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Monticello

Our Mission

The Jefferson Society, Inc. is a non-profit corporation, founded on July 4, 2012 for the advancement of its members' mutual interests in Architecture and Law. The Society intends to accomplish these purposes by enhancing collegiality among its members and by facilitating dialogue between architects and lawyers.

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The Jefferson Society, Inc.
c/o 2170 Lonicera Way
Charlottesville, VA 22911

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Send his or her name to President Craig Williams at cwilliams@hksinc.com and we will reach out to him or her. All candidates must have dual degrees in architecture and law.

AUTHORS WANTED

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The Endless Negotiation.

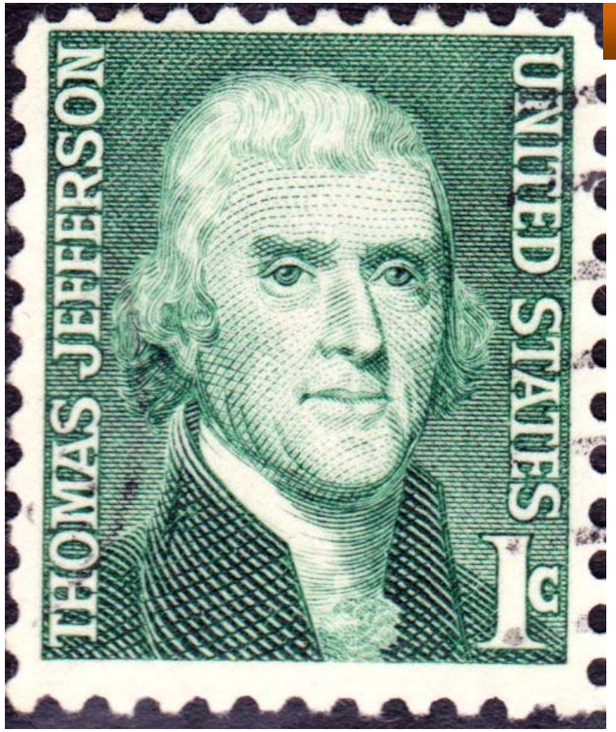
By Charles R. Heuer, FAIA, Esq.
The Heuer Law Group

Each issue of Monticello contains a message from the President. My message this month is "Help!" Here is my problem and I bet it's one many of you share with me. Maybe if we put our heads together we can think of some creative solutions. I spend a lot of my time reviewing contracts for architects. They are becoming increasingly lengthy and onerous. This is not a recent phenomenon but, nevertheless, it is a troublesome one.

First, many attorneys (excluding TJS members, of course) and owners' representatives have apparently decided that they know better than architects how to practice architecture. They specify the most minute details of what services are required -- which is not necessarily unreasonable -- but they also specify exactly how those services should be performed, what tools should be used, what services shall not be provided, which consultants may or may not be hired and the like. They leave precious little to the professional judgment of the architect. Nevertheless they expect the architect to be responsible for the outcome of events over which the architect has no control. That last part is the definition of an insurance company, not an architect. Whatever happened to hiring architects on the basis of professional competence and judgment and then working cooperatively with them? One architect once commented to me that he never had a bad contract with a good client. I think that works both ways.

Next, many attorneys spend vast efforts in drafting provisions to determine who to blame if something goes badly in every circumstance that they can think of. I have asked some lawyers why they don't spend more time in drafting provisions that will address actions that could be taken by the parties to help prevent things from going south or to help cure problems when they do. I have not received any very good answers. Maybe this is what IDP is all about. I, personally, haven't seen that in action yet.

(Continued on page 2)



(President's Message Cont'd from page 1)

Then, there are those contracts like the one I reviewed last week that opened with "The terms and conditions of this agreement are non-negotiable." OK. Unfortunately many were also uninsurable! Where do you go from there? I know the law about adhesion contracts, but I don't find it helpful. Finally, the English language is not spoken well or, even, correctly anymore. This is more from architects than attorneys. I read many architects' proposals, letters and contract drafts and I can't understand what they are saying. It's not as bad as the unintelligible dribble in the architectural press, but it's pretty bad. And this goes to "standard forms" from large owner-entities who build frequently. You would think they would at least proofread the documents, but not so much. I often find the same paragraph repeated unintentionally two or three times. Or, conversely, part of a sentence or paragraph is missing. OK, we all make mistakes, but often the response is "it can't be changed." It's not that the change is controversial. The time and effort to go up the ladder to get someone in "legal" to approve any change whatsoever is apparently monumental.

Am I just old and curmudgeonly or are others seeing these things too? What can we do? Are there any procedures or provisions that you have used successfully to address these matters? I would appreciate comments and suggestions. Send them to me by email at: cheuer@heuerlaw.com. I will collate them and provide a summary of good ideas in a future edition of *Monticello*.

TEXAS:

Two New Cases Split on Certificate of Merit Law.

Case#1. Architect Who Filed Pro-Se Answer Waived the Certificate of Merit As A Defense!

An owner hired a design-build contractor to build a nursing and rehabilitation center. The design-builder hired an architect to design the facility. Another consultant was hired to design the HVAC system to be built by a trade subcontractor. About three months after substantial completion, there were problems allegedly due to negative air pressure in the building caused by a faulty HVAC system. The problem was so severe it required the residents of the nursing facility to be evacuated due to excess humidity and inadequate cooling. The owner sued the design-builder, architect, HVAC consultant and subcontractor. Tex.Civ.Prac.& Rem.Code § 150.002(a) requires that, *"in any action ... for damages arising out of the provision of professional services by a licensed or registered professional, the plaintiff shall be required to file with the complaint an affidavit of a ... third-party licensed architect."* However, no certificate of merit was attached to the owner's original petition. The architect, proceeding pro se, filed an Answer to the lawsuit, apparently by writing a letter to the court. Now, apparently armed with a lawyer, the architect filed a motion to dismiss the owner's claims based on the lack of a certificate of merit. The owner argued, in response, that the architect waived the certificate of merit requirement, then filed an amended petition (18 months after the original petition) which attached a certificate of merit. The trial court denied the architect's motion to dismiss, and the architect appealed.

Justice Benavides, writing for the majority, wrote that, "Waiver is the intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right," adding that: "There can be no waiver of a right if the person sought to be charged with waiver says or does nothing inconsistent with an intent to rely upon such right." The Court then ruled, surprisingly, that the architect's actions prior to seeking dismissal amounted to a waiver of his right to seek dismissal under section 150.002. In his original pro se answer, the letter to the Court, the architect did not assert a general denial, but addressed each allegation. In fact, his answer affirmatively admitted that the HVAC design was faulty, and he later admitted in a Request for Admissions that it was his duty to "ensure that the facility was constructed pursuant to the requirements and regulations contained in [Texas regulations]." With those admissions, the Court ruled that, "the purpose of chapter 150 is to deter meritless claims and bring them quickly to an end." Here, however, the architect had admitted that the HVAC design was faulty, thus giving merit to plaintiff's claims. "[His] own admissions lend support to plaintiff's claims that negligence occurred in the construction of the HVAC system, and granting a motion to dismiss in this case would defeat the purpose of this statute," the Court ruled.

