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ENGINEERS JOINT CONTRACT DOCUMENTS COMMITTEE

RECENT COURT DECISIONS OF RELEVANCE TO CONTRACT DOCUMENTS

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1. **Issue:** Construction Manager at Risk's right to rely on drawings and specifications furnished by Owner, under implied warranty of design. *Coghlin Electrical Contractors, Inc. v. Gilbane Building Company.* Supreme Judicial Court of Massachusetts (2015).

   Summary: Gilbane was the construction manager at risk (CMAR) on a public hospital project. Coghlin Electrical was a subcontractor to Gilbane. According to Coghlin, errors and omissions in the design furnished by the public owner (and prepared by an A/E firm) were a primary cause for labor increases of 49% for the electrical work. Gilbane ultimately pursued recovery from the owner for the losses incurred by the subcontractor.

   In traditional design-bid-build construction, the owner presents the contractor with a completed set of drawings and specifications, and impliedly warrants that design against defects. As stated nearly a century ago in *United States v. Spearin*, "if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for defects" in the design. In the CMAR project delivery system, however, the CMAR typically has responsibilities with respect to the design, while the A/E is still preparing it. During the design phase, a CMAR typically provides advice, consultation, and commentary regarding the design, and may influence the final design. In this case, the public owner argued that the CMAR's involvement during the design eliminated the CMAR's ability to benefit from an implied warranty of the design. The trial court agreed with the owner's position, finding that the CMAR method entails "material changes in the roles and responsibilities" of the parties, and that as a result the owner did not impliedly warrant the design to the CMAR.

   Decision: The Massachusetts Supreme Judicial Court reversed the lower court decision, holding that the owner continues to impliedly warrant the design under CMAR. The court reasoned that despite CMAR consultation during the design, the owner (and the owner's A/E) ultimately control the design. Mere consultation should not make the CMAR a "guarantor" against all design defects.

   Despite this general support for the implied warranty of design in the CMAR setting, the court did hold that the scope of the implied warranty is somewhat reduced in CMAR. In limiting the scope of the implied warranty, the court noted that even under the law applicable to implied warranty of design in a traditional setting, the warranty is not absolute: the contractor's reliance on the design must be given in good faith, essentially meaning that a contractor may not ignore obvious omissions or errors in the design. In a CMAR situation, the court held that there must be good faith reliance on the design **and** the CM must act "reasonably" in light of its own "design responsibilities." According to the decision, the greater the CMAR's design responsibilities in the contract, the greater the burden on the CMAR to show that its reliance was in good faith and reasonable.

Comment: A CM is not a design professional and should not have genuine "design responsibilities." Most of the design-related duties under the Gilbane CMAR contract are similar to those required of the contractor under standard general conditions such as EJCDC® C-700—for example, careful review of the design, comparison of the design to field conditions, and reporting of obvious errors or inconsistencies. The difference is that the CM begins its design-related tasks before the design is completed, at a point when the CM input can make a greater impact (and in some cases before a final construction price or GMP is established). In addition, the CM looks for the potential impact of the design on construction costs, and constructability. But it is important to recognize that a CM is not qualified to apply engineering expertise to a review of the design. A CM's review of the design is not a peer review. A CM contract should be explicit in emphasizing the two very different roles played by the A/E and the CM, and in fact the Gilbane contract had some good clauses in that regard (for example, a statement that the CMAR shall make recommendations about the design relating to "construction feasibility, schedules, cost or quality…without, however, assuming the [A/E's] responsibility for design.")

The "limits" that the Massachusetts decision places on the scope of the implied warranty in CMAR appear to be reasonable and unremarkable. Essentially, if a CM's consultations regarding design result in exposure of a possible defect or similar issue, the issue should be confronted and addressed at that point, for the good of the project. If the CM raises an issue and the A/E and Owner choose to ignore it, the implied warranty should apply.

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2. **Issue:** Construction Manager as Advisor/Agent—liability for site safety. *Hunt Construction Group, Inc., v. Garrett.* Indiana Supreme Court (2012).

   Summary: Construction managers often provide services related to project safety. This case, arising from the construction of Lucas Oil Stadium in Indianapolis, examines whether a substantial set of contractual safety duties exposed the CM to liability to the project workforce for injuries.

   During construction of the stadium, an employee of the concrete contractor was injured after removal of a form. She sued Hunt, the CM, claiming that Hunt was partly responsible for the safety of the workforce at the site.

