EJCDC
ENGINEERS JOINT CONTRACT DOCUMENTS COMMITTEE

RECENT COURT DECISIONS OF RELEVANCE TO CONTRACT DOCUMENTS

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Issue	**Citation**	**Summary**	**Contract Document Implications**
1. Statute of Limitations for design error claim	*Newell Recycling of Atlanta, Inc. v. Jordan Jones and Goulding, Inc.,* Supreme Court of Georgia (2010).	Engineering firm designed a shredding facility for a private recycling company. The services were provided pursuant to a collection of letters, agreements, and a "draft Scope of work." After construction was completed, the facility's concrete drainage control structure began to fail. The recycling company waited to bring suit until more than four years after discovering the drainage control structure's failure. The Georgia Court of Appeals examined both a four-year statute of limitations, on "any implied promise or undertaking," and a six-year statute of limitations on actions based on written contracts. It concluded that even if the paperwork taken together could be viewed as a written contract, nonetheless the four-year limitation period should apply, because the core claim really involved the conduct of professionals acting in their area of expertise—professional malpractice. Apparently the Court of Appeals believed that the predominant obligations of the design professional were implied, unwritten duties, despite the existence of the written documentation. The Georgia Supreme Court reversed, holding that a professional malpractice claim premised on a written contract should be governed by the six-year statute of limitations applicable to written contracts. The shorter statute of limitations would apply only if the claim was based solely on an oral or implied obligation. If there are implied duties but also a written agreement, the six-year statute of limitations would apply.	The case shows that using a standard written contracts can eliminate disputes about whether there is or is not a contract—as opposed to the confusion that occurred here. However, the implications of being governed by laws applying to contracts will vary. Here, the contract statute of limitations helped the owner and harmed the design professional. In some cases the contract statute of limitations, regardless of length in years, will start running well before the parallel tort statute of limitations. Contract limitation periods are frequently based on the time of the breach; tort limitations, by contrast, are often based on the date of the discovery of the injury. Note in this regard that EJCDC E-500, Agreement between Owner and Engineer for Professional Services, provides that any applicable limitation period should start running no later than the date of substantial completion of the project.

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2. Application of ten year statute of repose to complex multi-party construction project: when does the ten year period begin to run?	*State of New Jersey v. Perini Corporation,* Appellate Division, Superior Court of New Jersey (2012).	The centralized underground hot water distribution system for South Woods State Prison deteriorated after project completion, resulting in the need to shut down the system, and therefore shut down the prison. The state sued four companies responsible for design and construction, and the manufacturer of defective piping. The New Jersey statute of repose is ten years. The state's lawsuit was filed more than ten years after the prison, including the hot water system, was put into service; however, the last of thirty separate certificates of substantial completion was dated just under ten years prior. In a convoluted decision the appellate court held that the statute of repose did not begin to run until all phases of the project were substantially complete. The court acknowledged that multiple statute of repose starting points were possible, but that in this case substantial completion of all phases was necessary because the defendants had all maintained some degree of continued presence at the jobsite until well after occupancy. The court held that the statute of repose does not apply to protect manufacturers of materials.	The EJCDC construction documents allow for partial utilization and multiple substantial completion certifications. Thirty separate certificates is an extreme example, and would present various administrative challenges. Two of the defendants were subcontractors. If they had finished their work and not returned to the jobsite, the individual certificates applicable to their work would have been taken as the starting point of the statute of repose for their liability. Their punch list work extended their exposure, for reasons that are not well explained by the court. Wording and interpretation of statutes of repose varies from state to state. It is typical for the statutes to not apply to manufacturers of incorporated materials.

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3. Contractor's entitlement to compensation for extra work.	*G. Voskanian Construction, Inc. v. Alhambra Unified School District,* Court of Appeal of the State of California, Second Appellate District (2012).	Contracts for relocation of school buildings and for installation of fire alarm system required that modifications be in writing, consistent with state public contract law. On the relocation contract, the school district issued oral orders for extra work, but later endorsed the necessity for the extra work in change orders; these did not address additional compensation. The appeals court held that the contractor could recover for the value of the extra work. On the fire alarm contract, the extra work was necessary because the plans and specifications incorrectly portrayed the number of rooms requiring alarms; bidders had not been allowed to view the interiors of the buildings because classes were in session during the pre-bid walk-through. The appeals court held that if extra work is necessitated by misleading or inaccurate drawings and specifications, the contractor may recover for the work, regardless of receiving prior written authorization.	The school district did not administer these contracts very well, and the result is not unfair. On the relocation contract the procedure was akin to use of a Work Change Directive—proceed with the work, pricing to be determined later. The fact that the directive to proceed (authorization to do the extra work) was put in writing well after the fact was an added wrinkle. The extra compensation on the fire alarm contract is a bit more debatable. No question that deficient design documents can trigger the right to more compensation; but when the contractor realized that there were many more rooms than depicted, should the school district have been given the opportunity to scale down the scope of the installation? The need was probably driven by code, but quantity increases should be approved in advance; analogous to getting a determination on what to do when a differing site condition is encountered.