A strong dissent by Justice Perkes disagreed that, "one sentence from [the architect's] original answer and a single responsive admission to a request for admission amounts to a substantial invocation of the judicial process clearly demonstrating an intent to waive the right to dismiss under subsection 150.002-(3)." In this case, the architect did not request affirmative relief, participate in mediation, or wait years to assert his right to dismiss. Although he filed an original answer, the dissent argued that, "Filing an answer is inconsequential in the analysis." The case is *Frazier v. GNRC Realty, LLC*, 2014 WL 4635881 (Tex. App.-Corpus Christi).

Case#2. Case Against Engineer Dismissed With Prejudice!

An engineering firm was hired as project engineer at a natural gas well in Zapata County, Texas. Three contractors were then hired to perform hydraulic fracturing operations, during which a natural gas well was damaged. The owner sued the engineer and fracking contractors for breach of contract, negligence, fraud, common law fraud, fraud by nondisclosure, and negligent misrepresentation. The owner also included a cause of action for breach of fiduciary duty against the engineer, arguing that the engineer was hired "to supervise the fracking operations," and that the engineer had failed to report that the job was not completed and the well was damaged. The engineer filed an Answer with a motion to dismiss on the grounds that a certificate of merit did not accompany the original petition as required by Tex.Civ.Prac. & Rem. Code § 150.002(a). In response, the plaintiff/owner filed a notice of nonsuit as to the engineer, without prejudice, which was granted by the trial court. The case then proceeded solely against the contractors during which an expert (P.E.) for the owner testified that the engineer breached the standard of care by failing to supervise the operations. The owner then amended its petition and joined the engineer again as a defendant, alleging the same causes of action alleged in the original petition. This time, however, the petition included a certificate of merit. The engineer responded with another motion to dismiss, since there was no certificate of merit in the *original* petition as required under section 150.002. The trial court denied the motion, and the engineer appealed.

The Court of Appeals ruled that because the certificate of merit was not filed with the first-filed petition, the trial court erred. The ruling was reversed, and the petition was dismissed with prejudice, with the Court stating, "We, therefore, hold that, as a matter of law, when a plaintiff fails to file an affidavit contemporaneously with the first-filed complaint, and the exception under section 150.002(c) does not apply, the Legislature intended the complaint be dismissed with prejudice." See, *Bruington Engineering, Ltd. v. Pedernal Energy, L.L.C.*, 2014 WL 4211024 (Tex . App. - San Antonio).

Texas Supreme Court Carves Out Exceptions to No-Damages-for-Delay Clauses.

Mike F. Pipkin, Esq.
(Guest Author)
Sedgwick, LLP
Dallas, TX

On August 29, 2014, in *Zachry Construction Corp. v. Port of Houston Authority of Harris County*, No. 12-0772, 2014 WL 4472616 (Tex. 2014), the Texas Supreme Court found that no – damages – for – delay clauses that purported to waive Zachry's right to damages for delay of work caused by an owner's intentional misconduct were unenforceable. Zachry, a Texas-based contractor entered into a contract with the Port of Houston to construct a wharf. Under the no-damages-for-delay clause, the parties agreed that:

"Zachry shall receive no financial compensation for delay or hindrance to the Work. In no event shall the Port Authority be liable to Zachry … for any damages arising out of or associated with any delay or hindrance to the Work, regardless of the source of the delay or hindrance to the Work. In no event shall the Port Authority be liable to Zachry … for any damages arising out of or associated with any delay or hindrance to the Work, regardless of the source of the delay or hindrance, including events of Force Majeure, AND EVEN IF SUCH DELAY OR HINDRANCE RESULTS FROM, ARISES OUT OF OR IS DUE IN WHOLE OR IN PART, TO THE NEGLIGENCE, BREACH OF CONTRACT OR OTHER FAULT OF THE PORT AUTHORITY. Zachry's sole remedy in any such case shall be an extension of time."

Zachry and the Port of Houston further agreed to a strict timeline for completion of the wharf. The contract was entered into on June 1, 2004 and imposed an interim deadline of February 1, 2006, and a completion deadline of June 1, 2006. In March 2005, the Port of Houston and Zachry entered into a change order, extending the interim deadline 14 days and the completion deadline by 1.5 months.

The change order incorporated Zachry's bid proposal for extension of the wharf out over the water, which was subject to the Port of Houston's review. Under the "revise and resubmit" procedure in the contract, the Port of Houston submitted revisions to Zachry's proposal that caused significant delays. In response to the Port of Houston's revisions, Zachry abandoned its approach to construction of the wharf extension, causing further delays. As a result, the Port of Houston notified Zachry that it would begin withholding payment on Zachry's invoices for completed work as liquidated damages. Zachry then sued the Port of Houston for breach of contract, seeking compensation for the additional costs incurred by Zachry when the Port of Houston submitted its revisions to Zachry's proposal for the wharf extension. At trial, the jury was instructed that the contract's no – damages – for - delay provision precluded Zachry's "Revise and Resubmit Damages" unless it found that they resulted from the Port of Houston's "arbitrary and capricious conduct, active interference, bad faith and/or fraud," an instruction modeled after a common law exception to enforcement of no – damages – for - delay clauses.

Notwithstanding this instruction, the trial court awarded Zachry "Revise and Resubmit Damages" in the amount of $18,602,697. The Port of Houston appealed the trial court's judgment, arguing that that the no-damages-for-delay clause precluded "Revise and Resubmit Damages." The Texas Court of Appeals addressed whether the no-damages-for-delay clause was intended to foreclose Zachry's recovery for delay damages arising from the Port Authority's "arbitrary and capricious conduct, active interference, bad faith and/or fraud." The Court of Appeals viewed the parties' reference to "other fault" in the contract as evidence of their intent that damages caused by delays resulting from the Port of Houston's intentional misconduct should be precluded under the no-damages-for-delay clause, and reversed the trial court.

The Texas Supreme Court reversed the Court of Appeals' decision. After casting doubt on the reasonableness of the Court of Appeals' interpretation that assumes delays resulting from an owner's intentional misconduct are foreseeable before contracting, the Texas Supreme Court found that no-damages-for-delay clauses purporting to insulate an owner from liability for deliberate misconduct are void as a matter of public policy.

There are at least three important implications of the *Zachry Construction* opinion that will be of interest to owners and contractors alike. First, the Texas Supreme Court recognized five exceptions to enforcement of no-damages-for-delay clauses. Such clauses are not enforceable when the delay: (1) was not intended or contemplated by the parties to be addressed by the provision; (2) resulted from fraud, misrepresentation, or other bad faith; (3) has extended for such an unreasonable length of time that the party delayed would have been justified in abandoning the contract; (4) is not within the delay scenarios addressed by the clause; or (5) is based on "active interference" with Zachry or other wrongful conduct, including "arbitrary and capricious acts," "willful and unreasoning actions," "without due consideration" and "in disregard of the rights of other parties."