   Hunt was a CM whose obligations were advisory; it was not a CM at risk, in that Hunt did not itself perform construction or enter into construction contracts with lower tier parties. Its safety duties were fairly extensive, however. According to its contract with the public owner, among other safety duties Hunt was required to develop a project-wide safety program; review safety plans of the various construction contractors; observe the construction in progress and report any safety violations;

and remove unsafe employees or equipment from the site. On the basis of these duties, the Court of Appeals of Indiana held that the injured employee could proceed with a negligence case against Hunt. The appeals court acknowledged that the owner–CM contract contained clauses that emphasized that the various construction contractors were not relieved of their obligations for site safety by the CM's involvement, that the CM did not control the construction contractors or their means and methods of construction, and that the owner-CM contract was solely for the benefit of the owner. Nonetheless, the Court of Appeals concluded that the CM's contractual safety duties were such that it had assumed a duty to workers at the site. Hunt appealed this decision to the state supreme court.

Decision: The Indiana Supreme Court overturned the lower court's decision, ruling that the CM did not owe a duty to the project workforce. The court relied on the "disclaimer" clauses in the owner-CM contract to conclude that the CM's duties were strictly for the benefit of the owner. The court also saw the need to establish a policy that promoted safety by allowing CMs to enhance and promote safety without becoming the "insurer of safety for workers of other contractors."

Comment: The decision places a premium on the carefully crafted contract clauses that sought to clarify that the CM's involvement in safety was limited, and always secondary to the construction contractors' safety duties. The court perceived that making a limited contribution to safety, without exposure to liability, was better for the workforce than if CMs declined to undertake any safety tasks at all. The same reasoning might be beneficial to design professionals that are encouraged to take safety concerns into consideration during design—perhaps contract clauses could shield them from punishment for a good deed, at least in jurisdictions taking the Indiana Supreme Court's position.

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3. **Issue:** Enforceability of limitation and waiver of liability clauses in a teaming agreement, after parties have entered into a subcontract. *URS Corp. v. Transpo Group, Inc.* United States District Court for the Western District of Washington (2015).

   Summary: On a design-build highway project, the design-builder, Flatiron, withheld payment from the lead design firm, URS, asserting that certain signs that were part of the project failed to meet project criteria. URS in turn withheld payment from the sign consultant, Transpo. Eventually URS sued Transpo, contending that deficiencies in Transpo's services had resulted in damages of about $1.5 million.

   During the project formation stage, URS and Transpo had entered into a teaming agreement for the pursuit of the work on the project. This teaming agreement included a clause waiving consequential and indirect damages, indicating that the

clause would survive the termination or expiration of the teaming agreement. Subsequently, Flatiron awarded the design work to URS, and URS entered into a subagreement with Transpo regarding sign-related services. The subagreement did not contain a waiver similar to the one in the teaming agreement, and contained a typical integration clause asserting that the subagreement superseded all prior agreements regarding the same subject matter. As the litigation commenced, the court was called upon to decide whether the limitation on liability in the teaming agreement applied as a defense to URS's claim for damages.

Decision: The court pointed out that whether the damages that URS sought from Transpo were indeed consequential or indirect damages, in whole or in part, was an issue that was not before the court, and would need to be determined in a different proceeding.

The court concluded that the subject matter of the teaming agreement and the subagreement were not the same—the teaming agreement involved pursuit of the work, and the subagreement involved the provision of sign-related services. If the subject matter of two contracts is not the same, the integration clause of the second contract will not supersede the first; rather, the second contract must expressly revoke and supersede the first contract, by name. This had not been done in the subagreement. The court's final conclusion was that the because the teaming agreement does not cover the same subject matter as the subagreement, the teaming agreement's provisions regarding limitations on damages survive and "may be applicable" to the URS-Transpo dispute.

Comment: Like many interim court decisions, this one is somewhat unsatisfying. Even if the court is correct that the teaming agreement provisions survive, do they in fact apply to the dispute? Typically the limitation provisions in a teaming agreement would apply only to transgressions in seeking an award of contract—why was that point not addressed, rather than merely acknowledging that the provisions "may be applicable"?

In a general way, one might assume that both the teaming agreement and the subagreement do indeed apply to the same subject matter (signs on the highway project) and hence the standard integration clause would be sufficient to supersede the teaming agreement. To avoid results like the one here, the safest course would be to expressly name the teaming agreement and declare it revoked and superseded (perhaps reserving any pending claims, such as disputes over costs incurred in pursuit of the award of contract).

