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Healthcare Facility Construction Project: A Post-mortem

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A recent Illinois appellate case arising from a healthcare facility project, *Doornbos Heating and Air Conditioning, Inc.*,¹ highlights challenges that are common to most construction projects, and healthcare construction in particular. Although the decision is interesting for its legal ruling on a relatively obscure provision of the Illinois Mechanics Lien Act,² it may have more practical utility as a case study of missed opportunities during many phases of this project:

1. Selection of the project team
2. Selection of the project delivery system
3. Contract drafting
4. Project administration
5. Health Department regulations and quality control
6. Litigation and dispute resolution

Part 1: Selection of the Project Team

The project consisted of the design and construction of a three-story addition, including a surgery center, to expand an existing one-story medical center. The project was subject to the requirements of the Illinois Department of Public Health ("IDPH"). The property was owned by a trust held by a physician and his wife ("Owners"). The judicial decision makes no mention of an owner's representative or similar consultant being engaged by the Owners. The Owners hired an architect ("Architect") who admitted he was not experienced in IDPH requirements for healthcare facility construction. The Architect suggested that the Owners hire a mechanical engineer, but they declined at the outset of the project due to the added expense. A mechanical engineer was later hired to correct problems that plagued the project. The Owners hired a general contractor ("GC"), but hired trade contractors directly as well. The GC's role and authority is not spelled out in the decision, but he is also described as a project manager, and it is noted that he directed the work of the trade contractors, approved invoices and approved the performance of extra work. The HVAC contractor ("HVAC Contractor") admitted that he was not familiar with IDPH designs and did not hire a mechanical engineer to perform HVAC design services. An electrical design-build contractor was also hired. Payment disputes related to the HVAC work led to the lawsuit. Separate lawsuits were filed against the Architect and GC.

The makeup of the project team could have been used to predict that there likely would be significant problems on the project. The Owners are not described as having any training, expertise or experience in construction. The decision portrays the physician as the more involved of the two Owners, but notes that he "acknowledged that he did not maintain a daily presence at the jobsite and did not know of the communications between" the GC, Architect and HVAC Contractor. One might expect that a business owner with additional professional responsibilities in his own practice would find it difficult to dedicate sufficient time to manage a construction project or to have the training and experience to do so. It is rare to find an owner that can successfully administer a construction project without experienced in-house design and construction professionals or the assistance of competent professionals tasked with overseeing the entire project from design and

financing through construction and approval from appropriate licensing bodies. The Owners in this case would likely need to rely on the services of professionals or consultants to make the project work.

Historically, architects have filled the role of the professional tasked with shepherding a project from concept to completion. However, in current practice, design responsibility is often fragmented to different entities, an architect's duties and authority to oversee construction is diluted, owners try to retain control or economize by minimizing the architect's role, and technical specialty-construction areas such as HVAC can often be more efficiently designed and performed by specialty contractors. The Architect in this case appears not to have been the best professional to run the project alone. He indicated that a mechanical engineer should be engaged and also, after receipt of the HVAC contractor's unstamped shop drawings, that he had expected to receive HVAC drawings stamped by a mechanical engineer. The Architect was not tasked with being on the site on a day-to-day basis and apparently was not immediately available to answer the HVAC Contractor's questions. Coupled with his admission that he lacked experience in this type of project, the Architect could not be expected to lead the entire project.

The GC, or project manager, was not positioned to control the project either. Details about his role and abilities are sketchy in the decision. It is apparent that he did not exercise control over the design process. When the HVAC Contractor presented him with questions or criticism of the design, the response was to proceed with construction. Similarly, he ordered construction to continue without approved drawings. Also, even though the GC certified payment of invoices, the Owners did not consider that indicative of a review of the construction for compliance with codes. The GC appears to have been more of a construction manager without any risk for the trades and no input on the design.

The project team seemed to be challenged with an uphill struggle. No team member appears to have had the experience, authority and responsibility to coordinate the entire project. An owner that does not regularly construct new projects normally would not have an in-house staff of professionals to manage its construction project. Unfortunately, owners may often be lured by predictions of cost-savings through minimizing up-front fees by foregoing necessary professional services. In this project, the Architect and HVAC Contractor each suggested engaging a mechanical engineer familiar with IDPH requirements, but the Owners chose not to do so. Another useful option might have been the services of an owner's representative, designer or design/build contractor, or construction attorney experienced in healthcare projects and IDPH requirements. The idiosyncrasies of IDPH inspections have frustrated many seasoned design and construction professionals and caused projects to founder. However, the right team of contractors, designers, attorneys and consultants can pilot a project through to a successful completion.

Part 2: Selection of a Project Delivery System

In Part 2, we will analyze the shortfalls of the project delivery system used for this project and offer suggestions for successful alternatives.

Jeffrey L. Hamera is a litigator who focuses his practice in construction. Mr. Hamera's clients include general contractors, design/builders, construction managers, subcontractors, suppliers, owners, architects, engineers and sureties. He represents clients on matters involving contract drafting and negotiation for design agreements, construction contracts, EPC contracts and design/build agreements. He also represents clients in arbitration and litigation of breach-of-contract claims, delay, disruption, loss of productivity, excessive change orders, out-of-scope work, mechanic's liens, errors and omissions, construction defects, and property damage and personal injury claims due to design errors and omissions or faulty

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Notes

1. *Doornbos Heating & Air Conditioning, Inc. v. Schlenker*, 2010 Ill. App. LEXIS 704 (Ill. App. Ct. 1st Dist. July 12, 2010).
2. The decision held that the limitation period in section 6 of the Illinois Mechanics Lien Act (770 ILCS 60/6), which requires that the work supporting a mechanic's lien must be completed within three years, does not begin to run when the contract work is first started but when the unpaid portion of the contract work is performed.