



Louisiana Construction Law and News Update

Summer 2008

Construction Law Update

Louisiana legislative update

Two particular pieces of legislation of note to the construction industry were passed by the Legislature in its recent 2008 session.

House Bill 558 initially called for advertisements for public bids to provide therewith a budget estimate for the project. The bill – after amendment – passed unanimously in both the House and Senate.

As revised, the bill provides only that:

- projects shall not be advertised for bid if, at the end of the preparation of contract documents and before the bid, “It is determined that the designer’s estimate is more than the funds budgeted by the public entity for the project”; and
- the designer’s estimate shall be read aloud upon the opening of bids.

No provision was enacted to require declaration of the designer’s estimate to the bidders prior to the time of opening bids.

House Bill 563, relating to public bid forms, was also unanimously passed by the Legislature. In principal part, the bill calls for the Division of Administration, Office of Facility Planning and Control, to “develop and prescribe through the promulgation of rules and regulations...” a standard bid form to be used for public bid of public works projects. The bid form to be developed is demanded by the Legislature to require only “the information necessary to determine the lowest bidder” and to otherwise include sections or requests for information on the following:

- bid bond
- acknowledgment of addenda
- base bid
- alternates
- bid total
- signature of bidder
- name, title and address of bidder
- name of firm or joint venture
- corporate resolution
- Louisiana contractor’s license number
- unit prices (where appropriate)

The bill further provides that other documentation and information that might be required of a contractor “shall be furnished by the low bidder at a later date,” and further excluded DOTD bids from the new rules.

House Bill 563 is no doubt in response to the string of Louisiana court decisions (most recently affirmed in *Beverly Construction Company, L.L.C. v. The Parish of Jefferson*, 979 So. 2d 551 (La. App. 5th Cir. 2008)), wherein Louisiana courts have hammered home the rule that, notwithstanding the myriad (and sometimes confusing) bid forms utilized by the various state and local agencies in Louisiana, those public entities lack the discretion to waive even seemingly insubstantial deviations by bidders on the bid forms.

The two House Bills both amend Louisiana Revised Statute 38:2212.

When it rains it pours

The City of Lake Charles, Louisiana, petitioned the Louisiana Attorney General for an opinion on whether the City might voluntarily execute a change order whereby a contractor would receive payment for material cost increases due to “weather related conditions.” In particular, the “weather related conditions” were Hurricanes Katrina and Rita in 2005. The Attorney General, in its Opinion Number 06-0304, 2008 La. AG Lexis 75, notes that the city expressed in its request substantial concern that its unilateral actions in declaring a mandatory evacuation and shutting down construction project sites may give rise to termination claims by the contractors, and otherwise result in present-day rebidding which would cause substantially increased construction costs. Hence, the city deemed it expedient to consider executing change orders in favor of the contractor to cover material cost increases – so that the same contractor could complete the project it started.

In the opinion of the Attorney General, however, neither the adverse weather conditions at play nor the results of those – including increased material costs

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We are pleased to deliver to you the latest edition of "Louisiana Construction Law and News Update." This newsletter is provided to keep you and your company current on legal topics that affect the construction industry. The firm hopes you find this information insightful and relevant to your work.

The newsletter is published on a quarterly basis by the firm and is distributed to the construction industry. We encourage suggestions and ideas for articles from our readers so that this publication can be as current and useful as possible.

We appreciate the opportunity to provide this newsletter to you. If you know of others in the industry whom you think might enjoy receiving the publication, please let us know so that we can add them to our industry list.

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Surety Decisions and Non-Louisiana Cases

United States Surety Company v. Hanover R.S. Limited Partnership, 543 F. Supp 2d. 492 (W.D.N.C. 2008)

In this case, the surety, as plaintiff, filed a motion seeking a declaration that certain issues related to its surety bonds were not arbitrable, and sought also to stay an arbitration in which the surety was named as a respondent.

The conventional bond in question (issued in relation to a subcontract) stated simply that the "...Subcontract is by reference made a part hereof..." and that "the Bond incorporate[s] the Subcontract by reference..." The subcontract at issue contained an arbitration clause governing the resolution of disputes between the subcontractor and general contractor. The surety initially was "invited" to join the arbitration (to which it agreed) but sought by its motion in court to reserve its right to litigate its special surety claims and defenses. In response, the general contractor moved to require the surety to arbitrate all of its claims and defenses.