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4. Common law indemnification duty in worker injury case.	*McCarthy v. Turner Construction, Inc.,* Court of Appeals of New York (2011).	Manhattan property owner leased a retail space to Ann Taylor, Inc. Ann Taylor entered into a contract with a CM at risk for build-out of the space. The CM subbed out the telephone/data cabling; sub-subbing of actual cable installation. Employee of the sub-sub was injured in a fall from a ladder. A lawsuit followed, based in part on a New York scaffolding law that imposes strict liability on general contractors and property owners when a fall occurs on a jobsite. Ultimately the CM and the property owners both contributed $800,000 to a settlement. The property owners then pursued a common law indemnification claim against the CM. The Court of Appeals found that although the CM had taken responsibility for supervising and directing the work in its contract with the retail tenant, it had not actually supervised or directed the injured worker's activities; CM had delegated that to the subs. The CM was non-negligent and faced liability to the worker only through the vicarious terms of the scaffolding law; thus it did not owe a common law indemnity duty to the property owners. The court rejected an argument that a new rule should be imposed to create an indemnification duty merely for failing to exercise the authority to supervise or control.	The EJCDC indemnification clause in the General Conditions (C-700) applies only to the extent of Contractor's or Subcontractors' negligent acts or omissions; and duty is owed to Owner and Engineer, and not to remote parties such as the Site's owner. This is a good decision for general contractors and CMs who delegate safety and supervision duties to subs. However, note that typically express indemnification duties would appear in contracts, leases, etc., up and down the chain, thus allowing a property owner to obtain compensation from the tenant, which would then push the claim down to the GC. In the New York case, it may be that the lease to Ann Taylor was favorable to tenant and excluded any duty to indemnify the property owners for construction injuries.

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5. Delegation of safety obligations to independent contractor.	*Seabright Insurance Co. v. U.S. Airways, Inc.,* Supreme Court of California (2011).	U.S Airways hired an independent contractor, Aubry Co., to maintain and repair a baggage conveyor. One of Aubry's employees was injured while working on the conveyor, allegedly as the result of lack of safety guards at "nip points." The employee collected from worker's compensation insurance; the worker's comp insurer and the employee then brought an action against U.S. Airways. The California Supreme Court held that when U.S. Airways hired Aubry Co., U.S. Airways implicitly delegated any tort law duty of care it might have had to ensure Aubry's employees' safety. Thus U.S. Airways delegated to Aubry the duty to identify the absence of needed safety guards, and to take steps to address the hazard. The court held that delegation is favored as a matter of policy. Aubry's costs in obtaining workers' compensation insurance were presumably factored into the contract price. It was significant that the independent contractor had sole control over the means and methods of performing the maintenance and repair work. Also noted was the inequity in allowing employees who happen to have a hiring party (e.g. U.S. Airways) to pursue receive a greater recovery than employees who do not work for hired contractors.	The decision is consistent with EJCDC principles regarding allocation of safety duties. The case should stand as a valuable precedent because of the prestige of the court and the clarity of the analysis and reasoning.

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6. Absolute liability for excavation work.	*Yenem Corp. v. 281 Broadway Holdings,* Court of Appeals of New York (2012).	Plaintiffs were owners and tenants of landmark cast iron and masonry building in Manhattan. Defendants were the owner and contractor of adjacent lot. Excavation was conducted on the adjacent lot to a depth of 18 feet below curb level. The landmark building shifted nine inches out of plumb and was declared unsafe for occupancy. Plaintiffs sought summary judgment based on a city ordinance requiring support during excavation of neighboring buildings. The defendants argued in part that the poor condition of the landmark building excused them from liability. The court noted that violation of certain state laws can create absolute liability, making it easier for claimants to make their case, and to obtain summary disposition. This status is not usually extended to city ordinance violations, but in this case the court determined that the ordinance had its origin in state law, and therefore conferred absolute liability status on the violation. The court held that the pre-excavation condition of the landmark building would be relevant to the measure of damages, but not to the question of liability.	In C-700, EJCDC addresses the responsibility of the contractor with respect to damage to adjacent properties. Liability could also be determined to rest with the engineer, if the excavation would inevitably destabilize adjacent buildings, regardless of standard precautions taken by Contractor.

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7. Application of economic loss doctrine to contractor's claims against design professional on design-build project.	*Maeda Pacific Corporation v. GMP Hawaii, Inc.,* Supreme Court of Guam, (2011).	Design-build project to establish water supply system for Air Force base. Design-builder Maeda retained an engineering firm, GMP Associates, Inc., as lead designer and for engineering quality control, and also subbed out design and build of a water reservoir tank to Smithbridge, which in turn subbed out the tank's structural design. The tank roof collapsed during testing of the system, probably as the result of lack of proper venting. Maeda pursued claims against the two design professionals, GMP and Jorgenson. The Supreme Court of Guam examined the issue of whether the economic loss doctrine should apply in Guam. That doctrine precludes parties in a contractual context from pursuing tort claims for purely economic or commercial losses. Rather, such parties must pursue economic loss claims under applicable contract provisions. According to the economic loss doctrine, where what is at stake is in essence "the benefit of the bargain," contract law, rather than negligence/tort law, should control. In the contractual context, the economic loss doctrine "encourages the party best situated to assess the risk [of] economic loss…to assume, allocate, or insure against that risk." The court adopted the economic loss rule for Guam non-residential construction cases. It further held that the rule should apply to claims against design professionals, and should apply regardless of whether there is privity (a contractual relationship) between the two parties, under the understanding that the other party is doubtless a party to other contracts involving the same overall construction project.	The economic loss doctrine is entirely consistent with EJCDC principles favoring a through written contract that addresses the risks and issues that typically arise on a construction project. Guam joins the majority of jurisdictions, though the scope of the application of the doctrine varies widely. No discussion in the case as to the significance to Maeda of pursuing rights in tort against GMP, with which Maeda had a contract. It is possible that contract rights had lapsed or been waived in some manner. This is a laudably clear and cogent discussion of the economic loss doctrine.