

CCL Summaries

Summarizing the advances and changes in Technology, Law, Insurance and Accounting that affect you.

September 2006

Volume 13, No. 9

CLAIMS

SET OFF

Turner Constr. Co. v. E & F Contrs. Inc., 2006 Fla. App. Lexis 15501, 31 Fla. L. Weekly D 2400 (Sept. 20, 2006).

Key Point:

A contractor is not allowed to use set-off as an affirmative defense to nonpayment where the set-off claims are subject to pending lawsuits arising out of separate subcontracts.

CCL Summary:

E&F Contractors, Inc. (subcontractor) entered four separate subcontracts with Turner Construction Company (contractor) to perform work on different construction sites. The subcontractor filed separate suits against the contractor for payment pursuant to each of the subcontracts. In the present case, the contractor conceded nonpayment, but raised set-off as an affirmative defense, claiming that the subcontractor owed more than the amount of nonpayment for deficient work on the other projects that the parties were litigating. The subcontractor filed a motion for summary judgment based on the argument that set-off was unavailable because the set-off claims and the nonpayment claim arose out of different subcontracts and construction projects. The trial court struck the affirmative defense of set-off and entered final summary judgment for the subcontractor. The contractor appealed.

The affirmative defense of set-off was in the nature of a permissive counterclaim that did not arise out of the transaction or occurrence that was the subject matter of the nonpayment claim. It was within the trial judge’s discretion to sever the permissive counterclaim from the main claim if there was no evidence of prejudice. The trial court’s order did not prejudice the contractor because the contractor still had the opportunity to fully litigate its set-off claims in pending lawsuits arising out of its other subcontracts. The trial court’s order striking the set-off claim also promoted judicial economy and avoided the potential for inconsistent judgments. Affirmed

ARBITRATION
 Federal Arbitration Act.....9
 General.....2
Bidding
 DBE’s.....2
 Negligence.....7

CLAIMS
 Phased Construction.....4
 Plans and Specificaitons.....8
 Set Off.....1
CONSTRUCTION
 Delay Clauses.....10

CONTRACTS
 Authority.....11
 Breach.....7
 Construction Manager.....4
SURETY
 Material Fact.....5
 Performance Deadline.....3

Chaz Concrete Co., LLC v. Codell, 2006 U.S. Dist. LEXIS 60013 (E.D. Ky. Aug. 23, 2006).

Key Point:

Bidding State Contracts. A class action is not appropriate to adjudicate claims that the Kentucky DBE program is fraudulently administered because of the factual inquiries required for each DBE and each project.

CCL Summary:

Chaz Concrete Company, L.L.C., Grant Trucking, Inc., Sweeney Enterprises and Green River Seed and Sod, Inc. (plaintiffs) were certified by the Kentucky Transportation Cabinet (Cabinet) as a Disadvantaged Business Enterprise (DBE). The plaintiffs sued James C. Codell and J.M. Yowell (defendants) in their individual capacities as Chief Executive Officer and State Highway Engineer, respectively, of the Cabinet. The plaintiffs brought a civil action under the Racketeering Influence and Corrupt Organizations Act (RICO), alleging that the plaintiffs obtained DBE certification and participated in the DBE program in reliance on the defendants' misrepresentations in public speeches, private meetings and letters that they fairly and legally administered the program. The plaintiffs asserted that the defendants committed fraud by falsely certifying DBE businesses that were not minority or women-owned and by permitting legitimate DBEs to be awarded contracts and then brokered the actual work to companies that were not eligible for DBE certification. The plaintiffs sought damages for work that went to improper DBEs and should have gone to legitimate DBEs. The plaintiffs filed a Motion for Class Certification to act as representative parties for the class of legitimate DBEs similarly harmed.

