

# CCL Summaries

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

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## BIDDING

## FEDERAL PROJECTS

**Chapman Law Firm Co. v. United States**, 2006 U.S. Claims LEXIS 145  
(Fed. Cl. June 6, 2006).

### Key Point:

**Purpose of Public Competitively Bid Federal Projects. An agency's reopened bidding process should not be limited to sole source negotiations, but should include other offerors in the competitive range.**

### CCL Summary:

The Department of Housing & Urban Development (agency) sought competitive proposals from contractors for the provision of management and marketing services for a certain geographic area. The agency employed a cascading procedure in which competition was first limited to eligible small businesses. The agency awarded a contract to Chapman Law (protester). The agency decided to terminate the contract for convenience and issue a new competitive solicitation. The protester filed a bid protest. The agency entered into new negotiations with the protester. The agency sought to dismiss the bid protest so it could implement corrective action that was acceptable to the protester. The protester's competitors opposed the corrective action and intervened. Greenleaf Construction (intervenor) sought to engage in the reopened bidding process. The government moved to dismiss, requesting that the agency be allowed to implement corrective action.

Under the agency's cascade method of evaluating proposals, both the protester and the intervenor were eligible small businesses. The agency's exclusion of the intervenor from competing in the small business tier where the Small Business Administration's Office of Hearings and Appeals recently ruled that the intervenor was a small business was not reasonable. The agency's desire to negotiate only with the protester would have been highly prejudicial to the intervenor and would not have been in the government's best interests. Because the agency was introducing a new tiered pricing approach, the agency would receive better prices through competition than it would by engaging in

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sole source negotiations with the protester. The exclusion of the intervenor when the agency's work requirements were being amended, including the change to pricing, would have violated the basic competition requirements in federal procurement. The agency's proposed corrective action of reopening discussions and requesting an updated proposal only from the protester lacked a rational basis and was contrary to the Competition in Contracting Act. The agency was required to reopen discussions and request updated proposals from the protester and the intervenor. The motion to dismiss was denied.

## CONTRACTS

## PURCHASE ORDERS

**United States ex rel. Graybar Elec. Co. v. Overstreet Elec. Co.**, 2006 U.S. Dist. LEXIS 32396 (E.D. Wash. May 22, 2006).

### **Key Point:**

**A contractor can enforce a purchase order agreement against a supplier who never signed the agreement, where in past dealings it was customary for the supplier to perform without a signature.**

### **CCL Summary:**

The U.S. Army Corps of Engineers (Corps) awarded a Miller Act contract to Overstreet Electric Company's (contractor) for the installation of a station service transformer at a Dam project in the state of Washington. The contractor issued a Purchase Order (P.O.) to Graybar Electric Company (supplier) for the provision of specially manufactured materials and equipment. The P.O. was signed by the contractor's purchasing manager but was never signed by the supplier. The contractor and supplier had a history of business dealings where the contractor purchased goods from the supplier under a P.O. signed by the contractor but not the supplier. The supplier did not deliver the materials until two months after the completion date in the Corps' contract with the contractor. When the contractor failed to pay the supplier for the specially manufactured equipment and materials, the supplier filed suit against the contractor's surety in federal district court. The contractor filed a counterclaim against the supplier for breach of the P.O. because the supplier failed to timely deliver the materials and equipment in compliance with the completion date in the Corps' contract, which the contractor alleged had been incorporated by reference into the P.O. The contractor filed a motion for summary judgment.

The supplier argued that, because the P.O. was signed only by the contractor, it was not an enforceable bilateral contract and therefore could not be enforced by the contractor against the supplier. The supplier contended, however, that the P.O. could be enforced by the supplier against the contractor, who signed the P.O., up to the price of the goods provided. The contractor argued that the P.O. was an enforceable bilateral contract based on the supplier's provision of the specially manufactured goods and past business dealings between the parties. In order to determine whether the P.O. was an enforceable bilateral contract, the Court looked to the Federal Acquisition Regulation (FAR), since the language used in Miller Act performance bonds was set through the FAR. The P.O. became an effective contract by the supplier's performance through the provision of specially manufactured materials and equipment for the installation of a station service transformer under the Corps Contract. Based on the contractor's past dealings with the supplier, it was customary for the supplier not to sign a purchase order but instead just perform without a signature. Under the particular facts of this case, the P.O. fell within extremely broad definition of "contract" found in the FAR. Summary judgment granted.