Second, a contractor cannot waive its right to recovery for damages resulting from future project delays caused by the intentional or willful conduct of the owner through a no-damages-for-delay clause. This is true regardless of the purported intentions of the parties as manifested by the terms of the agreement. Third, such clauses may be unenforceable even when the contractor is sophisticated and the no-damages-for - delay clause is conspicuous.

The *Beacon* Case: A View from Inside

R. Craig Williams, AIA, Esq.
HKS
Dallas, TX

As reported in the July 2014 issue of *Monticello*, the California Supreme Court recently handed down a decision in the case styled, *Beacon Residential Community Assn. vs. Skidmore, Owings & Merrill LLP and HKS, Inc.*, which I will simply call "*Beacon*." *Beacon* has recently been the subject of considerable ink, or using current terminology, blogging. The case is still pending and procedurally has a long way to go before trial. The purpose of this article is to give a few of my thoughts from "an insider's view" that, in my opinion, make the court's decision more far reaching than it may first seem.

As a reminder, The Beacon is a mixed use and condominium development in San Francisco. The *Beacon* lawsuit was filed by a homeowner's association on behalf of the individual condominium unit owners, against the developer and various parties, which included the contractor. Those parties also included the architectural firms of Skidmore, (SOM), and HKS. SOM was the architectural design firm and HKS was the architecture firm of record. The trial court granted a demurrer filed by SOM and HKS, claiming the architects owe no duty to the ultimate purchasers of the condominium units in the absence of privity. The Court of Appeal reversed, however, and the state Supreme Court upheld.

The plaintiff alleged that negligent architectural design work performed by the defendants resulted in several defects, including extensive water infiltration, inadequate fire separations, structural cracks, and other safety hazards. One of the principal defects alleged is solar heat gain, which allegedly make the condominium units uninhabitable and unsafe during certain periods due to high temperatures. Plaintiff alleged that the solar heat gain is due to the defendants' approval, contrary to state and local building codes, of less expensive, substandard windows and a building design that lacked adequate ventilation. It is important to note that the design of the Beacon project, including the glazing, meets all applicable building codes, including the California version of "green" building codes, Title 24. The plaintiff seeks to have the defendants pay for the cost to install air-conditioning, although the developer's program did not include air-conditioning, and when the units were sold to the homeowners they were informed that the units may be uncomfortable during certain times of the year, and they were advised to install ceiling fans.

The trial court assigned significance to the fact that defendants made recommendations to, and that the final design decisions rested with, the developer. SOM and HKS contended

(cont'd on p. 6)

TJS Membership Is Approaching 100 Professionals!

The following new members have joined since our last Newsletter:

NEW MEMBERS:

92. Kelli Goss Hopkins, Esq.
Conner Gwyn Schenck, PLLC
Raleigh, NC

93. Jason Patrick Phillips, Esq.
Hines
Washington, DC

94. Tat-yeung Shiu, Esq.
Duane Morris
Chicago, IL

95. Mike Koger, Esq.
The American Inst. of Architects
Washington, D.C.

We have identified 125 potential Members, those who have dual degrees in law and architecture. So far, 75% have joined as Members. To check the list of our current Members, go to the Jefferson Society website and click on the "Membership" tab.

Beacon: An Insider's View (continued)

that they had no role in the actual construction.

Instead, the developer, contractors, and sub-contractors retained primary control over the construction process, as well as final say on how the plans were implemented. The Supreme Court disagreed with this analysis, noting that even if an architect does not build or make final decisions on construction, a property owner relies upon the architect's specialized training, technical expertise, and professional judgment.

At this point in its analysis, the Court embarked upon a point that may have the most far reaching impact to architects. The Court noted that "just as a lawyer cannot escape negligence liability to clearly intended third party beneficiaries on the ground that the client has the ultimate authority to follow or reject the lawyer's advice (see, e.g., *Heyer v. Flaig* (1969) 70 Cal.2d 223, 226; *Lucas v. Hamm* (1961) 56 Cal.2d 583, 588), so too an architect cannot escape such liability on the ground that the client makes the final decisions." Then, this: . . . it would be patently inconsistent with public policy to hold that an architect's failure to exercise due care in designing a building can be justified by client interests at odds with the interest of prospective homeowners in safety and habitability.

The Beacon Complies with all Building Codes.

One of the more interesting points made by the Supreme Court involves the inclusion of a clause in one of the architect's contracts that expressly provided that there would be no third party beneficiaries to the architect's contract. The Court's take on this point is that third party beneficiary status is not a prerequisite to "alleging negligence", noting that third parties may possess the rights of parties to the contract, but the lack of such status does not preclude liability in tort. More alarming is the Court's adoption of the Court of Appeals opinion that "if anything, the contract provision on which defendants rely only serves to emphasize the fact that defendants were more than well aware that future homeowners would necessarily be affected by the work that they performed." In other words, by the inclusion of an agreement between two contracting parties to exclude third parties from benefiting from the terms of a contract, the parties must have known they should benefit, so the clause should not be enforced.

Ultimately, the Court relied on the factors outlined in *Biakanja v. Irving* 49 Cal.2d 647 (1958) to justify its decision. Those factors are:

(1) Defendants' work was intended to benefit the home-owners living in the residential units that defendants designed and helped to construct.

(2) It was foreseeable that these home-owners would be among the limited class of persons harmed by the negligently designed units.

(3) Plaintiff's members have suffered injury; the design defects have made their homes unsafe and uninhabitable during certain periods.

(4) In light of the nature and extent of defendants' role as the sole architects on the Project, there is a close connection between defendants' conduct and the injury suffered.

(5) Because of defendants' unique and well-compensated role in the Project as well as their awareness that future homeowners would rely on their specialized expertise in designing safe and habitable homes, significant moral blame attaches to defendants' conduct.

(6) The policy of preventing future harm to home-owners reliant on architects' specialized skills supports recognition of a duty of care.

Is *Beacon* a landmark case? No. Other states have allowed such claims in the absence of privity. However, architects who design condominium projects in any state, but specifically in California, should be alert to the fact that regardless of any terms in the architect's contract to the contrary, the architect can expect to have liability exposure to many down-stream purchasers of condominium units, without the ability to rely their clients' programs in the event of any failure of building elements related to safety and habitability, even if the design complies with relevant building codes.

So even if an architect is directed to make design changes by a client, if those changes may affect safety or habitability (not limited to building code compliance), the architect may ultimately have liability for those design decisions.

[Editor's Note: The thing that really feels so wrong about the Beacon case is that it was the developer who chose not to install air conditioning in the condo units, who warned the buyers about this condition, and yet the architects may be held liable when the developer and buyers all knew of the condition - and accepted it. There are so many decisions made on complex design and construction projects, some for financial considerations, that the architect cannot control. What was SOM and HKS to do here? Would it be enough to put in writing their concerns? Did they need to go to the building code officials and complain? Should they have laid down their pencils and refused to go forward with the project? When the project met all applicable codes? Although Craig does not consider Beacon a landmark case, time will tell whether Beacon-like rulings will follow in other states. Let us know your thoughts].