The defendants argued that their claims were typical of the claims of the class. There were issues common to all members of the class, including whether the defendants certified companies as DBEs knowing that they did not meet the legal qualifications and whether the defendants awarded contracts to DBEs knowing they would not actually perform the work. However, because of the varied nature of the alleged misrepresentations and of the recipients of the misrepresentations, the issues of reliance and causation involved extensive individual factual inquiries for each proposed class member. There was no allegation that the proposed class members received a standard written document that induced them to act. Nor was there any allegation that the plaintiffs were the recipients of uniform oral representations. Instead, the plaintiffs asserted that the misrepresentations occurred at different times, in different places and contexts, and in different manners. The individual issues were predominant over the common issue of whether contracts were fraudulently awarded in the DBE program. Because the plaintiffs were seeking the value of the contracts awarded to illegitimate DBEs, they had to demonstrate causation by showing that defendants' conduct caused the individual plaintiffs not to be awarded the contracts, which required intensive factual inquiries regarding each DBE and each project. These individual issues of reliance and causation operated against finding that a class action was the superior method of adjudicating the potential claims. Motion for class certification denied.

RLI Ins. Co. v. St. Patrick's Home for the Infirm, 2006 U.S. Dist. LEXIS 69590 (S.D.N.Y. Sept. 27, 2006).

Key Point:

An owner's decision not to terminate a contractor or declare the contractor in default when the contractor fails to complete all work by a deadline does not constitute a waiver of the contract's liquidated damages provision.

CCL Summary:

St. Patrick's Home for the Infirm and Aged (owner) contracted with a contractor to construct a new façade for a nursing home. RLI Insurance (surety) provided a performance bond to guaranty the contractor's performance. The work was not substantially completed by the contract deadline, so the owner and contractor executed a change order which provided for liquidated damages. When the project was further delayed, the surety and contractor executed an interim funding agreement (IFA). The IFA provided that the owner was entitled to liquidated damages if the work was not completed by a certain date. The IFA also provided that the owner would waive liquidated damages if all work other than punchlist work was completed by a particular deadline. The contractor was eventually terminated for cause. The surety filed suit against the owner and the owner counterclaimed for liquidated damages. The owner moved for partial summary judgment on its claim for liquidated damages and moved to dismiss the surety's claim for damages. The surety moved for summary judgment on the owner's counterclaim and on the surety's request for a declaration that the surety bore no responsibility to the owner under its performance bond.

The owner and surety disagreed as to whether the owner was entitled to recover liquidated damages under the IFA. They also disputed whether and when the contractor completed all work on the project. The surety sought to avoid paying liquidated damages by arguing that the owner failed to terminate the contractor or otherwise mitigate its damages after the contractor failed to complete all work by the IFA's deadline. The surety also argued that the owner breached the terms of the bond by failing to give prompt notice to the surety of the contractor's default, thus forfeiting any claim against the surety under the bond. However, the performance bond did not include an explicit notice requirement. In addition, the contract's notice provision did not require that the owner give written notice to the surety that the contractor had defaulted. The owner's decision not to terminate the contractor after the contractor failed to complete all work by a deadline did not constitute a waiver of the contract's liquidated damages provision. Even if the owner had an obligation to mitigate its damages by taking action after the deadline was missed, the surety presented no evidence regarding how the owner's actions would have resulted in all work being completed before another deadline had passed, thus eliminating some portion of the liquidated damages that the owner sought to recover. The performance bond, the contract, and the IFA did not require the owner to have declared the contractor to be in default when the contractor failed to complete all work by the deadline. The owner was entitled to liquidated damages. The owner's motion for partial summary judgment on its counterclaim was granted and its motion to dismiss the surety's claim for damages was denied. The surety's motion for summary judgment was denied.

Maxwell Partners, L.L.C. v. Building Studio, LLP, 2006 NY Slip Op 6301, 2006 N.Y. App. Div. LEXIS 10367 (Aug. 24, 2006).

Key Point:

Where work on a construction project has been performed in phases, a release of claims executed by an owner and architectural firm may be limited rather than general.