**Nat'l Wrecking Co. v. Sarang Corp.**, 2006 Ill. App. LEXIS 490 (June 6, 2006).

**Key Point:**

**Subcontractor Bids and Their Binding Effect. A joint venture formed to submit a bid must pay a partner for work performed where it has always been the intent of the joint venture that the partner do the work.**

**CCL Summary:**

National Wrecking Company (contractor one) and Sarang Corporation (contractor two), a small business contractor, entered into a joint venture agreement (Agreement) for the purpose of bidding on a section 8(a) set-aside contract related to a Navy demolition project. The Agreement provided that the joint venture would perform a specified minimum percentage of the cost of the contract per the requirements of the Federal Acquisition Regulations (FAR). The joint venture submitted a bid that included a fixed price for the abatement of contaminated soil, with the understanding that contractor one would perform that portion of the work. The Navy awarded the contract to the joint venture. Contractor one performed the work involving the contaminated soil; however, the joint venture did not pay to contractor one the money it had received from the Navy for the soil work. After an arbitration hearing, the arbitrator awarded contractor one the bid price for that portion of the soil work that had been performed. The circuit court upheld the arbitration award and contractor two appealed.

Contractor two argued that, in making the monetary award to contractor one for the soil remediation work, the arbitrator had failed to adequately address the issue of the minimum percentage requirements in the FAR. It had always been the parties' intention that contractor one would perform the soil remediation work as evidenced by the fact that contractor one developed that portion of the bid package and contractor two had no knowledge or experience in soil remediation. Neither contractor two nor the joint venture had taken any steps to procure other bids for the soil remediation or investigated any other subcontractor for the work. The amount of the arbitrator's award was based on the bid price for the soil remediation work that had already been completed by contractor one. The arbitrator's award was otherwise very specific as to how the minimum percentage requirements were to be achieved. Accordingly, the circuit court did not err in confirming the arbitration award and entering judgment in favor of contractor one. Affirmed.

**Tradesmen Int'l, Inc. v. McKenzie Mech. Contrs., Inc.**, 2006 Ohio 2562, 2006 Ohio App. LEXIS 2408 (May 24, 2006).

**Key Point:**

**Based on the written contract between a contractor and temporary labor provider, the provider is not liable for damages resulting from the faulty performance of a temporary worker.**

### CCL Summary:

Tradesmen International, Inc. (provider) employed skilled construction craftsmen, which it then provided to customers' job sites when needed. The provider contracted with McKenzie Mechanical Contractors, Inc. (contractor) to provide a master plumber. The plumber performed inferior work, and after two weeks, the contractor terminated his services. After the contractor refused to pay for the plumber's work, the provider filed a lawsuit to recover the amount owed by the contractor for services rendered. The contractor counterclaimed seeking damages sustained as a result of the plumber's faulty work. The provider filed a motion for summary judgment on its claim and on the contractor's counterclaim. The trial court granted summary judgment to the provider on the counterclaim, and based on stipulations entered into by both parties, granted a judgment for the provider on the unpaid amount plus interest. The contractor appealed.

The contractor argued, based on a clause in the contract, the provider had guaranteed the work of the plumber and thus was liable for damages as a result of the faulty work. The provider denied that it gave any sort of guarantee, other than that, if the contractor was displeased with the work, it could send the plumber back within the first four hours, without expense. The contract provision relied on by the contractor stated that the provider guaranteed that the worker sent to the contractor's job site would be of the quality and have the knowledge the contractor requested, and if that was not the case, the contractor had the option of sending the worker back to the provider within the first four hours of the first day at no charge. There was another provision in the contract, which had been initialed by the contractor, whereby the contractor agreed that the provider was neither a guarantor, nor insurer and was not liable for any injury, loss, or damage to persons or property arising from the performance or non-performance of the work by the provider's employees. Based on these provisions, the appeals court found the contract did not provide any guarantee in addition to the four-hour guarantee. Affirmed.

