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CONSTRUCTION AND PROCUREMENT LAW NEWS

Recent federal, state, and local developments of interest, prepared by Bradley's Construction and Procurement Group:

Casting the First Stone: Contractors Considering Default Termination Should Examine Which Party Committed First Material Breach

During a construction project, circumstances may arise that lead a general contractor to consider termination of a subcontractor's right to proceed under the subcontract. The *Randy Kinder Excavating v. J.A. Manning Construction* opinion recently delivered by the United States Eighth Circuit Court of Appeals, the federal appeals court encompassing federal cases in Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota, should provide a cautionary tale to general contractors seeking termination without first examining which party committed the first material breach.

Randy Kinder Excavating, Inc. ("Kinder") was the general contractor on an Army Corps of Engineers ("COE") project on the White River in Arkansas (the "Project"). Kinder signed a subcontract with J.A. Manning Construction Co. ("Manning") to engineer, furnish, and install a mechanically stabilized earth wall (the "MSE wall") on the Project. Kinder's initial schedule called for the Project to be completed in 425 days with an original completion date of September 26, 2011. Due to weather delays, scheduling conflicts, and other site conditions, the project schedule was revised multiple times, with an updated completion date of November 1, 2011. When Manning was first able to mobilize to the Project site in August 2011, Manning could not begin its work on the MSE wall due to Kinder's failure to complete certain predecessor work that needed to be completed prior to construction of the MSE wall.

Due to these delays, Manning was not able to utilize its intended supplier for portions of the MSE wall. Manning retained another supplier, EarthTec, whose materials were rejected by the COE, requiring Manning to retain yet another supplier to help Manning complete its work. Roughly two weeks after Manning began its work, Kinder began to send emails and deficiency notices

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to Manning claiming that Manning's inability to complete its work in a timely manner was delaying progress on the project. At the same time, Kinder was representing to the COE that delays on the project were due to weather and other scheduling issues. Despite these issues, Manning continued constructing the MSE wall.

Kinder and/or the COE claimed that Manning was failing to perform by placing panels of the MSE wall with a 0.25-inch variance from the contractually prescribed distance. Kinder and/or the COE claimed that no variance was allowed, and refused to allow Manning to construct the MSE wall with any variance in placement of the panels. Kinder ultimately directed Manning to suspend its work on the project on March 7, 2012, with less than three-quarters of the MSE wall constructed.

Kinder later filed suit against Manning, claiming that Manning had breached the subcontract by failing to pay its suppliers and provide shop drawings in a timely manner. Manning filed a counterclaim against Kinder, asserting that Kinder had wrongfully terminated its right to proceed under the contract. The trial court found that Kinder, rather than Manning, had committed the first material breach of the contract. The trial court also found that Kinder had materially breached the contract by wrongfully terminating Manning's performance, and awarded Manning damages for unpaid labor and costs incurred prior to termination. In particular, the trial court found that Kinder committed the first material breach of the subcontract "by threatening to assess delay damages against Manning without justification; interfering in the relationship between Manning and EarthTec; and failing to provide adequate assurances that Manning would be paid for its work." Kinder appealed to the 8th Circuit Court of Appeals.

The 8th Circuit likewise rejected Kinder's argument that Manning's failure to pay its suppliers was the first material breach of the subcontract, finding that Manning's suppliers, not Kinder, were the parties who were harmed by Manning's failure to pay their invoices in a timely manner. The 8th Circuit also determined that Manning was attempting to perform under the subcontract, and its failure to pay its suppliers was based, in part, on Manning's belief that Kinder would not pay Manning due to Kinder's incessant threats to terminate Manning's right to proceed. Accordingly, the 8th Circuit found that the first material breach of the subcontract was Kinder's wrongful termination of Manning's performance. In particular, the Court focused on Manning's continued performance under the subcontract that was ultimately terminated at Kinder's election, not Manning's.

This case serves as a lesson in "contract termination" to contractors or owners considering whether to terminate a party's right to proceed—remember, termination should be considered and evaluated, if applicable under the terms of the contract, under an assessment of the factual circumstances at the time, including an effort to determine if the terminating party is the first to breach a material term of the contract.

