

CCL Summaries

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BIDDING

STATE CONTRACTS

Blaine Equip. Co. v. State, 138 P.3d 820, 2006 Nev. LEXIS 98, 122 Nev. Adv. Rep. 76 (July 27, 2006).

Key Point:

In Nevada, a district court does not have the equitable power to reach a conclusion contrary to the State Purchasing Act, which requires purchasing contracts to be awarded to the lowest responsible bidder.

CCL Summary:

Through a purchase price agreement, the Nevada Department of Transportation (NDOT) requested that the state purchasing division invite bids from suppliers for the purchase of articulated motor graders. The purchasing division accepted multiple bids as responsive. NDOT requested that the purchasing division purchase some of the necessary motor graders from Cashman Equipment (supplier). In addition to purchasing motor graders from the supplier, the purchasing division purchased one motor grader from Blaine Equipment (protester). The protester filed a complaint against the purchasing division and NDOT. The protester sought declaratory relief, alleging that the purchase price agreements violated the State Purchasing Act (statute). The protester sought to void each motor grader contract that violated the statute, even if the contract had already been performed. The protester also sought injunctions to prevent the purchasing division from entering into contracts that violated the statute. After the district court denied injunctive relief, the protester filed a motion for summary judgment. The district court partially granted the motion. The district court agreed that the use of the purchase price agreements violated the statute because there was no clear procedure for determining the lowest bidder, but declined to void the contracts already performed between the supplier and the purchasing division. The protester appealed.

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The district court erred by not sua sponte joining the supplier as a necessary party to the proceedings. Complete relief could not have been accorded to the purchasing division in the supplier's absence. The district court was obligated to join necessary parties in actions involving state purchase challenges under the statute. Furthermore, the district court did not have the equitable power to affirm contracts that violated the statute. The legislature intended to void any contract that violated the statute regardless of whether performance had been completed. The district court could not disregard the mandatory language of the statute, which plainly stated that any contract for the purchase of equipment by any state officer would be void if the contract violated the statute. The purchasing division failed to demonstrate that the district court's equitable power should be extended. Reversed as to the district court's order affirming the contracts between the supplier and the purchasing division; remanded with instructions to join the supplier.

CONTRACTS

SPECIFICATIONS

RaCON, Inc. v. Tuscaloosa County, 2006 Ala. LEXIS 184 (July 28, 2006).

Key Point:

A contractor cannot rely on general specifications in a contract where conflicting technical specifications are controlling.

CCL Summary:

Tuscaloosa County (County) undertook a road construction project funded by the Alabama Department of Transportation (ALDOT). The County contracted with Burk-Kleinpeter, Inc. (engineer) to be the project engineer. The engineer retained TTL, Inc. (consultant) to provide geotechnical services to investigate soil conditions and make recommendations concerning rock buttresses likely needed to stabilize slopes along the proposed roadway. Based on the consultant's recommendations, the bid forms contained estimated quantities of various materials needed for soil stabilization and for each estimate a place to include unit price and total price to be included in the bid. In addition to the plans specific to the project, the contract documents incorporated ALDOT Standard Specification 219, which stated that construction of rock buttresses was one of several methods to correct landslides. RaCON, Inc. (contractor) submitted a bid and was awarded the contract for the road construction. Based on its own field investigation and pre-bid representations by the engineer and consultant that ALDOT Specification 219 required rock buttresses only as a last resort to correct actual slope failures and not as a preventive measure, the contractor zero bid the rock stabilization items, taking a commercial risk that there would be no slope failures. After the contract was awarded, the consultant designed rock buttresses for 14 locations and the engineer directed the contractor to construct rock buttresses at those locations. The contractor constructed the rock buttresses under protest and billed the County for extra work. The County refused to pay and the contractor filed suit against the County for breach of contract. The trial court granted the County's motion for summary judgment. The contractor appealed.

