

THE FLORIDA BAR CONSTRUCTION LAW COMMITTEE
CONSTRUCTION TRANSACTIONS SUBCOMMITTEE
Annotated Construction Contract Provisions 2019

1	<p>INDEMNIFICATION</p> <ul style="list-style-type: none"> • <u>Section 725.06, Florida Statutes</u> Entire provision is not void and unenforceable under statute if the indemnitor is required to indemnify its indemnitor for “claims, damages, losses, and expenses or causes of action [that] are caused in part by those indemnified hereunder...” The appellate court reasoned that the only portion of the provision that violated the statute was the portion requiring the subcontractor to indemnify the general contractor for its own negligence even if only a portion of the loss was caused by the general contractor. The entire indemnity provision was not void and unenforceable. <p style="text-align: center;">---<i>CB Contractors, LLC v. Allens Steel Products, Inc.</i>, ___ So. 3d ___ (Fla. 5th DCA 2018)</p>
2	<p>MISCELLANEOUS PROVISIONS</p> <ul style="list-style-type: none"> • <u>Third Party Beneficiary</u> Contract expressly barred any third party beneficiaries. Therefore, the architect could not be a third party beneficiary of the contract between the Owner and Architect. <p style="text-align: center;">---<i>Perez-Gurri Corp. v McLeod</i>, 238 So. 3d 347 (Fla. 3rd DCA 2017)</p> <ul style="list-style-type: none"> • <u>Flow down</u> Subcontract expressly incorporated prime agreement terms into the subcontract. However, the indemnification obligation was limited to subcontractor, not its subcontractors by the express terms of the indemnity provision. <p style="text-align: center;">--- <i>Blok Builders, LLC v Katryniok</i>, --- So. 3rd --- (Fla. 4th DCA 2018)</p> <ul style="list-style-type: none"> • <u>Merger/integration clause</u> Express provision that agreement constituted the entire agreement and superseded all prior agreements, oral and written, precluded claim for fraud in the inducement. Also covenant not to sue in later transaction released claims of each subsidiary, predecessor, affiliates, and assigns against the other. Third transaction for assignment for the benefit of creditors transferred all assets. Complaint was dismissed on third attempt and affirmed by Third District Court of Appeal. <p style="text-align: center;">---<i>YS Catering Holdings, Inc. v. Attollo Partners LLC</i>, __ So. 3rd __ (Fla. 3rd DCA 2019)</p>

3	<p>TERMINATION OR SUSPENSION OF THE CONTRACT</p> <ul style="list-style-type: none"> • Performance of condition (failure of) <p>Real estate contract required performance of funding before transfer of property was to occur as conditions of closing. <i>---Univ. Housing by Dayco Corp v. Foch, 221 So. 3d 701 (Fla. 3rd DCA 2017)</i></p>
4	<p>CLAIMS AND DISPUTE RESOLUTION</p> <ul style="list-style-type: none"> • <u>No damages for delay</u> <p>A contract waiver of damages (“no-damages-for-delay” provision) did not bar the contractor’s right of action for delay damages against the architect <i>Perez-Gurri Corp. v McLeod, 238 So. 3d 347 (Fla. 3rd DCA 2017)</i></p> <ul style="list-style-type: none"> • <u>Mutual waiver of consequential damages</u> <p>Damages for cost to repair hangars, taxiways, and subgrade under concrete and asphalt surfaces. Trial and appellate courts held that such damages were not recoverable as such damages were characterized as consequential damages and, as such, were barred by virtue of the waiver of consequential damages contained in the contract between the Engineer and the Owner.</p> <p>First District Court of Appeal certified question to the Florida Supreme Court: Where a contract expressly requires a party to inspect, monitor, and observe construction work and to determine the suitability of materials used in the construction, but the party fails to do so and inferior materials are used, are the costs to repair damage caused by the use of the improper materials general, special, or consequential damages?</p> <p><i>Keystone Airpark Authority v Pipeline Contractors, Inc., 266 So.3d 1219 (Fla. 1st DCA 2019)</i></p>

1) INDEMNIFICATION

Blok Builders, LLC v Katryniok, —So. 3rd — (Fla. 4th DCA 2018)

I: Whether section 725.06(1), *Florida Statutes*, applied to subcontract for utility work requiring subcontractor to indemnify owner for losses arising under the subcontract for utility work.

H: Section 725.06(1), *Florida Statutes*, does not apply to underground utility agreements

The court interpreted the prime agreement and the subcontract.

Section 725.06(1), *Florida Statutes*, covers contracts for construction as follows:

Any portion of any agreement or contract for or in connection with, or any guarantee of or in connection with, any construction, alteration, repair, or demolition of a building, structure, appurtenance, or appliance, including moving and excavating associated therewith . . . shall be void and unenforceable unless the contract contains a monetary limitation on the extent

of the indemnification that bears a reasonable commercial relationship to the contract and is part of the project specifications or bid documents, if any.

