



RETENTION OF DESIGN-BUILD PLANS: THE ANSWER IS IN THE AGREEMENT

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As part of a design-build project in New Jersey, the General Contractor is typically responsible for preparing the design-build plans or having a licensed design professional subcontractor prepare such plans, and submit them to the public entity. Typically, when the project is completed the design-build plans are retained by the public entity. However, it is unclear what happens to the plans if the public entity must terminate the project prior to completion or if a court of competent jurisdiction invalidates the project. The New Jersey Appellate Division has recently touched on these issues.

The Appellate Division issued an opinion discussing these topics and questions in an unpublished opinion, Jose R. Jimenez, Jr. v. Union County Improvement Authority, County of Union and Terminal Construction Corporation, No. A-0764-21, 2022 WL 457387 (N. J. Sup. Ct. App. Div. Feb. 15, 2022). The facts of the Jimenez matter, like the recently decided similar case of Dobco, Inc. v. Bergen Cty. Improvement Auth., No. A-2201-20, 2021 WL 2832890 (N.J. Super. Ct. App. Div. July 8, 2021), involved the Local Public Contracts Law (“LPCL”) (N.J.S.A. 40A:11-1, et seq.), a county improvement authority, and design-build projects.

Specifically, the Union County Improvement Authority (the “UCIA”) and the County of Union (“County”) used a procurement process where Terminal Construction Corporation (“Terminal”) was selected as the “redeveloper” by the UCIA for the construction of the new County government center in Elizabeth, New Jersey (the “Project”). The Project was separated into two phases, Phase 1 and Phase 2. Terminal was selected by the UCIA under the Local Redevelopment Housing Law, where UCIA negotiated directly with Terminal, a private construction contractor, to complete the Project, a publicly funded project. The UCIA did not utilize the LPCL to select Terminal.

In Jimenez, the Appellate Division determined that in using a “design/build” construction and funding mechanism, the UCIA sought to circumvent the LPCL by calling a general contractor a “redeveloper.” However, the court found this mechanism to be in violation of the LPCL because, consistent with its ruling in Dobco, the LPCL applies to county improvement authorities and public projects of this type, regardless of the designation of the contractor as being a “redeveloper.”

In Jimenez, the Appellate Division found that the trial court misapplied a question of law, the interpretation of the Development Agreement between UCIA and Terminal (the “Agreement”), in rendering its decision. Specifically, the trial court agreed with the County and UCIA that the Project was one continuous proj-

ect, only separated into two phases due to funding. However, the Appellate Division rejected this finding. The Appellate Division found that the Agreement explicitly stated that the Project consisted of two phases. Terminal had only performed work under Phase 1 and the UCIA had only secured financing for the tasks performed under Phase 1. Further, the Appellate Division determined the language in the Agreement was unambiguous that the Project consisted of two distinct phases with seemingly discrete, non-overlapping tasks. As such, the UCIA was required to publicly bid the Project and the UCIA was required to bid Phase 2 of the Project.

Although the Jimenez court found Phase 2 severable from Phase 1 and subject to the LPCL, the UCIA was permitted to retain the design-build plans. The Agreement contained a termination provision that permitted either party to terminate the Agreement if the project was delayed for more than 120 days, which occurred in this instance due to the litigation. Significantly for purposes of a design-build project, if the Agreement was terminated for such reason, the Agreement stated the UCIA would own “all reports, studies, data, plans, surveys, title reports, maps and specifications prepared by [Terminal] and third parties...and all documents, reports, permits and approvals obtained by [Terminal].” As such, the work that was completed by the architect and engineer performing geotechnical civil engineering services would be owned by the UCIA prior to the commencement of Phase 2 due to the termination provision of the Agreement. In short, the UCIA would own the design-build plans developed by Terminal, and its subcontractors, and can use the plans for Phase 2.

A crucial takeaway for contractors from Jimenez is an understanding of the provisions of the Agreement between UCIA and Terminal regarding the design-build plans for the Project. Although UCIA and the County failed to follow the LPCL when securing the services of Terminal, the Court permitted the UCIA to retain the design-build plans for Phase 2, even though Terminal may not be awarded the contract under the LPCL for Phase 2.

Moving forward, it is critical for contractors to review contract language regarding the transfer of design-build plans from the contractor to the public entity prior to the final completion of the project. This includes transfer of design-build plans due to termination, with or without cause, a decision by the public entity to no longer pursue the project, or for any other reason which may permit the termination of the project prior to final completion. The language of a contract must be clear regarding the retention of design-build plans by a contractor prior to and up until completion of the project.