RECENT COURT DECISIONS OF RELEVANCE TO CONTRACT DOCUMENTS

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1. Subcontractor's entitlement to additional compensation for extra work.	*Carolina Conduit Systems, Inc. v. MasTec N.A.*, United States District Court, Eastern District of Virginia (2011).	Light rail project in Norfolk, Va., included the construction of underground ducts and a conduit system. Contractor MasTec North America obtained pricing from subcontractor Carolina Conduit based on drawings that showed certain duct banks in a vertical configuration. The two had worked together previously, usually without a written contract. Carolina Conduit began work prior to executing a contract. As the work progressed it was agreed that it would be necessary to construct these duct banks in a horizontal configuration, which entails substantially more flowable fill. This change was not reflected in the contract documents as executed, or in a change order or other contractual documentation. On two occasions the sub expressed concern about obtaining payment for the extra work, and was told by the contractor "not to worry" and in fact was assured that "plenty of funds were available." MasTec later took the position that since the need for the pricier horizontal configuration was known when the subcontract was executed, it was included in the scope of work, at the contract price. Alternatively, MasTec pointed out that it was not obligated to pay for extra work unless such work was authorized in a written change order or similar documentation. The reviewing court agreed with this analysis. The court criticized the sub for not using the contractual methods pertaining to extra work, and rejected arguments that MasTec had waived the change order requirement, or modified it through course of conduct.	EJCDC C-700, Standard General Conditions, requires a change order or similar change documentation, and forbids recovery for unauthorized work. Article 10. The parties should have addressed the duct bank change in the contract documents that were executed after the issue arose, both in the drawings and in the contract price. Requirements for change orders and other contract procedures are not mere "formalities" and are routinely enforced. As a bare minimum there should be a confirming note or e-mail to start the paper trail—here not even that much had been done. The reported history of working without a written contract is remarkable for serious underground construction.

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2. Contractor claim against design professional based on implied warranty of drawings and specifications.	*North Peak Construction, LLC, v. Architecture Plus, Ltd*., Court of Appeals of Arizona (2011).	Owner instructed architect to design hillside house such that it was oriented to provide views of the city of Scottsdale in the valley below. Contractor followed the architect's design and had completed over $150,000 in construction before the owner realized that the design had incorrectly oriented the house to face a water tank rather than the city. The contractor tore down the misaligned work and rebuilt the house in the correct orientation. Typically in such a case the contractor would be compensated for the extra work by the project owner, which would in turn seek reimbursement from the architect. In this case, however, for reasons unstated the contractor pursued the architect directly. The lawsuit was primarily based on a claim of breach of an implied warranty of the design (essentially breach of an implied contract), because (a) the two year negligence statute of limitations had expired, whereas the contract statute of limitations had not, and (b) under Arizona law the prevailing party in a contract case can recover attorneys fees, whereas no such rule applies in tort/negligence cases. Based on precedent from an earlier case, the court held that in Arizona there is an implied warranty by the design professional to the contractor that the A/E has exercised its skills with care, diligence, and in a reasonable, non-negligent manner. Contractors can sue A/Es in tort (negligence) and contract (implied warranty). The court did conclude that because there is no actual contract, only an implied contract, that the attorneys fee rule did not apply.	The law in Arizona differs from that in most states. Many states do not recognize direct actions of this type by contractors against design professionals, based on lack of privity, or economic loss rule barriers. Other states allow direct actions, but only those based in tort (negligence, negligent misrepresentation). Note that most jurisdictions recognize an implied warranty of the drawings and specifications **by the owner** (Spearin doctrine). This traditional warranty is an implied term of an actual contract between the owner and contractor. Perhaps the prior Arizona case recognizing a warranty by a design professional was the result of confusion regarding the Spearin category of implied warranties. There is no discussion here regarding the owner-architect agreement or its terms. If that agreement disavowed any implied warranties (as EJCDC does at para. 6.01 of E-500), would that have influenced the court?

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3. Federal Prompt Payment Act.	*U.S. ex rel. IES Commercial, Inc. v. Continental Insurance Co.*, United States District Court for the District of Columbia (2011).	Plaintiff IES Construction was an electrical subcontractor to Grunley Construction on a federal government project involving utility tunnels near the U.S. Capitol Power Plant. Various changes and delays occurred, leading to a payment dispute between contractor and sub. IES brought an action on the payment bond, and also sued Grunley for breach of contract and violation of the Prompt Payment Act. The primary issue in the case is a technical legal point: does a sub have an independent cause of action (claim) based on alleged violations of the Prompt Payment Act? The court concluded that the answer is no. The Prompt Payment Act requires the general contractor to include various payment provisions in its subcontracts, including a commitment to pay within 7 days, and to pay an interest penalty for late payment. Assuming that such clauses are included, as required by law, then the subcontractor can enforce the clauses in the same manner as any other contractual terms—but does not have a separate "violation of the Prompt Payment Act" claim.	EJCDC requires payment of the general contractor by owner within 10 days of the engineer's recommendation of payment. C-700, 14.02.C. This timeframe can be modified if a prompt payment law dictates a shorter time to pay. EJCDC is currently drafting a standard subcontract and will take into account prompt payment provisions as a factor in setting the standard time for payment. Note that at least some state prompt payment provisions differ from the federal law in requiring payment within a certain number of days, rather than requiring use of specified payment clauses in the contracts/subcontracts. The federal law requires the contractor to notify the federal government's contracting officer if there are delays in payment of the sub. In some cases contract proceeds must be returned to the government pending resolution of the dispute.