By: Justin Scott

Statutory Pre-Suit Notice Constitutes an "Action" Under Florida's Statute of Repose

Most states have statutes of repose, which define the date certain for parties to assert any and all claims for construction and design related issues, and provide a final cut-off for liability with respect to a project. For example, Florida's statute of repose (Fla. Stat. § 95.11(c)(3)) provides that a claimant must initiate an "action" for a construction-related issue/claim within ten (10) years of the latest of "the date of actual possession by the owner, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion of the contract or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer…" An "action" under Florida's statute of repose is further defined under Fla. Stat. § 95.011 as a "civil action or proceeding." A parties' failure to timely and properly assert a claim prior to the expiration of the statute of repose will result in a complete bar to recovery.

Some states also have pre-suit inspection and repair procedures that a party must follow before initiating a construction-related claim in either arbitration or litigation. Florida's pre-suit procedure is specifically outlined in Chapter 558 of the Florida Statutes, and requires an owner (unless the parties contractually opt out) to provide the general contractor with notice of a construction defect, and an opportunity to inspect and cure the defect prior to initiating an action. But what happens in Florida if the statute of repose expires while the Chapter 558 pre-suit inspection/repair process is still ongoing and before a lawsuit or arbitration is actually filed? Is the owner statutorily barred from ever recovering on the claim in such a circumstance? The Florida Fourth District Court of Appeal recently

answered this very question in the case of *Gindel v. Centex Homes*.

In *Gindel*, Centex Homes ("Centex") constructed a townhome development in Palm Beach County, Florida, and the homeowners closed on and took possession of the project on March 31, 2004. The homeowners discovered water intrusion issues several years later, and served Centex with the requisite pre-suit Chapter 558 notice on February 6, 2014. At the conclusion of the Chapter 558 procedure several weeks later, Centex advised the homeowners that it would not repair the purported defects. The homeowners filed suit on May 2, 2014 – more than ten years after the statute of repose first began to run on March 31, 2004, asserting various claims against Centex and its subcontractor Reliable Roofing and Gutters, Inc. ("Reliable"). Centex and Reliable moved for summary judgment, arguing that all of the homeowners' claims were statutorily barred because they did not file the "action" (the lawsuit) on or before March 31, 2014. The trial court agreed and awarded judgment in favor of Centex and Reliable on the homeowners' claims.

On appeal, the Florida Fourth District reversed the trial court's award of summary judgment in favor of Centex and Reliable, finding that "Chapter 558 lays out a series of mandatory steps that must be complied with before judicial action is taken, and therefore, the pre-suit notice constitutes an 'action' for purposes of the statute of repose." The court reasoned that the Chapter 558 procedure constitutes a "proceeding" under the definition of "action" in Florida Stat. § 95.011, and that the homeowners therefore commenced their "action" prior to the expiration of the statute of repose when they sent their 558 pre-suit notice on February 6, 2014. The Fourth District further noted that that the homeowners should not be penalized for complying with Chapter 558, as the pre-suit procedure "was not intended as a stalling device in order to bar claims." The homeowners' claims against Centex and Reliable were thus deemed timely, and the case was remanded back to the trial court.

The *Gindel* case is important to contractors, subcontractors, and design professionals, because their potential liability for construction and design errors does not necessarily end at the expiration of the ten-year statute of repose if the Chapter 558 process is still ongoing. This decision is also important to developers and subsequent owners, as it ensures that their potential claims will not be prejudiced when properly complying with the 558 process, and will dissuade parties from potentially attempting to delay the 558 process in the hopes of running out Florida's statute of repose.

By: Brian Rowlson

Endorsement Read to Require Privity of Contract between Policyholder and Additional Insured to Extend Coverage

A recent New York case highlights the importance of thoroughly analyzing all contract language in minimizing project risk. In *Gilbane Bldg. Co./TDX Construction Corp. v. St. Paul Fire & Mar. Ins. Co.*, the Court of Appeals of New York held that a named additional insured was not covered under an insurance policy because the plain meaning of the language in the policy endorsement required a written contract between the policyholder and the additional insured.

The Dormitory Authority of the State of New York ("DASNY") contracted with Samson Construction Company ("Samson") as general contractor for the construction of a new building. DASNY also contracted with a joint venture, formed by Gilbane Building Company and TDX Construction Corporation (the "JV"), to serve as construction manager on the project. The contract between DASNY and Samson required Samson to procure general liability insurance for the project and name the JV as an additional insured. Samson obtained this coverage from Liberty Insurance Underwriters ("Liberty").

