SHIELDS MOTT LUND L.L.P.
ATTORNEYS AND COUNSELLORS AT LAW

Louisiana Construction Law and News Update

Winter 2009

# Construction Law Update

## Methinks thou dost protest too late

The case of *The Ramelli Group, L.L.C. v. The City of New Orleans*, 2008 La. App. LEXIS 1369 (4th Cir.), proves up at least two points:

- Awarding authorities may get away with waiving substantial defects in public bids if no one timely attacks the defective bid; and
- Attacks on bids should be full-fledged, including, typically, filing promptly for injunctive relief pursuant to the Louisiana Public Bid Law.

The plaintiff, The Ramelli Group, competed against SDT Waste and Debris Service for a sanitation contract with the City of New Orleans. Both submitted bids on November 17, 2006. The court reports that Ramelli learned shortly after the bids were submitted that SDT did not place its Louisiana contractor's license number on its original bid, but only later filed an addendum to its bid which provided the license number. Ten days after the bid opening, Ramelli issued a written protest by letter to the Director of the Department of Sanitation to which a response was received three days later wherein the City indicated that it did not "credit the Ramelli Group claim." Thereafter, the City fully accepted the SDT bid, awarding the contract on December 18, 2006.

A full 9 months after the bid opening, Ramelli filed a lawsuit in Civil District Court in New Orleans seeking to require the City to reject the SDT bid as being non-responsive to the bid requirements. At this juncture, given the passage of time, Ramelli also asked the district court to declare the contract between the City and SDT null and void and to order the City to reopen the bidding process. SDT (which was not named as a party by Ramelli in the suit against the City) intervened in the litigation and filed an exception of prescription (statute of limitations) and an alternative motion for summary judgment seeking to have Ramelli's suit dismissed. SDT succeeded on its exception.

On appeal, Ramelli argued that there was no particular prescriptive period applicable to the type of suit it filed and that the statutory provisions (particularly La. R. S. 38:2220) and jurisprudence interpreting those should not affect the timing of Ramelli's suit because Ramelli was not seeking injunctive relief per se. The court of appeal disagreed, and upheld the district court's grant of the exception of prescription. In the words of the appellate court, "[I]t can be gleaned from the jurisprudence and in the language contained in La. R.S. 38:2220, that *timely* injunctive relief must be sought in order for an aggrieved bidder to assert its rights..." to other forms of relief (for example, pursuit of an ordinary action for damages against the awarding authority). Failure to timely seek an injunction pursuant to the cited statute resulted in a waiver of the right to seek any other type of relief.

The court continued: "We find that once the City notified Ramelli that it did not give merit to its claim, Ramelli had the legal obligation to seek injunctive relief to prevent the City from moving forward with awarding the contract." This holding by the court of appeal is in concert with subpart B of La. R.S. 38:2220, which states specifically that the injunctive relief provided for therein is intended to be directed to "enjoin the award of a contract or to seek other appropriate injunctive relief to prevent the award of a contract which would be in violation" of the Public Bid Law.

## The last shall be first

Louisiana law on contracts, including construction agreements, is fairly straightforward as it relates to offer/counteroffer and acceptance. In essence, when an offeree returns an offer made to it with new conditions attached, the result is not acceptance of the original offer with conditions but a counteroffer, requiring full and complete acceptance of that counteroffer for an agreement to be struck. Hence, in the case of *Superior Steel, Inc. v. Woodrow Wilson Construction Co., Inc*., 2008 La. App. Unpub. LEXIS 562 (1st Cir.), it came as a surprise to the general contractor that a liquidated damages provision unilaterally crossed out by a subcontractor was held to be eliminated from the subcontract.

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Shields Mott Lund L.L.P. • 650 Poydras Street • Suite 2600 • New Orleans, Louisiana 70130
504-581-4445 • Fax 504-581-4440 • www.shieldsmottlund.com

# Letter From the Partners

*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.*

*Lloyd N. Shields*
*Norman A. Mott*
*Daniel Lund, III*
*Elizabeth L. Gordon*
*Ana Maria Price*
*Andrew G. Vicknair*
*Adrian A. D'Arcy*
*Jeff K. Prattini*
*Ingrid M. Kemp*
*Katy B. Kennedy*

The lawyers of
Shields Mott Lund L.L.P.