CCL Summary:

Maxwell Partners (owner) retained The Building Studio (architectural firm) to provide services in connection with the construction and renovation of a medical center. After the medical center was severely damaged on September 11, 2001, the owner again retained the architectural firm to oversee restoration of the center. In 2002, the architectural firm performed additional work at the medical center. In 2003, the owner again contracted with the architectural firm to perform more work on the medical center. The owner, as releasor, executed a release of claims to the architectural firm. In 2004, the owner filed suit against the architectural firm and its principal architect for breach of contract, malpractice, and unjust enrichment. The complaint alleged that the claims arose in connection with the firm's work on the initial project. The architectural firm moved to dismiss the complaint, claiming that the release provided for the release of all claims related to the construction project. The state supreme court granted the architectural firm's motion to dismiss, concluding that the release provided for a general, rather than limited, release.

The architectural firm argued that the general language in the release indicated an unambiguous release of all claims related to the project. The release contained limiting language, however, which may not have affected any claims that could have been raised by the owner in connection with the architectural firm's work on the initial project. The initial project and successive projects were undertaken with new proposals and fee arrangements. The release indicated that claims associated with licensed documents issued on or around December 1, 2003 were deemed to be released. The scope of the work associated with the December 1, 2003 documents and the extent of the work performed by the architectural firm pursuant to those documents, rather than to the prior agreements, was unclear. Documents that were executed with the release, such as a release of liens, indicated that the parties considered the work to have been performed in phases and that the owner agreed to indemnify the architectural firm only as to claims arising after December 1, 2003. Because the release of claims did not define the term "project", issues of fact existed with regard to the scope of the release. The state supreme court erred in granting the architectural firm's motion to dismiss the complaint. Reversed.

Holder Constr. Group v. Ga. Tech Facilities, Inc., 2006 Ga. App. LEXIS 1230 (Oct. 3, 2006).

Key Point:

A construction manager bears the risk of the late delivery of steel if not included in the force majeure clause.

CCL Summary:

Holder Construction Group (construction manager) entered a construction-manager-at-risk contract with Georgia Tech Facilities (developer) to construct a project at a guaranteed maximum

price. The contract provided that the construction manager was at risk for performance deficiencies, construction delays and cost overruns. After the construction manager experienced difficulties due to an increase in steel prices and late delivery of steel materials, it requested a 67-day time extension. The developer denied the request. The construction manager filed a Declaratory Judgment action, contending it was entitled to an upward adjustment in the contract price and to at least a 63-day extension. It later amended the complaint to add claims for breach of contract. The developer filed a motion for summary judgment. The trial court granted the motion and the construction manager appealed.

The construction manager argued that the delays and cost overruns were due to a steel crisis and that it was entitled to acceleration costs attributable to the developer's failure to grant its request for an extension. The construction manager also contended that there were other delays caused by the owner, apart from the steel crisis, for which the construction manager should have been granted extensions of time. The contract included a Force Majeure clause which provided extensions for performance delays resulting from governmental preemption of materials during a national emergency; riot, insurrection or civil disorder; or extreme weather conditions constituting Acts of God. The contract went on to state that late deliveries other than those set out in the Force Majeure clause did not constitute reason for extending the completion date. Accordingly, under the contract, the construction manager bore the risk of the late delivery of the steel. The contract also provided for an extension for any delay caused by the owner. In the construction manager's initial request to the owner for a time extension, the only reason given for the request was the late delivery of steel. The construction manager was unable to show the length of any owner-caused delays or that such delays resulted in any escalation in costs or late deliveries of steel. Affirmed.

SURETY

MATERIAL FACT

Totty v. Chubb Corp., 2006 U.S. Dist. LEXIS 61013 (W.D. Pa. Aug. 28, 2006).

Key Point:

Ambiguous insurance policy exclusions are construed against the insurer and in favor of coverage.

