
**Construction Tool Box: Construction Laws, Cases, Notes and Alerts**

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**Construction Law Committee**

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## INTRODUCTION

As the holidays approach, as well as a New Year, we are pleased to publish and post this final edition for 2013. Many of the cases in this edition adhere to the importance of contractual provisions on topics and disputes such as consequential damages, statute of limitations, limitation of liability clauses and liquidated damages.

Have a Happy and "Harmonie-ous" New Year.

-The Editor
December 2013

**INDEX OF TOPICS COVERED**

**NATIONAL FOCUS**

**CONTRACT CANCELLATION FOR LACK OF FUNDS**

*Matter of Specialized Steel Contractors, Inc.*, 2013 U.S. Comp. Gen. B-408022 (May 14, 2013).

Specialized Steel Contractors protested cancellation of a project to rehabilitate levees in Texas on which it was the apparent low bidder. Under FAR, an agency must make an award to the lowest responsible bidder, unless there is a compelling reason to reject all bids and cancel the invitation for bids. The government claimed there was not enough available funding for the project. A second issue was an ongoing question whether the project was necessary because a determination was made that existing levees were sufficient.

The Comptroller General ruled that a contracting agency has the right to cancel a solicitation if sufficient funds are not available. The funding was not available at the time of bid opening, and FAR permits cancellation of the bids.

**NATIONAL FOCUS**

**NO "BIVENS" CONSTITUTIONAL CLAIMS FOR CONSTRUCTION DISPUTES**

*M.E.S., Inc. v.Ella Snell,* 2013 U.S. App. LEXIS 5415 (2d Cir. 2013).

Under the *Bivens* case, federal officials may be liable in their individual capacities for money damages for violating certain constitutional rights. However, the Contract Disputes Act of 1978 ("CDA") governing construction contracts may bar such claims by construction contractors. MES sued four Army Corps of Engineer's officials for terminating three construction contracts totaling more than $30 Million in alleged "retaliation" for criticism of Corps' project management. According to the claimant, the terminations violated its rights to free speech and due process. MES argued that the constitutional claims against the individual federal employees were outside the CDA because that statute affords relief only against the federal government itself.

The District Court ruled that the CDA offered a comprehensive remedial scheme for complaints relating to the termination of government contracts, and that ruling was affirmed on appeal. MES's government contract incorporated the CDA by reference, MES's constitutional claims clearly originated from contractual obligations, and MES had a comprehensive process by which it could seek remedies against the United States under the CDA.

**NATIONAL FOCUS**

**CONTRACT SPECIFICATIONS**

*James A. Cummings, Inc. v. Department of Veteran Affairs*, 2013 U.S. CBCA 2409 (June 28, 2013).

The Contractor entered into a fixed price contract to install fuel systems at a medical center in Orlando, Florida. The Contractor intended to supply glass fiber reinforced (FRP) carrier pipe, but the VA demanded the contractor install steel pipe housed within the FRP. The contractor requested that the VA reconsider the contractor's plan to use FRP carrier pipe since the contract specifications could be

interpreted to require steel pipe above grade but non-metallic conduit below grade. Eventually, the contractor proceeded under protest to install steel pipe, and submitted a claim for approximately $200,000.00 to cover the increased cost. The VA denied the claim, and the contractor appealed to the Board of Civilian Contract Appeals which sided with the contractor.

The contract permitted the contractor's choice of FRP pipe, which also complied with State of Florida requirements and regulations. The VA's rejection of FRP, and its requirement that the contractor use steel piping, amounted to a contract change and the contractor was entitled to an equitable adjustment for the increased cost. While both sides argued to some extent that the contract specifications were "ambiguous" the Judge ruled that they were both wrong and there was no ambiguity. There was a way to read the specifications so that either FRP or steel pipe would meet contract requirements which also met Florida requirements, and the contractor's interpretation was valid.

## NATIONAL FOCUS

## CONTRACTUAL STATUTES OF LIMITATION

*Brisbane Lodging, L.P. v. Webcor Builders, Inc.,* 216 Cal. App. 4th 1249 (June 3, 2013).