# Surety Decisions and Non-Louisiana Cases

*Atlantic City Associates LLC v. Carter & Burgess Consultants, Inc*., 2008 U.S. Dist. LEXIS 93684

The contract for architectural services for a mixed retail and commercial use property in Atlantic City, New Jersey, contained at least three separate paragraphs covering the potential liability of the architect to the project owner for damages. In addition to a paragraph limiting the architect's liability for errors and omissions (and the like) to the "total compensation" received by the architect under the agreement, the contract contained what appeared to be a corresponding indemnity provision whereby the architect agreed unequivocally to hold harmless and to protect the owner and its agents from all claims and damages caused by any negligence, errors or omissions of the architect. At the same time, however, there also existed in the agreement a waiver of consequential damage provision which stated in very vanilla terms that the "Architect and Owner waive consequential damages for claims, disputes or other matters in question arising out of or relating to this Agreement."

When the construction project experienced delays, the owner blamed the architect. In its defense, the architect cited the waiver of consequential damages clause (the damages to be suffered by an owner for delays on a construction project are almost all "consequential" in nature). In response, the owner posited that the indemnity and consequential provisions either modified each other, conflicted with each other or harmonized with each other, and further urged the court to allow the indemnity provision to prime the waiver of consequential damages provision based upon its separate negotiation by the parties (whereas the waiver of consequential damages provision, according to the court, was "part of a form contract from the American Institute of Architects..."). The owner also argued that if the two provisions were found to conflict with each other, either the more specific provisions of the indemnity provision should control or, alternatively, the provisions might be harmonized so that consequential damages were waived only in regard to breaches by the architect not involving negligence, errors or omissions.

Finding in favor of the architect on the consequential damages issues, the court held that the indemnification provision would be harmonized with the consequential damages clause, but not as the owner proposed. Instead, the court held that the subsequent negotiation of the indemnity provision did not modify the waiver of consequential damages provision but, rather, simply provided for indemnity by the architect for "direct" as opposed to "consequential" damages incurred by the owner for negligent acts, errors, or admissions of the architect. "In this way, both provisions can be harmonized with each other so as to give effect to the parties' intent and relate them to the contractual scheme as a whole." Evening up the score a bit, however, the court held that the contractual damage cap and the indemnity clause conflicted with each other, and determined that the more specific of the two provisions – the indemnity provision – should prevail, entailing that the amount of direct damages recoverable against the architect would not be capped according to the contract sum.

*United States of America v. Encon International, Inc*., 571 F. Supp. 2d 754 (W.D. Tex. 2008)

On a Miller Act claim filed by a sub-subcontractor (that is, a "second-tier" claimant), the defendants (the general contractor and the direct subcontractor) filed a motion to dismiss based upon what they asserted was the plaintiff's lack of proper notice under the Act. The Miller Act requires that sub-subcontractor claimants such as the plaintiff provide notice of a claim to the general contractor within 90 days from the last date upon which the claimant supplied the materials or labor for which the claim is made.

In support of maintaining its claim, the claimant contended that it provided notice by registered mail to the general contractor within the ninety days, and, if the written correspondence did not suffice, that the general contractor had received from the claimant notice of the claim based on several conversations between agents of the plaintiff and the general contractor, as well a meeting involving the parties, during the applicable 90-day period. The court, remarking that the relevant statute (40 U.S.C. § 3133(b)(2)) has been held to require that the notice expressing the claim of a second-tier claimant must inform the prime contractor, expressly or by implication, that the "[plaintiff] is looking to the contractor for payment of the [plaintiff]'s bill..." noted nonetheless that the United States Fifth Circuit Court of Appeals (the circuit in which the Texas district court sits) has permitted some "liberality as to the manner of communicating the written notice" (for example, the Fifth Circuit has previously held that sufficient notice was constituted by discussions at a meeting wherein the parties reviewed and discussed a list of outstanding invoices).

Examining the course of conduct between the claimant and the general contractor – including continued contact on a "weekly basis" through two months during the 90-day period to discuss the outstanding balance – the court held that the only reasonable inference from that conduct was that the claimant was seeking payment from the general contractor "and that the presentation of the unpaid invoices at the meeting was intended to constitute written notice" of the sub-subcontractor's claim. The court denied the motion to dismiss.

