EJCDC
ENGINEERS JOINT CONTRACT DOCUMENTS COMMITTEE

RECENT COURT DECISIONS OF RELEVANCE TO CONTRACT DOCUMENTS

May 2011

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Issue	**Citation**	**Summary**	**Contract Document Implications**
1. Design professional's liability for contractor's failure to place safety diagram on electrical switchgear.	*LeBlanc v. Logan Hilton Joint Venture,* Appeals Court of Massachusetts, 2011.	Maintenance electrician was electrocuted while working on switchgear at airport hotel. Electrical engineer (subconsultant to hotel's architect) had designed system to include two live feeds, and had specified that the switchgear should include a warning and diagram that would alert users to danger. The electrical subcontractor did not include these warnings. This omission was detected and noted in punch list, with a request for a shop drawing of the warning wording and placement. No follow up by anyone. Estate of maintenance electrician sued hotel, contractor, electrical subcontractor, architect, electrical engineer, and others. Electrical sub cross-claimed against design professionals, essentially claiming that the architect and engineer should have protected sub against its own oversight. Appellate court held as a matter of law that the sub's causal negligence barred its cross-claim. Court then took a "comprehensive view" of design contract and concluded that although certain clauses relieved architect of duty to ensure compliance or compel contractor performance, the failure to monitor and report dangerous deficiency to owner (hotel) was a contract breach, and created a "field of risk" for third parties. Finally the court concluded that no expert testimony was needed, since hazards were comprehensible to laypersons.	Core A/E error was failure to keep owner informed. Court noted that although A/Es were correct that they lacked power or duty to force electrical sub to perform, if they had informed owner of sub's failure to comply, owner could have withheld payment or exercised other contractual powers. Court cited provisions requiring architect to visit the site, provide weekly reports to owner regarding progress and deficiencies, make payment recommendations, and arrange and observe tests, as indicators of intention to create duty to inform. EJCDC documents contain similar duties of Engineer. These are integral to Engineer's services and cannot be eliminated. Also relevant is need to render an opinion on completion of punch list. GC 14.07.A.1.

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2. Professional services exclusion in Commercial General Liability policy.	*QBE Insurance Corporation v. Brown & Mitchell, Inc.*, United States Court of Appeals, Fifth Circuit, 2009.	Trench collapsed during sewer project, killing worker. Worker was in trench while engineer's site representative was measuring pipe. Worker's estate alleged that engineering firm "owed a duty to perform its professional responsibilities" with due care. Firm sought coverage under its own CGL policy, which contained an express exclusion of claims arising from professional services, including supervisory and inspection services. (No discussion of whether a Professional Liability policy existed, or had been exhausted.) Engineer argued that the field services were fundamentally non-professional, noting that site rep was only high school educated. Court of Appeals concluded that allegations were of professional services, and that "pipe measurement" was not inherently non-professional. "…precisely the sort of potential liability the professional services exclusion is designed to excise from coverage."	A straightforward decision. Relatively few engineer services are capable of being defined as non-professional. Sometimes in similar cases the plaintiff will reword the allegations to attempt to assert non-professional acts/omissions as well. The professional services exclusion also applies to additional insured situations. Note: Additional insured issues, and parallel indemnity provisions (see C-700, Para. 6.20C), are currently under review.

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3. Design professional's liability for failure to note structural defect during site visits.	*Black + Vernooy Architects v. Smith,* Texas Court of Appeals, 2010.	Architect designed lakeside vacation house, and provided construction-phase services. Balcony 20 feet off ground was thoroughly designed with various sound structural features. A few years after completion, a pair of house guests stepped onto the balcony together and it collapsed, resulting in serious injuries. Forensic review revealed that contractor had failed to follow key design requirements, most notably by nailing the balcony to a thin sheet of plywood rather than bolting it to a 3-inch thick rim joist/blocking assembly as spec'd. Architect failed to notice defects, both in person and in photographs that established that the defects were open and obvious at the time of site visits and after completion. Jury assigned 90% responsibility to contractor and sub, and 10% to architect. On appeal architect noted various standard AIA clauses that minimized the duty to detect construction errors, and asserted that the only duty was to report errors that architect had actually noticed. The court disagreed, holding that the architect had "a duty to identify observable, open, and obvious deviations that implicated safety and structural integrity and that were clearly presented to the architect."	The court distinguished the facts here from cases involving means and methods; from situations where defects are latent or obscured by other construction; where seeing the problem requires a particular vantage point; or involving insignificant deviations. The EJCDC construction-phase obligations attempt to reflect the balance that must be struck between the limited ability of an inspector to detect all problems and the owner's need for assurance that the construction conforms to the design. It is not contractually possible, or desirable from a policy standpoint, to create immunity for construction-phase A/E services.

