemnifies you, your risks are lessened. You need to make sure that you are properly indemnified before you can count on a lesser degree of risk, as this architect discovered.

Second, it is important to be aware of duties of the parties in a construction project towards each other. In California, and many other states, construction managers do not owe any particular duty to the architect. Similarly, the architect would not owe any particular duty to the construction manager. As a general proposition, duties are owed only where a contract creates a duty. Note that this generality does not apply to more general duties where personal injury or property damage may result.

Both of these concerns, risks and duties, can be addressed by using good contracts. The contract used in this case was not an AIA contract. Thus, the many court interpretations of the language of prior AIA contracts will likely not apply. Such non-standard contracts, such as the one used by BUSD, must be carefully reviewed by an experienced construction attorney before they are signed. Otherwise the parties run the risk of the unknown.

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