The contractor argued that ALDOT Specification 219 limited a contractor's obligation to build a rock buttress to situations where a slope actually failed and that the

engineer instead required the contractor to build rock buttresses at multiple locations to prevent, not to remedy, slope failures. The contractor argued further that the engineer's directive to build rock buttresses was contrary to oral pre-bid representations by the engineer and consultant that those structures would be constructed only as a last resort if less costly construction methods would not stabilize slope failures. The County argued that the contract obligated the contractor to build preventive rock buttresses as directed by the project engineer. An integration clause in the contract provided that any pre-bid representations by the engineer or consultant, limiting the contractor's obligations to construct rock buttresses, had to be memorialized in the contract in order to survive. There were no references to the pre-bid representations in the contract. The contract further provided that, in the event of a conflict in the contract documents, technical specifications took precedence over general specifications. Thus, Specification 219 was not controlling where the specific plans and specifications obligated the contractor to build the rock buttresses. The engineering plans stated that quantities of materials had been included in the plans to be placed "as directed by the project engineer" for rock buttresses. Summary judgment for the County affirmed.

BIDDING

BID PROTESTS

A&D Fire Prot., Inc. v. United States, 2006 U.S. Claims LEXIS 237 (Fed. Cl. Aug. 10, 2006)

Key Point:

The Federal Court of Claims lacks jurisdiction over protests of the award of individual task orders by contractors who are operating under multiple award IDIQ contracts.

CCL Summary:

A&D Fire Protection, Inc. (contractor) was awarded an Indefinite Delivery-Indefinite Quantity (IDIQ) contract with the General Services Administration (GSA) for construction related services. The contractor was one of multiple awardees, any one of which could be selected through a competitive bidding process to perform individual task orders at various government properties. The contractor submitted a proposal on a project to replace the fire alarm system at a federal building in California. Among the five bidders, the contractor submitted the lowest bid. The evaluation factors listed in the request for proposal (RFP) were weighted 25% for price, 25% for past performance, and 50% for other non-price factors. When weighting had been applied, the contractor's score ranked fourth out of the five offerors. Hernandez Construction Corporation (Hernandez) was awarded the task order for the project. At a formal debriefing with GSA, the contractor presented a variety of arguments as to why its proposal had been scored inaccurately. As the result of a rescoring, the contractor's score was raised to second overall. Hernandez still had the highest score, and GSA sustained its initial award of the task order. The contractor filed a bid protest complaint in the United States Court of Federal Claims. The government filed a motion to dismiss.

The contractor's master IDIQ contract incorporated by reference certain sections of the Federal Acquisition Regulations (FAR), which in turn referenced the Federal

Acquisition Streamlining Act of 1994 (FASA). The FASA provided that when a procurement envisioned a multiple award IDIQ contract, creating through competition a pool of contractors for certain work projects, the issuance of individual task orders to those contractors was not subject to protests. There was an exception for a protest on the ground that the order increased the scope, period, or maximum value of the contract under which the order was issued. The intent of Congress was to exempt from protest the issuance of individual task orders to contractors who had already received awards, subject to protest, of their master IDIQ contracts. Congress instead offered disappointed task order bidders recourse to the agency's task and delivery order ombudsman. Based on FASA, the court did not have jurisdiction over the contractor's bid protest due to the contractor's lack of standing. Motion to dismiss granted.

SURETY

PROPERTY DAMAGE

Standard Fire Ins. Co. v. Spectrum Community Assn., 141 Cal. App. 4th 1117, 2006 Cal. App. LEXIS 1182, 2006 Cal. Daily Op. Service 6986 (July 31, 2006).

Key Point:

Under a CGL insurance policy, it is the existence of damage, not of the complaining party, during the policy period that determines coverage and the insurer's duty to defend.

CCL Summary:

Bristol House Partnership, Ltd. (developer) contracted with Mercantile Builders, Inc. (contractor) for construction of a large condominium complex. The Standard Fire Insurance Company (insurer) issued a commercial general liability (CGL) insurance policy with respect to the project for the period of August 6, 1991 to August 6, 1992. The owners and occupants of the condominiums filed 67 separate lawsuits against the developer for bodily injury and property damage caused by numerous construction defects. The Spectrum Community Association (Association), a homeowners association, also filed suit against the developer and contractor for design and construction defects related to the condominium construction project. The developer and contractor tendered defense of the litigation to the insurer. The insurer filed a complaint seeking a declaratory judgment that it had no duty defend or indemnify in connection with the construction defect litigation. The insurer and the Association both filed motions for summary judgment. The trial court granted summary judgment in favor of the insurer. The Association appealed.

