lines for filing claims. Nullem tempus, which has been rightly characterized as an "awesome doctrine," means that on public projects you may be defending project-related claims decades after the work in question is finished, when the witnesses and documents that you need for an effective defense may no longer be available.

Indefinite exposure to liability, unnerving as it may be, is generally accepted as one of the prices that must be paid to secure work from governmental agencies. However, a Pennsylvania trial court's recent rulings suggest that this exposure can be managed contractually. In *Wilson Area School District v. Skepton, et al.*, a school district's suit against an architect seeking damages for alleged defects in the design and construction of the masonry work at a high school was dismissed by a Pennsylvania trial court because it was filed too late. The architect's contract with the school district included paragraph 9.3 of AIA Form B141 (1987 ed.), which provides that the "applicable statutes of limitation" for all causes of action between the parties begin to run from the date of substantial completion or, for acts and omissions that occur after substantial completion, on the date that the final Certificate of Payment is issued.

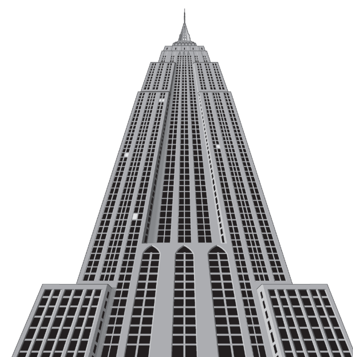
In Wilson Area School District v. Skepton, et al., a school district's suit against an architect seeking damages for alleged defects in the design and construction of the masonry work at a high school was dismissed by a Pennsylvania trial court because it was filed too late.

The school district filed suit five years after the final Certificate of Payment was issued. The statutes of limitation for negligence actions (two years) and contract actions (four years) had expired by the time suit was filed, when measured as required by the contract, so the school district fought to keep the court from enforcing the contract's terms concerning the deadlines for filing suit. The school district argued that the doctrine of nullem tempus precluded the architect from asserting any statute of limitations defenses against it, and it further argued that the defects about which it complained were latent defects about which it was unaware during the limitations period and which it would not have discovered then through the exercise of reasonable care, thus entitling it to an extension of the limitations period under the "discovery rule" exception to the strict application of the statute of limitations.

The Court rejected both arguments. The Court acknowledged that "statutes of limitation do not apply against a school district when it is seeking to enforce a strictly public right," as it was doing in this case, "unless the statute of limitation expressly provides otherwise or the school district waived its right to invoke the doctrine." A governmental agency can waive the protection afforded by the doctrine of nullem tempus, and parties have the right to "adopt a limitation of action period by contract." If a governmental agency enters in to a contract agreeing to be bound by statutes of limitation, then it will not be relieved of the consequences of doing so by nullem tempus.

A governmental agency can waive the protection afforded by the doctrine of nullem tempus, and parties have the right to "adopt a limitation of action period by contract."

In this case, the Court found that the school district's agreement that "all applicable statutes of limitation" would begin to run at a defined period constituted an agreement to waive nullem tempus, to be bound by statutes of limitation, and to have the commencement of those limitations periods begin as provided in the contract. The school district and the architect



are "sophisticated parties represented by counsel and capable of revising a contractual provision that they disputed," so when the school district "signed the contract with Article 9.3 in it" it "waived its right to assert the doctrine of nullum tempus occurit regi." To hold otherwise "would read an express provision, agreed to by the parties, out of the contract." The architect "had the right to rely on the provision in determining what to charge for its services; the duration of its exposure to litigation was a matter it negotiated." Failing to enforce the provision "without altering the rest of the contractual obligations of the parties" would be "unfair."

The same reasoning lead the Court to reject the school district's attempt to rely upon the "discovery rule" exception to the strict application of statutory limitations periods. "Article 9.3 contractually precludes the application of the 'discovery rule.'" The parties expressly agreed when the limitations period would begin and "[t]he language of the contract controls." To accept the school district's argument "would eliminate an express provision of the contract."

In the same litigation, the school district sued the issuer of the general contractor's performance bond. The bond provided that "if [the general contractor] shall remedy, without cost to the [school district], all defects which may develop during the period of one year from the date of completion by the [general contractor] and acceptance of the [school district] of the work to be performed," then the bond would be void. Construction was completed in 1994; the construction defects were discovered in 1997; and the school district filed suit in 2001.

The school district tried to characterize the bond provision as a one year statute of limitations rendered unenforceable by nullem tempus, so that the bond provision would not bar its suit. The bond issuer argued, more plausibly, that the provision merely limited the scope of its contractual responsibility to defects that develop within a year of completion and acceptance of the project. However, the Court saw no need to "decide which characterization is correct" because in either case the school district loses.

"Unquestionably, the school district could defeat the assertion that the action is time-barred if the limitation period had its origin in a statute." In this case, though, "the limitation period is contractual." "The school district agreed to the contractual provision, thereby waiving its right to assert the doctrine [of nullem tempus]" and "each party gained something by the Agreement. The bond issuer "limited the duration of its exposure," and the school district "reduced costs because a bond of unlimited duration would be more expensive than one of limited duration." Allowing the school district to abandon its contractual statute of limitations "would have a significant impact on governmental effort to reduce the costs of public works."