LEGAL BRIEFS

LOUISIANA:
Architect Recovers Attorney's Fees Under AIA Contract Equal to Amount in Dispute!

In the Spring of 2007, an architectural firm was hired by two lawyers (problem #1) to design a commercial office building. The architect did a site study and then met with the lawyer/clients and their contractor. The project was on a fast-track to take advantage of some financial incentives by end of 2008, so the design needed to be completed within 2-3 months. One of the lawyers asked the architect to prepare an AIA contract, which the firm sent to the client the very next day proposing a fee of 5.9%. The contract was clear that payments to the architect shall not be withheld, postponed, or made contingent on the construction, completion, or success of the project. The cover letter requested the lawyer to sign and return it if he was in agreement with its terms. The lawyer testified that he read the clause regarding the calculation of the architect's fee, but did not read the rest and did not sign and return the contract. Nonetheless, work proceeded with the fast-track schedule. The client then put the project on hold, after substantial work had been done. The architect sent an invoice for services rendered prior to the client placing the project on hold. The lawyer/clients refused to pay, claiming that the architect was "working on a contingency fee basis" (problem #2). The architect sued, based on the unsigned AIA contract terms. After a 4-day jury trial, a verdict was rendered in favor of the architect for $280,614, finding that the parties had agreed to be bound by the AIA contract. The trial court added attorney's fees in the amount of $249,505, plus costs. The lawyers appealed claiming they never signed the AIA contract. The Court of Appeals upheld the judgment, finding that, "A contract is formed by the consent of the parties established through offer and acceptance. Unless the law prescribes a certain formality for the intended contract, offer and acceptance may be made orally, in writing, or by action or inaction that under the circumstances clearly indicates consent."

The lawyers argued that the cover letter specified the method of acceptance, but the Court ruled that the architect proved by a preponderance of the evidence that the parties "had clearly manifested their intention to be bound."

See, *Robert M. Coleman & Partners v. Lewis*, 2014 WL 4919689 (La.App. 1 Cir.).

AIA Large Firm Roundtable & McGraw Hill Release New Claims Study

In 2012, the AIA Large Firm Roundtable (LFRT) embarked on a study to find the source of claims in the design and construction industry and what percent of errors and omissions should be expected by a project owner. The study, entitled, "*Managing Uncertainty and Expectations in Building Design and Construction*," was conducted by McGraw Hill Construction, with funding from the AIA, Autodesk, DBIA, AGC, and others. The report begins with this statement: "Perfection is a baseline expectation when you purchase a product.

But as experienced owners of building projects know, design and construction is an imperfect process with a variety of inherent uncertainties. Given that reality, what can project teams do to identify, anticipate and mitigate the conditions and factors that drive uncertainty, and how can owners adjust their expectations of project team performance to align with reasonable, achievable metrics that truly benefit the project? These are the core questions behind this [report]."

The project has been led for LFRT by Clark Davis, FAIA, former vice chairman of HOK and principal consultant with Cameron MacAllister Group. TJS members R. Craig Williams, AIA, Esq. and G. William Quatman, FAIA, Esq. were also consulted by LFRT about the study.

Top Causes of Overall Uncertainty for Owners, Architects and Contractors

Source: McGraw Hill Construction, 2014

	Ranking of Causes by Player		
Causes of Uncertainty	Owners	Architects	Contractors
Unforeseen Site or Construction Issues	1	3	1
Design Errors	2 (tie)	6	5
Design Omissions	2 (tie)	7	2
Contractor-Caused Delays	4	4	6
Owner-Driven Changes	5 (tie)	1	4
Accelerated Schedule	5 (tie)	2	3
Construction Coordination Issues	7	5	7

Owner-related issues, such as accelerated schedule, unclear project requirements, lack of direction and involvement, and program or design changes, are cited by the report as the leading drivers of uncertainty on building projects. While only 7% of owners believe perfect construction documents are possible, per the study, design errors and omissions are still considered highly impactful sources of uncertainty. On average, owners say they expect to pay somewhere between 3% – 5 % added cost on a building project due to these issues, and consider anything up to 6% to still be acceptable as "good performance."

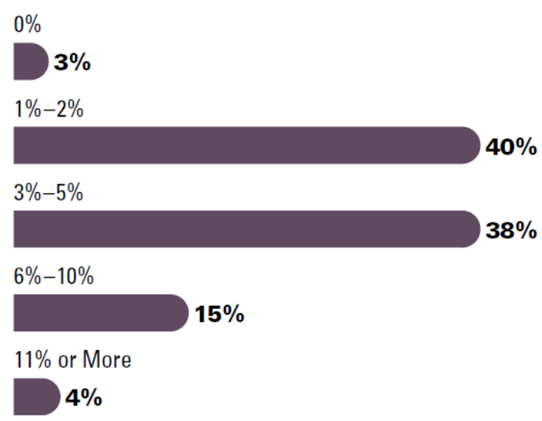
One of the most interesting, but not surprising, findings of the report is the perception by owners and contractors on one hand, and architects on the other, about the overall causes of project uncertainty. As the chart above shows, owners and contractors each ranked Unforeseen Site Conditions #1 and Design Omissions #2 as the top two factors. Architects, by contrast, but no surprise, ranked Design Omissions dead last at #7, while ranking Owner - Driven Changes #1 and Accelerated Schedule as #2.

Individual trade contractor performance is the top - named reason for construction coordination issues by all parties, the study found, led by the general contractors (67%). Despite their direct responsibility for these issues, higher percentages of contractors cite "scope gaps" among prime and sub-contracts (41%), and lack of thoroughness of pre-construction planning, estimating and scheduling (33%) as leading causes of uncertainty than either the architects or the owners do. Although almost one third (32%) of general contractors appear to believe that trade contractors benefit the most from uncertainty, roughly half of architects (47%) and owners (50%) believe that general contractors do, per the report's findings.

So, how do we improve the system? The LFRT report found that owners can best help to reduce claims and disputes through: "Clearer direction from owners" (79%), and "More active leadership by owners" (68%), the two top-cited mitigating elements. Nearly two thirds (64%) of those polled identified "best value" or other team selection criteria (not based primarily on cost) as very important, a method prominent in public design-build. Reinforcing the value of tighter designer and builder collaboration, the report found that more integration between design and build parties during design and construction (77%), more time for design firms to participate in coordination (66%), and clearer definition of deliverables between parties during the design process (67%) all ranked among the top five. In addition, technological advances, such as the use of BIM by entire project team (50%) outranked the use of BIM by single firm (32%), another nod to the value of early collaborative efforts during design.

How about use of contingencies for errors and omissions, or for unexpected costs? Most owners surveyed (8 out of 10) said they always have a project contingency, but just 1 in 4 owners those said they have a standard risk assessment process to determine the right amount of contingency. Only about half (51%) of the owners "always" tell architects about their contingency, while only around a third (37%) "always" tell their contractors. While a quarter "never" tell their architect, even more (37%) "never" tell their contractor.

Level of Additional Costs Accepted as Normal (According to Owners Who Anticipate Additional Costs)



"Imperfection Is Inevitable," is a subheading of the report, which found that, "expecting flawless execution of error - free drawings on building projects is not realistic." Only 1% of owners surveyed said they'd even seen "a perfect set" of drawings.