Subcontract provision reviewed:

“Indemnification. a) Subcontractor agrees to indemnify and hold harmless Contractor and its directors, officers, employees and agents (collectively the "Indemnitees") and each of them from and against any loss, costs, damages, claims, expenses (including attorneys' fees) or liabilities, causes of action, lawsuits, penalties, or demands (collectively referred to as "Liabilities") by reason of any injury to or death of any person or damage to or destruction or loss of any property arising out of, resulting from, or in connection with (i) the performance or nonperformance of the Work contemplated by this Agreement which is or is alleged to be directly or indirectly caused, in whole or in part, by any act, omission, default, negligence (whether active or passive) of Subcontractor or its employees, agents or subcontractors, regardless of whether it is, or is alleged to be, caused in whole or part (whether joint, concurrent, or contributing) by any act, omission, default or negligence (whether active or passive) of the indemnitees, or any of them . . . Said indemnity shall include but not be limited to injury or damage which is or is alleged to be caused in whole or in part by any act, omission, default or negligence of Subcontractor or its employees, agents or subcontractors. . . .

c) Where not specifically prohibited by law, Subcontractor further specifically agrees to indemnify and hold harmless the Indemnitees from all Liabilities, by reason of any injury, death, or damage to any person or property whatsoever, caused by, arising from, incident to, or connected with the performance or nonperformance of the work contemplated by this Agreement which is, or is alleged to be, caused in part (whether joint, concurrent, or contributing) or in whole by any act, omission, default, or negligence (whether active or passive) of the Indemnitees.

The general contract provision reviewed:

Contractor Agreement

The Contractor shall indemnify and hold harmless the Company and its directors, officers, employees and agents (collectively the "Indemnitees") and each of them from and against any loss, costs, damages, claims, expenses (including attorneys' fees) or liabilities (collectively referred to as "Liabilities") by reason of any injury to or death of any person or damage to or destruction or loss of any property arising out of, resulting from, or in connection with (i) the performance or nonperformance of the work contemplated by this Contract which is or is alleged to be directly or indirectly caused, in whole or in part, by any act, omission, default, negligence (whether active or passive) of Contractor or its employees, agents or subcontractors, regardless of whether it is, or is alleged to be, caused in whole or part (whether joint, concurrent or contributing) by any act, omission, default or negligence (whether active or passive) of the Indemnitees, or any of them....

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INDEMNIFICATION and section 725.06, *Florida Statutes*

- *CB Contractors, LLC v. Allens Steel Products, Inc.*, ___ So. 3d ___ (Fla. 5th DCA 2018)

- I: Whether the entire indemnification provision is void and unenforceable where the indemnitor is required to indemnify the indemnitee for claims caused in part by the indemnitee.
- H: No, the entire indemnification provision is not void, only the portion requiring the indemnitor to indemnify for the indemnitee's negligence.

-and-

- I: Do a general contractor and subcontractor have a special relationship such that the general contractor could be entitled to common law indemnity from the subcontractor?
- H: Yes, the relationship between a general and a sub qualifies as the requisite "special relationship."

A condominium association sued a general contractor for construction defects and the general contractor sued its subcontractor alleging contract and common law indemnity. The Fifth District Court of Appeal reversed the lower court ruling that an indemnity provision violated section 725.06, *Florida Statutes*, where the indemnity provision required a subcontractor to indemnify its general contractor for "claims, damages, losses, and expenses or causes of action [that] are caused in part by indemnified hereunder..." The appellate court reasoned that the only portion of the provision that violated the statute was the portion requiring the subcontractor to indemnify the general contractor for its own negligence even if only a portion of the loss was caused by the general contractor. The entire indemnity provision was not void and unenforceable.

A second issue involved whether a special relationship existed between the general contractor and the subcontractor sufficient to allow a claim for common law indemnity against the subcontractor arising from allegedly negligent performance resulting in construction defects. The appellate court reversed the lower court and held that such special relationship did exist, citing to *CC-Aventura, Inc. v. Weitz Co.*, ___ F.Supp ___ (S.D. Fla. 7 13 2019); *Diplomat Properties Limited Partnership v. Tecnoglass*, 114 So. 3d 357 (Fla. 4th DCA 2013)

Contract provision reviewed:

11. Indemnity as to Liabilities. Contractor and Owner shall not be liable or responsible for, and shall be saved and held harmless by Subcontractor from and against any and all suits, actions, losses, damages, claims, or liability of any character, type or description, including all expenses of litigation, court costs, and attorney fees arising out of, related to, directly or indirectly, the performance of Subcontractor. Subcontractor's indemnity obligations hereunder shall apply regardless of whether or not the claims, damages, losses, and expenses or causes of action are caused in part by a party indemnified hereunder and regardless of whether or not the claim relates to a claim under the worker's compensation policy of Subcontractor. Such obligations to indemnify shall not be construed to negate, abridge, or otherwise reduce any other right or obligation of indemnification which would otherwise exist as to any party or person in any other portion of this Subcontract under law.