A word of caution is in order. These are trial court opinions; other trial courts are not bound to follow them, so the holdings should not be mistaken for fixed principles of Pennsylvania law. Neither opinion has yet been subjected to review by an appellate court. One of the opinions, concerning the architect's contract with the school district, has not been formally published as a precedential opinion. Nevertheless, these two opinions yield valuable lessons about risk management.

First, get signed contracts. Second, don't dismiss what you may perceive to be "boilerplate" provisions. They usually mean something, and they can often mean the difference between winning a case and losing it. These important provisions are often missing from letter agreements and other manuscript contracts that we are asked to review only after a potential problem arises on the project. Third, add contractual statutes of limitation to your contracts whenever you can do so. Fourth, there is hope for limiting the amount of time that you will remain exposed to claims in connection with a project undertaken for a governmental agency. Nullem tempus can be waived, and at least one court has interpreted a standard form provision concerning the commencement of all applicable statutes of limitation to constitute such a waiver.

Professional Service Firms Should Not Overlook Domestic Production Activity Deduction

By Dirk Simpson, Esquire

With the end of the year present, and tax time looming, it may be worthwhile to consult with your tax advisor about the applicability and feasibility of claiming the relatively new, and potentially valuable, domestic production activity deduction under Internal Revenue Code Section 199.

The calculations and record-keeping required to claim the deduction can be complex, and the benefits usually do not outweigh the administrative burdens for small companies entitled to claim the deduction. Nevertheless, experts still believe the deduction offers significant tax opportunities for eligible midsized companies. The deduction is summarized below.

Section 199 allows a deduction equal to a specified percentage (it increases from 3% in 2006 to 9% in 2010) of the lesser of something called "qualified production activities income of the taxpayer for the taxable year" or taxable income for the taxable year. The second element can be ignored, as it is designed to prevent the deduction from generating a negative taxable income. The deduction, which is limited to 50 percent of a company's W-2 wages paid, is available to qualifying C corporations, S corporations, partnerships, sole proprietorships, estates and trusts.

Unfortunately, determining what is "qualified production activities income" or QPAI as it has come to be known can be difficult. The statute provides that it equals any excess of the taxpayer's "domestic production gross receipts" for the taxable year, over the sum of the cost of goods sold allocable to those receipts, other deductions, expenses, or losses directly allocable to those receipts, and a ratable portion of other deductions, expenses, and losses not directly allocable to those receipts or to another class of income. If you are still processing that last sentence, the point to be taken is that you must focus on "domestic production gross receipts" or, to use the rapidly emerging acronym, DPGR.

> ***The deduction, which is limited to 50 percent of a company's W-2 wages paid, is available to qualifying C corporations, S corporations, partnerships, sole proprietorships, estates and trusts.***

DPGR are the gross receipts derived from the production of personal property in the United States (this deduction was designed to reward United States manufacturers), but it also includes gross receipts collected by service firms that:

- ***Provide engineering and architectural services performed in the United States.***
- Engage in substantial renovation of real property or infrastructure, such as residential and commercial buildings, roads, power lines, water systems, and communications within the United States.

Recent Treasury regulations clarify that taxpayers wishing to qualify for the deduction must generate DPGR from regular activities defined as construction by the North American Industry Classification System. Additionally, architectural or engineering services must be performed in connection with the construction of real property within the United States. Income from land sales or leasing does not qualify as construction for the purposes of determining gross receipts. However, the regulations offer a safe harbor for determining the value of land, which should greatly reduce allocation concerns.

We recognize that all of this may appear technically overwhelming, but that impression should not keep you from seeking professional counsel to explore the potential from this deduction. We will happily assist you in the effort.

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A Note From The Editors:
This Bulletin addresses recent developments affecting Design Professionals as well as business concerns as important as the specific professional and technical issues they face.

Court Finds That Standard AIA Contractual Limitations Period Waives Governmental Immunity To Statutes of Limitation

Neil P. Clain, Jr.

One of the risks that you face when working with a governmental agency on a construction project is that your exposure to liability never ends. However, a Pennsylvania trial court recently issued two opinions stating that this open-ended exposure to liability can be limited by an appropriately drafted contract.

When you provide professional design services to a private sector owner, the law imposes deadlines upon the owner for filing claims related to the project. First, statutes of limitation require that claims be filed within a prescribed time period after the basis of the claim arises; for example, the statute of limitations for professional negligence claims requires that claims be filed within two years (subject to a "discovery rule" that may extend the deadline in certain cases in which the plaintiff neither knew of its injury nor could reasonably have been expected to know of it). Second, the statute of repose prohibits a plaintiff from filing a claim based upon the design of an improvement to real property when the claim arises more than 12 years after the completion of the improvement's construction.

Governmental agencies are not typically subject to statutes of limitation or the statute of repose, as long as the work for which they are contracting serves a public purpose. This longstanding doctrine, known as nullem tempus occurrit regi ("time does not run against the king"), allows governmental agencies to circumvent the rules that govern time dead-

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