Another subheading, "Design Team Impact on Owner Causes of Uncertainty," reported that on "programmatically intense" buildings, it is unrealistic to expect all owner stakeholders to understand design and construction well enough to provide perfect guidance. Therefore, "design professionals should make the effort to understand more about what end users will really be doing in the building (e.g., technical, workflow, operating requirements)" before, as one owner said, "they start getting people excited about where spaces are going to be." Better-informed design is less likely to generate disruptive stakeholder changes and more likely to increase owner satisfaction, the report found. Another owner surveyed said, "Before you draw one thing, finalize the value propositions so you know what you're answering, instead of what you think we want."

Although we architect-lawyers are all too familiar with design errors and omissions as creating claims and litigation, the practitioners surveyed downplayed E&O as a major source of problems. In fact, only 15% of architects said that design omissions were a major problem, with 21% citing to design errors. Owners took the most heat, with architects citing to "owner-driven changes" (63%) and "accelerated schedules" (55%) as the main problems. Owners, by sharp contrast, cited design errors as the main factor, especially those doing mostly office projects. The LFRT report cites to a 2012 study by Dougherty, Hughes and Zack summarizing statistics from more than 25 papers covering 359 building and infrastructure projects, the direct costs of rework from design errors and omissions alone range from 0.5% to 2.6% of total construction cost. The LFRT report concludes that "more research is needed." Perhaps there is a role for The Jefferson Society in this study.

As the first phase of this research, over 1,500 owners, architects and contractors were presented with a list of factors and asked to select the one that causes the greatest uncertainty on building projects. Listed below are the top seven causes of uncertainty identified by these respondents.

- **Accelerated Schedule**
- **Owner-Driven Program or Design Changes**
- **Design Errors**
- **Design Omissions**
- **Construction Coordination Issues**
- **Contractor-Caused Delays**
- **Unforeseen Site or Construction Conditions**

AIA LFRT STUDY: How It All Got Started !

One of our own TJS members was influential in initiating the AIA/McGraw Hill claims study reported on pp. 8-9 of this newsletter. Craig Williams, AIA, Esq. gave this backstory on how the study came to be. Craig came up with the basic concept during a Fall 2007 session of the LFRT's Legal Committee. "I posed this question to the group," Craig recalled. The Committee, which meets twice per year, took up the issue with added thoughts and commentary, but slow progress until the LFRT CEO Meeting in Dallas in 2011. Craig was invited to that meeting to talk about risk issues. "I took the opportunity to try to get the CEO group interested in and behind the idea of defining the standard of care," Craig said. He discussed the idea in a breakout session with the Risk Management Committee, and the idea then went to the general session that followed. "With huzzahs all around, the CEO group endorsed the idea with a general authorization to move forward." Clark Davis, FAIA, was the Legal Committee liaison at the time so he became engaged to move the project forward. The Legal Committee formed a subcommittee to work with Clark. Craig and a few others were members of the subcommittee.

TJS member Bill Quatman, FAIA, Esq., was invited by Clark Davis to address the LRFT meeting in St. Louis on whether the standard of care could be measured on an objective basis in such a study. Bill's research found no design professional cases in which a percent of error was found to be acceptable, other than cases dealing with cost estimating. It was his thought that while a court might not accept a percentage of error as a defense to a negligence claim, the study might have value in contract negotiations when an A/E firm and client discuss contingencies to use in establishing a threshold for indemnification. The LFRT decided to seek industry partners, such as DBIA, to help with funding.

An RFP was drafted by the subcommittee and McGraw-Hill was selected to conduct the study. More sponsors were added, meetings were held to define the scope of the project, the research was undertaken, final report drafted and reviewed, and now published.

Craig recalls that the entire project began with a rather philosophical base. "The question is one that is at the core of our collective souls as lawyers who represent architects. Sure, the theoretical historical view is that all of the architect's 'errors' should be taken up as a whole and discussed in the context of imperfection. In that way, a reasonable mind would say 'human beings are not perfect no field of human endeavor will produce perfect results.' Does Peyton Manning throw the perfect pass each time he heaves one down the field? Did Michael DeBakey guarantee a long life to a heart transplant patient? Can a lawyer legally guarantee the results of her services?"

Craig continued the inquiry: "Why do some people acknowledge that an architect cannot produce a perfect set of documents, yet later ask the architect to pay the first dollar of any additional cost allegedly arising from an error in the construction documents? The answer is that while everyone will agree that architects are human and not perfect, no one wants to pay additional money when they can blame someone for it and get them to pay."

In the end, the study concluded that imperfection is expected in the design and construction process. With only one percent (1%) of owners saying they'd ever seen a perfect set of drawings, it seems that some level of imperfection should be the norm. However, our profession does not lend itself to a statistical defense, other than, say, for cost estimates.

Bill Quatman's comment to the LFRT was to ask them about the Hyatt Regency skywalk collapse in 1981, which killed 114 people and injured another 216. "The cost of the box beam hanger rod connection was a small percent of the cost of that $40 million hotel," Bill said. Would a court say that was within the standard of care, if the error was less than 2% of the building cost? No, of course not. "A line by line analysis of negligence is the result," said Craig Williams. "We ask the questions: Would a reasonably prudent architect have made THAT mistake? Or THAT one? And so on."

The 2014 report is a good start to understand perceptions within the industry about the causes of defects and cost overruns. Now on to the harder part . . . finding the root causes and making improvements in the industry to help reduce (but likely not eliminate) design and construction errors.

Flying High, But Keeping A Low Profile: Are Drones Legal in the U.S.?

G. William Quatman, FAIA, Esq.
Burns & McDonnell
Kansas City, MO

In April 2012, the FAA issued a $10,000 fine to an aerial photographer who flew a small drone over Thomas Jefferson's campus at the University of Virginia while making a commercial video. The photographer (Mr. Pirker) used an inexpensive lightweight, remote-controlled glider to capture aerial footage as part of an advertisement for the medical school. Mr. Pirker appealed the fine on the basis that the FAA had no valid rules over "model aircraft" flight operations. He won the appeal with the administrative law judge ruling that the FAA could not discriminate against drones versus other forms of model aircraft, since the FAA doesn't have any regulations (yet) that govern model aircraft as "unmanned aircraft" and since there is no difference in the law (yet) between a drone and a model aircraft.

While the FAA has the power to regulate the U.S. airspace, there is no Federal statute currently prohibiting use of a drone (called an "Unmanned Aircraft System" or "UAS") for commercial use

FAA Policy Statement. In early 2007, the FAA issued an official "Policy Statement" on UAS saying: "No person may operate a UAS in the National Airspace System without specific authority. For UAS operating as public aircraft the authority is the COA [certificate of authorization], for UAS operating as civil aircraft the authority is special airworthiness certificates." That sums up the FAA's position, i.e., no commercial use of UAS without a special certificate… and the FAA is only issuing very few at present for manufacturers and for public bodies and universities for research. The only commercial exemption issued to date was for an oil company to monitor wildlife in the Arctic, not over a habitable or urban area. Therefore, it is not likely one would be issued for purely commercial purposes.