CCL Summary:

Helen Totty (insured) purchased homeowner's insurance from Great Northern Insurance Company (insurer). During the policy period, the insured submitted a claim for property damage caused by vibrations from road construction equipment used by the City of Pittsburgh (City) near her home. The insurance adjuster sent a letter denying coverage based on an engineer's report, which concluded that cracks observed throughout the house were due to foundation settlement induced by dry weather and not by ground vibration. When the insured did not respond to the first letter, the adjuster sent a follow-up letter restating his position. The insured responded that she was retaining her own experts and counsel to pursue her claim. Over the next eleven months, the adjuster sent several letters to the insured indicating he had not received any documentation supporting another cause of loss, and suggesting that the parties and their experts meet to resolve any differences. When the insured did not respond, the adjuster

sent a letter stating that he was closing the file. The insured then filed a lawsuit against the insurer for breach of contract and much later produced an expert's report which concluded that the vibration's from the construction equipment caused a sand layer to densify and settle over time, eventually affecting the foundation. The insurer hired two more experts, who supported the initial engineer's report. The insurer filed a motion for summary judgment based on exclusions in the policy.

The insurer argued that, even if the insured's theory of what caused the damage was true, the loss fell within the policy's earth movement and structural movement exclusions and, therefore, was not covered. The insured argued that the exclusions were not intended to exclude damage resulting from a sudden non-natural occurrence, such as the vibrations from road construction equipment outside her home, and that the evidence was more than sufficient to create a genuine issue of material fact as to causation. Although not entirely clear, the insured could have reasonably concluded that the earth movement exclusion applied to earth movements due to natural events only. If the insured wanted to exclude damage for earth movement caused by man-made events, it could have done so clearly and unambiguously. The structural movement exclusion was also reasonably susceptible to different interpretations. Being ambiguous, the exclusion had to be construed in favor of the insured and thus did not encompass damage precipitated by a sudden non-natural occurrence such as the vibrations from construction equipment. The insurer produced evidence that the insured's home did not suffer damages as a result of vibrations from the paving project; however, the insured put forth her own evidence sufficient to create a genuine issue of material fact on causation and damage. Insurer's motion for summary judgment denied.

ARBITRATION

GENERAL

Matter of Siemens Transp. P'ship Puerto Rico, S.E. v. Redondo Perini Joint Venture, 2006 NY Slip Op 51730U, 2006 N.Y. Misc. LEXIS 2426 (Sept. 15, 2006).

Key Point:

An arbitration panel's conclusion that a contractor's indemnity rights flow down to a subcontractor is not irrational and does not warrant vacatur of the arbitration award.

CCL Summary:

Siemens Transportation (contractor) was the prime contractor for the construction of an urban train system. Redondo Perini (subcontractor) was a subcontractor for the project. Disputes arose between the parties regarding delays and budget issues. The parties executed an amendment to the subcontract providing that all disputes would be submitted to binding arbitration. The subcontractor filed a demand for arbitration with the American Arbitration Association. The contractor counterclaimed. An arbitration panel issued an award directing the contractor to pay the subcontractor a net amount. The panel concluded that the contractor was liable to the subcontractor for damages because the contractor's indemnity rights under a different contract for losses arising from design services for the project flowed down to the subcontractor under the subcontract. The contractor requested a stay of enforcement of

the award and moved for an order vacating the award.

The contractor contended that the arbitration award was contrary to law and irrational. According to the contractor, the arbitration panel created a fictitious indemnification provision in the subcontract. The contractor also contended that the panel's manifest disregard of the law could only be explained by a biased arbitrator. However, the allegedly biased arbitrator made a full disclosure prior to arbitration regarding any connections he had with the subcontractor. The contractor waived objections and fully participated in the arbitration. Furthermore, the contractor failed to meet its burden of demonstrating manifest disregard of the law. The contractor did not show that the panel knew of a governing legal principle and refused to apply it. Because the arbitrators reasoned that there was an indemnification right flowing from the contractor to the subcontractor based on the parties' relationships and responsibilities as set forth in various contracts associated with the project, there was a barely colorable justification for the arbitrators' conclusions. The award did not contradict any unambiguous terms of the subcontract or general contract. Although the subcontractor did not expressly provide for indemnification by the contractor to the subcontractor, the panel found the source of that indemnity right in the general contract and a consortium agreement. There was evidence from which the panel could have rationally concluded that the contractor's indemnity rights flowed to the subcontractor. The contractor did not demonstrate a basis to vacate the award. The motion to stay enforcement of the award was denied. The contractor's petition to vacate the award was denied and the subcontractor's counterclaim to confirm the award was granted.

