

CONSTRUCTION LAW NEWSLETTER

VOLUME II, ISSUE VI FEBRUARY 2017

TRENDS IN CONSTRUCTION LAW

As part of Governor Cuomo's 2011 tax and job creation bill, design-build state projects were authorized for some state agencies.

As many contractors already know, design-build projects link project design firms and contractors under one contract, with a single point of responsibility. This would be opposed to the traditional "design-bid-build" approach to construction.

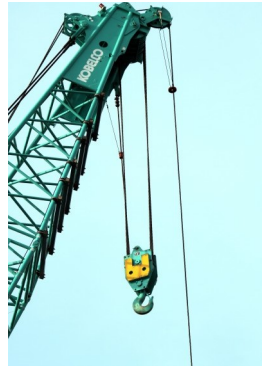
Many proponents of design-build believe it is more cost efficient than traditional construction methods and point to the construction of the new

Tappan Zee Bridge as an example of a design-build project working well. Some estimates put potential savings on that project at over \$1 billion.

Currently, the NYS DOT, DEC, Thruway Authority, Bridge Authority and Office of Parks, Recreation and Historic Preservation are authorized to use design-build in awarding contracts. No other state agencies are permitted to do so.

Proposals to expand design-build use to New York City agencies did not gain approval in the last legislative session, although its proponents will undoubtedly continue to seek its expansion.

When considering whether to proceed with a design-



build project, careful consideration should be made to clearly distinguish the scope of responsibility of each party. Many design firms seek to shift risk on to the contractors for defects in design and construction.

CASE LAW UPDATE

On February 10, 2017, the Fourth Department Appellate Division decided the case of *Pike Co., Inc. v. Jerson Constr. Group, LLC*.

At issue in the matter was whether the Supreme Court properly dismissed a fraud cause of action alleged by the subcontractor against the general contractor.

The GC relied on language in the subcontract which stated that the sub accepted responsibility for inspection

of conditions that could affect its work at the project site, and that it was not relying on any opinions or representations made by the GC.

The sub alleged that the GC committed fraud because it had been informed by another sub that its substrate work was deficient and that the GC subsequently made representations to the sub that the work was accurate, flat and level.

The Supreme Court dismissed the fraud cause of action based on the disclaimer language in the subcontract, but the Appellate Division reversed and reinstated the fraud cause of action.

The Court held that the representation made by the GC was after the subcontract was signed and thus, the disclaimer language did not apply to it.

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