*Insurance Company of the West v. The United States*, 83 Fed. Cl. 515 (2008)

The plaintiff surety sued the federal government obligee for making payments on contracts to the surety's general contractor principal in derogation of the surety's demand that the government

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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.*

The general contractor's subcontract form contained (wisely) a provision for pass through to the subcontractor of liquidated damages to the extent those were assessed against the general contractor by the owner and determined to be the fault of the subcontractor. Upon receiving the form subcontract (which had already been signed by the general contractor), the subcontractor crossed out the liquidated damages provision, placed the initials of its president and date next to the crossed-out paragraph, and returned the executed amended contract by mail to the general contractor. Thereafter, and without further activity in regard to the contract or the changes to that, work commenced under the subcontract.

At the end of the project, when the subcontractor resisted assessment against it of a portion of liquidated damages charged against the general contractor by the owner, litigation ensued. Although the court of appeal was not able to ascertain exactly what the general contractor did with the amended subcontract when it received it, it held that the actions of the parties (in this case, either the silence of the general contractor or its allowing the subcontractor to proceed with the work, or both) indicated the tacit consent by the general contractor to the changed subcontract and, therefore, the mutual consent of the parties to the amendment unilaterally initiated by the subcontractor. (The court also rejected the general contractor's effort to withhold monies from the subcontractor based upon a "pay if pay" clause, noting that the owner had not withheld contract sums specifically related to the work of the subcontractor.)

## He who slings mud may lose ground

A general contractor on a public project for construction of an underground water line was sued by a private property owner whose property was subject to a personal servitude for the underground utility. In *Barabay Property Holding Corporation v. Boh Bros. Construction Co.*, 2008 La. App. LEXIS 722 (1st Cir.), the landowner sued the general contractor for damages related to removing and disposing of excavated soil from the landowner's property. At trial, the general contractor was held liable to the plaintiff property owner in the amount of $58,020, which represented the value of approximately 5,802 cubic yards of soil removed from the plaintiff's land. The general contractor appealed.

The general contractor asserted as its defense Louisiana Revised Statute 9:2771. That statute absolves contractors (such as the general contractor here) from liability for "destruction or deterioration of or defects in any work constructed, or under construction, by him if he constructed, or is constructing the work according to plans or specifications furnished to him which he did not make or cause to be made..." and if the destruction, etc. is due to the "fault or insufficiency of the plans or specifications." In essence, the general contractor argued to the court that the general contractor was simply following orders – the plans and specifications handed to it by the Parish – and that, therefore, under the cited statute, the general contractor could have no liability.

The court of appeal disagreed with the general contractor. Affirming the trial court's ruling, the court of appeal held that removal of excavated soil – although arguably "work" in the sense of a construction contract under the Public Bid Law – was not synonymous with the "work" as that term is used in La. R.S. 9:2771. Instead, the court held that the term in the statute refers only to a building "or other fixed construction constituting the end product or object of the contract" – and not to excavated soil. (There was no discussion in the case on whether the general contractor would pursue or had the right to pursue an action against the Parish for indemnity, although such an action certainly seems plausible.)

## Louisiana Attorney General construction law update

**Opinion No. 08-0046**
**November 12, 2008**

The Louisiana Department of Transportation and Development requested an opinion from the Attorney General on the extent to which preparation of certain legal documentation by outside contractors of the DOTD might constitute the unauthorized practice of law. As an example of the practice about which the DOTD had a question, the DOTD described the agency's use of non-attorney negotiators to make offers to landowners to purchase property, and to thereafter prepare the acts of sale to conclude the transactions. The negotiators would stay involved at all points in the negotiation, including revisions of the acts of sale. The DOTD noted that the revisions to the acts of sale are sometimes substantial.

The Louisiana Attorney General opined that while the negotiation activities or the simple filling in of blanks on a pre-prepared sale contract would not constitute the practice of law, a negotiator undertaking "to explain to others the legal effects of the sale or other clauses in the contracts" would likely constitute the practice of law. The Attorney General also noted that the issue is "compounded" by the fact that DOTD was not certain whether the documents (because of their age) had actually been prepared by attorneys in the first instance, a problem the Attorney General suggested the DOTD could repair by having its legal department promptly review, edit and approve the documents for future use.