Brisbane Lodging and Webcor entered into a contract for the design and construction of a hotel using a standard 1997 AIA Contract. Article 13.7 of the Contract stated that all causes of action relating to contract work would accrue from the date of substantial completion of the project. The hotel was substantially completed on July 31, 2000. In May 2008, Brisbane sued Webcor for breach of contract, negligence, and breach of implied and express warranties. Webcor moved for summary judgment contending that the action was barred by Article 13.7. Webcor argued that the statute of limitations began to run on the date of substantial completion, July 31, 2000. Brisbane opposed the motion arguing, *inter alia*, that Article 13.7 did not waive a California Civil Code procedure which set a maximum ten year period to sue for latent defects. The trial court granted summary judgment for Webcor based upon Article 13.7 and Brisbane appealed.

The appeal court referred to many out of state authorities concluding that the AIA provision governing accrual of causes of action was valid and enforceable. Importance was attached to the fact that this was a sophisticated business contract entered into by parties represented by counsel on a major commercial construction project.

Latent defects and the discovery rule often result in protracted collateral litigation over when an owner discovered, or should have discovered, a defect. Article 13.7 removes this uncertainty by fixing the running of the statute of limitations to a date certain. This provision allows the parties to avoid uncertainties of litigation, and set a date beyond which they can reasonably expect to no longer be exposed to potential liability.

The court also rejected *Brisbane's* argument that the provision violated public policy. The court found that, especially where the parties are on equal footing and there is considerable negotiation over contract terms, the parties should be given the ability to enjoy freedom of contract. The trial court's grant of summary judgment in favor of Webcor was affirmed.

**NATIONAL FOCUS**

**LIMITATION OF LIABILITY CLAUSE BARS NEGLIGENT DESIGN CLAIM**

*SAMS Hotel Group, LLC v. Environs, Inc.*, 2013 U.S. App. LEXIS 11047 (7TH Circuit May 31, 2013).

SAMS Hotel hired architect Environs to design a six-story hotel in Fort Wayne, Indiana. The building had to be demolished without ever opening due to structural defects. SAMS alleged that the architect provided a defective design, and negligently performed its obligations. SAMS claimed damages of more than $4.2 Million, but due to a limitation of liability clause in the contract with Environs, SAMS' damages were limited to $70,000.00. The limitation of liability clause stated that Environ's liability could not exceed the amount of the total lump sum design fee due to negligence, errors, omissions, strict liability, breach of contract, or breach of warranty.

SAMS sued Environs for negligence and breach of contract. As to the first charge of negligence, the District Court ruled that Environs was not liable for negligence due to the "economic loss rule" under Indiana precedent. Indiana courts had previously held that a contracting party cannot be liable under tort theory for purely economic loss caused by alleged "negligent contract performance." As to the second charge, the District Court did find Environs liable for breach of contract, however it ruled that the limitation of liability clause was enforceable and limited SAMS' recovery.

On appeal, this decision was affirmed. The court drew a clear line between claims of contract breach and claims for negligence that arise from a contractual duty resulting in purely economic loss. Claims in tort for professional malpractice were barred by the economic loss doctrine, and the contractual limitation of liability clause was enforceable as between sophisticated contracting parties.

**NATIONAL FOCUS**

**IMPLIED CONTRACTUAL WARRANTY**

*Drennon Construction & Consulting Inc. v. Dept. of the Interior*, 2013 CIVBCA Lexis 22 (Jan. 4, 2013)

The government provided a contractor with design specifications, and the contractor was bound to build according to those specifications. In a contract of this nature there is an implied warranty that applies to the design specifications. The Civilian Board of Contract Appeals ruled that such a warranty applied in this case. There was no evidence that the contractor should have or could have anticipated the design flaws.

**NATIONAL FOCUS**

**PRICE FLUCTUATIONS CONTRACTOR RISK**

*Lakeshore Engineering Services, Inc. v. U.S.*, 2013 U.S. Ct. Fed. Cl. Lexis 245 (April 3, 2013)

Lakeshore Engineering Services, Inc. sought recovery of approximately $2 Million for losses incurred on a U.S. Army construction project at Fort Rucker, Alabama. Lakeshore claimed it was entitled to equitable adjustment equal to the difference between its actual cost and prices set under the contract because those set prices did not reflect local rates for labor, materials, and equipment.