The insurer argued that the Association could not have suffered property damage during the policy period, so as to trigger coverage under the policy, because the Association did not own any interest in the project nor did it even exist during the policy period. The Association countered that damage to the project occurred during the policy period, which was all that was required to trigger coverage under the policy. The developer and contractor were developing the property in question at the time the alleged damage occurred and the insurer had the opportunity to evaluate the risks associated with the development of the property and to underwrite those risks accordingly. The Association alleged the occurrence of physical injury to tangible

property during the policy period, which gave rise to the insurer's duty to defend. It was the existence during the policy period of the damage, not the complaining party, that determined coverage. Reversed and remanded.

CLAIMS

DELAY CLAUSES

Guy M. Cooper, Inc. v. East Penn Sch. Dist., 2006 Pa. Commw. LEXIS 404 (July 26, 2006).

Key Point:

Under a “no damages for delay” clause, a school district is not liable to a mechanical prime contractor for a general contractor’s delays where the general contractor is responsible for scheduling and coordination.

CCL Summary:

The East Penn School District (school district) awarded a heating, ventilation, and air-conditioning contract to Guy M. Cooper (mechanical contractor) for the construction of a new middle school. The contract contained a “no damages for delay” clause, which provided that the school district was not liable to the mechanical contractor for monetary claims arising out of delays. The contract provided for additional time to complete the work as a remedy for construction delays. The project was substantially completed more than five hundred days after the original completion date. The mechanical contractor sued the school district, alleging that the school district breached its contract by failing to ensure that construction proceeded without delay. The mechanical contractor also brought an unjust enrichment claim against the school district. The trial court granted summary judgment in favor of the school district and other defendants. The mechanical contractor appealed.

The mechanical contractor argued that the contract's “no damages for delay” clause should have been set aside because the school district failed to prevent delays by overseeing and controlling the general contractor's work and by allowing defects in the architect's work. However, the school district was not responsible for the general contractor's construction delays. Under its contract with the school district, the general contractor was responsible for construction scheduling and coordination. As the school district bore no contractual responsibility to oversee the schedule or to coordinate work among the contractors, the school district was not liable for the general contractor's construction delays. The trial court properly determined that the “no damages for delay” clause should not be set aside with respect to claims that the school district failed to control the general contractor. The trial court erred in concluding that the school district could not be liable for construction delays attributable to the architect as the school district's representative, but the mechanical contractor failed to present sufficient evidence demonstrating that the architect's actions caused construction delays for which the school district was liable. Furthermore, the mechanical contractor could not proceed on a theory of unjust enrichment because the relationship between the mechanical contractor and the school district was governed by a written agreement. Affirmed.

Stromberg Sheet Metal Works, Inc. v. Wash. Gas Energy Sys., 2006 U.S. Dist. LEXIS 59036 (D.D.C. Aug. 23, 2006).

Key Point:

Where a subcontract allows a contractor to assign its contract rights, the contractor's assignee may enforce a mandatory arbitration provision in the contract, despite language in the arbitration clause prohibiting non-party participation.

CCL Summary:

The federal government awarded a contract to Washington Gas and Light Company (contractor) to design and build a heating and chilling facility. The contractor subcontracted with the Thermal Engineering Group (subcontractor one) to design the project and with Washington Gas Energy Systems (subcontractor two) to serve as the project manager. Subcontractor two subcontracted with Stromberg Sheet Metal Works, Inc. (sub-subcontractor) for construction and manufacturing services. The sub-subcontractor filed suit against the contractor and subcontractor two for damages, alleging that the sub-subcontractor had not been paid for work performed including work required as a result of subcontractor one's design defects. Subcontractor two filed a counterclaim asserting that the additional costs were due to the sub-subcontractor's failure to properly fabricate, install and correct its work, which caused delay damages. The contractor filed a third-party complaint against subcontractor one due to the alleged design defects and then filed a motion to compel arbitration based on a mandatory arbitration clause in the subcontract between the contractor and subcontractor one. The contractor, subcontractor two and sub-subcontractor agreed to dismiss their claims against each other, with the contractor assigning its claim against subcontractor one to the sub-subcontractor. The contractor then requested on behalf of the sub-subcontractor that the court grant its motion to compel arbitration.

