

# ALABAMA CONSTRUCTION LAW NEWSLETTER

WALLACE  JORDAN  
WALLACE, JORDAN, RATLIFF & BRANDT, LLC

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## Specifications in Subcontract Control Over Those in Prime Contract

*Peachstate Roofing, Inc., v. Kirlin Builders, LLC* 2018 WL 3097326 (M.D. Ala. June 22, 2018).

The court considered a dispute between a roofing subcontractor and general contractor and conflicting contractual provisions in their subcontract and the prime contract. In play was a subcontract “flow down” provision saying the subcontractor would be bound to the general contractor to the extent the general contractor was bound to the owner in the prime contract. Also pertinent

was subcontract provision saying that its terms would govern any inconsistent provisions between the subcontract and prime contract. The court, relying on this inconsistent provisions clause, found that the subcontractor was not bound to follow certain roofing specification requirements that were undisputedly contained in the prime contract because they were not included in its subcontract. The court also found that the general contractor was being informed throughout the project by the

owner of issues with the roofing subcontractor’s work but failed to pass those owner concerns down to the subcontractor. In failing to do so, the court found that the general contractor violated an implied covenant to work in good faith with its roofing subcontractor.



## Surety Entitled to Rely on “Pay if Paid” Clause in Subcontract

*Keller Construction Company of NW Florida, Inc. v. Hartford Fire Insurance Company*, 2018WL 5306918 (Ala. Civ. App. Oct. 26, 2018).

The court considered a subcontractor’s claim that it should be entitled to recovery for retainage and extra work from a general contractor’s surety bond. In response, the surety argued that the subcontractor’s recovery should be

denied because the subcontract contained a “pay if paid” clause and the owner had not paid the general contractor. The court sided with the surety and found that the surety could rely on the subcontract’s “pay if paid” clause because owner payment to the general contractor was a condition precedent to entitlement to payment to the subcontractor. The court found it persuasive

that wording in the subcontract stated that the surety was a “third-party beneficiary” of the “pay if paid” clause in the subcontract and that the surety was entitled to assert the “pay if paid” clause in the subcontract as a defense.

## Location of Arbitration Proceeding Determined by Court

*Alliance Investment Co, LLC v. Omni Co., Inc.*, 2019 WL 1219416 (Ala. Mar. 15, 2019).

The Alabama Supreme Court determined that the location of an arbitration proceeding involving claims between a contractor and subcontractor should be determined by the

arbitrator and not the court. In making this determination the court considered a subcontract that clearly found that claims would be resolved in arbitration but had one provision saying the proceedings would take place in Alabama while another said Ohio. In reaching its

conclusion, the Alabama Supreme Court overturned a lower court's ruling finding that the proceedings should take place in Ohio and determined that this arbitration location decision could only be made by the arbitrator and not the court.

## Subcontractor's Payment Bond Suit Must Be Resolved in the Location of the Project

*Ex Parte Consolidated Pipe and Supply Co., Inc. v. The Ohio Casualty Insurance Company*, 256 So. 3d 1267 (Ala. 2018).

The court found that the only location for a lawsuit by a subcontractor against a general contractor's payment bond was in the county in which the project was located. In this case there was a question as to whether or not a lawsuit could take place in the location of the project

or where the general contractor's business was located. The court found that the performance bond contained a clause saying that suit should take place in a court in the same county where the

project was located. The court enforced that clause and found that "forum selection" clauses such as this should be enforced as long as they are reasonable.



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*The construction law practice group of Wallace, Jordan, Ratliff & Brandt handles a full range of legal issues related to all aspects of a construction project. The attorneys working in this area represent owners, developers, design professionals, contractors, subcontractors, and suppliers in all areas related to the construction industry. Visit us at [alabamaconstructionlaw.com](http://alabamaconstructionlaw.com) and [wallacejordan.com](http://wallacejordan.com) to learn more.*