The fixed-price contract placed the risk of cost increases or unanticipated inflation on the contractor, not the government. The contract required Lakeshore to price the job using a coefficient, a number multiplied by unit prices in a Universal Unit Price Book (UUPB), to account for indirect costs not included in the prices. The coefficient was to reflect "risks of doing business" such as "inflation or material cost fluctuations." Accordingly, the court granted the government's motion to dismiss the claim.

**NATIONAL FOCUS**

**LINE ITEM PRICE OMISSION WAS NOT IMMATERIAL DEFECT**

*Matter of: Massillon Construction and Supply, Inc.*, 2013 U.S. Comp. Gen. B-407931 Lexis 57 (March 28, 2013)

Massillon Construction and Supply Inc. (Massillon) protested rejection of its $13.6 Million bid for a DOT project. The project solicitation included "Schedule A," "Schedule B," and "Schedule C." Before bid opening, DOT faxed an amendment to bidders that added a fourth option, "Schedule D," and requested that the Schedule D price be included in the sum total of all schedules. In response, Massillon annotated its bid under Schedule A with the words "Amendment 001" and entered an overall contract line item price for Schedule A. Because the bid did not state a separate price for Schedule D work, the contracting officer rejected the bid.

Massillon claimed that DOT should have waived as a minor formality the missing price for an optional contract line item. The Comptroller General disagreed because a responsive bid must constitute an unequivocal offer to perform the solicitation. Although Massillon acknowledged the amendment in its bid, it did not provide a separate specific price, and therefore the bid was insufficient.

**NATIONAL FOCUS**

**FALSE CLAIMS ACT**

*Kermit L. Prime, Jr. v. Post Buckley, Schuh & Jernigan, Inc.,* 2013 U.S. Dist. LEXIS 120166 (M.D. Fla. August 23, 2013).

In this case, a whistleblower claimed that a contractor made "false statements" to the government by failing to disclose profit earned through the use of labor costing less than rates listed in the contract. The agreement was for a fixed price and contained an economic adjustment clause. The government knew that the contractor would be responsible for any cost increases, but also be permitted the benefit of any cost savings. The plaintiff was unable to reference any contract clause or FAR provision requiring a contractor to notify the government of a change in personnel or labor costs, and accordingly there was no false claim. The mere fact that an activity may be accomplished less expensively on a fixed price contract falls short of "fraud" for purposes of the False Claims Act.

**ALABAMA**

**CONTRACT SPECIFICATIONS AMBIGUOUS**

*Otis Elevator Co. v. W.G. Yates & Sons Construction Co.,* 2013 U.S. Dist. LEXIS 111039 (N.D. Ala. August 7, 2013)

Otis Elevator was low bidder for escalator work on a county airport and proposed to supply and install escalators with a 32-inch step width. Eventually a change order was issued for a 40-inch step width. Otis filed a breach of contract action to recover compensation based upon the primary argument that the project specifications did not prescribe the escalator width.

The court ruled in favor of Otis, concluding that the contract specifications were ambiguous. Otis' shop drawings clearly indicated its plan to install 32- inch step width escalators, there were regular site visits and inspections of the project as it was progressing, and multiple bidders included 32-inch step width in their proposals. No one apparently ever questioned the width. Where a bidder reasonably interprets unclear specifications, it is protected if it is later required to perform in a different or more costly manner.

## ARIZONA

## PROMPT PAY ACT NOT APPLICABLE TO ARCHITECTS

*RSP Architects, LTD. v. Five Star Development Resort Communities, LLC*, 2013 Arizona App. Lexis 135 (July 16, 2013).