In ruling against the surety, the district court held that the arbitration provision which provided for arbitration of "any dispute arising out of or relating to" the subcontract applied to the special surety defenses and claims, declaring that those claims and defenses either arose out of the subcontract or, "at the very least are 'related to' or have a 'significant relationship' to the Subcontract, as the Bond's purpose is to ensure [the Subcontractor's] performance under the Subcontract and the Bond incorporates the terms of the Subcontract without limitation."

American Contractors Indemnity Company v. United States, 81 Fed. Cl. 682 (2008)

The surety for a general contractor on a construction project in New Orleans was the beneficiary of a guarantee agreement issued by the Small Business Administration whereby the SBA agreed to reimburse the surety for 80% of any loss or expense suffered by the surety in connection with issuing the surety bonds for the project. The particular guarantee agreement issued by the SBA stated that it was governed by the provisions found at 13 C.F.R. § 115. Performance and payment bonds in the amount of \$1,781,850.00 were executed by the surety.

During the course of the work the contractor and project owner entered a change order increasing the contract by \$240,000.00. The surety acquiesced in the contract increase, and thereafter sought to have the SBA increase its guarantee, which the SBA agreed to do. However, when claims were made subsequently upon the surety bond and paid, the SBA refused to honor its guarantee agreement on the basis that the surety had acquiesced in the increased bond amount of \$240,000 prior to obtaining the approval of the SBA as required by the applicable federal regulations. The surety filed suit against the SBA, which moved to dismiss the claims of the surety for failing to state a claim upon which relief can be granted.

The cited federal regulation required the surety to seek and obtain prior written approval from the SBA before agreeing to an alteration of the surety bond. The court deemed that regulation to be an "unambiguous requirement." Over the objection of the surety – which made several secondary arguments in support of its cause, including an attempt to show that the increased bond was not effected until after the SBA approved of it (even though the surety had previously received additional premium for the bond increase) – the court held in favor of the SBA and dismissed the entirety of the claims of the surety (which, although not described in particularity in the written decision, appear to have been in excess of \$600,000).

Hunt Construction Group, Inc. v. National Wrecking Corporation, 542 F. Supp. 2d. 87 (D.C.D.C. 2008)

Nothing can be clearer, both upon principle and authority, than the doctrine, that the liability of a surety is not extend, by implication, beyond the terms of the contract. To the extent and in the manner, and under the circumstances, pointed out in his obligation, he is bound, and no farther.

These are beautiful words (if you are a surety) uttered by the federal district court in Washington, D.C. (citing an 1824 United States Supreme Court case). It against the backdrop of the foregoing rule of law that the federal district court in Washington, D.C. evaluated the defenses of a surety which claimed it was deprived of its ability to protect itself under the terms of a performance bond because of an obligee's delayed notice to the surety of the principal's default. In the case, the principal (an excavation subcontractor on a downtown Washington, D.C. project) consistently failed during the course of the work to properly supply a work force, resulting in increased costs to the general contractor/obligee of \$804,264.00. However, notice of the subcontractor default was not sent to surety by the general contractor until more than three months after the excavator was completed with its work and no longer on the site.

At the heart of the surety's defense was language in the performance bond which provided the surety the options upon a notice of default to either remedy the default, arrange for the performance of the principal's obligation or provide for the obligee to arrange for alternative means of completing the work – none of which options were available by the time the surety received notice

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This newsletter covers recent case law and other developments of significance to the construction industry. However, the information contained in this newsletter should not be considered legal advice and does not create an attorney-client relationship with the readers. ADDITIONALLY, PURSUANT TO THE APPLICABLE RULES GOVERNING ATTORNEY CONDUCT, THIS NEWSLETTER MAY BE CONSIDERED LEGAL ADVERTISING. Readers should always seek the advice of competent legal counsel for any matters on which they need legal advice.

and the risk of litigation – constitute valid grounds for execution of change orders (or otherwise amending contracts) to increase the contract price. To allow for such changes in the contract, according to the Attorney General, would constitute “a donation of public funds” (prohibited by the Louisiana Constitution). The Attorney General opinion leaves open, however, a possibility that change orders as such might be appropriate in the event that the public entity “is responsible for disruption of a construction site or delay in a construction project” (noting that the particular case brought to it by the city did not involve a project which was subject to a mandatory evacuation or work stoppage order).