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4. Standard of care and scope of duty of design engineer. **Follow-up to June 2010 report on court of appeals decision in same case.**	*Thompson v. Gordon,* Supreme Court of Illinois, 2011.	**June 2010**: New interchange and bridge deck replacement project. Professional services agreement spelled out scope of consulting engineer's duties, including design of new interchange, "improvements" to certain existing highway components, and design of "replacement" of bridge deck including related median. Years after completion of design and subsequent construction, motorists were killed when a car from the opposite direction jumped the median and crashed head-on. Lawsuit against engineers and others. Engineers moved for summary judgment and trial court granted the motion. On appeal, the Appellate Court first reviewed the substantive "scope of services" assigned in the contract. Improving the median was not in the scope, and engineers' design of a replacement median very similar to existing median was deemed sufficient. However, court then noted that the contract contained a standard of care requiring the "degree of skill and diligence normally employed by professional engineers… performing the same or similar services." Plaintiffs (estates of deceased motorists) submitted an expert's affidavit stating that an engineer has a duty to design with the safety of the public in mind, and should have required a tall "jersey barrier" to prevent jumps over the median. The court held that the standard of care created potential additional duties, over and above the scope of services, to consider safety improvements, and that further proceedings (a trial) would be needed to determine if positions taken in the expert's affidavit were correct. Dissenting judge lamented the "disturbing disregard" for precedent, and the "staggering" implications of the decision. **May 2011:** Illinois Supreme Court reverses, holding that engineer's duty depends on contract, and is defined by contract. Scope of work did not include median improvements.	**June 2010:** An engineer's general obligation to be mindful of the safety of the public while performing its services is nothing new. What is new is the notion that the routine standard of care can be construed as creating additional substantive duties beyond those set out in the scope of services. The standard of care is meant to be applied to the services that are performed, not to create new obligations, such as designing new safety barriers. **May 2011:** The high court's decision confirms a two-step analysis: (1) determine the A/E's scope of work (assignment) from the contract, and (2) apply the professional standard of care to the A/E's performance of that scope of work. The decision restores the vitality of a very important construction case, *Ferentchak v. Village of Frankfort* (1985) (engineer had no duty to establish grade levels, when that task was not included in contractual scope of services). The cases confirm the importance of Exhibit A of the EJCDC E-series documents.

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5. Engineer's liability to project's general contractor.	*Excel Construction v. HKM Engineering, Inc.,* Supreme Court of Wyoming, 2010.	Water and sewer project. Contract documents and owner-engineer agreement appear to be pre-2002 EJCDC documents. Contractor brought a breach of contract claim against owner, and a tort claim against engineer based on allegedly defective specifications, misrepresentations during construction, improper assessment of liquidated damages, and denial that the work was substantially complete. The court rejected the contractor's claims against engineer, stating that in Wyoming the economic loss rule barred tort claims unaccompanied by physical injury to persons or property. Purely "economic" claims should be based on contracts, where the parties can allocate risks by agreement. The court acknowledged that many states do allow tort claims against A/Es in the absence of contract privity, but noted many that do not and expressly chose to continue to bar such claims in Wyoming as a matter of policy. The court closely examined the "exculpatory" contract clause stating that engineer's authority and responsibilities, and its decisions, if made in good faith, do not create a duty to Contractor, and held this to be permissible as an allocation of risk "as encouraged by the economic loss rule."	The decision is generally consistent with EJCDC principles supporting the use of contracts to determine duties and allocate risk. The court's analysis of the "exculpatory" clause (currently GC-9.09) was perhaps missing some nuances, but came to the correct result. The clause is not meant to create a simple divide between "good faith" and "bad faith" engineer actions, but to point out that although Engineer has a significant role in the administration of the contract, having such a role does not of itself create direct duties to Contractor, subs, or other third parties, in contract or tort. Rather Engineer's duty is to the party with which it has contracted: the owner.

