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An Explanation For The Decline In Design-Bid-Build

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A recent opinion of the Court of Special Appeals of Maryland signals the continuation of the economic loss rule in construction cases in Maryland, while simultaneously underscoring some possible reasons for the declining popularity of design-bid-build construction contracts.


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In Balfour Beatty Infrastructure Inc. v. Rummel Klepper & Kahl LLP, Case No. 496, September Term, 2014, 2016 Md. App. LEXIS 3 (Md. Ct. Spec. App. Jan. 28, 2016), the intermediate appellate court held that the economic loss rule applied to bar three tort claims brought by a general contractor against a design engineering firm to recover alleged damages arising from problems in the design of two projects related to upgrades at Baltimore City's Patapsco Wastewater Treatment Plant. A predecessor-in-interest to general contractor Balfour Beatty Infrastructure Inc. (BBII) successfully bid on the Baltimore City contract for construction of the plant upgrades after the design engineering firm, Rummel, Klepper & Kahl LLP (RK&K), had designed the upgrades based on a prior agreement with the city, in what is known as a design-bid-build construction project.

According to BBII's complaint, it learned during the course of construction that joints connecting pipes and wastewater tubs were leaking. BBII determined that RK&K's design, which called for the joints to expand and contract to handle fluctuating water pressures, caused the leaks. BBII also alleged that RK&K's design for the plant pipe system was defective and that RK&K had not set a reasonable timeline on certain aspects of the project, which delayed the completion of BBII's work.

To recover its losses for the delays and costs of fixing the leaks, BBII filed a complaint, in which it alleged three tort claims against RK&K: (1) professional negligence; (2) violation of Restatement (Second) of Torts § 552 "Information Negligently Supplied for the Guidance of Others"; and (3) negligent misrepresentation. As there was no contract between BBII and RK&K, there was no basis upon which to bring a claim for breach of contract.

BBII founded its claim for professional negligence on the theory that RK&K could reasonably foresee that BBII would rely on its designs and, therefore, that there was an "intimate nexus" in the form of a "contractual privity equivalent" between the parties. BBII further alleged that RK&K breached a duty to BBII by failing to design the project within the standard of care of the engineering profession.

Relying on Restatement (Second) of Torts § 552, BBII alleged that it suffered damages "'[a]s a direct and proximate result of [RK&K's] failure to exercise reasonable care in preparing, supplying and communicating the design, including plans and specifications, for the project.'" As to the claim for negligent misrepresentation, BBII again alleged that the nature of the project was such that there was an intimate nexus between the parties and that BBII suffered damages due to RK&K negligently misrepresenting the completion date of the work.

The Circuit Court of Maryland for Baltimore City granted RK&K's motion to dismiss the complaint and BBII appealed. In affirming the Circuit Court's ruling, the Court of Special Appeals rejected BBII's arguments claiming several exceptions to the economic loss rule. That rule generally holds that "a party cannot recover against another in tort where the resulting harm is purely economic loss and the parties have no contract between them."

First, the court reasoned that BBII's case did not fall within a narrow exception to the economic loss rule in construction cases where, in the absence of contractual privity, a duty is imposed on an architect, engineer or contractor due to a risk of personal injury or property damage arising from the party's conduct. The court held the exception inapplicable because BBII's complaint failed to contain factual allegations to support imposition of the exception.

Second, and more importantly, the court rejected BBII's argument that an "intimate nexus" existed in the form of a "privity equivalent" between the parties. BBII founded its argument on the theory that as a bidder on the city's contract RK&K should have known that BBII would rely on the RK&K designs, and therefore owed a duty to BBII to act with reasonable care in those designs.

The court noted that there is precedent in Maryland for the imposition of tort liability conditioned on an "intimate nexus" between the parties "when the failure to exercise due care creates a risk of economic loss only, and not the risk of personal injury." In those cases, Maryland courts found that a privity equivalent existed, for example, between bankers and their clients, between accountants and third-party investors and between title companies and purchasers of real estate.

As the court explained, however, Maryland courts have never applied the intimate nexus analysis in the construction industry context and the court declined to extend the holding of those cases to a claim against a design professional by a contractor under a public design-bid-build contract. Under the Court of Appeals's interpretation of the "Spearin doctrine" (named for the opinion of the Supreme Court of the United States in United States v. Spearin, 248 U.S. 132 (1918)), the court reasoned that a contractor in BBII's position has grounds to recover from the city government for providing it with defective specifications, even if its contract with the government included a "no-damage-for-delay clause." See Dewey Jordan Inc. v. Maryland-National Capital Park & Planning Commission, 258 Md. 490, 498 (1970).

Furthermore, the court explained that "expanding Maryland law to permit exposure to tort liability for economic loss [under these circumstances] would create a chilling effect on the design professional's neutrality and ability to communicate effectively" with contractors, which would undermine public safety interests. Accordingly, the court held that BBII could not prevail on its claim of professional negligence against RK&K.

Finally, the court rejected BBII's arguments that it should prevail against RK&K under Restatement (Second) of Torts § 552, for "Information Negligently Supplied for the Guidance of Others"; or under its separate negligent misrepresentation count. The court rejected the Restatement § 552 claim specifically

because it found that such a claim may be applicable only where a sophisticated party was providing guidance to a lay person, not where a claim involved two sophisticated parties. The court's rejection of the negligent misrepresentation claim was premised on its finding that it would require a similar intimate nexus to impose a duty of care as the professional negligence claim.

Although the Court of Special Appeals's opinion is certainly favorable for design professionals, the court did not go as far with its holding as RK&K suggested. Specifically, in construing the "intimate nexus" argument set forth by BBII, the court noted that it declined to "reach whether or not intimate nexus concepts of extracontractual duty may be applied in a private-sector construction case." In other words, the court left open the possibility that the same exact claim might succeed if the contract was for a private project as opposed to a public one.

The opinion in Balfour Beatty is also significant because the issues giving rise to the case underscore some of the problems inherent in the design-bid-build process. Namely, a peculiar relationship arises where the designer and contractor are not accountable under the same contract. Disputes in this area are known to develop when contractors seek change orders claiming problems with design specifications. These problems arise because members of the design team, who are often part of the government's project oversight team during construction (as RK&K was in this case), have an interest in preserving the integrity of the design, but have no contractual obligation to the contractor. In these situations, the designers may argue that the contractor is seeking the change orders only to increase its profits. This puts the contractor in a potentially precarious position because while it was aware of the design when it bid on the contract, the contractor may later have difficulty proving the need for change orders due to push back from a designer with whom there is no privity.

These problems may explain why the design-bid-build contract method has been waning in popularity as compared to the more modern design-build contract. With the later arrangement, the owner executes one contract with a general contractor who handles the design in-house or subcontracts the design to a design firm. Under the design-build method, claim dilemmas, such as those in Balfour Beatty, are not likely to arise because the general contractor is either responsible for the design directly or would have a breach of contract claim against the design firm.

It will be interesting to see whether the City of Baltimore continues to utilize the design-bid-build process for similar projects in the future. To the extent that it does, contractors should be conversant with the Balfour Beatty opinion before bidding on such contracts.

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