



## Indiana Federal Court Bars City's Negligence Claim Against Subcontractor, Allows Breach Of Contract Claim Despite Lack Of Privity

July 10, 2019 | [Construction Law](#), [Construction Defects](#), [Subcontractors](#)



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An Indiana federal court applied the Indiana economic loss rule to bar the city of Whiting from recovering most of the negligence damages it claimed against a marine engineering subcontractor that allegedly performed defective design work in connection with a lakefront park project. However, the decision then allowed the city to pursue its breach of contract damages directly against the subcontractor despite lack of privity as a third-party beneficiary.

With respect to the negligence damages in *City of Whiting v. Whitney, Bailey, Cox & Magnani, LLC*, 2018 U.S. Dist. LEXIS 44943 (N.D. Indiana, March 20, 2018), the court refused to allow the city to recover most of its claimed damages related to the project on the grounds that they did not constitute damage to “other property” under the recognized exception to the economic loss rule. Citing Indiana Supreme Court precedent, the court determined that “[w]hat matters is what the City purchased” which, in this case, was an entire lakefront park. Even though the project was divided into sub-projects by the prime agreement, the court held that the allegedly defective revetment was part of the overall park project, and therefore did not qualify as “other property.” Other damages (including damage to trees and an existing structure) were held to qualify for recovery as “other property” because the city had acquired that property separately from the park project.

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With respect to the city's contract claim, the court found that the city could sue the subcontractor directly for breach of contract as a third-party beneficiary. The decision holds that the subcontract conferred third-party beneficiary rights on the city, in part, because the subcontract referred to the city as the party for whom the marine engineering design services were to be performed.

The court also held that the subcontract created a duty to the city that could establish third-party beneficiary rights because the subcontract incorporated the city's prime agreement by reference, thereby including provisions regarding the city's ownership of the subcontractor's instruments of service. Finally, the court found that performance of the subcontract provided a direct benefit to the city. Accordingly, the court held that the city could pursue its breach of contract damages directly against the subcontractor as a third-party beneficiary.