CONTRACTS

BREACH

Commonwealth Constr. Co. v. Cornerstone Fellowship Baptist Church, 2006 Del. Super. LEXIS 349 (Aug. 31, 2006).

Key Point:

A church breaches its contract with a contractor by delaying the project's commencement, failing to pay outstanding pay applications, and failing to submit claims to the architect.

CCL Summary:

Cornerstone Fellowship Baptist Church (church) contracted with Commonwealth Construction (contractor) to convert an existing building into a place of worship. The contract provided that any claims arising under the agreement should be submitted to the architect. The church issued a large number of change orders and requests for information. The project was delayed due to design changes resulting from inconsistencies in the design documents. Due to disputes over pay applications, the contractor suspended work on the project. The contractor filed a mechanic's lien on the property. The parties brought suit against each other for breach of contract.

The contractor asserted that the church refused to pay certain pay applications as required by the contract. The contractor contended that it was delayed in commencing work because the church failed to obtain the necessary permits. The contractor also contended that its performance was delayed by the church's failure to

quickly approve plans and make decisions. The church maintained that it disputed the pay applications in good faith. The church breached the contract when it delayed the commencement date by failing to have the proper variance. A large number of design changes also delayed the contractor's performance. The church materially breached the contract by failing to pay the contractor for work completed under the contract. Because the church improperly withheld payments for work that had been completed, the contractor did not breach the contract by stopping work. The church also materially breached the contract by not submitting its claims to the architect as a condition precedent under the contract to litigation. The contractor was entitled to damages resulting from delay of the commencement and performance of the project. The contractor was entitled to the payments in the outstanding pay applications because its work was completed. The contractor prevailed on its breach of contract claim and mechanic's lien claim. The church did not prove its claim for breach of contract.

CLAIMS

PLANS AND SPECIFICATIONS

Blakley Corp. v. EFCO Corp., 2006 Ind. App. LEXIS 1798 (Aug. 31, 2006).

Key Point:

A supplier is liable for breach of a purchase order agreement where the supplier does not review structural requirements before submitting its proposal and fails to show that the requirements are defective.

CCL Summary:

The Blakley Corporation (subcontractor) was responsible for the installation and erection of an exterior curtain wall for the construction of a state museum. EFCO Corporation (supplier) submitted a bid to the subcontractor for the curtain wall based on its standard curtain wall system. The supplier did not review the project's structural requirements, which included deflection requirements, before submitting its proposal. The subcontractor and supplier entered into a purchase order agreement. The supplier later realized that the deflection requirements in the structural drawings exceeded the capabilities of its standard curtain wall system. The project engineer relaxed the deflection criteria of the original structural drawings to enable the supplier's system to meet the specified requirements. Due to the supplier's late deliveries, the subcontractor incurred additional expenses. The supplier sued the subcontractor to recover the unpaid balance of the purchase order price. The subcontractor counterclaimed, alleging that the supplier breached the purchase order by failing to timely deliver materials and by providing defective materials. Concluding that the supplier's late deliveries and fabrication errors resulted in a breach of contract, the trial court entered judgment in favor of the subcontractor, offset by the outstanding amount due under the agreement. The parties appealed.