4. **Issue:** Interpretation of "substantial completion" with respect to a statute of repose. *Horning v. Penrose Plumbing & Heating, Inc*. Supreme Court of Wyoming (2014).

   Summary: Mr. and Mrs. Horning awoke confused and disoriented one January morning. Their condominium unit was extremely cold. Investigation revealed a rupture in the furnace exhaust pipe. The couple had sustained severe carbon monoxide poisoning.

   The Hornings filed a negligence lawsuit against the HVAC contractor, Penrose, in November 2012, several months after the poisoning event. Among other contentions, the plaintiffs asserted that Penrose had wedged the HVAC system's installation instructions and owner's manual in the exhaust pipe, resulting in its eventual rupture.

   Wyoming has a 10-year statute of repose. A lawsuit concerning a construction project must be filed within 10 years of substantial completion. Penrose submitted evidence showing that it had completed the HVAC work in 2001. The condo unit was completed in early 2002. The developer secured a certificate of occupancy 18 months later, in 2003—the delay reportedly the result of a delay in payment of a water tap fee. Penrose argued that the Horning lawsuit was filed more than ten years after substantial completion in 2001, and thus must be dismissed under the statute of repose. The lower court agreed, and dismissed the case. This appeal to the Wyoming Supreme Court followed.

   Decision: The statute of repose contains the following definition of "substantial completion":

   > **The degree of completion at which the owner can utilize the improvement for the purpose for which it was intended.**

   In the court's view, the owner could not utilize the HVAC or condo unit until the city completed its inspections and issued a certificate of occupancy, in 2003. Thus, pursuant to the "plain language" the court held that the repose period did not begin until 2003 and the Horning lawsuit was timely. The court acknowledged the persuasive appeal of Penrose's argument that the legislature had not intended that the repose period could be extended by delays having nothing to do with the construction, but felt the actual wording of the statute was unambiguous and could not be "rewritten" by the court.

   Comment: Determining the date of substantial completion can be challenging, whether for purposes of a repose statute or on the project level. The facts of this case (18-month delay in paying a fee) are extreme, but often there are routine delays in arranging an inspection or issuing a certificate of substantial completion. Also, there is the question of completion of a component, as opposed to the project

as a whole. For subcontractors that perform their work early in a project, the wait for substantial completion of the whole project may be years, and is almost always out of their control.

At a micro-level, perhaps the HVAC contractor could have argued that there is a difference between "can utilize" and "may utilize." "Can" suggests physical capability (you can drive through a red light) while "may" refers to permission or authorization (you may not drive through a red light). Also unexamined in the court's brief analysis is the import of the wording "the degree of completion…." This brings the focus on the progress of the physical construction. The condo did not achieve a greater degree of completion while the developer dragged its feet over paying the fee.

Many statutes of repose provide a short grace period for claims that arise near the end of the repose period—for example, if the claim is discovered in the last year of the period, the claimant has 18 months from discovery to file the lawsuit. The Wyoming statute did not include such a grace period.

EJCDC's definition of substantial completion is similar to the Wyoming statute, with the notable exception that substantial completion is expressly dependent on the opinion of the Engineer. One point to consider is what EJCDC's intent is with respect to delays in Engineer rendering that opinion, or perhaps even an unjustified failure by Engineer to acknowledge substantial completion.

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5. **Issue:** Official immunity of engineering firm functioning as city engineer. *Kariniemi v. City of Rockford.* Court of Appeals of Minnesota (2015).

   Summary: The City of Rockford, Minnesota, retained a private engineering firm, Bonestroo, to act as city engineer. One task was to design storm sewers, retention ponds, and street grading for a new residential development. Years later, flooding damaged the property of an adjacent landowner, who sued the city on various grounds, including design errors by the city engineer. The city raised the defense that both it and the engineering firm were immune under state statutes granting immunity for certain actions by municipal officials.

   In Minnesota, as in other states, municipal officials have immunity for "discretionary" acts undertaken in their official capacity. Failure to carry out a non-discretionary duty, such as a clerical obligation to file a submitted document, is actionable; whereas there is immunity for errors in performing discretionary acts. Is design of sewers and other improvements a discretionary act for purposes of determining immunity? Another issue under this subject is whether independent contractors retained by a municipality qualify for the immunity.