**Opinion No. 08-0167**
**November 12, 2008**

The St. Tammany Parish coroner sought an opinion on the possibility that his office might construct a new coroner's facility without pursuit of public bids therefor. In view of increasing costs of construction, the coroner proposed that he, personally, would supervise the construction and subcontract out various portions of the project to different contractors (presumably, if any portion of the work exceeded $100,000 in value, that portion would be let for bids).

The Attorney General balked at the idea proposed by the coroner, noting that public works projects which exceed the $100,000 threshold (whereupon public bids are required) must be viewed as a whole, adding together (according to the Attorney General) the total cost of labor and materials, wages, benefits, supervision, equipment and administrative overhead. The Attorney General supported its position with Louisiana Revised Statute 38:2212, which specifically prohibits division or separation of any public work project into smaller projects "where the effect would be to avoid the bidding requirements of the Public Bid Law." Additionally, the Attorney General pointed out that the Public Bid Law expressly provides that construction managers employed by public entities may not also serve as general contractors on the project. La. R.S. 38:2212(a)(3)(g).

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# Surety Decisions and Non-Louisiana Cases

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refrain from doing so. At issue in the case was whether the surety's notice to the government triggered the government's duty to act with "reasoned discretion" to protect the interests of the surety in the remaining contract funds. Two aspects of the notice from the surety potentially confounded the matter before the court. First, the surety notified the contracting officer of an actual default, but on a different bonded contact and not the contracts for the project at issue. Second, according to the government, notice of mere potential default on the instant contracts could not trigger the government's duty to protect the equitable rights of the surety in the contract funds on the corresponding project.

In fashioning its ruling, the court noted that previous court decisions on the topic of whether a surety's notice must refer to an "actual default" as opposed to probable or imminent default are not uniform. Holding (after further briefing by the parties on the topic) that notice of a potential default is sufficient to trigger the government's duty to protect the surety's interest in the contract funds, the court tackled the issue of whether notice was insufficient "because it did not refer to the contracts at issue." Holding that the notice from the surety must provide notice of potential default as it relates to the particular bonded contracts at issue – as opposed to merely referring to defaults on other projects – the court nonetheless rejected the government's defense. The court did so on the basis that the notice from the surety, by demanding that the government withhold further contract payments on the particular contracts at issue, effectively notified the government of a potential default on those contracts by virtue of reference to the actual default of the contractor on another contract. "[T]he Court believes that a reasonable and competent contracting officer who received this letter and read the caption and text would understand that it was expressing the ["surety's] concern over the [contractor's] ability to complete performance and or pay all suppliers and subcontractors for the contracts at issue in this case."

# News and Notes

## Announcements

The firm is pleased to welcome **Katy B. Kennedy** as a new associate attorney.

The firm congratulates **Lloyd N. "Sonny" Shields** for being named as one of the 2009 Louisiana Super Lawyers in Construction Litigation and Elizabeth L. "Betsy" Gordon for being named as one of the 2009 Louisiana Super Lawyers in Construction/Surety by *Super Lawyers* magazine.

## Construction Law Seminars and Publications

**Shields Mott Lund L.L.P. is pleased to announce the following construction law seminars.**

***The Fundamentals of Construction Contracts: Understanding the Issues, (Lorman Education Services), New Orleans, Louisiana, May 13, 2009, 8:30 a.m. - 4:30 p.m.***

***Current Developments in Labor & Employment Law, LSU Law Center, McKernan Law Auditorium, Baton Rouge, Louisiana , May 13, 2009, 9:00 a.m. - 5:00 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 seminar can be obtained by contacting Dan Lund at Shields Mott Lund (504-581-4445), or, for the Lorman seminar, from Lorman at www.lorman.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 others. For more information, please go to http://www.constructionchannel.net/law_books/Louisiana.asp.

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ATTORNEYS AND COUNSELLORS AT LAW

650 Poydras Street • Suite 2600 • New Orleans, Louisiana 70130

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