



EJCDC: RECENT COURT DECISIONS OF RELEVANCE TO CONTRACT DOCUMENTS June 2009

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Issue	Citation	Summary	Contract Document Implications
1. Flow-Down provision governs commencement of contractual limitations period.	<i>Steadfast Ins. Co. v. Brodie Contractors, Inc.</i> , 2008 WL 4780099 (U.S. District Court, W.D. Va. 2008).	<p>Action by general contractor against masonry sub. The prime contract's general conditions provided that the statutory limitations period on claims arising under the contract would begin to run no later than the date of the project's substantial completion date. The subcontract was silent on the issue of limitations, but through operation of a flow-down provision was subject to the general conditions contained in the prime contract. Contractor filed suit against masonry subcontractor more than five years after substantial completion, claiming that the subcontractor's work was defective. The contractor argued that its claim accrued as of the date it formally rejected the subcontractor's work, a date subsequent to the project's substantial completion that would bring the claim within Virginia's five year limitations period on contract claims. The subcontractor responded that the limitation period began to run at the time the project was substantially completed per the provision contained in the prime contract.</p> <p>The court held that the general conditions of the prime contract governed. Therefore the court stated that the limitations period began to run as of the date of the project's substantial completion and contractor's claim was time-barred.</p>	<p>a. General Conditions provisions generally flow down from the prime contract to a subcontract if the subcontract does not expressly address the topic, and the terms of the prime contract have been incorporated by reference and are stated to flow down.</p> <p>b. EJCDC E-500 contains a similar contractual limitations provision. C-700 does not.</p> <p>c. Limitations provisions are a two-way street. Here, the contractor got caught in the middle between owner and sub.</p>

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2. Owner failed to timely elect to arbitrate.	<i>Hempfield Area School Dist. v. Independence Excavating, Inc.</i> , 2008 WL 4692343 (U.S. District Court, W.D. Pa. 2008).	<p>A contract provided that an owner had thirty days from the time the contractor submitted a dispute to the architect to decide between arbitration and litigation of the dispute. Fifty-six days after the contractor submitted a dispute to the architect and two weeks after the contractor attempted to initiate arbitration of its claims, the owner sought to have the dispute tried in court.</p> <p>The court held that the owner was required to arbitrate the dispute, as the owner had waived its right to choose between arbitration and litigation by failing to make a timely decision between the two.</p>	<p>A supplementary condition created some confusion regarding the dispute resolution process. The court noted the strong legal favor for arbitration. More specifically, when a contract requires a party to make a decision between arbitration and litigation, the failure to select litigation within the period of time specified by the contract will result in the dispute being arbitrated.</p>

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<p>3. Contractual privity with a subcontractor not a requirement for an owner to enforce an arbitration agreement.</p>	<p><i>Drywall Systems Plus, Inc. v. Steel Systems</i>, 2008 WL 3307296 (U.S. District Ct., W.D. Tenn. 2008).</p>	<p>A subcontractor sued the owner and general contractor for breach of contract. Owner filed a motion to stay the proceedings pending arbitration. The court looked at the two applicable contracts, the prime contract and the subcontract between the general contractor and subcontractor. Both contracts included arbitration agreements and the prime contract was incorporated by reference into the subcontract.</p> <p>The court held that even without a contractual relationship between the owner and subcontractor, the owner has a right to enforce arbitration agreements against the subcontractor through the subcontract's incorporation of the prime contract.</p>	<p>Arbitration is fundamentally a function of contract. However, an owner may be able to force a subcontractor with which it has no direct contractual relationship into arbitration where the subcontract incorporates a prime contract containing an arbitration clause.</p> <p>The decision did not quote or review the exact terms of the arbitration clauses, but seemed to be indicating a general rule favoring arbitration if there is a flow-down.</p>

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4. Recovery for withdrawn bid limited to bid bond.	<i>Rye City Sch. Dist. v. Xavier Contractors, LLC</i> , 54 A.D. 3d 927 (N.Y. App. Div. 2008).	<p>A contractor withdrew its bid for work on a school project following discovery of an error that led it to submit an erroneously low bid. The withdrawal came two weeks after the school board had accepted the bid. The project was re-bid and the lowest bid submitted was \$465,000 higher than the contractor's withdrawn bid. The district sued the contractor for breach of contract and the contractor's surety sought to limit the district's recovery to the value of the bid bond (\$176,400).</p> <p>The court held that the district's recovery was limited to the value of the bid bond because the contract documents stated that the recovery would be limited only to the bid bond proceeds.</p>	EJCDC bid documents expressly indicate that recovery of bid security (bond) is owner's sole remedy if a bidder defaults.