This case held that Arizona's Prompt Payment Act does not apply to a contract for architectural services since it provides protection only to "contractors" performing under "construction contracts". RSP's $3,000,000 contract did charge it with "construction administration", "overall coordination" of the project as well as their creation of the design documents. RSP therefore argued that its contract did relate to the construction and development of the project. However, the court refused to accept such a broad reading of the Prompt Payment Act language because doing so would make it applicable to almost any agreement pertaining to a construction job.

## CALIFORNIA

## BIFURCATION OF CONTRACT AND BAD FAITH CLAIMS

*American Steel & Stairways, Inc. v. Lexington Insurance Co.,* 2013 WL 4425704 (N.D. Cal. August 14, 2013).

In a construction defect lawsuit, plaintiff sued the general contractor alleging water intrusion and other construction defects, and the general contractor in turn sued various subcontractors including American Steel. American Steel was insured under policies by three different companies. American Steel claimed that a $1.5 Million settlement offer was on the table but expired when Lexington and another carrier refused to contribute. The case ultimately settled for $1.75 Million with one of the carriers paying its $1 Million policy limit plus an additional $500,000.00. American Steel subsequently sued Lexington and the other carrier for breach of contract and bad faith.

The insurance companies moved to bifurcate the breach of contract and bad faith claims. They contended that trying the two claims together would create jury confusion and also be prejudicial in presenting evidence of conditional offers to contribute towards a settlement which were rejected. They argued that the offers showed that they did not act in bad faith, but jurors could interpret the offers as admissions of coverage.

The motion was denied with the court ruling that any risk of jury confusion could be minimized by jury instructions and a special jury verdict form. Also, since the two claims were inter-related, bifurcation would result in unnecessary repetition of evidence.

**FLORIDA**

**CONSEQUENTIAL DAMAGES BARRED BY CONTRACT**

*Kalzip, Inc. v. TL Hill, Construction, LLC,* 2013 U.S. Dist. LEXIS 65611 (M.D. Florida May 8, 2013).

Kalzip, a supplier, sought to recover $223,000.00 for roofing materials it provided to subcontractor T.L. Hill on a project to be constructed in Virginia. Kalzip's quote included a cover letter which stated that all orders were accepted, and all goods and services were supplied, subject to Kalzip's terms. T.L. Hill accepted the purchase order and also sent a letter of its intention to use Kalzip as the roofing supplier. It also issued a purchase order accepting the Kalzip proposal.

The court first ruled that a contract had arisen and the acceptance/confirmation was either T.L. Hill's letter of intent or its purchase order. The court further ruled that it could not recover for alleged repair costs and lost profits because those damages are consequential, which Kalzip's terms expressly and in bold print excluded. The court therefore granted Kalzip summary judgment on its claims, counterclaims, and defenses.

**KANSAS**

**LIQUIDATED DAMAGES CLAUSE FLOWS DOWN TO SUBCONTRACTOR**

*Rand Construction Co. v. Dearborn Mid-West Conveyor Co.,* 2013 U.S. Dist. LEXIS 64225 (D. Kan. May 6, 2013)

The general contractor on an Air Force project to construct a coal conveyor system for a power plant hired subcontractor Rand Construction to demolish the old conveyor system and install the new equipment. Rand acquired components for the conveyor system from Dearborn Mid-West. The new conveyor failed to perform properly. Rand blamed Dearborn Mid-West for supplying faulty equipment and withheld more than $300,000.00 of the contract price for the alleged breach. The District Court ruled that Dearborn Mid-West breached the contract because spillage from the conveyor was sufficient and constant , and prevented continuous operation of the conveyor.

Rand also sought indemnification from Dearborn Mid-West for liquidated damages that were imposed on Rand by the Air Force. The Court ruled that Rand was legally responsible for the liquidated damages under its subcontract and Dearborn was obligated to indemnify Rand for those damages.

Dearborn primarily argued that it was not liable for liquidated damages because the primary contract contained a blank line where insertion of the amount of liquidated damages was to be completed, thus Dearborn Mid-West argued Rand voluntarily paid the damages. Rand argued that its contract with the primary contractor did contain a liquidated damages clause and also provided that General Conditions of the prime contract would control the relations between the primary contractor and Rand. The Court ruled that, because the prime contract's liquidated damages clause placed responsibility for liquidated

damages on the contractor, and Rand's subcontract incorporated the primary contract, Rand was held responsible for the liquidated damages in the first instance, and then entitled to indemnity from Dearborn Mid-West for such damages.