Subcontractor one disputed the contractor's contention that the sub-subcontractor could enforce the arbitration agreement on behalf of the contractor, arguing that the contractor's decision to assign its right to arbitration invalidated the arbitration provision. Subcontractor one supported its argument with language in the arbitration clause which stated that no arbitration arising out of the agreement could include by consolidation, joinder or in any other manner any person or entity not a party to the agreement. The contractor argued the sub-subcontractor's status as a non-party to the agreement was irrelevant to the enforceability of the arbitration clause because the contractor assigned its rights to the sub-subcontractor. The contract between the contractor and subcontractor one allowed the contractor to assign its rights under the contract as evidenced by language stating that the parties agreed to bind themselves and their partners, successors, assigns, and legal representatives. While the arbitration agreement contained language limiting the obligation of parties to the agreement to arbitrate with non-parties, it was well-settled in the law that an assignee of a contract stood in the

shoes of the assignor and acquired the same rights and liabilities as if it had been an original party to the contract. Therefore, as an assignee of the contractor, the sub-subcontractor had the same rights as the contractor in its contract with subcontractor one. Motion to compel granted.

CONTRACTS

APPARENT AUTHORITY

Quality Foods, Inc. v. Holloway Assocs. Prof'l Eng'rs & Land Surveyors, Inc., 2006 Ind. App. LEXIS 1538 (Aug. 9, 2006).

Key Point:

A realtor for developers has apparent authority to enter into a contract with an engineer on the developers' behalf.

CCL Summary:

Two developers decided to develop two properties into residential subdivisions. The developers engaged a realtor to assist with rezoning the properties. The realtor contacted an engineer concerning lot layout and wetlands delineation. The engineer thought that the realtor was an agent of the developers. Based on an oral agreement with the realtor, the engineer assisted with preparing lot layouts and performing rezoning representation at zoning meetings. When the engineer's invoices were not paid, it filed a mechanic's lien on one of the properties. In addition, the engineer filed complaints against the developers to recover for unpaid invoices and to foreclose the lien. The cases were consolidated. Although the engineer dismissed its claim against the realtor, the developers filed a cross claim against her. The developers' president and vice president testified that they did not authorize the realtor to hire the engineer or to incur any engineering expenses regarding the proposed subdivisions. The trial court found that the engineer was entitled to foreclosure of its mechanic's lien and to judgment for the amount owed for work performed. The trial court also found that the realtor owed nothing to the developers. The developers appealed.

The developers argued that the realtor did not have actual or apparent authority to make commitments on their behalf. They maintained that they did not directly or indirectly communicate to the engineer that the realtor was their agent. However, the developers' president signed a zoning amendment application that identified the engineer as its land surveyor. The president also attended zoning meetings with the realtor and engineer. The president testified that he considered the realtor his partner. Although the developers did not directly inform the engineer that the realtor was their agent, they placed her in a position that instilled a reasonable belief in the engineer that she was their agent. Even if the realtor did not have apparent authority, the developers were aware that the engineer was performing work for the rezoning of the properties and accepted the benefits of that work. The trial court's conclusion that the realtor had authority to enter into contracts on behalf of the developers was not clearly erroneous. Because the realtor had apparent authority to enter into a contract with the engineer, the trial court's enforcement of the engineer's mechanic's lien was not clearly erroneous. Affirmed.

Murdock & Sons Constr., Inc. v. Goheen General Constr., Inc., 2006 U.S. App. LEXIS 21056 (7th Cir. Ind. Aug. 17, 2006).

Key Point:

A masonry subcontractor's constructive acceleration claim fails where there is no evidence that the union masons' slow pace is caused by a labor dispute or a cause beyond the subcontractor's control entitling the subcontractor to a time extension.

CCL Summary:

The State of Indiana decided to build a maximum security prison. Goheen General Construction (contractor) was the general contractor. Murdock & Sons Construction (subcontractor) was to perform the masonry work for the project. The subcontractor was required to use union masons. The subcontractor estimated that each mason could lay 150 blocks a day, but the masons were only laid 50 blocks a day. The masons' failure to work as quickly as projected in the original bid resulted in delays and cost overruns. The state refused to provide the subcontractor with a time extension. The subcontractor stopped work and filed a constructive acceleration claim against the contractor and the state. Finding that the subcontractor did not experience an excusable delay, the district court ruled against the subcontractor. The subcontractor appealed.