Decision: The Court of Appeals presented an interesting discussion of whether independent contractors can share in the municipal immunity. The court reviewed a recent U.S. Supreme Court decision on a similar question involving a private individual who was hired to conduct a fire investigation. Based on the history of common law immunity (for example, the judicial immunity enjoyed by part-time judges in the 19th century), the Supreme Court concluded that there was no reason to deny immunity to private citizens or entities that perform the same work that is otherwise done by government employees.

The claimants in the Minnesota case objected that if the immunity was extended to independent contractors, then construction contractors on public projects would escape liability for dangerous acts. The court held that "Official immunity for design does not necessitate official immunity for construction." According to the court, design involves the application of "expertise and discretion, balancing the often-competing considerations of cost, quality, and aesthetics" whereas construction involves merely the "ministerial" role of executing the design provided by the owner and A/E. Thus the court was not concerned that the decision would create a vast category of construction immunity.

Comment: As noted in a recent posting about this case by attorney Kent Holland, municipalities often require design firms to waive any entitlement to official immunity. Such waiver requirements may be contrary to the municipalities' best interests, because the immunity reduces risks and thus should result in better pricing for A/E services.

EJCDC's Engineering Subcommittee may want to discuss the possibility of a standard clause that affirmatively acknowledges entitlement to immunity if available under controlling law.

6. **Issue:** Viability of supplier's claim against design engineer. *State Ready Mix, Inc., v. Moffatt & Nichol.* Court of Appeals of California (2015).

Summary: Bellingham Marine, as "project manager," (in reality a design-builder) hired Moffatt & Nichol, an engineering firm, to design a travel lift pier at the Channel Islands Harbor. Bellingham contracted with Major Engineering Marine to construct the pier. Major subcontracted with State Ready Mix to supply the concrete.

Moffatt's design included concrete specifications for air entrainment and for compressive strength after 28 days. As the work progressed, State Ready Mix wrote a concrete mix design (in essence the "recipe" for preparing the concrete). The case definitively states that Moffatt had no duty to review or approve the mix design, suggesting that it was not a contractually required submittal. At any rate, at some point Major, the contractor, asked Moffatt to review and approve the mix design. Moffatt did so "gratuitously."

The concrete mix design called for the addition of an air entrainment chemical, Micro Air—in quantities 32 times greater than recommended by the manufacturer. Moffatt's review did not identify this flaw. Later, a substantial portion of concrete was found to be substandard in compressive strength and needed to be removed and replaced. An investigation by the contractor revealed that on the day of the pour of the substandard concrete, State Ready Mix had experienced a mechanical failure and added the air entrainment chemical manually (in a manner that was "the antithesis of precision"), in amounts that differed from its own flawed mix design. The end result was concrete that contained Micro Air at 6.5 times the necessary rate, seriously reducing the compressive strength.

The contractor, Major, sued State Ready Mix, which in turn pulled Moffatt into the lawsuit, under various liability theories all linked to the voluntary review of the concrete mix design. The trial court rejected the claim against Moffatt; State Ready Mix then appealed to the California Court of Appeals.

Decision: The core of the appellate decision was a routine determination that because there was no contractual privity between the concrete supplier and the design engineer, and because there was no element of property damage or injury, the economic loss rule barred the claim. The court also concluded that Moffatt's review of the concrete design mix was intended solely for the benefit of the design-builder, Bellingham, not for the contractor or concrete supplier.

State Ready Mix advanced a spin on its claim contending that there were special factors at play that justified survival of the claim, as a matter of public policy under California tort law. The court held that State Ready Mix was unable to satisfy any of the six required factors, concluding that "Moffatt was not State's insurer or guardian angel." In approving the mix design, Moffatt did not warrant that the concrete would work "if overdosed with the Micro Air additive."

The court concluded with one final blast for the concrete supplier, stating that if the supplier "wants to see who is at fault, it should look in the mirror." The failure to follow its own mix design compelled the conclusion that the supplier "alone is responsible for the bad concrete."

Comment: This decision illustrates the dangers that accompany straying from the contractual scope of services. An engineer that receives an unrequired submittal should politely return it without review.

There was no discussion in the case of the contractual procedures that governed legitimate submittals. EJCDC's submittal procedures in C-700, the standard general conditions for construction, define and limit the purpose of the review and approval.