This case is an example where "merger by incorporation" and integration clauses "flow down" provisions from primary agreements and General Conditions to govern the rights and liabilities between Rand, a subcontractor, and Dearborn Mid-West, a sub-subcontractor.

**KENTUCKY**

**MILLER ACT –STATUTE OF LIMITATIONS**

*U.S. ex rel. MLE Enterprises, Inc. v. Vanguard Contractors, LLC,* 2013 U.S. Dist. LEXIS 66240 (W.D. Ky May 9, 2013).

Vanguard Contractors agreed to install architectural finishes on a renovation project in Oklahoma. Vanguard was the general contractor and MLE Enterprises was the relevant subcontractor. When Vanguard failed to pay the full contract amount, MLE sought recovery under the contractor's Miller Act payment bond. Vanguard's surety refused to pay and moved for summary judgment arguing the lawsuit was not filed within the Miller Act's one year statute of limitations.

In June 2009, a payment application from MLE stated that there was no money due for any balance of work to be performed under MLE's subcontract. According to the payment application, MLE had completed its subcontract work over a year before the suit was filed in August 2010.

MLE attempted to extend the contract period by arguing that one of its workers performed labor on a later date in September 2009 by making checks and adjustments to doors, but the court ruled that such "finishing" tasks did not constitute actual project work under Miller Act definitions. Under the Miller Act, work is considered labor or material if it is performed as part of the original contract and not for the purpose of correcting defects or making repairs following inspection of the project. Case precedents hold that remedial or corrective work or materials, or inspection of work already completed, are not within the meaning of labor or material under the Miller Act. MLE had also submitted a "final invoice" affirming that its work was complete, even the punchlist period was completed, and a deposition witness for MLE also testified that the job was indeed finished by June 2009 rendering MLE's August 2010 lawsuit beyond the statute of limitations.

The Court concluded that any work MLE performed in September 2009 was remedial, corrective, or pursuant to warranty and did not extend the statute of limitations. Although mere "substantial completion" does not start the one year clock, something closer to 100% completion is needed to start the statute of limitations running.

**MISSOURI**

**FORUM SELECTION CLAUSE**

*DesignSense, Inc. v. MRI Global,* 2013 U.S. Dis. LEXIS 8866 (W.D. Mo. June 25, 2013).

DesignSense developed design specs for a construction project under a subcontract with MRI Global. DesignSense originally initiated a suit in Colorado claiming violation of copyright and trademark rights in the work product. That case was dismissed, so DesignSense then sued for a variety of business torts in Missouri.

The motion to transfer venue was based on the subcontract's forum selection clause and the federal statute, 28 U.S.C. 1404(a) which states that for the convenience of the parties and witnesses, and in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought. The Missouri court found that, although the clause did not explicitly refer to tort claims, the wording was broad enough to bring the case within the clause. The tort claims ultimately involved and depended on the contractual relationship. This forum selection clause governing any dispute or claim "pertaining to a contract" was more broad, for example, than contracts using the phrase "arising out of a contract".

For contract drafters, this case suggests inserting the "pertaining to the contract" language in any venue or forum selection clause.

**NEVADA**

**ECONOMIC LOSS DOCTRINE BARS CLAIMS OF "NEGLIGENT MISREPRESENTATION"**

*Halcrow, Inc. v. District Court (Pacific Coast Steel),* 2013 Nev. LEXIS 52 (June 27, 2013).

The Nevada Supreme Court answered an "open question" whether the economic loss doctrine bars claims alleging negligent misrepresentation against design professionals for purely economic loss, and the answer is "Yes". The case involved construction of a Las Vegas tower which was supposed to be more than 40 floors, but was reduced to 26 floors due to flaws in the steel installation. Under attack from the project owner, the general contractor sought contractual indemnity from its steel subcontractor who in turn sued the structural engineer for allegedly "negligently misrepresenting" that it had inspected and made corrections to the steel work. The engineer cited Nevada case law enforcing the economic loss doctrine and argued that numerous courts have refused to exempt "negligent misrepresentation" claims from the economic loss doctrine in construction cases.