Thereafter, DASNY sued Samson and the project architect. In turn, the architect filed a third-party complaint against the JV, which then provided notice to Liberty seeking defense and indemnification. Liberty denied coverage, and the JV initiated suit against Liberty, arguing that it qualified for coverage as a named additional insured. The New York Supreme Court denied Liberty's motion for summary judgment and held that the JV was an additional insured under the applicable insurance policy. The Appellate Division reversed and the Court of Appeals affirmed.

The court reviewed the language of the additional insured provision which read, in relevant part, "an insured [is] any person or organization *with whom* you have agreed to add as an additional insured by written contract…" Here, the JV and Samson did not have a written contract with one another. Nonetheless, the JV argued that the written contract requirement conflicted with the plain meaning of the language in Liberty's

endorsement, "well-settled rules of policy interpretation," and the parties' reasonable expectations. The court disagreed, and found that the language was facially clear. It concluded that Liberty's endorsement would only provide coverage to the JV if Samson and the JV entered into a written contract because "unambiguous provisions of an insurance contract must be given their plain and ordinary meaning."

The court then explained how the outcome would differ if the provision did not include the word "with." In that case, the endorsement would have provided coverage to "any person or organization whom [Samson had] agreed by [any] written contract to add..." Since Samson already contracted with DASNY to add the JV as an additional insured, coverage would have been effective as to the JV.

The key takeaway of this case is broadly applicable. It is critically important to analyze *all* contract documents to ensure an accurate understanding of the language used. Realistically, parties often become complacent during the contract review process, especially when certain documents are considered "standard" or when a document seems like a minor formality to finalize a contract. As a result of the hurried nature of review, or the overwhelming volume of contract documents requiring review, parties can easily adopt a reading of contract language that might reflect reasonable expectations but does not necessarily adhere to the plain meaning of the language. And that diligence must extend to insurance policies, which may come into existence after the contract is signed, such as the policy at issue in this case. Ignoring the actual language of the policy can result in significant risk exposure.

By Alex Thrasher

A Dangerous Myth: That a Great Subcontract Will Prevent Claims on a Poorly-Executed Project

Well-drafted, legally-enforceable agreements are key to any construction company's risk management strategy. This is especially true for subcontracts, which serve as a contractor's critical tool to coordinate a successful project among multiple subcontractors with varied scopes of work.

But, as emphasized by the recent opinion *Rai Industrial Fabricators, LLC v. Federal Insurance Company*, a strict and unambiguous subcontract may not protect the contractor from claims where the contractor's actions fail to comply with the subcontract or are beyond the reasonable contemplation of the parties when executing the subcontract.

In *Rai Industrial*, subcontractor Agate Steel ("Agate") filed an action against general contractor Sauer Incorporated ("Sauer") arising out of Agate's work on a federal project in Fort Hunter Liggett, California. Agate alleged four causes of action against Sauer: (1) breach of contract (extra work), (2) breach of contract (delay and disruption), (3) unjust enrichment, and (4) breach of the implied covenant of good faith and fair dealing.

Each of these causes of action arose out of Agate's assertions that Sauer failed to behave in a manner consistent with Agate's reasonable expectations when entering into its subcontract for the erection of structural and miscellaneous steel on a training complex project for the U.S. Army. Agate claimed that Sauer failed to enforce change order provisions (including unilaterally implementing changes to the project schedule and significantly revising project drawings during the course of construction), and failed to pay undisputed amounts to Agate. According to Agate, Sauer's actions required Agate to extend its on-site schedule from 121 days to 422 days; to field-modify nonconforming steel provided by another subcontractor; to procure 4,000 additional steel clips; and to assemble steel stairs on-site, all contrary to the subcontract terms and project drawings.

Sauer's subcontract with Agate contained a broad no-damages-for-delay provision that disclaimed all liability "for any delay, disruption or interference" to Agate's work due to a large number of causes, including delayed material deliveries from Sauer, delayed site access by Sauer, defects in plans or specifications, and changes ordered in the work by Sauer. The subcontract also expressly restricted Agate's relief for changed conditions only to the extent of any actual relief Sauer received from the owner. In Sauer's view, these contract provisions barred Agate from bringing the claims it alleged.