The supplier contended that any delays in its performance were solely attributable to defects in the project's design plan and specifications. The supplier maintained that it had to modify details of its standard curtain wall system. The supplier also argued that a conflict between the architect's aesthetic requirements and the engineer's structural requirements regarding the curtain wall made compliance with the specifications impossible. However, the supplier bore responsibility for delays in its

performance. The supplier did not review the deflection requirements prior to submitting its proposal and did not demonstrate that the deflection values were defective. The subcontractor relaxed its deflection criteria to accommodate the supplier's standard product, not because the criteria were incorrect. The supplier did not follow the contractually designated procedure for suggesting modification to the deflection requirements. The supplier delivered defective materials and failed to meet its deadlines. The supplier did not show that its delayed performance was caused by defects in the project plans and specifications. Sufficient evidence supported the trial court's determination that the supplier was liable for breach of the purchase agreement. Affirmed.

ARBITRATION

FEDERAL ARBITRATION ACT

Industra/Matrix Joint Venture v. Pope & Talbot, Inc., 341 Ore. 321, 2006 Ore. LEXIS 824 (Sept. 8, 2006).

Key Point:

Under the Federal Arbitration Act, questions whether contractual conditions precedent to arbitration are met are to be decided by the arbitrator.

CCL Summary:

Industra/Matrix Joint Venture (contractor) contracted with Pope & Talbot, Inc. (owner) for construction and installation of equipment at the owner's pulp mill in Oregon. The individual Joint Venture contractors held licenses with the Oregon Construction Contractors' Board (CCB); however, the Joint Venture did not. The construction contract contained general conditions related to resolution of claims and disputes through arbitration. Prior to arbitration, the dispute was to be submitted to the project engineer. If a party was not satisfied with the engineer's decision, it was to provide written notice to the other party and make another attempt to resolve the dispute by agreement. The Oregon Arbitration Act (OAA) applied to any arbitration hearings. Due to various problems, the contractor missed the scheduled completion date, and both parties incurred unanticipated expenses. Each party blamed the other. The contractor filed suit for breach of contract and quantum meruit. After discovery, the contractor filed a motion to stay the proceedings and compel arbitration. The trial court denied the contractor's motion on the basis that it had failed to meet the contractual conditions precedent to arbitration. It then granted summary judgment to the owner based on an Oregon statute prohibiting claims by contractors that were not licensed by the CCB. The Court of Appeals reversed holding that the Federal Arbitration Act (FAA), rather than the OAA, applied to prearbitration issues, and that under the FAA the arbitrator should decide whether the contractor met the statutory and contractual preconditions to arbitration. The owner appealed to the State Supreme court.

The owner argued that the parties intended that Oregon law, rather than the FAA, be applied to the question of whether a particular dispute must be arbitrated and to questions of substantive contract law. The contractor argued that the Court of Appeals correctly held that the parties intended the OAA to govern the conduct of the hearing, but that nothing indicated an intention to choose Oregon law to govern resolution of the legal issues involved in determining whether a hearing should occur. The

reference to the OAA in the contract required only that “any arbitration hearings” be governed by the OAA. The provision said nothing about issues that might arise and require resolution before a hearing nor did it speak to the source of law governing the way in which any such issues should be resolved or by whom. Given that the contract involved companies incorporated in three different states, thus involving interstate commerce, the arbitration agreement in the contract fell within the coverage of the FAA. Under the FAA, questions of substantive arbitrability were to be decided by the court and questions of procedural arbitrability were to be decided by the arbitrator. The effect of the contractor’s failure to meet state licensing requirements and its failure to meet contractual conditions precedent to arbitration were procedural questions that the arbitrator should decide. Court of Appeals decision affirmed.

CONSTRUCTION

DELAY CLAUSES

United States v. David Boland, Inc., 2006 U.S. Dist. LEXIS 66568 (M.D. Fla. Sept. 16, 2006).

Key Point:

Summary judgment is not warranted whether there are issues of fact as to whether a contractor actively interfered with a subcontractor’s work.

