Act #2023-316
Roadbuilder Civil Liability

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Overview

• Background
• 2012 Code – Loopholes
• 2023 Code – Changes
• Passage
• Benefits
• Impacts
Background
Background

• Industry tried to change law last few years
• Loopholes in 2012 code
• Resulted in many lawsuits
• Goal was to codify Completed and Accepted Work Doctrine
• State Supreme Court recognized in H. O. Weaver & Sons vs Balch in 2013
Background

• Accepted Work Doctrine
  • Removes civil liability from contractor
  • After awarding authority accepts for maintenance
  • Provided work in substantial compliance with specifications

• Liability pre-August 2023
  • Up to 7 years from substantial completion
  • Civil action must commence within 2 years of cause
Background

• The Problem? To accept, awarding authority has...
  • Conducted all item inspections
  • Performed final inspection
  • Agreed Punch List is complete
  • Agreed all work is in accordance with plans and specifications
  • Once accepted, contractor has to demobilize and has no responsibility
  • All maintenance is awarding authority’s responsibility
Background

• Despite this,
  • Private businesses have been liable for years
  • For crashes due to project designs and lack of maintenance
  • Including after acceptance
  • Because of state’s sovereign immunity and local gov. caps
Background

- To best summarize, this has hurt roadbuilding industry
  - Financially
  - Availability of insurance companies
  - Locations to bid
- In turn, has hurt awarding authorities with higher bids
2012 Code - Loopholes
Existing Law – the Loopholes

• Potentially Dangerous Condition Notification
  • By the contractor
  • To ALDOT Chief Engineer
  • If plans and specs \textit{COULD RESULT}...

• Notification
  • Supposed to take responsibility off the contractor
  • That awarding authority did not scope or design properly
  • Changes needed
Existing Law – the Loopholes

• Contractor’s Responsibility
  • Key phrase: “...should have appeared to a reasonably prudent contractor...”

• Courts/juries have put more credence in contractor’s experience
  • Than AA and PE who scoped and designed the plans

• Cases where juries told contractor he should have done the work anyway despite what the contract required or what the engineer directed

• Dozens and dozens of lawsuits/settlements - $100 million
2023 Code Changes
2023 Code Changes

Definitions

• Awarding Authority includes:
  • ALDOT
  • County
  • Municipality
  • Other government entities (boards, commissions, departments, higher education institutions)

• Contracts for road construction, repair, or maintenance
2023 Code Changes

Definitions

• Project:
  • Construction, repair, or maintenance by a contractor
  • Section of highway, road, bridge, or street
  • With all appurtenances
  • Specified in a contract with the Awarding Authority
2023 Code Changes

Definitions

• Specifications include:
  • Specifications, plans, drawings, bid documents, but now also
  • Traffic control and communication requirements
  • Communication was major issue for ACCA
  • Wanted proper notice using Subarticle 104.02(b)
  • “As directed by the engineer” – need to document
2023 Code Changes

Definitions

• Contractor:
  • Technical change using ALDOT spec language

• Latent Defect:
  • Defect or omission resulting from the work conducted or materials provided by the contractor under the contract that was not discoverable, visible or apparent.

• Disclaimer about ALDOT history
2023 Code Changes

Definitions

• Conclusion of the Project, earlier of:
  1. Awarding Authority notifies in writing assuming maintenance
  2. 45 days after contractor provides notice of presumptive conclusion by certified mail return receipt with no response
  3. 90 days after advertising per Title 39 is completed and Awarding Authority has made final payment

• Note: will be #1 or 2.
2023 Code Changes

When a contractor may be held liable:

• Dangerous Condition (DC) resulting in physical injury, property damage, or death

• When plaintiff can show by preponderance of the evidence
  • Contractor failed to follow plans and specs resulting in DC
  • Latent Defect creates DC

• Basically, there are 2 exceptions
2023 Code Changes

When a contractor may be held liable:

• HUGE change!