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6. Engineer's duty to inform government or public of a dangerous condition.	*Reeser v. NGK North American,* Superior Court of Pennsylvania, 2011.	Owner of a beryllium processing plant retained engineering firm to conduct "stack testing." Tests showed that emissions significantly exceeded the EPA allowable limits for beryllium particulates. The testing firm reported its findings to the plant owner, as required by its contract, but did not make any report to any government agency or the local community. Plaintiff lived near the plant and was stricken by chronic beryllium disease, an incurable lung disorder. She sued the testing firm, contending that it had a legal duty to those who might be harmed by the beryllium emissions. The appellate court acknowledged that the law may impose a duty to perform a contractual undertaking in a manner that does not harm third parties. Here, however, the testing firm had conducted its contractual duties in a satisfactory manner. There was no duty to warn the public, and no duty to perform any remedial action to enhance safety—such tasks were not within the testing firm's scope of work. Therefore there was no liability to any third party.	The case was based on common law tort principles and did not include any discussion of possible statutory disclosure rules, or of engineering ethical standards that might come into play when an engineer learns of a dangerous condition, whether environmental or otherwise. EJCDC E-500 provides that if the Engineer encounters a contaminant at Owner's site, Engineer shall notify appropriate government officials if it concludes that it is required to do so by governing laws or regulations. This resolves in advance the potential conflict between Engineer's duty to the client and its duty to the public with respect to environmental conditions. We do not expressly address potential conflicts of the same sort in structural or other contexts.

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7. Effect of engineer's recommendation of final payment, and owner's making of final payment, on owner's subsequent construction defect claim against contractor.	*City of Kimberling v. Leo Journagan Construction Company, Inc.,* Missouri Court of Appeals, 2011.	Sanitary sewer project. EJCDC Standard General Conditions appear to have been used. Engineer recommended final payment, and city made such payment. The city subsequently brought a breach of contract and breach of warranty claim against contractor, based on subsequently discovered defects. Contractor contended that by making final payment the city had waived the right to make a subsequent claim regarding the quality of the work. The appellate court rejected the notion that engineer's recommendation was a binding determination that the work complied in all respects with the contract documents—it merely indicated that "to the best of Engineer's knowledge" the work had been satisfactorily completed such that payment could be made. The court also rejected the waiver argument, pointing out the clearly stated exception in the waiver clause (exception for claims for defective work, failure to comply with contract documents, or breaches of contractor's continuing obligations). As a side note, the court expressed uncertainty as to whether a post-completion warranty claim must first be presented to the engineer.	The court here had no trouble identifying and applying the substantial exceptions to the waiver set out in C-700 Para. 14.09.A.1, or in recognizing the related application of Para. 17.04, Survival of Obligations. As a matter of policy, EJCDC to date has viewed progress and final payments as merely that – payments—and not as validations of the work, acceptance of nonconforming work, or waivers of latent defects. If we take a different approach such that payment does constitute a broad waiver, then owners are going to be reluctant to make final payment and release retainage. The format of 14.09 is such that the exceptions substantially outweigh the rule. The Construction Subcommittee is currently considering a restructure/rewording that would present the current exceptions as the rule. The issue of engineer's role in post-completion disputes is also under review.

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8. Enforceability of oral "change order" granted by city staff.	*P&D Consultants v. City of Carlsbad,* California Court of Appeals, 2010.	Engineering contract for $550,000 to redesign a city golf course. Contract provided that all changes must be set out in a written change order. A California municipal statute requiring the mayor or other officer to sign "all written contracts" also may have applied to change orders. A city staff member allegedly told the consultant to proceed with certain extra work and that the staff member would "take care of it." Based on this promise, the consultant billed the city for $109,000 in extra work. The trial court instructed the jury that a written contract could be modified by an oral agreement as shown by the conduct of the parties, and the jury awarded the consultant the extra fees. The appellate court held that California case law regarding public contracts severely restricted the ability to make an oral modification to the contract. A prior case had pointed out that most city staff do not have the authority to bind the city, and that as a matter of policy local governments cannot be bound by officials acting in excess of their authority. Moreover, case law also made clear that although many ordinary contract rules apply, public works contracts "lack the freedom of modification present in private party contracts."	This case illustrates that permissive rules that allow exceptions to contract formalities, for equitable reasons, may not apply in the public contract context. It is also important to be alert to the possibility that a statute may trump the provisions of a contract—all parties are on legal notice as to governing statutes.