## CLAIMS

## EXPERT TESTIMONY

**Lake Superior Ctr. Auth. v. Hammel, Green & Abrahamson, Inc.**, 2006 Minn. App. LEXIS 83 (June 6, 2006).

### Key Point:

**Expert Testimony Is Required on Issue of Professional Malpractice. In Minnesota, difficulty in securing a witness justifies the extension of the time limit for filing an affidavit of expert review for a malpractice claim against an architectural firm.**

### CCL Summary:

The Lake Superior Center Authority (authority) entered into a contract with Hammel, Green, & Abrahamson (architectural firm) for architectural services for the construction of an aquarium. Repair of the defective walls of the project's largest exhibit tank required significant additional labor and expenditures. The authority and the Lake Superior Center (center) brought a malpractice claim against the architectural firm, as well as numerous other claims against the firm and other parties. The authority and the center filed an affidavit certifying expert review after the ninety day time period specified

by Minn. Stat. Section 544.42 (statute). They subsequently filed an application to waive or extend the time limits for certification of expert review under the statute. The district court held that the affidavit was timely and denied the architectural firm's motion to dismiss the complaint for failure to abide by the time limits for certification of expert review. The appellate court and state supreme court denied the architectural firm's petitions for review.

The architectural firm asserted that the district court erred by failing to dismiss the malpractice claim because the center and the authority failed to timely file the expert-review affidavit. The statute was inconsistent with state Rule 6.02 (rule), which allowed an extension after the expiration of the time limit upon a showing of excusable neglect. The time limits imposed by the statute were procedural and thus could be extended after the time limits expired, upon a showing of excusable neglect. The record supported the finding of excusable neglect by the district court. There was a reasonable basis for the claim by the authority and center, based on the expert affidavit eventually submitted. The authority and center demonstrated a reasonable excuse for their failure to comply with the statute, considering the unique nature of the aquarium and the conflicts of interest preventing local experts from providing opinions in the city's relatively small engineering community. The authority and center used due diligence in attempting to secure expert review. The architectural firm suffered no meaningful prejudice from the expansion of time limits as the litigation could still progress during the time extension, permitting the parties to conduct discovery. The district court did not abuse its discretion in finding that the authority and center showed excusable neglect sufficient to expand the time limits for filing their affidavit of expert review. Affirmed.

## CONTRACTS

## UNSIGNED

**Fed. Ins. Co. v. Grunau Project Dev., Inc.**, 2006 Wis. App. LEXIS 486 (June 6, 2006).

### **Key Point:**

**An owner accepts the terms of an unsigned standard industry contract by acting in conformance with the contract and expressing its intent to use the contract.**

### **CCL Summary:**

Brewery Works (owner) hired Grunau Project Development (contractor) to renovate an old bottling house. The contractor prepared and signed a standard industry contract. The owner allowed the project to progress without signing the contract. The contractor hired subcontractors. The contract, as well as the subcontracts, contained a waiver of subrogation rights provision. The building partially collapsed. The claim for the damage was submitted to the owner's all-risk insurer, who paid the claim. The owner and its insurer filed suit against the contractor and others for subrogation. The contractor and subcontractors filed motions seeking summary judgment. They alleged that the prime contract was enforceable and that any subrogation claims were waived. The owner claimed that the work proceeded pursuant to an oral contract, which did not include a waiver of subrogation rights. The trial court ruled in favor of the contractor and subcontractors. The owner and its insurer appealed.