“I can’t get no satisfaction”

A general contractor on a road improvement project in Tangipahoa Parish sued the parish for the cost of extra work it performed, ultimately obtaining a judgment in the amount of \$253,623.16, plus interest and court costs. No appeal from the judgment was taken by the parish, although it also did not pay the judgment.

Seeking to recover on its judgment, the general contractor filed a “judgment debtor rule” – a device utilized under Louisiana law for determining the sources of assets from which a particular judgment might be satisfied. The parish resisted the judgment debtor rule in significant part, and obtained a protective order from the trial court judge substantially limiting the scope of the general contractor’s examination of the parish’s assets. The district court allowed the judgment debtor examination only on the matter of the

“existence and amount of any separate account established by [the parish] for the payment of judgments and legal claims...” as well as related to funds separately maintained by the parish for the particular construction project at issue. Obviously disappointed with the limitations placed upon it by the trial court, the general contractor sought writs from the Louisiana First Circuit Court of Appeal.

In *Barriere Construction Company, L.L.C. v. Tangipahoa Parish Government*, 2008 La. App. LEXIS 538 (1st Cir.), the general contractor argued that its scope of inquiry in the judgment debtor examination should be broadened so that the contractor might glean information on myriad sources of funds in the possession of the parish which are not exempt from seizure. Although the court of appeal acknowledged certain exceptions to the broad seizure exemptions afforded state public entities, the court held that such exceptions do not apply to satisfaction of a judgment. In upholding the protective order issued by the trial court, the court of appeal interpreted strictly Louisiana state law on satisfaction of judgments against political subdivisions (such as the parish). As that law (Louisiana Revised Statute 13:5109(B)) provides that judgments against political subdivisions may be paid only out of “funds appropriated for that purpose by the political subdivision,” the court of appeal determined that further examination of the parish regarding its other assets was unwarranted. (The court noted, also, that the Louisiana Supreme Court is presently considering whether the cited statute is judgment specific, that is, that monies set aside to pay judgments,

generally, would not be subject to seizure or discovery through a judgment debtor rule unless specifically allocated to pay the particular judgment at issue; see *Newman Archive Partnership, Inc. v. The City of Shreveport, writ granted*, 967 So. 2d 527 (La. 2007).)

When you fail to plan...

General contractors have long enjoyed in Louisiana statutory immunity for defective construction when the contractor follows the plans and specifications provided to it for construction, and otherwise “did not make or cause to be made” the plans and specifications. This is true in particular if the destruction, deterioration or defect is due to any fault or insufficiency of the plans or specifications. Louisiana Revised Statute 9:2771.

In *Galatas v. Wallace C. Drennan, Inc.*, 975 So. 2d 660 (La. App. 4th Cir. 2008), the general contractor on a road repair project in New Orleans was sued for alleged damages suffered by houses and property along the route of the repair work. In its defense, the general contractor argued very simply and straightforwardly that it neither drafted the plans and specifications for the construction, nor was there any evidence that the contractor did not follow the plans and specifications it was provided. The court of appeal held as did the trial court: without evidence from “any experts or construction engineers or project engineers to establish that [the contractor] did not do the work in accordance with the plans and specifications...” no proof of negligence existed on the part of the contractor. The contractor was dismissed from the suit.

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of the default. Recognizing its weak position, the obligee relied on a 2007 Washington state case (*Colorado Structures, Inc. v. Insurance Company of the West*, 167 P.3d 1125 (Wash. 2007)), wherein the surety was deemed to be immediately liable to the obligee on the express provision in the bond declaring that condition of the surety’s obligation was that “it shall remain in full force and effect” should the principal fail to promptly and faithfully perform its obligations under the subcontract. In essence, the Washington state court had separated the concept of surety liability and the remedies described in the bond, finding that the former was triggered simply upon the principal’s default.

In refusing to adopt the reasoning of the Washington state court in *Colorado Structures*, the federal district court (rejecting the entirety of the claims of the general contractor against the surety) declared that it was doing so to avoid turning “a performance surety into a commercial guarantor,” which is an undertaking beyond the limits of the surety

contract. The federal district court took a further swipe at the Washington state court by declaring that the latter “failed to appreciate the inter-relationships” among the liability and notice provisions of performance bonds.