CCL Summary:

David Boland Inc. (contractor) contracted with the United States government to be the primary contractor for the construction of an operations support building at the NASA Space Center. The contractor entered into a subcontract with Dura-Stress (subcontractor) for the design, fabrication, and erection of precast concrete panels. The subcontract contained a “no damages for delay” provision providing that the contractor would not be liable for any damages arising out of delays caused by its negligent acts or omissions. The project fell behind schedule. The contractor assigned and transferred its rights and obligations to another contractor. The subcontractor’s request for equitable adjustment was denied. The subcontractor claimed that the original contractor caused delays by engaging in active interference during the project. The subcontractor filed suit against both contractors and their sureties for active interference and breach of contract. The contractors and their sureties filed a motion for summary judgment.

The subcontractor asserted that the original contractor was responsible for delays by failing to timely and adequately respond to the subcontractor’s Requests for Information (RFIs) and comments, failing to timely forward the government’s responses to the RFIs, and failing to adequately address the substandard work of a piling subcontractor. There was an issue of fact regarding whether the original contractor timely and adequately responded to the subcontractor’s RFIs. The contractor’s vice president testified that an average RFI was forwarded to the government approximately 3 days after its receipt and returned to the subcontractor approximately 4 days after it was answered by the government. However, some RFIs were not answered for extended periods of time. An issue of fact also remained regarding whether the original contractor actively interfered with the subcontractor’s obligations by knowingly contributing to a lengthy delay in the piling subcontractor’s work. The piling subcontractor testified that its activities were delayed when the original contractor failed to ensure proper site elevation, failed to move a sewer line, and failed to ensure that

water was removed from the site prior to the piling work. The delays in the piling subcontractor's operations delayed the subcontractor's ability to start its work under the subcontract. Communications between the government and the original contractor also created an issue of fact regarding whether the contractor violated its obligation not to obstruct the subcontractor's performance. The government wrote to the contractor on multiple occasions complaining about its poor performance and questioning its ability to timely complete performance. Summary judgment was not warranted as there were issues of fact as to whether the original contractor unreasonably delayed the subcontractor's work. Motion denied.

CONTRACTS

AUTHORITY

Aquatrol Corp. v. Altoona City Auth., 2006 U.S. Dist. LEXIS 62243 (W.D. Pa. Aug. 31, 2006).

Key Point:

An owner, as a third-party beneficiary of a contract between the contractor and subcontractor, cannot rescind the subcontract.

CCL Summary:

The Altoona City Authority (Authority) contracted with G.M. McCrossin, Inc. (contractor) to upgrade computer software at five of the Authority's water treatment plants. The contractor subcontracted with Aquatrol Corporation (subcontractor) for a portion of the work. The upgrades were to be completed by a specified date and in accordance with technical specifications prepared by Gwin, Dobson & Foreman, Inc. (engineer). Problems arose and persisted well beyond the completion date. The subcontractor proposed that the existing computers be replaced with new computers, which would require an increase in the initial subcontract price. The Authority responded that it was unwilling to absorb the additional cost. The Authority subsequently deleted the total value of the subcontract work from its contract with the contractor. The subcontractor later discovered what was needed to correct the original software problems and offered to perform the work for the original contract price. The Authority declined the offer and contracted with another consultant to complete the work at a considerably higher price. The subcontractor sued the contractor for breach of contract. The contractor filed a motion for summary judgment.

The contractor argued that the subcontractor's breach of contract claim could not proceed because the underlying contract was rescinded. The contractor also argued that summary judgment was not warranted because the subcontractor had not performed to the satisfaction of the Authority, as required by the subcontract. The subcontractor contended that the Authority, as the third-party beneficiary to the underlying subcontract, had no authority to rescind the contract, and that the contract was not rescinded by the subcontractor's conduct. The Authority, as a third-party beneficiary of the contract between the contractor and subcontractor, could not have rescinded the subcontract. As to the subcontractor's performance, the subcontract included language that the subcontractor was to meet the technical specifications of the project engineer and indicated that the contractor reserved the right to cancel if the order was not "filled as specified." This language had more to do with the specific nature of the work itself rather than with the satisfaction of the Authority or the engineer. Because the contract language was ambiguous, the resolution of the issue related to the subcontractor's performance under the contract was properly left for determination by the finder of fact. Motion for summary judgment denied.