The owner and its insurer argued that the trial court erred in concluding that the owner accepted the terms of the unsigned contract. By its conduct, however, the owner clearly intended that the project would be governed by standard industry contracts. The owner's failure

to sign the document did not render the contract ineffective or unenforceable. The parties intended that the contract would govern their relationship and intended to waive subrogation rights. The owner's representative admitted that it always intended to use the AIA contracts on the project. The owner signed a similar AIA form contract with the contractor for an associated parking structure that included the same waiver provision. The owner allowed the contractor and subcontractors to work without objecting to a single word in the contract. After the building collapsed, the owner signed documents which acknowledged the existence of the contract and allowed the subcontractors to act based on their belief that the waiver clause was enforceable. The owner's consistent conduct in conformance with the unsigned contract and its expressed intent prior to the collapse bound the owner to the contract terms, including the waiver of subrogation. Affirmed.

## CONSTRUCTION

## STATUE OF LIMITATIONS

**Epicentre Strategic Corp. v. Perrysburg Exempted Vill. Sch. Dist.**, 2006 U.S. Dist. LEXIS 36675 (N.D. Ohio June 7, 2006).

### **Key Point:**

**A statute of limitations for negligence actions is not tolled by a contract limitation that bars a suit until administrative appeals are exhausted.**

### **CCL Summary:**

The Perrysburg Exempted Village School District (District) contracted with Rudolph/Libbe Company, Inc. (construction manager) to provide construction management services for construction of a new high school in Ohio. Nine months later, the District awarded a contract to C&R Masonry (contractor) for the masonry work. The contract required the contractor to submit a construction schedule for its work that the construction manager then used to create a Master Schedule, which was provided to the contractor on March 28, 2000. The contractor did not initially raise any concerns about the Master Schedule, even though it felt the schedule covered only a portion of the project and was not really a "master schedule." The masonry work fell behind almost immediately, which impacted the progress of other prime contractors. On May 31, 2001, the construction manager informed the contractor that the District would impose backcharges related to the delays. On June 25, 2001, the contractor notified the construction manager that it disputed the backcharges and on September 14, 2001, requested additional compensation for the resources it had to expend as a result of the construction manager's negligence in preparing the Master Schedule. In October of 2005, the contractor filed a suit against the construction manager for negligence. The construction manager filed a motion to dismiss based on Ohio four-year statute of limitations.

The construction manager argued that the contractor became aware of the construction manager's alleged negligence no later than June 25, 2001, when the contractor sent the letter, and an attached affidavit, outlining the issues. The contractor argued that the statute of limitations did not begin to run until October of 2005 because of a provision in its contract with the District which precluded litigation until after the claim was adjudicated administratively, and the District's architect did not deny the claim

until just before the suit was filed. In the contractor's June 25, 2001 letter, the contractor claimed it had to expend additional resources as a result of the construction manager's alleged negligence. Those extra costs were the damages at issue and the contractor had, as of its September, 2001 request for additional compensation, already spent the additional monies. While the contractor sought, and was eventually denied, reimbursement for those additional monies from the District under the contract provisions, that appeal did not alter when the damage occurred. Though the contractor had the option to seek redress against the District under the contract, exercise of that option did not toll the statute of limitations with respect to a tort claim against the construction manager who was not a party to that contract. Consequently, the contractor suffered, and was aware of, injuries stemming from the construction manager's alleged tortious conduct by June 25, 2001, and its cause of action as to the construction manager arose at that time and was filed untimely. Motion to dismiss granted.

## SURETY

## MISREPRESENTATION

**RLI Ins. Co. v. Indian River Sch. Dist.**, 2006 U.S. Dist. LEXIS 41368 (D. Del. June 20, 2006).

### **Key Point:**

**Based on a surety's claims that a construction manager and architect have supplied false information regarding a contractor's work, the surety sufficiently alleges that the construction manager and architect are in the business of supplying information.**