The federal trial court denied Sauer's motion to dismiss Agate's claims because Agate's allegations (if proven) would fall within the reasoning of prior opinions awarding a subcontractor recovery despite and beyond the terms of its subcontract. These opinions included an exception to the enforceability of a no-damages-for-delay provision where a contractor unreasonably (by way of conduct beyond the contemplation of the parties) delayed the subcontractor; a ruling that the parties

"abandoned" the construction contract by failing to follow its procedures; and another ruling that, by imposing an excessive number of cardinal changes to alter the original scope, the parties similarly "abandoned" their subcontract. The court granted Sauer's motion to dismiss Agate's claim of unjust enrichment, but with leave for Agate to amend. The court also denied Sauer's motion to dismiss Agate's fourth claim of breach of the implied covenant of good faith and fair dealing.

Thus we have a reminder that even sophisticated, well-drafted subcontracts may not prevent subcontractor claims where the subcontract collects dust in a file cabinet rather than serves as a portion of the framework for site management decisions. Or, as another moral to this story: while skilled attorneys drafting and negotiating agreements are useful and necessary, contractors cannot ignore the critical importance of having experienced contracts managers, project managers, and site superintendents in construction risk management who are familiar with the terms of their subcontracts.

By: Monica Wilson Dozier

Termination & Limitation of Liability Clauses: Proceed with Caution

Contractors and subcontractors expect to be paid, and, when contracts are terminated, the termination provisions play a critical role in determining payment. Just as important to contractors and subcontractors is limiting liability as much as possible. In a recent case, *Atos IT Solutions and Services v Sapient Canada Inc.*, a Canadian court explored the relationship between termination clauses and limitation of liability clauses in the context of interpreting "lost profits." *Atos* reminds us of the importance of being thoughtful in deciding which provision to utilize in terminating a contract, and the reality that limitation of liability clauses may be interpreted narrowly.

In *Atos*, the defendant, Sapient, was the general contractor for a $50-million-dollar IT replacement project. It subcontracted with Siemens to provide data conversion and application management support. The subcontract provided that Sapient could terminate the entire agreement "for cause," and allowed it the right to terminate the data conversion services portion of the subcontract for convenience. As the project progressed, Sapient decided to terminate Siemens' subcontract for cause. Three days later, Sapient executed a new $8-million-dollar agreement with the owner to provide the application management support services, which were originally within Siemens' scope of work. Siemens sued for damages, including lost profits, alleging that the subcontract was wrongfully terminated.

After a five-week bench trial, the trial court found that there was no material breach of the subcontract justifying termination. As a fallback position, Sapient argued that it had a right to terminate at its convenience the portion of the contract associated with data conversion services. The trial court found that Sapient's intent was to terminate the entire subcontract so that it could take over the application management services portion, which was not subject to the termination for convenience provision. As a result, the court determined that Sapient could not rely on the subcontract's termination for convenience provision.

Having concluded that the subcontract was improperly terminated, the trial court focused on the issue of damages. Sapient argued that the subcontract's limitation of liability clause meant Siemens could not make a claim for the lost profits arising from the breach of the application management support portion of the subcontract. In relevant part, the limitation of liability provision stated that neither party "will be liable to the other for indirect, special, consequential or punitive damages or **for loss of profits** ...." (emphasis added). The court found that "loss of profits" referred only to consequential or indirect profits, *i.e.*, the opportunity cost associated with turning down other work due to work on the subcontract. As the court noted, a key principle of contract law is to place the plaintiff in the same position they would have been in had the contract been performed. Accordingly, the court concluded that the clause did not prevent Siemens' recovery of lost profits from the application management support portion of the subcontract.

Although *Atos* involves an agreement for IT services, the lesson holds true for construction agreements. If, after careful consideration, it is decided to limit the agreement's termination for convenience clause to specific obligations, the termination for convenience clause should be used only to terminate that specific obligation. If Sapient had done so here, it may have been able to eliminate Siemens' award of

lost profits. Finally, the court's interpretation of the subcontract's limitation of liability clauses serves as a helpful reminder that damage exclusion provisions may be narrowly construed.