The subcontractor argued that because its efforts to speed up the masons' pace failed, the slow pace was outside of its control. The subcontractor also argued that it could not have foreseen the construction delays caused by the masons' slow pace. The subcontractor asserted that it relied on historical data and industry standards in compiling its bid. However, the subcontractor failed to establish that the slow pace of the masons was due to a labor dispute or to a cause beyond its control, as required by the subcontract. The subcontractor speculated that the delay of its work was caused by a labor dispute with the masons, but introduced no evidence at trial of a labor dispute or other evidence indicating why the masons were working at a slower pace than anticipated. There was no evidence of a controversy between the subcontractor and the masons regarding employment terms or union representation. No written grievances or complaints were lodged against the subcontractor. There was no evidence of a labor dispute as defined by the Norris-LaGuardia Act or the state's Anti-Injunction Act. Furthermore, the subcontractor did not show that it exhausted all methods to increase the masons' productivity. The subcontractor increased productivity temporarily by adding more masons to the job, but did not continue with that method due to cost concerns. The subcontractor did not offer cash incentives to the masons to increase their pace. In preparing its bid, the subcontractor was aware that the masons' pace could be slower than anticipated. The subcontractor knew that it could not set minimum production levels for the masonry work because it had to use masons from the local union. The prison's wall required special reinforcements which may have required more manpower than projected. The subcontractor grossly underestimated the amount of time and effort required to perform the masonry work for the project. The subcontractor did not experience an excusable delay that would have entitled it to a time extension. Affirmed.

Kel Homes, LLC v. Burris, 2006 Fla. App. LEXIS 12068; 31 Fla. L. Weekly D 1953 (July 21, 2006).

Key Point:

A specific contractual provision that allows a lawsuit for a contractor's default controls over a more general provision that requires arbitration for any dispute arising out of the contract.

CCL Summary:

Michael and Tonia Burris (purchasers) entered into a contract with Kel Homes (contractor) for the construction of a residence. The contract contained an arbitration provision. The contract also contained a default provision that permitted the purchaser to file suit for specific performance upon the contractor's default. After three hurricanes hit the area, the contractor attempted to terminate the contract pursuant to the "acts of God" provision. The purchasers filed suit against the contractor, seeking specific performance and damages for fraud in the inducement. Relying on an arbitration provision in the contract, the contractor moved for dismissal. The trial court denied the motion, finding that neither claim was within the scope of the arbitration provision. The contractor appealed.

The contractor asserted that the claim for specific performance fell within the scope of the arbitration provision because the term "suit" as used in the default provision should have been construed to mean "arbitration." The purchasers countered that a suit was not arbitration and that the contract plainly stated they could file a suit for specific performance. The purchasers' claim for specific performance did not fall within the scope of the arbitration provision, since it was based on the contractor's default. The term "suit" was not interpreted to normally encompass an arbitration proceeding. The use of different terms within the contract indicated that different meanings were intended for "suit" and "arbitration." The specific contractual provision which allowed a suit for the contractor's default controlled over the more general dispute resolution provision that required arbitration for any dispute arising out of the contract. The contract required the parties to arbitrate all disputes other than those seeking specific performance for the contractor's breach. Unlike the specific performance claim, however, no other provision of the contract referenced any other possible forum for resolving the fraud claim. Under the clear terms of the contract, the claim for fraud in the inducement clearly fell within the scope of the arbitration provision. Affirmed in part, reversed in part, and remanded for further proceedings concerning the validity of the arbitration provision.

American Contrs. Ins. Co. v. United Nat'l Ins. Co., 2006 U.S. Dist. LEXIS 57253 (E.D. Ky. Aug. 14, 2006).

Key Point:

Business risk exclusions in a CGL policy preclude coverage on a surety's claim for damages resulting from a subcontractor's negligent work in a right-of-way area.

CCL Summary:

Centers Contracting (contractor) contracted with a city to install a sewage drainage system. The contractor had a commercial general liability (CGL) policy issued by United National Insurance (insurer). The contractor acquired a performance and payment bond from American Contractors Indemnity (surety). The contractor began to bore under a highway, but the auger bit on the boring machine became stuck. The subcontractor entered a right-of-way area and dug out a large section of an embankment adjacent to the highway in an unsuccessful attempt to recover the stuck auger. The subcontractor backfilled the soil into the excavated area, but did not properly compact the soil. The slope gave way and a section of the asphalt in the highway's southbound lane sank. The contractor abandoned the project and filed for bankruptcy. The contractor's surety hired another contractor to repair the embankment and the southbound lane. The contractor's insurer refused to provide coverage for the cost of repairs. The surety filed suit against the insurer. The parties filed cross motions for summary judgment.