### **CCL Summary:**

A school district contracted with McDaniel Plumbing & Heating (contractor) for mechanical, plumbing, and temperature control work at a high school. RLI Insurance (surety) issued a performance bond to the contractor for the project. Edis Company (construction manager) and Becker Morgan (architect) provided the school district with reports regarding the contractor's progress. The surety alleged that the construction manager and architect failed to visit the site to evaluate the contractor's work, failed to reject non-conforming work, and failed to determine whether the work was being performed in accordance with the contracts. The surety issued payment in excess of the actual work performed by the contractor. The school district allegedly terminated the contractor without notice to the contractor or the surety. The surety filed suit against the school district, construction manager, and architect, alleging negligent misrepresentation. The surety claimed that the construction manager and architect supplied false information regarding the quantity and quality of the contractor's work. The construction manager and architect filed a joint motion to dismiss.

The construction manager and architect asserted that the economic loss rule barred the surety from bringing its negligent misrepresentation claim. They argued that their actions did not fall within the negligent misrepresentation exception to the economic loss rule because they were not in the business of supplying information and because the surety did not allege reliance. The surety countered that its claim fell within the negligent

misrepresentation exception because the construction manager and architect were information providers who failed to exercise reasonable care when they provided false information, on which they knew the surety would rely. The exact roles of the construction manager and architect on the project were not clear. Because summary judgment was not appropriate and because there had been little discovery, the court did not decide whether the construction manager and architect were hired to provide information or to build a structure. In its complaint, the surety clearly alleged that the construction manager and architect provided information regarding the progress of the contractor's work. The surety sufficiently alleged that the construction manager and architect were in the business of supplying information. Motion denied.

## SURETY

## PUNITIVE DAMAGE

**Century Surety Co. v. Polisso**, 2006 Cal. App. LEXIS 768 (May 22, 2006).

### **Key Point:**

**Measure of Punitive Damages Award. A punitive damage award of over \$2 million is not constitutionally excessive based on an insurer's reprehensible conduct in denying coverage to a subcontractor.**

### **CCL Summary:**

Kinzel Glass (subcontractor) subcontracted with S.W. Allen Construction (contractor) to install glass panels in an underground viewing chamber at a creek near Lake Tahoe. Prior to the project's completion, the creek overflowed and flooded the viewing chamber. The panels were damaged when clean-up efforts by the contractor's workers scratched the glass. The subcontractor had purchased a commercial lines policy for property damage liability and glass coverage from Century Surety (insurer). The contractor sued the subcontractor, alleging that negligent installation of the glass caused property damage. The insurer denied coverage to the subcontractor. The insurer filed suit against the subcontractor and the contractor for declaratory relief. The subcontractor counterclaimed against the insurer for failing to defend them in the underlying action. A jury found that the insurer breached the implied covenant of good faith and fair dealing. The jury awarded the subcontractor, the subcontractor's owner, and his spouse compensatory and punitive damages. The insurer appealed.

The insurer asserted that the punitive damage award should be reversed because of instructional, evidentiary, and due process violations. The insurer argued that the trial court's instruction was prejudicially inadequate because it did not tell the jury to consider comparable sanctions. However, due process did not require the jury to consider comparable sanctions. Furthermore, the jury was properly instructed to consider the insurer's net worth. Evidence of the insurer's net worth was admissible to establish the lower and upper limits of a permissible punitive award. The punitive damage award of \$2,015,000 was not constitutionally excessive. The insurer engaged in misconduct over an extended time period that was moderately reprehensible. Over a five year period, the insurer's conduct caused severe economic and emotional harm to the subcontractor's owner and his wife, leading to physical symptoms. The owner suffered heart palpitations, depression, panic attacks, and sleep loss. The owner's wife suffered heart palpitations, loss of hair, and post traumatic stress disorder. The insurer's

bad faith denial of policy benefits impaired their ability to manage their business and contributed to the loss of their credit, their lease, and their decision to file for bankruptcy. The insurer knew that the owners were financially vulnerable. The insurer's coverage attorney admitted filing the declaratory relief action as a scare tactic. The punitive damage award was less than four times the amount of the compensatory damages. The ratio of punitive damages to compensatory damages was within the constitutional limit, given the reprehensibility of the insurer's conduct. The punitive award was less than four percent of the insurer's net worth. Considering the insurer's net worth, a smaller award would have been a mere slap on the wrist. The award reasonably achieved the state's interests in retribution and deterrence. Affirmed.