By: Marcus Augustine

Safety Moments for the Construction Industry

Workers performing work on and around scaffolding are exposed to falls, electrocutions and falling object hazards. Safe and proper operations on scaffolding should be utilized to avoid injury on and around scaffolding.

Hard hats should be worn when working on, under or around a scaffold. Workers should also wear sturdy, non-skid work boots and use tool lanyards when working on scaffolds to prevent slips and falls and to protect workers below. Workers should not, under most circumstances, work on scaffolding covered in ice, water or mud.

Workers should not exceed the maximum load when working on scaffolds. Tools, equipment or materials on the scaffold should be removed or secured at the end of a shift. Workers should not climb scaffolding anywhere except for the access points designed for reaching the working platform. Tools and materials should be hoisted to the working platform once the worker has climbed the scaffold.

If personal fall arrest systems are required for the scaffold you will be working on, thoroughly inspect the equipment for damage and wear and for how it is to be installed to protect a worker or workers.

Bradley Arant Lawyer Activities

Our firm is extremely grateful to our clients to have been recognized as the "**Law Firm of the Year**" in **Construction Law** for 2018 by the *U.S. News & World Report* in its "Best Law Firms" rankings. Bradley has held a National Tier 1 ranking in Construction Law and a National Tier 2 ranking in Construction Litigation every year since the rankings began. The group has also earned Tier 1 metropolitan rankings in Construction Law for its offices in Birmingham, Alabama; Houston, Texas; Jackson, Miss.; Nashville, Tenn.; and Washington, D.C. We are very proud of this honor and even more proud to have the opportunity to advise our clients on projects locally, throughout the country, and around the world.

Chambers USA ranks lawyers in specific areas of law based on direct feedback received from clients. **Bill Purdy, Mabry Rogers** and **Ralph Germany** are ranked in *Litigation: Construction*. **Doug Patin, Bob Symon** and **Ian Faria** are ranked in *Construction*. The firm's Washington D.C. office is recognized as a "Leading Firm" for Construction Law.

Jim Archibald, Ryan Beaver, Axel Bolvig, David Owen, David Pugh, Mabry Rogers, Walter Sears, Monica Wilson Dozier, Jim Collura, Ian Faria, Ralph Germany, Jon Paul Hoelscher, Bill Purdy, David Taylor, Eric Frechtel, Douglas Patin, and Bob Symon have been recognized by *Best Lawyers in America* in the area of Construction Law for 2019.

Keith Covington was recognized by *Best Lawyers in America* in the areas of Employment Law - Management, Labor Law - Management, and Litigation - Labor and Employment. **John Hargrove** was recognized in the area of Litigation - Labor and Employment. **Frederic Smith** was recognized in the area of Corporate Law.

Mabry Rogers, Doug Patin and **David Taylor** were also recognized by *Best Lawyers in America* for Arbitration for 2019.

Ian Faria was recognized as Lawyer of the Year in Construction Litigation (Houston). **David Pugh** was recognized as Lawyer of the Year in Construction Law (Birmingham). **Bill Purdy** was recognized as Lawyer of the Year in Construction Law (Jackson).

Jim Archibald, Bill Purdy, Mabry Rogers, Wally Sears, Bob Symon, Ian Faria, Doug Patin and **David Taylor** were named *Super Lawyers* in the area of Construction Litigation. **Aron Beezley** was named *Super Lawyers* "Rising Star" in the area of Government Contracts. **Andrew Stubblefield**, **Jon Paul Hoelscher**, **Bryan Thomas, Luke Martin, Daniel Murdock, Aman Kahlon, Amy Garber, and Jackson Hill** were listed as "Rising Stars" in Construction Litigation. **Ryan Kinder**, **Justin Scott**, and **Mary Frazier** were recognized as "Rising Stars" in Business Litigation. **Monica Dozier** was named a 2018 North Carolina *Super Lawyers* "Rising Star" in Construction Litigation, and **Matt Lilly** was named a "Rising Star" in Energy and Resources.

Jim Archibald, **Axel Bolvig**, **Jim Collura**, **Keith Covington**, **Ian Faria**, **Arlan Lewis**, **Doug Patin**, **David Pugh**, **Bill Purdy**, **Mabry Rogers**, **Wally Sears**, **Bob**

Symon, and **David Taylor** have been rated AV Preeminent attorneys in Martindale-Hubbell.