• Many contractors sued for crashes during construction
  • Even if work conforms to plans, specs, and traffic control

• Plus,
  • No more dangerous conditions letters
  • No more “...should have known...”
2023 Code Changes

Impaired Driving change

• Distracted

• Impaired

• Driving over 25 mph the posted speed limit

• Applies to both *Contractor and Awarding Authority*
2023 Code Changes

Impaired Driving change

• Presumed no liability for Contractor or Awarding Authority
• When evidence supporting violation
• Presumption that prohibited conduct was the cause
• Rebuttable if plaintiff can show that prohibited conduct was not the proximate cause
2023 Code Changes

Pleading Requirements

• For claims against Awarding Authority or its contractors

• Heightened requirement to plead with specificity

• From Medical Malpractice law
2023 Code Changes

Pleading Requirements

• Complaint shall include:
  • Detailed specification and factual description of each act and omission alleged
  • When feasible and ascertainable, the date, time, and place of the act(s)
  • Without it, complaint is subject to dismissal for failure to state a claim upon which relief may be granted
2023 Code Changes

Impaired Driving and Pleading Requirements

• COLOSSAL CHANGES!

• Now all protected – ALDOT, ACCA, ALM, and contractors

Other changes:

• Some minor wording substitutes

• Changes only apply to causes of action after August 1, 2023
Passage
Benefits
Benefits

• Should protect industry and local governments

• Should bring back insurance carriers

• Less risk and increased competition for insurance

• Should mean cheaper premiums and better bids

• WIN-WIN for AA and contractors
Impacts
Impacts

• Act #2013-401 Civil Liability for Construction Monitoring Services
  • i.e. Construction Engineering & Inspection (CE&I)
• Passed in May 2013
• Codified existing common law relating to public or private infrastructure
• Professional firms and employees not civilly liable
• Property damage, personal injury, or death
• Resulting from construction monitoring services
Impacts

• Lawsuits
  • Not completely eliminated
  • More difficult for plaintiff due to impaired driving & pleading
  • Easier for contractor to estimate risk

• Specific examples
  • Drunk/impaired driver speeding and goes through curve
  • Shoulder drop-off 4 years after acceptance
Shoulder Examples
Impacts

• Potential concerns
  • Accidents on the project
  • Traffic control devices / MOT does not conform to TCP
  • Cross-slope or “e” not within tolerance
  • Guardrail at wrong height or missing bolts
  • Guardrail with field modifications that do not conform to standard drawings
  • Latent defect
Guardrail Examples
Impacts

• Change Orders and Revised Plans
  • Back of the napkin at lunch / legal pad on hood of the truck
  • Those days are OVER!!!
  • Precedent begin in Construction Bureau between 2017-2020
  • Not always consistent – judgement decision based on work
Impacts

• Change Orders and Revised Plans
  • Examples:
    • No – tack coat for paving; temporary E&SC items
    • Yes:
      • Revised Sequence of Construction
      • TCP Changes
      • Work contrary to the plans and standard drawings
      • Structural design changes
Impacts
Change Orders and Revised Plans

TCP NOTES

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Impacts

Change Orders and Revised Plans

08/17/2020:
REVISED MEDIAN, DRIVEWAYS
MODIFIED LEFT TURN LANE AND
ADDED TRAFFIC CONTROL MARKINGS
REMOVED RETAINING WALL #4
ADDED GUARDRAIL AND TRAFFIC E-A
REPLACED CUL-DE-SAC WITH
DRIVEWAY (OLD MOBILE ROAD)
ADDED C&G TY-"C", LT, STA: 182.44 TO 183.24
Impacts

• Change Orders and Revised Plans – why are they needed?
  1. Contractor needs to know what is required
  2. Is TCP affected
  3. Inspector needs to know the changed work, what to inspect, and what to measure
  4. Awarding authority needs records for final quantities check, as-built plans, and asset management
  5. Liability – without them, trial lawyers may have loophole
Example of Inspector’s Needs
Impacts

• Change Orders and Revised Plans – why are they needed?
  • Example – culvert repair / extension in Black Belt county
Impacts

• Change Orders and Revised Plans – why are they needed?
  • Moving forward, contractors need to require revised plan sheets if there is any question
  • Start with a napkin / legal pad
  • Designers will have to adjust and provide flagged changes
  • Without, contractors will decline or else price excessively
Impacts

• In summary, while this was not planned:
  • Standard practice for revised plan sheets
  • Better documentation of as-built plans
  • Benefits contractors and awarding authorities
Questions
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