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4. Damages under indemnification clause; impact of waiver of consequential damages.	*Black & Veatch Construction, Inc. v. JH Kelly LLC,* United States District Court, Oregon (2011).	Black & Veatch had an engineer-procure-construct (EPC; similar to design-build) contract with Portland General Electric to build a power plant. JH Kelly was a sub to B&V for installation of the turbine and related air inlet filter house and ducts. During initial operation of the turbine the compressor blades were damaged by foreign objects presumably left behind by JH Kelly during installation, including nuts, bolts, a metal plate, and a welding rod. B&V settled with the owner and sought to recover $1.5 MM in repair costs and $2.1 MM representing delay costs incurred by owner and reimbursed by B&V, based on the terms of the subcontract's indemnification clause. In the indemnity JH Kelly agreed to pay for "any and all liability and costs" arising from "physical damage to third party property." Kelly contended that this narrowly limited its obligation to actual repair costs; the court disagreed, finding that the "any and all…" wording created a broader duty that encompassed delay damages as well. Kelly also argued that a waiver of consequential damages applied, and that by its terms "loss of use" damages were waived; the owner's delay damages were in fact from loss of use of the turbine. The court accepted this reasoning, but pointed out that indemnification claims were expressly excluded from the terms of the waiver of consequential damages. In the end, JH Kelly was responsible for B&V's settlement payment to the owner.	B&V may have had means of recovering from the sub other than the indemnification claim, such as a breach of contract claim. The waiver of consequential damages clause was very specific and appeared to be aimed at protecting the subcontract's parties from exactly the type of damages involved; yet the protection was stripped away by the exception. The drafting process would be interesting to review—was this the result of transparent negotiations and conscious risk taking, or an oversight by JH Kelly's attorneys and contract review team? Also of interest is how B&V's contract with the owner addressed damages for loss of use, and whether any property or other insurance might have been applicable. EJCDC construction contracts do not contain a general waiver of consequential damages. The wording of the indemnification clause is roughly similar as to the key elements relied upon by the court in the B&V case.

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5. Owner's liability for construction accident.	*Beil v. Telesis Construction, Inc.*, Supreme Court of Pennsylvania, 2011.	Renovation of the engineering building at Lafayette College in Easton, Pa. Subcontractor's employee fell and was severely injured while carrying heavy flashing up a ladder, and sued the college and others. The case went to trial, with the jury finding the general contractor 50% liable, and the college 35% liable; total damages $6.8 MM. After the trial, the judge held that as a matter of law the college was not responsible for injuries sustained by an independent contractor's employees. The decision examined the "retained control" exception to the general rule that an owner is not responsible for workforce safety: did the owner retain control over the means and methods of contractor's work? The court held that exercising a degree of control over safety, such as imposing and enforcing safety requirements, reserving the right to stop work, conducting safety orientations, and employing an on-site safety inspector, did not constitute "retained control" of the contractor's work. The court pointed out the public policy benefits of not discouraging owners from involvement in site safety.	This decision takes an expansive view of the owner's latitude with respect to site safety. EJCDC has recognized some of the same boundaries. For example, the Standard General Conditions allow the owner to provide a safety program that contractor must comply with; C-700, para. 16.13.C. The decision is noteworthy because it is from a well respected high court, and is detailed, well explained, and includes the important point that owners should not be penalized for making safety a priority. Though binding only in Pennsylvania, it may have influential value in other states.

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6. Enforceability and effect of arbitration clause.	*Gemstone Builders, Inc. v Stutz,* Court of Appeals of Oregon, 2011.	Construction contract contained multiple clauses that pertained to dispute resolution. In one location the contract stated that "the decision from arbitration shall be binding." In another, there was reference to arbitration **prior to** initiation of any suit or actions at law. The owner objected that the arbitration clauses were "irreconcilably contradictory" and should not be enforced; and if enforced, arbitration would be non-binding. The court agreed that the contract was ambiguous, but based on the guiding principle that arbitration is a favored procedure, the court held that the contract should be interpreted as calling for binding arbitration.	This was apparently a non-standard contract. The contradictions and redundancies created substantial confusion. Arbitration is an available option under the EJCDC documents but is not the default means of resolving disputes. As an aside, the court here noted with a smirk that the contract contained a clause that promoted a "spirit of mutual cooperation and friendship." Such aspirational clauses are pleasant, but the parties would have been better off devoting their efforts to drafting a single clear dispute resolution clause.