The 2012 Act. The FAA Modernization and Reform Act of 2012 was passed by Congress and signed into law by President Obama on Feb. 17, 2012. The Act addresses "unmanned aircraft" (but does not use the term "drone") and it orders that the FAA safely integrate commercial drones into the civilian airspace by Sept. 30, 2015. The exact wording of the relevant section 332 (a) requires that the Secretary of Transportation "*develop a comprehensive plan to safely accelerate the integration of civil unmanned aircraft systems into the national airspace system*. * * * The plan required under paragraph (1) shall provide for the safe integration of civil unmanned aircraft systems into the national airspace system as soon as practicable, but *not later than September 30, 2015*." Within 18 months after the Sept. 30, 2015 plan is submitted to Congress, the FAA is to publish a "final rule" on small unmanned aircraft systems that "will allow for civil operation of such systems in the national airspace system." So, it may not be until *March 30, 2017* that we have an FAA final and enforceable rule on use of drones. At present, however, there is no Federal statute permitting or prohibiting use of commercial drones.

Model Aircraft. Section 336 of Public Law 112-95, titled "Special Rule for Model Aircraft" is being cited by the FAA to prohibit use of commercial drones. This law essentially states, however, that the FAA cannot regulate *recreational use* of model aircraft under 55 lbs. By definition, the FAA is arguing that "commercial use" (rather than "hobby use") takes the aircraft out of the exemption and pulls it within FAA regulation. The problem is, however, that there is no FAA rule or regulation on commercial UAS as of this date. FAA's Advisory Circular, AC 91-57, dated June 9, 1981 says, "Do not fly model aircraft higher than 400 feet above the surface. When flying aircraft within 3 miles of an airport, notify the airport operator, or when an air traffic facility is located at the airport, notify the control tower, or flight service station." This is not a federal law, but merely guidance for voluntary compliance. FAA guidance also says that model aircraft flights should be flown a sufficient distance from populated areas and full scale aircraft.

What To Do?

To date, the FAA has apparently issued only one fine for an unauthorized commercial drone flight, and that was reversed on appeal. FAA reportedly wrote cease and desist letters to a Minnesota beer company and a Detroit florist to stop using drones in their activities. The FAA learns about most violations only from reports in the media, tips from rival businesses or when companies film their drone flights and post them on YouTube, so the ability to police the use of commercial drones is very limited. Lots of companies fly drones in the U.S. But until the new regs are adopted, fly at your risk!

McKim, Mead & White designed the palatial Hotel Nacional in Havana, Cuba, which opened in Dec. 1930. It has hosted many celebrities and dignitaries on their visits to Havana, and will host TJS in 2015!

Havana Calls! Cuba Trip Being Planned For April 11-18, 2015.

TJS member Joyce Raspa-Gore, AIA, Esq. is organizing a once-in-a-lifetime trip exclusively for Jefferson Society Members and their spouses***. 7 nights in Cuba!*** The group will stay in the historic Hotel Nacional, located at the cultural center of Havana City, and designed by McKim, Mead and White. Highlights of the trip will include: Guided tours of Old Havana, Cienfuegos, meeting with renowned Architect Miguel Coyula, tour Cuba's National Museum of Fine Arts, a presentation on the Cuban Legal, Judicial, and Penal Systems, meetings with local architects Orestes del Castillo, Nancy Benitez and Iran Millan, the Cienfuegos City Historian. The trip will also include a tour of an authentic Cuban cigar factory *(No, you cannot take them home, you'll have to smoke them on the island).*

We will also explore Finca Vigia, where Ernest Hemingway lived for over 20 years and tour Cojimar fishing village, Hemingway's favorite hangout! We will visit the studio of Jose Fuster, renowned Cuban ceramist and painter. To top it all, the tour group will dine at some of Havana's top "paladares" (family-run restaurants).

What Is The Cost?

For a group of 21 to 26: **$2,164/person.** For 16 to 20 travelers, the cost is: **$2,264/ person.**

The price includes: Treasury Department's Office of Foreign Asset Control (OFAC) License; 5 nights at Hotel Nacional (5 stars) in Havana with breakfast included; 2 nights at Hotel Jagua in Cienfuegos with breakfast included, 12 Meals: 7 breakfasts, 3 lunches, and 2 dinners, luxury air-conditioned coach transportation and professional driver. An expert English-speaking guide and translator will accompany us throughout the program. Interested?

Airfare is not included in this price. The travel agency tells us that the approximate cost of the charter flight from Miami to Havana is $449 round-trip, including taxes. The Cuban tourist visa is an additional $85. ***So, figure the total cost at $2,800 with airfare (from Miami).*** The extra cost of your flight to and from Miami will vary depending on your departure city, of course.

Have other questions? Call Joyce at (201) 232-6405 or email her today at: joyceraspagore@yahoo.com

Don't miss out, Amigos!

NOTE: The travel agency requires a $300 per person, deposit NO LATER THAN DEC. 15, 2014, payable to: "Bella Travel Group, Ltd." and mailed to: Joyce Raspa-Gore 157 Berwyn Street Roselle Park, New Jersey 07204

Joyce will hold your check until we have 15 minimum.

Calif. Passes: Major Design-Build Legislation

By Nancy Smith, Esq.
(Guest Author)
Nossaman
Los Angeles, CA

On Sept. 30, 2014, California passed SB 785, taking a major step forward in authorizing state and local agencies to use design-build. Although many California agencies have the ability to use design-build without the need for specific enabling legislation, other agencies require specific design-build legislation in order to be able to use design-build effectively, either because they are precluded by law from using a best value selection process for design-build or do not have the ability to bundle design and construction into a single contract. The new statute consolidates and amends existing laws allowing state and local agencies to use design-build, resolving various problems and inconsistencies with prior legislation. The bill grants authority to the following agencies (and repeals their existing design-build authority):

State agencies: The Department of General Services and the Department of Corrections and Rehabilitation, for public works projects in excess of $1,000,000 (Public Contract Code §§ 10187, et seq., article entitled "State Agency Design-Build Projects").

Local agencies:

a) For public works projects over $1 milion (Public Contract Code §22160 et seq., chapter entitled "Local Agency Design-Build Projects"):

(1) A city, county, city, county.

(2) A special district that operates wastewater facilities, solid waste management facilities, water recycling facilities, or fire protection facilities.

(3) Any transit district, included transit district, municipal operator, included municipal operator, any consolidated agency, as described in Sec. 132353.1 of the Public Utilities Code, any joint powers authority formed to provide transit service, any county transportation commission created pursuant to Sec. 130050 of the Public Utilities Code, or any other local or regional agency, responsible for the construction of transit projects.

b) Sonoma Valley Health Care District and the Marin Healthcare District, for hospital or health facility buildings and related improvements (Health and Safety Code § 32132.5).

c) San Diego Unified Port District, for buildings and related improvements in excess of $1,000,000 (SB 785 § 15).