Harper/Nielsen-Dillingham, Builders, Inc. v. United States, 81 Fed. Cl. 667 (2008)

Plaintiff, a landscape and irrigation services subcontractor, sought delay damages for increased cost of performance in the amount of \$770,565.00 – more than double the original amount of the subcontract. The work in question was performed on a federal project (for the Air Force) and the claim for the damages was attempted to be passed through by the general contractor to the federal owner. However, prior to the time of the submission of the claim by the general contractor to the federal owner, the general contractor and subcontractor entered into

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a "Settlement Agreement and Mutual Release" stipulating that the subcontractor dismissed the entirety of its lawsuit against the general contractor with prejudice. As an additional part of the settlement, the parties recited that the general contractor was completely released, except for the subcontractor's claim "for equitable adjustment for which [the general contractor] shall have no liability except to cooperate in submittal..." of that claim. The Air Force initially denied the pass-through claim asserted by the general contractor, on the basis that the general contractor, by virtue of the release it had executed with the subcontractor, had no potential liability to the subcontractor. Subsequent thereto, the general contractor and subcontractor entered into a revised agreement which provided for the former to remain obligated to the latter "to the extent of, and only to the extent, that any recovery is realized..." from the Air Force on the pass-through claim.

This case deals with the *Severin* doctrine, which allows a prime contractor to sue the government on behalf of its subcontractor, in the nature of a pass-through claim, if the prime contractor proves its liability to the subcontractor for the damages sustained by the subcontractor. Having apparently overcome the problem of non-liability imposed by the initial settlement agreement, the pass-through claims asserted by the general contractor were then rejected by the Air Force on the basis of a no damages for delay clause in the subcontract at issue. The general contractor and, particularly, the subcontractor attempted to play down the significance and enforceability of the no damages for delay clause, but the court was unpersuaded. Asserting as its *Severin* defense the existence of the no damages for delay clause and, therefore, the fact that the general contractor could not possibly be liable to the subcontractor for the delay damages claim, the government was successful in defeating the pass-through claim.

News and Notes

Announcement

The firm is pleased to announce that Deirdre Carey Brown of the firm was elected as the Vice-President of the National Association of Women in Construction – Chapter 17, New Orleans. **Congratulations Deirdre!**

Construction Law Seminars and Publications

Shields Mott Lund L.L.P. is pleased to announce the following upcoming law seminars:

Managing Construction Projects (Lorman Education Services), October 29, 2008, New Orleans, Louisiana – 8:30 a.m. - 4:30 p.m.

Insurance Law (LSU CLE), November 7, 2008, Baton Rouge, Louisiana – Time TBA

What to Do When Construction Projects Go Bad (Lorman Education Services), November 13, 2008, New Orleans, Louisiana – 8:30 a.m. - 4:30 p.m.

Resolving Problems and Disputes on Construction Projects (National Business Institute), December 1, 2008, New Orleans, Louisiana – 9:00 a.m. - 4:30 p.m.

AIA Contracts (National Business Institute), January 8, 2009, New Orleans, Louisiana – 9:00 a.m. - 4:30 p.m.

Our seminars are designed to address the legal issues that the construction industry faces and to zero in on the options that make the best legal advice. Understanding these issues and choices and being prepared for potential problems are the best ways to avoid pitfalls. Additional information on the seminars can be obtained by contacting Sonny Shields or Dan Lund at Shields Mott Lund (504-581-4445), as well as for the Lorman seminars from Lorman at www.lorman.com, and for the NBI seminars from NBI at www.nbi-sems.com.

The partners are pleased to have authored and to announce the release of the **Louisiana Construction Law Book**, a complete and current reference tool for contractors, surety companies, insurers, owners and design professionals in construction industry disputes – or if seeking to avoid disputes while working in Louisiana.

Published by HLK Global Communications of Vienna, Virginia, the easy-to-use 286-page comprehensive manual will help guide you through the Louisiana statutes and case law governing public works and private construction projects of any size. Topics covered in the book include contract drafting and interpretation, lien claims and enforcement of or defense against those, ordinary claims and disputes on the job (including changes in the work, delay and acceleration claims and claim documentation and preparation), differing site conditions, available damages and remedies, public works bidding and bid disputes, surety bonds, different types of insurance, licensing, statutes of limitation, collection strategies, alternative dispute resolution methods and other. For more information, please go to http://www.constructionchannel.net/law_books/Louisiana.asp.



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