## CLAIMS

## DELAY DAMAGES

**Blue Water Envtl., Inc. v. Incorporated Vil. of Bayville**, 2006 N.Y. Misc. LEXIS 1490, 2006 NY Slip Op 51123U (June 14, 2006).

### **Key Point:**

**An owner may be subject to delay damages, despite a contractual provision prohibiting such damages, where the cause of the delay is not anticipated by either the owner or contractor.**

### **CCL Summary:**

On January 5, 2004, the Incorporated Village of Bayville (Village) awarded a contract to Blue Water Environmental, Inc. (contractor) for construction and maintenance work at a marina. The work included the dredging and disposal of waste material. The contract provided that all work was to be performed in strict accordance with all regulatory agencies. The contract also contained a "no damages for delay" clause holding the Village and its engineer harmless for delays in commencement, performance or completion of the contract, even where the delays were caused by the owner, engineer or any governmental agency. The Village directed the contractor to begin construction on January 8 and to have the work completed by March 8, 2004. Due to ice on the creek and other adverse weather conditions, the contractor was not able to assemble its equipment in order to start work until late February. Before dredging began and due to local concerns regarding the adverse impact of the dredging on young shellfish, the Village's engineer directed the contractor on March 24 to cease its operations. Shortly thereafter, the New York Department of Environmental Conservation (DEC) and the U.S. Army Corps of Engineers (Corps) issued prohibitions against dredging for the period from April 13 to September 30, 2004. The contractor did not actually start dredging until October 20 and initiated a suit against the Village for delay damages. The Village filed a motion for summary judgment.

The Village argued that the hold harmless provision in the contract insulated the Village from the contractor's delay damages claim. The delay was caused by the directives from the DEC and the Corps prohibiting dredging between June and September, during which time the contractor was otherwise ready and able to perform the work. The Village was clearly in good faith in complying with the regulatory requirements and did not abandon the contract or breach a fundamental obligation arising from the agreement. Nonetheless, there was a triable issue of fact as to whether

the DEC's imposition of the prohibited dredging period, in order to protect local fish and shellfish breeding interests, was within the contemplation of the parties. As a contractor engaged in environmental clean-up, the contractor was on notice of the general requirement to obtain permits from environmental agencies. However, the contractor was not necessarily aware of when the spawning season would take place or the effect of the dredging operations upon the young shellfish. The Village, because of its proximity to Oyster Bay, in all likelihood had some familiarity with the local shellfish industry. However, there was no evidence that the Village previously understood the effect that dredging would have upon the shellfish. If the effect of dredging upon the shellfish was not within the contemplation of the parties, the contractor may have been able to recover delay damages as an unanticipated cost, despite the provision purporting to relieve the Village from liability. Village's motion for summary judgment denied.

## BIDDING

## DBE's

**W. States Paving Co. v. Wash. State DOT**, 2006 U.S. Dist. LEXIS 43058 (W.D. Wash. June 23, 2006).

### Key Point:

**Contracting With Disadvantaged Businesses. In an action to recover damages, a contractor must prove that a governmental entity acted with discriminatory intent when failing to award a contract to the lowest bidder.**