The Nevada Supreme Court agreed with this position. It refused to exempt the economic loss doctrine from applying to claims of "negligent misrepresentation" because doing so would lead parties to continually "recast" negligence claims as "negligent misrepresentation" in order to circumvent the economic loss doctrine. In many respects and ultimately, almost every negligent design claim could allege some form of "negligent misrepresentation". Because the steel subcontractor asserted only economic loss claims against the engineer, they were barred by the economic loss doctrine.

**NEW YORK**

**DELAY RISK BORNE BY CONTRACTOR**

*Bovis Lend Lease (LMB), Inc. v. Lower Manhattan Development Corp.*, 2013 N.Y. App. Div. LEXIS 3728 (1st Dept. May 28, 2013*)*.

Lower Manhattan Development Corp. hired Bovis Lend Lease to decontaminate and deconstruct a building containing asbestos and lead which was severely damaged during the September 11 attack on the World Trade Center. The original contract price was approximately $81 Million. The Agreement permitted no damages for delay, and no additional compensation whatever obstacles or unforeseeable conditions may arise or be encountered without a written change order. Nonetheless, Bovis Lend Lease sought relief of extra costs incurred after its performance was continually interrupted and scrutinized by regulators. A District Court dismissed a large portion of Bovis' claim because the contract explicitly barred extra work without a written change order.

Delays are not considered un-contemplated when they are reasonably foreseeable, arise from the contract work, or are mentioned in the contract. Bovis lost on this argument because the contract specifically anticipated that involvement of regulators could delay the project. The court ruled there was no basis for Bovis to argue that, by alleging that the extent for regulatory delays was extreme, it stated a cause of action. According to Lower Manhattan Development Corp. and the Court, Bovis was not entitled to a change order for extra work caused by "regulatory interference" because the contract explicitly stated that extra work does not include work required by reason of any change in legal requirements. The contract also placed upon Bovis the risk of all regulatory and other governmental authority delays. Thus, Bovis was not entitled for compensation for undergoing "meticulous" regulatory inspections. The contract contained clauses providing no damages for delay, no damages for unforeseen condition, no damages for governmental interference, and no damages for changes in rules or regulations. Taken together, these clauses presented an extreme barrier to Bovis' claims.

## OHIO

### BREACH OF CONTRACT IS NOT A TORT

*TolTest, Inc. v. Purcell P&C, LLC*, 2013 U.S. Dist. Lexis 52897 (N.D. Ohio April 12, 2013)

International Fidelity Insurance Company (IFIC) furnished a performance bond to a subcontractor on a project. The prime contractor sought to enforce that performance bond after it terminated the subcontractor for performance failures. IFIC refused to arrange for substitute performance and denied any obligation to the prime contractor. The prime contractor asserted a claim for bad faith against the surety. IFIC argued that a tort claim was inappropriate.

The court ruled a contractor may not pursue a tort for bad faith against a bond surety, but it may proceed with a contract claim for breach of the implied covenant of good faith and fair dealing. The court reasoned that a claim arising from a contract must be a contract claim. Furthermore, IFIC needed to have a duty independent of any duty arising from the contractual relationship between the parties before the prime contractor could proceed with a tort claim for bad faith.

## PENNSYLVANIA

### SURETY IS NOT A FIDUCIARY TO CONTRACTOR

*Reginella Construction Co., Ltd v. Travelers Casualty and Surety Co. of America,* 2013 U.S. Dist. LEXIS 76353 (W.D. Pa. May 31, 2013)

Travelers provided three surety bonds for the contractor on two-multi-million dollar construction projects. One was a school building in Pennsylvania and the second was with the Ohio Turnpike Commission to reconstruct service plazas. According to the contractor, Travelers interfered in its business relationships on both projects and it sued Travelers for breach of fiduciary duty. The District Court noted that the Pennsylvania Supreme Court had not clearly decided whether a surety contract gives rise to a fiduciary relationship between the surety and the contractor. An insurer does owe a fiduciary duty to an insured in settling claims filed under an insurance policy. However, there is no similar established "duty" for a surety. The District Court looked to other state decisions and authority to decide how the Pennsylvania State Courts would likely decide the issue.