Jim Archibald, **Bill Purdy**, **Mabry Rogers** and **Wally Sears** are Fellows in the American College of Construction Lawyers

Jim Archibald, Ian Faria, Eric Frechtel, Mabry Rogers, Bob Symon, and **David Taylor**, have been selected as Fellows of the Construction Lawyers Society of America (CLSA). **Mabry Rogers** was elected as the 2019 President (CLSA). **David Taylor** received the CLSA Community Service Award.

In addition, **David Taylor** spoke at the second annual Construction Law Society of American (CLSA) conference in Banff, Canada in September 2018 on "Bad Faith Mediation: What Crosses the Line." **Mabry Rogers** attended the CLSA conference and presided as acting President. At the conference, **Bradley** was awarded a Law Firm Award in recognition of the firm's high acumen and ability in construction law, construction arbitration, surety, and other construction-related fields.

Aron Beezley was recently named by *Law360* as one of the top 168 attorneys under the age of 40 nationwide.

Doug Patin, Bill Purdy, Mabry Rogers, David Pugh, Bob Symon, and **Arlan Lewis** were listed in the *Who's Who Legal: Construction 2017* legal referral guide. **Mabry Rogers** has been listed in *Who's Who* for 21 consecutive years.

Axel Bolvig, **Stanley Bynum**, **Keith Covington**, and **Arlan Lewis** were recently recognized by *Birmingham's Legal Leaders* as "Top Rated Lawyers." This list, a partnership between Martindale-Hubbell® and ALM, recognizes attorneys based on their AV-Preeminent® Ratings.

Sarah Osborne was recently elected as Secretary and Treasurer of the Construction Section of the Alabama State Bar.

Abba Harris was recently elected to the Board of Directors for the Birmingham Chapter of the National Association of Women In Construction.

Arlan Lewis was appointed to lead the Division Chairs Standing Committee of the American Bar Association Forum on Construction Law. This committee manages the operations of the Forum's 14 substantive divisions.

Chris Selman serves on the Board and **Carly Miller** and **Aman Kahlon** are currently serving as Members of the Young Professionals of the Alabama Chapter of the Associated Builders & Contractors.

Jon Paul Hoelscher recently concluded his service as Chair of the Houston Bar Association Construction Law Section after serving on the council for seven years.

Daniel Murdock was selected to participate in the 2018 class of Future Leaders in Construction with the Alabama Chapter of the Associated Builders & Contractors.

David Taylor was recently named to the Board of Directors of the Nashville Conflict Resolution Center.

Michael Knapp was recently appointed to the Board of Trustees for the Patriot Military Family Foundation, a group that raises money and awareness to benefit wounded veterans and their families.

David Taylor was recently reappointed to the Executive Committee of the Tennessee Bar Association's Construction Law Committee. He was also recently reappointed to the Legal Advisory Counsel of the Associated General Contractors of Middle Tennessee.

Kyle Doiron was recently admitted to the Associated General Contractors' Construction Leadership Program for the Middle Tennessee Branch.

Bob Symon participated in a panel for Javits-Wagner O'Day Legal Symposium on October 3, 2018 at George Washington University Law School.

Ian Faria spoke at the Bay Area Builders Association (a Division of the Greater Houston Builders Association) on "Best Contract Practices and New Developments in Construction Law" on September 4, 2018.

On June 28, 2018, **Keith Covington** gave a presentation on "2018 Immigration Law Outlook" at the Associated Builders and Contractors' Legal Conference in Washington, DC.

On June 19, 2018, **Aron Beezley** spoke about international government contracting at the Veteran Institute for Procurement in Potomac, MD.

Aron Beezley spoke at Bradley's Government Contracting 101 seminar in Huntsville, AL on June 7, 2018.

In May 2018, **Aman Kahlon** was selected to participate in and completed the Alabama State Bar Leadership Forum.

Kyle Doiron and **David Taylor** spoke at Bradley's 17th Annual Tennessee Commercial Real Estate seminar on

the "Top 10 Reasons for Construction Disputes" on May 2, 2018.

NOTES

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