The legislation does not affect affect, expand, alter, or limit any rights or remedies otherwise available at law.

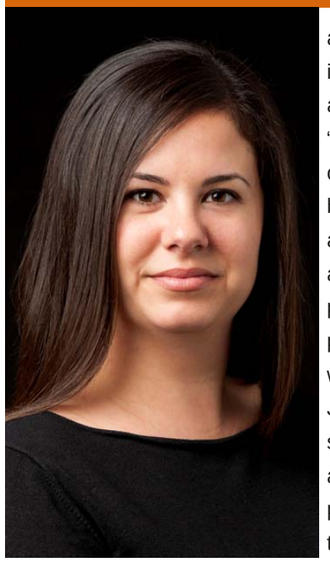
TEXAS: Plaintiff Allowed A "Second Bite" at the Apple, To File Cert. of Merit

An owner/investor sued an architectural firm (Perkins & Will) and an engineer, as well as one of the engineer's employees for fraud, negligent misrepresentation, aiding and abetting, and conspiracy related to an office building investment. The plaintiff did not file certificates of merit with its original petition, and both the architect and engineer moved to dismiss the claims under Tex.Civ. Prac.& Rem.Code § 150.002. The trial court granted the engineer's motion, but only granted the architect's motion in part, dismissing just the negligent misrepresentation claim, but not its fraud claims. An interlocutory appeal was filed by both parties.

The Court of Appeals reversed the trial court's order dismissing the claims against the engineer as well as the order dismissing the negligent misrepresentation claim against Perkins & Will, but affirmed the order denying the motion to dismiss of the fraud claims.

The case dealt with an investment into an office building of which the architect was the largest tenant. The owner claimed that it relied upon a "Property Condition Report" prepared by the engineer for LaSalle Bank, which was considering financing the transaction. The report expressly stated that potential investors could also rely on the report. The owner alleged that after it invested in the property, it discovered the report contained numerous misrepresentations concerning the building's condition, and that it steadily lost tenants, ultimately resulting in foreclosure on the building and loss of its investment. As to the engineer, the owner denied its need for a certificate of merit, but did not oppose a dismissal "without prejudice." After the trial court dismissed the claims against the engineer "without prejudice," the owner re-filed its suit, including a certificate of merit with its new petition, in a different district court. The engineer argued that a plaintiff cannot re-file a lawsuit to cure an earlier failure to file a certificate of merit, even when the earlier suit was dismissed without prejudice. The Court of Appeals held that the statute does not require a dismissal "with prejudice" and the trial court has discretion to determine whether a dismissal should be with or without prejudice. In a surprising ruling, the Court concluded that, "when a plaintiff files a new action and includes a certificate of merit with the first-filed petition in that action, the plaintiff has complied with the plain language of the statute."

The architect argued that it was covered by the statute because the claims were based on its tenancy in the building, and the reason it was a tenant was to provide architectural services, therefore, the claims "arose out of its provision of professional services." The Court of Appeals did not buy that line of reasoning, holding instead that the architect did not identify any services it provided or action that it took that related to the practice of architecture that was connected to plaintiff's investment in the building or to the misrepresentations claimed in its suit. *TIC N. Cent. Dallas 3, L.L.C. v. Envirobusiness, Inc.*, 2014 WL 4724706 (Tex. App.-Dallas).



MEMBER PROFILE:

JOELLE D. JEFCOAT, AIA, ESQ.
Perkins and Will
Charlotte, N.C.

Joelle Jefcoat is an Associate General Counsel for Perkins + Will, in a legal department with three attorneys, a paralegal, and an administrative assistant to serve a professional staff of more than 1600 architects, interior designers, urban designers, landscape architects, consultants, and branded environment experts. Although she was born outside New York City, she grew up in suburban Chicago, and "loved the Big Ten," so it is no surprise that she studied architecture at the University of Illinois in Champaign - Urbana. "I came to appreciate the U of I's proximity to Chicago while in architecture school," she said, "because we had the opportunity to visit the city quite a bit for construction site visits and studio project sites. We also had engagement and participation from architects practicing in Chicago." Joelle went on to the Thomas Jefferson - designed University of Virginia for graduate architecture school, whose program focus was design theory. Speaking about the influence of President Jefferson at UVa, Joelle said, "His spirit is alive and well there – and I think a bit in me. It was in my last year at Virginia that I decided I needed to be both an architect and a lawyer like my favorite President!"

Why go to law school (other than the influence of Thomas Jefferson)? "I felt called to the legal profession so that I could counsel my firm, my colleagues, and my fellow design professionals as we endeavor to navigate the changes in technology and project delivery that are transforming design practice and the construction industry." Joelle chose Charlotte School of Law in North Carolina. "I had been practicing architecture with Perkins+Will for seven years by 2008 and was a registered architect and a Project Manager for large and complex projects when I decided it was time to seriously consider law school. At that point in my life it wasn't an option for me to quit working to attend full-time. When I discovered that CharlotteLaw offered a part-time evening program, I decided to apply. It was a difficult 4 years managing projects and working hard to excel in school, but I made it!" Joelle said.

When asked about her first job out of architecture school, Joelle proudly said, "I still have my first job! I started working as an intern for Perkins+Will right out of grad school in 2001 and I have been with the company ever since, although my title has changed a few times." Joelle worked for Perkins+Will before, during, and after law school. "I tell people I have the best job in the world. I get to be a lawyer for architects!"

She is responsible for all of the detailed contract reviews for Perkins+Will's US and Canadian offices east of the Mississippi, and she assists those offices with their contract negotiations, claims, and general legal advice and counsel.

When asked about the best part of her job, Joelle said, "The best part is helping Perkins+Will's leaders make good deals so they can make great buildings. I enjoy counseling the firm's designers on their negotiations, project challenges, bad days, and innovative ideas."

Joelle has served on AIA's national Diversity Committee (2007), the AIA's Diversity and Inclusiveness Board Strategic Initiatives Group (2008), and the AIA Board Community Committee (2012). She and her husband David were married in May of 2008 and the couple is expecting their first child in early December. They live in south Charlotte in a 1950's ranch that they have renovated from top to bottom, doing nearly all of the work themselves. "I like being on the east coast and Charlotte's mid - sized city scale. It is an affordable city offering close proximity to the beach and the mountains with an inter-national hub airport for easy access to anywhere in the world. The city and surrounding neighborhoods are blanketed in green oak trees and the sky is Carolina blue most days."

Joelle and her husband, David, (above) hiking in the Pisgah National Forest in North Carolina; and (on p. 14) between zip lines in Costa Rica.

Her favorite building that inspires her is the Tribune Tower in Chicago. Her favorite architect is the New York firm of Gwathmey Siegel, who designed the modern art museum in Wilmington, NC where Joelle and David held their wedding reception.

Any advice for a young architect thinking about law school? "I recommend you follow your passion. If that leads you down the path to law school, things will fall into place," Joelle said. "Though they are very different, architecture school is an excellent preparation for law school. You likely have thick skin, can think creatively, are comfortable presenting in front of a jury, and understand precedent, but you may not be prepared for the voluminous reading that comes with law school or the need to manage your time effectively. Reading, writing, and time management are critical skills for success in law school."