The insurer argued that two business risk exclusions in its CGL policy precluded coverage. The surety asserted that the exclusions were not applicable because the project plan did not contemplate entry into the right-of-way area. The subcontractor's negligent excavation was performed in an effort to retrieve the auger, which was an integral part of the project. The right-of-way area was physically within the project area. The city had obtained an encroachment permit for the contractor to enter the right-of-way area to set up a bore pit and machinery. As the permit was broad enough to authorize the emergency work performed by the subcontractor, the subcontractor was not trespassing when it entered the right-of-way area. Although the subcontractor's retrieval effort was not expressly contemplated by the contract, it became part of the contractor's work. The surety sought to recover damages to the highway resulting from the subcontractor's negligent work on the contractor's behalf. Because the terms of the business risk exclusions were unambiguous and applied to the damage for which the surety sought coverage, the insurer was not obligated to provide coverage on the surety's claim. The insurer's motion for summary judgment was granted; the surety's motion was denied.

United States ex rel. Ocean Constr. Servs. v. Liberty Mut. Ins. Co., 2006 U.S. Dist. LEXIS 59974 (E.D. Va. Aug. 24, 2006).

Key Point:

Claimant Must Comply With the Act's Technical Requirements. To recover under the Miller Act, a subcontractor with a contract with a completion contractor must provide notice of claim to the surety that provided the bond for the original contractor.

CCL Summary:

The U.S. Army Corps of Engineers (Corps) contracted with Chianelli Building Corporation (contractor one) to construct improvements to housing units at Langley Air Force Base. As required by the Miller Act (Act), contractor one provided to the Corps payment and completion bonds issued by Liberty Mutual Insurance Co. (surety). After contractor one experienced financial difficulties, the surety entered into a Surety Takeover Agreement with the Corps to finish the project as required by its completion bond. The surety engaged Orion Enterprises of Virginia, Inc. (contractor two) to perform the work. Contractor two subcontracted with Ocean Construction Services, Inc. (subcontractor) to hang wallboard and apply plaster finish. When contractor two did not pay the subcontractor for its services, the subcontractor filed a Miller Act Claim against the surety seeking payment pursuant to the payment bond. The surety filed a motion to dismiss based on the subcontractor failure to file timely notice of non-payment as required by the Act.

The Act distinguished between a first-tier subcontractor, which had a direct contractual relationship with a contractor furnishing a payment bond, and a second-tier subcontractor having no such relationship. Second-tier subcontractors were required under the Act to give timely notice of non-payment as a prerequisite to recovery. First-tier subcontractors were not required to provide such notice due to their direct relationship with the contractor who procured the payment bond. The subcontractor argued that it was a first-tier subcontractor based on the fact that the surety and the Corps designated contractor two as the completion contractor in the Surety Takeover Agreement. The "completion contractor" designation in the Surety Takeover Agreement was irrelevant. The Act required notice unless the subcontractor had a contractual relationship with the contractor furnishing the payment bond. It was undisputed that contractor two never furnished a bond. The subcontractor therefore was a second-tier subcontractor required to give timely notice to the surety and/or contractor one. Surety's motion to dismiss granted.

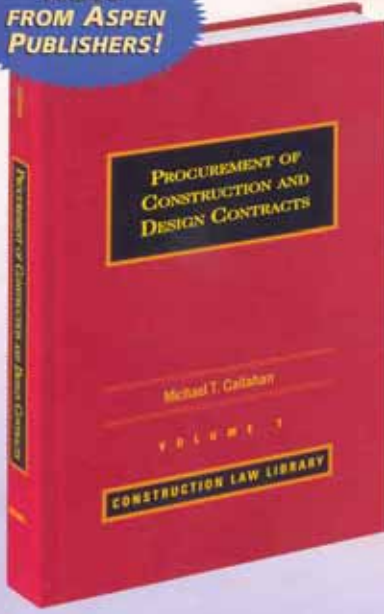
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