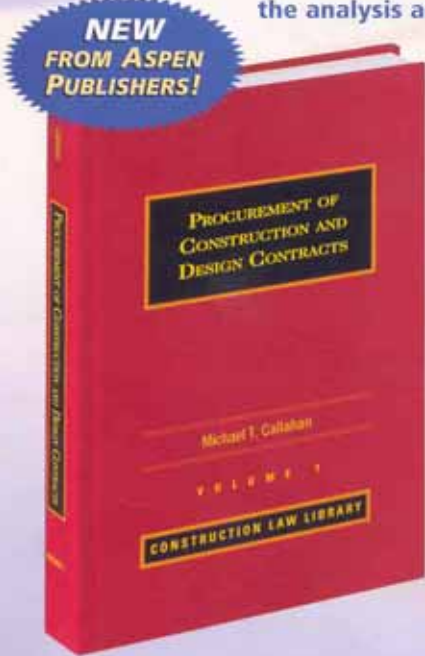
CCL's President, Michael T. Callahan, has authored a new two-volume test "Procurement Of Construction And Design Contracts" for ASPEN Publishers.

This book can be ordered from ASPEN Publishers. Call toll-free 1-800-638-8437 for details. Reference ISBN 0735556997

Ensure Full Compliance With All Construction Procurement Laws—and Navigate Every Step of the Procurement Process With Confidence


Turn to this authoritative resource for the analysis and guidelines you need to:

NEW FROM ASPEN PUBLISHERS!



- ✓ **Meet** all federal, state, and local bidding requirements affecting public or private construction projects
- ✓ **Master** every step of the procurement process—from soliciting and evaluating bids to defending bid challenges
- ✓ **Implement** "best value" selection and documentation procedures that will stand up in court.
- ✓ **Create** MBE, DBE, and WBE "set-aside" programs that meet all current constitutional requirements
- ✓ **Negotiate** better deals in compliance with FAR Part 15 provisions covering bid solicitation and negotiation
- ✓ **Slash** liability exposure at every step of the bidding process to prevent delays and potential litigation

And so much more...see inside!



TRY IT RISK-FREE FOR 30 DAYS!

Do you have particular subjects you would like to see summarized in upcoming issues? If so, please send a request to CCL at the address below. Be sure to let us know the specific topic you would like researched or about a particular problem you have encountered that others might need help with also. If you have any further questions or comments regarding a particular article, you may contact CCL. We are open to any new ideas. Please let us know what you think of Summaries.

Routing Slip

Please circulate this issue of *CCL Summaries* to everyone in your office who would benefit from the information. Thank you!

- ___ President: _____
- ___ Vice President: _____
- ___ Attorney: _____
- ___ Attorney: _____
- ___ Secretary: _____
- ___ Others: _____
- ___ Others: _____
- ___ Others: _____
- ___ Others: _____

CCL CONSTRUCTION CONSULTANTS, INC.

OFFICES & AFFILIATES IN: KANSAS CITY • COLORADO • CHICAGO •
 4600 COLLEGE BOULEVARD • SUITE 104 • OVERLAND PARK, KANSAS 66211-1606
 TEL: 1 - 800-533-8626 • FAX: (913) 491-9469

Internet World Wide Web: <http://www.cclcon.com> • **E-mail:** clccc@ix.netcom.com

Editor-in-Chief.....Michael T. Callahan

Subscriptions

Domestic	\$99/yr
International	\$300/yr
Past Issues	\$25 ea

Copyright 2003, CCL Construction Consultants, Inc. All rights reserved. ISSN 1084-838X.
 Copies of the articles and cases summarized in *CCL Summaries* can be obtained directly from the publishers cited in each of the articles. CCL will obtain copies on your behalf, with permission of the publisher, for \$25.00 per article requested.