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9. Statute of repose's application to property damage claim by landowner.	*Cianciola, LLP v. Milwaukee Metropolitan Sewerage District,* Court of Appeals of Wisconsin, 2011.	In 1988 MMSD purchased easements allowing it to build a storage tunnel 300 feet below various properties. The terms of the easements stated that MMSD would construct and maintain the tunnel "in good order and condition," and committed MMSD to indemnify the landowners from losses due to the construction, operation, maintenance, repair, or reconstruction of the tunnel. Shortly after construction the ground settled, resulting in damage to Cianciola's building, and such settlement has reportedly continued, as a result of leaks into the tunnel. Cianciola gave notice to MMSD in 1992 and requested that action be taken to stop further settlement. MMSD did not take any action. In 2007 Cianciola sued and ultimately received an award of $1.08 million in damages. MMSD appealed on the ground that the claim was not timely based on Wisconsin's 10 year statute of repose. Under that statute, claims arising from improvements to real property must be brought within 10 years, subject to specific exceptions, including an exception for express warranties. The court held that MMSD's commitments in the easement constituted a warranty, thus making the statute of repose inapplicable.	This ruling is not accompanied by sufficient explanation and could be misinterpreted as holding that any warranty will indefinitely extend the statute of repose exposure period. A Wisconsin Supreme Court decision had explained that the warranty exception was intended for extended warranties having a specific length of time, such as 20 year roofing warranties. It appears that the court's real point here was that the MMSD commitment applied to the sound operation and maintenance of the tunnel, which arguably was violated each day that MMSD neglected to take action to place the tunnel in good order and condition (such that it causes no more settlement). EJCDC's construction contracts contain an express general warranty that does not have a stated time limit. Typically a claim under this warranty must be brought within the statute of limitations and repose period.

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10. Subcontractor's obligation to supply specified liner system after engineer's rejection of proposed "or equal."	*John T. Jones Construction Co. v. Hoot General Construction Company, Inc.,* United States Court of Appeals for the Eighth Circuit, 2010.	Des Moines wastewater treatment plant improvement project. Project engineer Black & Veatch specified holding tank liner systems by Linabond. Hoot, a subcontractor specializing in Ameron liner systems, assured Jones that Ameron would qualify as an "or equal" and submitted a sub-bid that assumed Ameron. Jones relied on this and was awarded the contract. During formation of the Jones-Hoot subcontract, the two exchanged documents and communications about the content of the subcontract. Hoot wanted to include its bid (which specified the Ameron liner would be provided), whereas the base subcontract merely incorporated the B&V specs. Ultimately the subcontract that was executed did not include the bid limiting Hoot's commitment to Ameron. B&V rejected a request to accept Ameron as "or equal"—reportedly the first rejection of Ameron in 25 years. Hoot refused to absorb the costs of providing the more expensive Linabond, and contended that it had never intended to provide anything but Ameron. Jones pointed out that the subcontract contained no reference to Ameron and no exceptions to the B&V specification. The court examined the subcontract's integration clause, stating that no prior communications or agreements were part of the final subcontract, and held Hoot liable for $241,000 in costs needed to supply Linabond, plus attorneys fees.	There is no discussion in the case as to whether the bidding documents allowed for a pre-bid "or equal" determination. See EJCDC C-200, Instructions to Bidders, 11.01, second option. The C-700 "or equal" procedures afford a full opportunity to apply for equal status, but ultimately give the Engineer the final decision as to acceptance of a proposed equal. Bidders (prime or sub) proceed at their own risk if they assume a less expensive item is indeed an equal. EJCDC's integration clause is currently built into the definition of "Contract"—C-700, Article 1—and is supported by Article 9 of the Agreement, C-520.