A first distinction was that a surety bond is a financial product-a commercial guarantee- not an insurance policy. The contractor usually agrees to indemnify the surety if claims are filed, which is the reverse of an insurance contract. The contractor also purchases the performance bond, not for its own benefit, but that of the project owner. As a result, the surety may have a contractual relationship with two parties – the contractor and the owner- which may have conflicting interests. Based upon these concepts and others, the District Court predicted that Pennsylvania would hold that a surety does not owe a fiduciary duty to its principal, i.e. the contractor. With respect to the claim of breach a fiduciary duty, therefore, the contractor failed to state a claim upon which relief could be granted.

**PENNSYLVANIA**

**LACK OF WRITTEN NOTICE NOT AN ABSOLUTE BAR TO SUB'S DELAY CLAIMS**

*Nippo Corp./Int'l Bridge Corp. v. AMEC Earth & Environmental, Inc.*, 2012 U.S. Dist. Lexis 47232 (E.D. Pa. April 1, 2013)

AMEC Earth and Environmental subcontracted work for a runway renovation on a U.S. Air Force project to Nippo Corporation/International Bridge. AMEC withheld $837, 500 in liquidated damages because Nippo completed its work one year behind schedule. In return, Nippo attributed part of the delay and $16 Million in overrun costs to AMEC. AMEC argued that many of Nippo's claims were barred or waived by failure to comply with the subcontract's written notice provisions. For the most part, the court disagreed with AMEC.

Three elements were established for having Nippo's claims proceed although it had not complied with the written notice requirements: 1) timely communications with AMEC regarding the difficulties being encountered; 2) "notice" (not necessarily in writing) that it was incurring damages; and 3) in many cases, notice that Nippo intended to seek an adjustment to the contract.

**TENNESEE**

**STATUTE OF LIMITATIONS FOR CONTRACT BREACH**

*James G. Akers v. Sessions Paving Co.,* 2013 Tenn. App. LEXIS 535 (August 13, 2013).

Sessions Paving oversaw construction of a municipal airport, got into dispute with the Akers, a site contractor, and Akers suspended work on the project. Akers eventually sued Sessions for breach of contract in violation of the state's Prompt Pay Act. The claims were dismissed as not being timely under the six year statute of limitations for breach of contract.

The courts ruled that the statute of limitations clock begins to run "on the date of the breach", but can also arise beforehand if one party's conduct shows an intention to no longer be bound by the contract. In such a case, the clock begins running when the other party is aware the contract will not be performed. The court focused on the date there was a prospective "settlement agreement" to allow a third party to value the work Akers had completed, and the Appellate Court agreed with the Trial Court that Akers already believed by that time that Sessions had breached the sub-contract when it entered into such a settlement agreement.

**WISCONSIN**

**GOVERNMENTAL IMMUNITY DOES NOT PROTECT CONTRACTOR**

*Showers Appraisals, LLC v. Musson Brothers, Inc.*, 2013 Wis. Lexis 289 (July 18, 2013).

In this case, the contractor sought to apply governmental immunity to protect it from a $140,000 damages suit brought by an owner whose property was flooded during a sewer improvement project. The contractor attempted to argue that it was acting as the State DOT's "agent" when it removed an entire roadway and disconnected the storm sewers. However, to be such a governmental "agent", the government must exert discretion and control over the activity, and the governmental entity must have had control over the tasks performed by the contractor with "reasonably precise specifications" which the contractor followed. In this case, the contractor was not subject to such specifications because the contract itself stated that the contractor was solely responsible for the means and methods of work. The court opined that the contractor had substantial independent decision-making authority in performing the work, and therefore was not a "servant" or "agent" of the government.