Congress Tries To Limit Use of One-Step Design-Build.

The cost of competing for public design-build projects is a significant burden for most design firms. This is especially true for "single-step" procurement, when design and cost are submitted at once.

As a result, DBIA and other organizations are encouraging Congress to pass laws that limit the use of so-called "one-step" design-build RFP's and to further cap the number of prequalified teams from submitting to no more than five on "two-step" procurements. This reduces the economic burden on firms by narrowing the pool of potential design-build teams. Pending before Congress are the following two bills:

H.R. 2750: Design-Build Efficiency & Jobs Act of 2013

- Sponsor: Sam Graves (R-MO)
- What: Limits use of 1-step D-B to projects under $750K; limits use of over 5 finalists in 2-step D-B.

H.R. 4435: Howard P. "Buck" McKeon National Defense Auth. Act for FY 2015

- Sponsor: Buck McKeon (R-CA)
- What: Comprehensive defense spending legislation. 1,042 pgs.
- Section 805. Design-build competition is same as H.R. 2750, but increases cap on 1-step procurement to $1 million. Limits 2-step to 5 finalists.

Stay tuned for more info.

A Cougar Family Says: "Go Coogs!"

"We love watching our Houston Cougars play football in our new stadium," said Denis Ducran, AIA, Esq. shown with his wife Sally, also a UH graduate, and son Case.

MEMBER PROFILE: DENIS G. DUCRAN, AIA, Esq.

Satterfield + Pontikes Constr., Inc.
Houston, TX.

TJS member Denis Ducran, AIA, Esq. is Vice President and General Counsel for Satterfield and Pontikes Construction, Inc. ("S&P"), an ENR top 200 general contractor based in Houston. He is responsible for the company's legal affairs and risk management, as well as for the company's subsidiaries. Denis received his Bachelor of Architecture from the University of Houston, his hometown. His father worked in the construction industry in Houston for over 30 years, so building is part of his genetics. "I remember visiting jobsites with my father on weekends," Denis said, "walking on rooftops of some of downtown's most famous skyscrapers. Those experiences had a profound impact on me as a child and eventually inspired me to become an architect." His decision to study architecture at the prominent University of Houston College of Architecture was quite easy, Denis said, "because we are the fourth largest city in the nation, which serves as an excellent laboratory for architectural training."

During architecture school, Denis took several courses in UH's Construction Management department, which included a course dealing with the legal aspects of architecture and construction. At that time, the course was taught by a registered professional engineer who (also) went on to law school. "While I was eager to pursue a successful career as a design architect, my professor's story inspired me to consider a non - traditional role and to set myself apart as an architect-attorney," Denis said. By the time he began his fifth year of architecture school, that desire held strong and Denis knew he had found his niche. As many of us have done, Denis set his sights on becoming a licensed architect and attending law school. He chose South Texas College of Law in Houston because he wanted to continue practicing architecture while attending law school part - time. Fortunately, South Texas College of Law had an outstanding part - time program for law students with full-time careers, as well as one of the best advocacy programs in the nation, according to Denis.

When asked what intrigued him about this dual path, Denis said, "Being exposed to the construction industry during my childhood, coupled with the effect my professor's story had on me, I realized the industry needed strong legal representation with a fundamental understanding of the inner workings of the construction industry." He quickly learned that there were, and still are, only a handful of attorneys who are also registered architects in Texas. "Much like the quarterback who sees a crease in the defensive line and decides to run the ball," Denis said, "I ran the ball—hoping I wouldn't get hit!"

His first job out of architecture school was with mid-sized architecture firm in Houston — the same firm he interned with during his last year of school. "I was fortunate enough to work with the design team on several mixed-use commercial projects. It was an incredibly valuable learning experience and I am grateful to have been given the opportunity."

"I am fortunate enough to have a beautiful bride of five years, Sally, who has also been my best friend for nearly ten years," said Denis. The couple has a 19-month old son, Case. Asked to name his favorite architect, Denis said, "I have always admired the work of Lake/Flato Architects, a Texas based firm, particularly because of their ability to use local materials to gracefully engage any site and create beautiful destinations, all while commanding international acclaim." His advice to a young architect who may be considering law school is: "Don't let anyone tell you that you can't do it, no matter how farfetched it may appear!" For several years, Denis has taught continuing education courses for architects through the AIA/Houston Chapter. These courses have focused on the various legal aspects of architectural practice, as well as the construction industry. For the past four years, Denis has also taught Construction Law & Ethics at the University of Houston in its Construction Management Department, a mandatory course in order to graduate. Denis noted that many architecture students also take the course as a practical elective. "This experience has been incredibly rewarding, not only because I am privileged to educate the individuals who make up the future of the construction industry (many of whom are recruited to work for my company), but also because as a proud alumnus of UH, I am able to give back to the University," Denis added.

City's Indemnity Claim Against Architect Barred By 5-Year Statute.

A September 2014 Louisiana case involved the construction of a public project, the Louisiana Arts and Science Center Planetarium and Space Theater, in Baton Rouge. The City hired an architect to design the project and a contractor to build it. The contractor hired a sub to provide certain structural steel and metal work. A dispute arose between the contractor and steel sub over alleged extra work due to design errors in the architect's plans. The sub sued the architect, contractor and City for damages, including statutory attorney's fees. The City filed an Answer which, in part, asserted its rights against the architect for indemnity and contribution. The architect moved for, and was granted, summary judgment on the sub's claim and was dismissed from the lawsuit, with prejudice. The City sought to preserve its claim to indemnity by filing an action for declaratory judgment.

Although dismissed from the case, the architect argued that the declaratory judgment action was untimely under the Louisiana 5-year "peremptive period" for architects. The trial court agreed and ruled in favor of the architect. The City appealed and the Appeals Court upheld the dismissal of the architect.

The City's argument was that it "relied on the advice and counsel of its architect" and, therefore, if it was found liable to the sub, then the City is entitled to indemnity and contribution from the architect. Whether true or not, the architect argued that the City never filed a formal cross-claim against it for indemnity. Under Louisiana law, "preemption" is a period of time fixed by law for the existence of a right, more commonly called a "statute of repose." La. R.S. 9:5607 (A) establishes a 5-year peremptive period for claims against professional architects, which runs 5-years from acceptance of the work, or occupancy by the owner. The Court of Appeals said that the statute applies to all actions against an architect arising out of its services, which includes the City's claim for indemnity. Here, the 5-year peremptive period began to run on May 29, 2003, so any claim against the architect was perempted in May 2008. The City filed its petition for declaratory judgment on July 1, 2013, clearly outside of the 5-year peremptive period. The Court rejected the City's argument that its mention of a right to indemnity in the Answer was sufficient, and that the architect "had notice" of the potential for an indemnity claim, despite the procedural failures and form of the City's claim. Costs of the appeal were assessed to the City. The case is *Boes Iron Works, Inc. v. M.D. Descant, Inc.*, 2014 WL 4656493 (La.App. 1 Cir. 2014).