

UTILITY & TRANSPORTATION CONTRACTORS ASSOCIATION OF NJ

MEMBER ALERT

STATUTE OF REPOSE

October 2019

The Statute of Repose, N.J.S.A. 2A:14-1.1, *et seq*., generally provides that no action to recover damages for any deficiency in the design, planning, construction or related activities on a project to improve real property shall be brought against any person more than 10 years after the performance or furnishing of such services and construction.

There are several exceptions to this limitation on actions, including the following two that are the subject of this Member Alert. The statute provides that "this section shall not bar an action by a governmental unit" under the following conditions:

- On a written warranty, guaranty or other contract that expressly provides for a longer effective period; and
- Based on willful misconduct, gross negligence or fraudulent concealment in connection with performing or furnishing the design, planning, supervision or construction of an improvement to real property.

A case was recently filed in the Superior Court of New Jersey that highlights the importance of these exceptions to the contracting community. The City of Elizabeth filed a complaint against several defendants, including the general contractor, subcontractor and engineer, in connection with a project involving the development of approximately 166 acres of property that would include a manufacturer's value outlet mall and related retail and entertainment venues (the "Project"). The Project required certain transportation infrastructure improvements, including the "Kapkowski Road Section 2C Conceptual Design," prepared on behalf of the City by its engineering consultant.

The plans for the Section 2C Improvements included retaining walls that would be comprised of "Mechanically Stabilized Earth Walls" ("MSE"). The MSE walls were to be designed by or on behalf of the general contractor. However, the general contractor entered into

a subcontract which included in its scope the design of the MSE Walls. The plans, including the MSE Walls, were required to be built in accordance with the 1996 NJDOT Standard Specifications for Road and Bridge Construction, but for reasons not explained in the Complaint, the design documents incorporated the 1989 Standards. The 1989 Standards incorporate by reference the AASHTO Standards.

Importantly, the AASHTO Standards required MSE retaining walls to be built for a 100-year service life.

The design plans and calculations performed by the MSE subcontractor were submitted to the City's engineer and signed off on February 3, 1998. The design included calculations determining the ability of the wall components to resist corrosion for a minimum of 100 years, in accordance with the referenced AASHTO Standards. The cover page submitted by the MSE subcontractor states "Reinforced Earth Design Calculations, 100 Year Service Life Calculations." "Certified With Respect to Internal Stability of Reinforced Earth Structures Only."

The Complaint asserts that the MSE subcontractor also supplied various elements to be used in the construction of the MSE Walls, including, among others, precast concrete facing panels, reinforcement strips, bolt sets, connector rods, etc.

The MSE Walls were constructed and final acceptance of the Project took place in February 2001. In February 2017, sections of the MSE Walls collapsed. An engineering firm was retained by the City to determine the reason for the failure. The MSE subcontractor agreed to deconstruct and reconstruct the retaining walls, but reserved its right to seek compensation in the event that the causes of the collapse were determined not to be its fault.

The City's inspecting engineer asserts that the subcontractor failed to provide corrosion protection of the coil loop and connection tie rods; failed to provide a waterproof membrane above the wall; failed to anticipate corrosion rates; etc.

After the Complaint was filed, some of the defendants filed a motion to dismiss the Complaint, which is an application that may be brought at a very early stage in the litigation, that is granted only if the court is persuaded that there is no basis for the plaintiffs to succeed on their allegations, and that discovery – through document exchange, interrogatories and depositions – are not needed for the court to make that determination as a matter of law. It is a motion that is rarely granted, since the court typically prefers to allow both sides to engage in discovery, develop the facts, and present their positions more fully to the court before a decision can be reached on the merits of the case.

The defendants sought to convince the court that since the complaint was filed more than 10 years after the design services for the MSE walls were prepared and furnished, that the Statute of Repose bars many of the claims. The City countered that the statute does not apply to a contract with a public entity that expressly provides for a longer effective period. The City's position is that the contract explicitly provided that the retaining walls would be designed for 100 years because the AASHTO Standards required that condition, as well as because the design calculation cover page included a statement about the 100-year service life based on the calculations made.

On the basis of the allegations made, the Court ruled that it would not dismiss the Complaint. The court observed that the Statute of Repose "was not adopted to limit the liability of someone who expressly warranted the product for a longer time" (than the statute's 10-year cut-off).

The court noted that the City would be required to prove that the subcontractor warranted the 100-year service life for its retaining wall design. Discovery will be needed to flesh out whether this warranty was a part of the contract, or whether the reference to the AASHTO Standards, as well as the language used by the subcontractor on its cover sheet, could be interpreted in a different manner in accordance with general industry understanding.

The court will also require proofs concerning the City's allegations that the subcontractor was "grossly negligent" in its design that was supposed to last 100 years, but only lasted 16 years. As the court observed, the difference between negligence and gross negligence is a matter of degree, for the jury to decide at trial.

The case will proceed through discovery, with a possible summary judgment motion made in the future and/or eventual trial on the facts, in the event that a settlement is not reached among the parties.

TAKEAWAY

Contractors should be very careful in reviewing standards, such as those prepared by AASHTO, which may have design parameters that are greater than what can practically be constructed. Language may need to be added to the contract that clarifies what an industry standard actually represents. Also, contractors should be careful not to provide warranties (by itself or through a subcontractor) that they do not expect can be met. The Statute of Repose provides significant reduction in liability for contractors and design professionals. Care should be taken not to erode that protection.

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