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5. Recovery for delay waived by execution of releases.	<i>Addicks Services. v. GGP-Bridgeland, L.P.</i> , 2008 WL 4747343 (U.S. District Court, S.D. Tex. 2008).	<p>Contractor repeatedly executed lien waivers and releases as consideration for progress payments. The release form contained a place for listing contested amounts, but the contractor never listed any amounts in dispute. When the project finished nearly a year behind schedule, the contractor sued the owner for delay and lost productivity. The owner argued that the contractor's execution of the releases waived its right to recover damages. The contractor countered that the releases covered only work originally contemplated under the scope of the contract.</p> <p>The court held that the interim releases were enforceable and had effectively waived the contractor's right to recover damages from the owner.</p>	<p>Parties should fully understand what they are forfeiting by signing releases and the scope of the release should be clearly articulated in writing.</p> <p>EJCDC does not publish a lien waiver or release form. Application for Payment (C-620) contains contractor certifications, but these do not include waivers of claims.</p>

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6. Delay damages found to be direct damages.	<i>Tenn. Gas Pipeline Co. v. Technip USA Corp.</i> , 2008 WL 3876141 (Tex. App. 2008).	<p>A project planned for seventeen months took the contractor three years to complete. The prime contract provided that “indirect, special, incidental or consequential” damages were not recoverable by either party. The owner sued for damages, including delay and other damages, claiming they were all direct damages. The jury awarded the owner all damages sought, but the court limited the jury award to those damages related to contractor's defective work. Both owner and contractor appealed.</p> <p>The court held that the owner was entitled to delay damages because such damages were a direct consequence of the contractor’s delayed completion of the project. Additional damages sought, like those for lost energy efficiency savings, were not recoverable because they were consequential damages that did not necessarily result from the contractor’s breach of the prime contract.</p>	The distinction between "direct damages" and "consequential damages" is difficult to define. To categorize the damages in a particular case, for purposes of a waiver of consequential damages clause (used in some EJCDC documents), courts must apply precedent from their jurisdictions, and look to the totality of the contract.

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7. Design drawings created for a proposed project constituted the unlicensed practice of architecture.	<i>Davis v. Board of Architect Examiners</i> , 193 P.3d 1019 (Oregon Ct. App. 2008).	<p>Oregon Court of Appeals considered an order issued by the Board of Architect Examiners against an architect that imposed a \$5,000 fine for practicing architecture without a license. The court reviewed the statutory definition of “practice of architecture” and the question presented was whether the practice of architecture encompassed drawings and plans that were created for a client, but were never used for actual construction.</p> <p>The court held that the practice of architecture includes and encompasses the planning and the designing of a building regardless of whether the building is actually constructed. Therefore the court held that the definition of “practice of architecture” met the statutory purpose of the regulation by protecting the public, and the state need not wait until construction occurs to protect the public from an unlicensed architect's actions.</p>	<p>An unlicensed person may be held liable for violating statutes preventing the unlicensed practice of architecture just by submitting plans and drawings to a client, even if the planned buildings are never constructed.</p> <p>The facts in this case were clear, but the ruling does raise issues for firms that submit proposals, contractors and developers who sketch out concepts, and other situations on the margins of "design."</p>

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<p>8. Copyright Protection Afforded Architect's Work</p>	<p><i>Thomas M. Gilbert Architects, P.C. v. Accent Builders & Developers</i>, 2008 WL 2329709 (E.D. Va. 2008).</p>	<p>Company contracted with an architect for plans for construction of townhomes. The contract provided that the plans would remain the property of the architect and were to be used by third parties only with the architect's express permission. The plans themselves also contained a copyright notice. The company requested changes to the plans which the architect agreed to do for a fee. Thinking the fee unreasonable, the company copied the plans, made modifications, and provided the modified plans to subcontractors for construction. The architect sued for copyright infringement.</p> <p>The Court found that provisions in the contract for the drafting of the plans and a copyright notice on the plans made clear that the architect intended to retain ownership of the plans. Thus the company was precluded from using the plans and was liable for copyright infringement since it circulated the modified plans without the architect's express authorization.</p>	<p>Courts will enforce clear provisions regarding provisions regarding ownership and copyright.</p>

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<p>9. Enforceability of Limitation on Liability clause.</p>	<p><i>Witt v. La Gorce Country Club</i>, Florida Court of Appeals (2009)</p>	<p>Golf course irrigation project involving reverse osmosis water treatment system. Professional geologist provided hydrogeological consulting services to contractor. System failed and owner sued contractor and hydrogeologist (firm and individual). The hydrogeologist consulting agreement contained a limitation of liability clause.</p> <p>Court held that under Florida law a cause of action for professional negligence (malpractice) exists "irrespective, and essentially independent of a professional services agreement" and "because a professional negligence claim exists and operates outside of a professional services contract, it would be inapposite to limit such a remedy to the confines of the very document outside of which it was intended to operate." Therefore the limitation on liability clause was unenforceable.</p>	<p>Court's holding appears to have implications beyond the limitation of liability clause.</p> <p>Even if read narrowly—as applying only to the individual professional—the case would encourage claims against individual design professionals and circumvent contractual protections that the parties had bargained for.</p>
<p>10. Economic Loss Doctrine</p>	<p><i>Terracon Consultants v. Mandalay Resort Group</i>, Supreme Court of Nevada (2009)</p>	<p>See NSPE summary in Agenda book.</p>	<p>Court's decision confirms that many construction disputes should be resolved through recourse to contract terms.</p>