### CCL Summary:

On three separate occasions between March 1999 and August 2000, Western States Paving Co., Inc. (plaintiff) submitted the low bid for asphalt and paving work on federally-assisted projects. In each case, the low bid was rejected in favor of a higher bid submitted by a disadvantaged business enterprise (DBE) contractor. The plaintiff had previously been denied DBE status by the State of Washington. For each contract, the Washington State Department of Transportation (WSDOT) imposed a contract goal on the City of Vancouver (City) and Clark County (County) specifying a fixed percentage of the total contract that had to be awarded to DBE contractors. The City and County passed on the State's DBE utilization goal to their prime contractor as a condition in the contract. The plaintiff sued WSDOT, the City and the County challenging the constitutionality of the requirement that contractors use race and gender based criteria when awarding subcontracts and seeking monetary damages and injunctive relief. The district court granted summary judgment in favor of the defendants on all claims and the plaintiff appealed. The Ninth Circuit remanded the case to the district court on the basis that the State's DBE program, as applied, was not sufficiently tailored to further Congress' compelling remedial interest behind the Transportation Equity Act for the 21st Century (TEA 21). On remand, the WSDOT, City and County sought summary judgment on the damage claims.

Each of the statutes invoked by the plaintiff to hold the City and County liable for compensatory damages required proof of discriminatory intent. Any intentional discrimination occurred at the time the State established its DBE criteria and when the State denied the plaintiff's DBE certification on the basis of its shareholder's race, gender, and/or net worth. The City and County did not intentionally participate in either of these actions beyond passing requirements on to prime contractors. They did not have any role in setting the DBE utilization

requirement for their projects; instead, WSDOT determined and imposed this figure upon them. Similarly, the City and County did not take part in any way in the certification of a contractor as a business eligible for DBE status. The State maintained the list of DBE-eligible businesses and required local governments and prime contractors to ensure that those contractors selected as DBE-certified were from the list. WSDOT's DBE program was not a facially neutral policy. Instead, it was specifically race conscious. Any resulting discrimination was therefore intentional, whether the reason for the classification was benign or remedial. For the WSDOT DBE program to be upheld as constitutional, the State had to show that the program served a compelling governmental interest and was narrowly tailored to achieve that goal. No evidence was presented to suggest that minorities had suffered discrimination in the Washington transportation contracting industry. Therefore, the connection between means and ends that was a prerequisite to the use of racial classifications was absent from Washington's DBE program. Summary judgment granted for the City and County and denied for WSDOT.

## SURETY

## DUTY TO DEFEND

Am. Econ. Ins. Co. v. Holabird & Root, 2006 Ill. App. LEXIS 426 (May 30, 2006).

### Key Point:

**An insurer has a duty to defend a contractor as an additional insured on a subcontractor's policy where the only allegations against the subcontractor are in a third-party complaint.**

### CCL Summary:

An office worker filed suit against a university, subcontractor, and Holabird & Root (contractor), claiming that she suffered bodily injury due to exposure to fluorescent lighting installed in a university building. The office worker alleged that the fluorescent lights were not equipped with filters to diffuse ultraviolet rays. The university filed a third-party complaint against the electrical subcontractor that had been hired by the contractor to install lighting at the building. The contractor tendered its defense to American Economy Insurance (insurer), the insurer of the electrical subcontractor. The contractor was a named additional insured on the electrical subcontractor's insurance policy. The insurer denied coverage and filed a declaratory judgment action regarding its duty to defend in the underlying litigation. The trial court held that the insurer had an obligation to defend the contractor. The insurer appealed.

The insurer argued that the complaint filed by the office worker did not allege any negligence by the electrical subcontractor. According to the insurer, the trial court was limited to the allegations contained in the office worker's complaint and could not consider the third-party complaint filed by the university against the electrical subcontractor to find a duty to defend. The trial court was able to consider all the relevant facts contained in the pleadings, including the third-party complaint, to determine whether a duty to defend existed. The facts in the university's third-party complaint could have been used to determine whether the policy addressed the contractor's alleged liability. Both the office worker's complaint and the third-party complaint raised the potential of coverage based on the electrical subcontractor's actions. The office worker's complaint alleged that the fluorescent lighting was negligently installed, which the university's complaint alleged was the electrical subcontractor's task on the project. The insurer had a duty to defend the contractor as an additional insured even though the only allegations against the electrical subcontractor were in the university's third-party complaint. The trial court properly held that the insurer had a duty to defend based on the alleged facts that were potentially within the policy's coverage. Affirmed.