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7. Additional insured coverage under CGL policy.	*A-1 Roofing Co. v. Navigators Insurance Co.*, Appellate Court of Illinois, 2011.	General contractor A-1 was required to be named as an additional insured under subcontractor Jack Frost Iron Works' commercial general liability policy. The policy indicated that there would be no coverage of an additional insured in a case based on the additional insured's sole negligence. A boom lift accident occurred during construction, resulting in the death of a sub-sub's employee. The estate brought an action against the general contractor and three other defendants; Jack Frost Iron, however, was not included as a defendant. The insurance company took the position it did not have a duty to defend or provide coverage to the general contractor because the named insured was not implicated by the complaint, and also on the basis of the sole negligence exclusion. The insurance policy committed to defense and coverage when an accident arises out of work performed by or for the named insured. Here, the accident arose from the work of a sub-sub retained by Frost, the named insured. This was a sufficient connection—Frost's own apparent lack of negligence was immaterial. The court also held that the sole negligence issue was not to be determined in the isolated context of the general contractor and subcontractor alone: the allegations against two other defendants plainly demonstrated that the lawsuit was not based on the general contractor's sole negligence for insurance purposes.	Additional insured provisions are important mechanisms for assuring liability coverage from the appropriate source. Presumably in this case Jack Frost had protected itself contractually in the sub-sub agreement, with indemnification and insurance provisions that passed responsibility to the worker's employer.

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8. Unlicensed contractor's entitlement to collect payment.	*Stellar J Corporation v. Smith & Loveless, Inc.*, United States District Court, Oregon (2010).	Wastewater treatment plant project for the city of Rainier, Oregon. Stellar, the general contractor, subcontracted with Smith & Loveless for fabrication and installation of certain equipment. A dispute arose and Stellar terminated the subcontract. Smith contended in the lawsuit that followed that at the time of termination it was owed nearly $500,000 for equipment furnished and installed. Stellar and the payment bond surety realized that Smith was not a licensed Oregon contractor at the time it made its claims in the lawsuit, or during performance of the work. Under Oregon law, an unlicensed contractor is barred from recovering payments on Oregon projects. There are a few exceptions, such as avoidance of "substantial injustice," but the court held that none applied. A more intriguing issue was whether Smith was a "contractor" under Oregon law. The definition of contractor is broad but has limits. Smith contended it was primarily a manufacturer and vendor, and that the equipment was merely placed in the wastewater tanks that others had constructed, and connected to a power source by a sub; in fact, the equipment could be removed and was not "attached to real property," a core element of construction contracting as defined in Oregon. The court skipped lightly over this contention, focusing instead on the use of the terms "subcontract" and "subcontractor" in the controlling agreement, and on Smith's belated procurement of an Oregon contractor license, to find Smith was a contractor.	Smith's lack of a license was brought to the general contractor's attention by a line item in the subcontract—Smith indicated "N/A" in the blank for contractor license number. Lack of a license can often be cured after work begins, but the unlicensed party must act promptly. By the time a dispute arises it is usually too late. EJCDC requires the Contractor to list its license number, if applicable (some states do not license contractors) (see Agreement), requires Contractor to obtain all necessary "construction…licenses" (C-700, 6.08), and addresses licensing in the Instructions to Bidders (C-200, Article 3). The requirement to be licensed in the project location, if applicable, perhaps could be made even more explicit, for the benefit of all parties.

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9. Architect's recommendation against award to low bidder.	*Cedroni Associates, Inc. v. Tomlinson, Harburn Associates Architects & Planners, Inc.*, Michigan Court of Appeals (2010).	Cedroni submitted the low bid on a school project. The school's architect had a long, acrimonious history with Cedroni, and recommended awarding the contract to the second low bidder. Cedroni subsequently sued the architect, alleging tortious interference with a prospective business relationship. The court acknowledged the need for free exercise of professional business judgment, and that A/Es are entitled to some protection and deference in carrying out their advisory duties for public clients. However, the court declined to dismiss the case, finding that the record suggested the possibility of a "disguised or veiled attempt" to intentionally interfere with the bidder's right to the contract. In particular, the interviews conducted by the architect showed that the contractor had received tolerable reviews from most owners and architects—the genuinely negative reviews were from one particular individual working for the project architect. The court even hinted that the case might uncover "malicious," "unethical," "deceitful," and bad faith conduct by the architect, and a campaign to "sabotage" the bidder.	Many A/Es would prefer to not be involved with bidding, yet this is a process in which many owners need assistance. From both a liability perspective and a professional responsibility standpoint, A/Es must maintain objectivity and good faith in this process. Longstanding grudges and antagonisms should be identified and other individuals without "baggage" called in as necessary. When a genuinely marginal contractor is awarded the contract, more A/E time and effort may be needed in the administration of the contract, and to protect the owner's and public's interests. The professional services agreements should allow for additional compensation in such circumstances; see E-500, Exhibit A, para. A2.02.