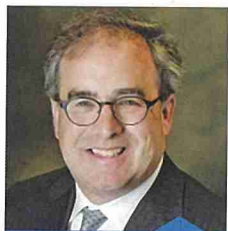




NO CONTRACT, NO PROBLEM

IN THE ABSENCE OF A CONTRACT, A CONTRACTOR MAY STILL BE ABLE TO RECOVER ITS INCREASED COSTS AND DELAY DAMAGES FROM PROJECT DESIGNERS AND ARCHITECTS

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Often claims for additional money are predicated on the existence of and compliance with a contract pursuant to which a recovery is sought. If, however, a con-

tractor suffers additional costs and delays due to design errors caused by an entity with whom the contractor does not have a contract, then there are some instances in which contractors can seek recovery from designers and architects under a negligence theory. Indeed, a recent opinion from a federal court in Florida permitted contractors to circumvent the absence of a contract and directly pursue negligence claims against the project designers and architects to recover increased costs and delays allegedly incurred by design errors.

In *Suffolk Constr. Co. v. Rodriguez & Quiroga Architects Chartered*, 2018 WL 1335185 (S.D. Fla. Mar. 15, 2018), Suffolk Construction Co., Inc. ("Suffolk") was engaged to develop a science museum in Miami, Florida. Suffolk's contract was with the owner only. The owner terminated Suffolk for convenience and contracted directly with Baker Concrete Construction, Inc. ("Baker") to complete concrete related work on the Project. Both contractors brought a negligence action against the project's designers and architects alleging that the design documents were flawed, which caused increased costs and delays to the project. Neither Suffolk nor Baker had any contractual relationship with the architects and designers.

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In Florida, a contractor may pursue a designer for negligence so long as the designer created a “foreseeable zone of risk.” In other words, a designer has to exercise some control over the contractor or the project by either maintaining a supervisory role or preparing designs that it knows will be relied on by the contractor. Here, the

Southern District of Florida found all the project's designers and architects exerted some form of control over Suffolk and Baker. The Court found that the prime designers exerted control through their supervisory role on the project, which included determining if Suffolk and Baker complied with the design specifications. The Court also found that the lower-tier designers – who only participated in preparing the designs but did not have a supervisory role – also exercised control over Suffolk and Baker. The Court reasoned that the lower-tier designers created a foreseeable zone of risk because they knew Suffolk and Baker would rely on the information contained in the design and structural documents that they prepared. Accordingly, Suffolk and Baker were permitted to prosecute claims against all of the project's designers and architects for increased costs and delay damages despite not having a contract with any of them. In ruling, the Court also importantly rejected arguments raised by the project's designers and architects regarding Suffolk's and Baker's alleged breach of the notice and claim procedures contained in their respective contracts with the owner.

While every contractor should know and follow the provisions in its contract required to preserve claims, the *Suffolk Constr.* opinion provides a potential avenue of recovery when increased costs and delay damages may otherwise be barred under a contract. Indeed, by pursuing negligence claims against the project's designers and architects, Suffolk and Baker were able to avoid common contractual defenses such as the existence of a no damages for delay or a failure to comply with the contractual notice and claim procedures. Therefore, if you find yourself in the unfortunate position of having failed to preserve your claims under the contract, you still may be able to recover those damages from the project's designers. ▴

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