The statute reviewed:

Section 725.06, *Florida Statutes*:

Any portion of any agreement or contract for or in connection with, or any guarantee of or in connection with, any construction, alteration, repair, or demolition of a building, structure, appurtenance, or appliance, including moving and excavating associated therewith, between an owner of real property and an architect, engineer, general contractor, subcontractor, sub-subcontractor, or materialman or any combination thereof wherein any party referred to herein promises to indemnify or hold harmless the other party to the agreement, contract, or guarantee for liability for damages to persons or property caused in whole or in part by any act, omission, or default of the indemnitee arising from the contract or its performance, shall be void and unenforceable unless the contract contains a monetary limitation on the extent of the indemnification that bears a reasonable commercial relationship to the contract...

2) MISCELLANEOUS PROVISIONS

a) THIRD PARTY BENEFICIARY

***Perez-Gurri Corp. v McLeod*, 238 So. 3d 347 (Fla. 3rd DCA 2017)**

I: Whether the architect was a third-party beneficiary of the agreement between the owner and general contractor.

H: The contract stated that it was neither the owner's nor the general contractor's intention that any other party be a third-party beneficiary to the agreement. Therefore, the NDFD provision did not apply to the architect, as a non-party.

The contract provision reviewed:

Neither Contractor nor City intends to directly or substantially benefit a third party by this Contract. Therefore, the parties agree that there are no third party beneficiaries to this Contract and that no third party shall be entitled to assert a claim against either of them based upon this Contract. The parties expressly acknowledge that it is not their intent to create any rights or obligations in any third person or entity under this Contract.

b) FLOW DOWN PROVISION

***Blok Builders, LLC v Katryniok*, —So. 3rd — (Fla. 4th DCA 2018)**

3) FAILURE OF CONDITION PRECEDENT

***Univ. Housing by Dayco Corp v. Foch*, 221 So. 3d 701 (Fla. 3rd DCA 2017)**

***Univ. Housing by Dayco Corp v Foch*, 249 So. 3d 636 (Fla. 3rd DCA 2018) decided without published opinion**

I: Whether the condition precedent to the obligation to transfer title had been performed.

H: Neither party performed the conditions precedent to obligate the owner to transfer title to property intended to be developed.

Upon execution of this AGREEMENT shall cause to be filed ... Articles of Organization for the Development Company, and to thereafter cause both private equity investment and commercial financing to be funded ("CONSTRUCTION LOAN") sufficient to complete the PROJECT in the manner agreed by the PARTIES." Section 2.02(B) contains a list of obligations which are to be performed "[c]ontemporaneous with funding the CONSTRUCTION LOAN"

4) CLAIMS AND DISPUTES RESOLUTION

a) NO DAMAGES FOR DELAY (NDFD)

Perez-Gurri Corp. v McLeod, 238 So. 3d 347 (Fla. 3rd DCA 2017)

I: Whether the NDFD provision in public owner/contractor agreement would bar the contractor's claim for delay against the architect.

H: No, the architect was not a party to the contract between the owner and the general contractor and, therefore, the contract waiver did not apply to the architect. (See, THIRD PARTY BENEFICIARY – this index).

The contract provision reviewed:

No claim for damages or any claim, other than for an extension of time, shall be made or asserted against City by reason of any delays except as provided herein. Contractor shall not be entitled to an increase in the Contract price or payment or compensation of any kind from City for direct, indirect, consequential, impact or other costs, expenses or damages, including but not limited to costs of acceleration or inefficiency, arising because of delay, disruption, interference or hindrance from any cause whatsoever, whether such delay, disruption, interference or hindrance be reasonable or unreasonable, foreseeable or unforeseeable, or avoidable or unavoidable; provided however, that this provision shall not preclude recovery of damages by Contractor for actual delays due solely to fraud, bad faith or active interference on the part of City or its Consultant. Otherwise, Contractor shall be entitled only to extensions of the Contract Time for completion of the Work as the sole and exclusive remedy for such resulting delay, in accordance with and to the extent specifically provided above.

Except as may be otherwise specifically provided for in the Contract Documents, the Contractor agrees to make no claim for damages for delay of any kind in the performance of the Contract Documents whether occasioned by any act or omission of the City or any of its representatives (whether it is an Excusable Delay or otherwise) and the Contractor agrees that any such claim shall be completed solely by an extension of time to complete performance of the Work. In this regard, the Contractor alone hereby specifically assumes the risk of such delays, including without limitation: delays in processing or approving shop drawings, samples or other submittals or the failure to render determinations, approvals, replies, inspections or tests of the Work, in a timely manner. Contractor shall not receive

monetary compensation for the City delay. Time extensions may be authorized by the City in certain situations. Contractor agrees to this section by submitting a bid response and shall have no recourse from this Section.

b) Waiver of consequential damages

Keystone Airpark Authority v Pipeline Contractors, Inc., 266 So. 3d 1219 (Fla. 1st DCA 2019)

- I: Whether damages for costs to repair resulting from an engineer's breach of his duty to determine the suitability of materials used in construction are

Waiver of consequential damages:

Designer shall have no liability for indirect, special, incidental, punitive, or consequential damages of any kind.