



## **Construction Tool Box: Construction Laws, Cases, Notes and Alerts**

**A Production of The Harmonie Group  
Construction Law Committee**

**Vol. II No. 2 (August 2013)**

### **INTRODUCTION**

It has been a busy summer of construction and construction claims. Several cases in this issue reflect the importance of written instruction or change orders, whether the contract is lump sum or time and materials. Other cases reflect the legal and practical issues that arise when a contract is modified, and questions arise whether the old contract or a new contract is operative. In many cases, that proves to be a good and difficult question.

- The Editor  
August 2013

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## National Focus

### **Bid Response as Binding Contract**

*M Electric Corp. v. Phil-Gets (Guam) International Trading Corp.*, 2012 Guam LEXIS 21 (December 27, 2012)

General contractor Phil-Gets hired subcontractor M Electric on two projects for the Guam Power Authority totaling \$5.5 Million. On each project, M Electric submitted, and Phil-Gets accepted, a job proposal and thereafter presented M Electric with a written subcontract “as a formality”. The projects suffered delays and litigation followed highlighting the terms of the proposals and the contracts. Phil-Gets sought summary judgment arguing that the subcontracts and their terms were binding, whereas M Electric countered that the subcontracts were “mere formalities” and, for example, the “no damages for delay” provision should not be enforced.

As a preface, the court noted that courts have expressed different opinions on whether a construction bid proposal and its acceptance constitute a legally binding contract for performance of work. Some courts have held that where one party accepts a bid to perform certain work, a contract can arise at that moment, even if a formal, written contract is later prepared. Other states have ruled that no contract is created until other formalities such as a written contract or furnishing of bonds follow. Still other courts have ruled that an accepted construction bid is merely a “preliminary agreement” to execute a formal contract, along the lines of an “agreement to agree”.

In this case, the court ruled that the two proposals from the subcontractor which Phil-Gets accepted and signed became legal contracts. The court was influenced by the parties’ apparent mutual belief that subcontracts were just a formality, which suggested they believed contracts were already formed.

The case then went into the substantive issue of Phil-Gets attempting to enforce the subcontracts’ “no damages for delay” provisions despite M Electric’s claims that differing sub-surface conditions resulted in nearly \$500,000.00 worth of extra costs and damages. M Electric argued that because the delays were unreasonable in duration, the “no damages for delay” clause should not be enforced.

Many jurisdictions have made exceptions to “no damages for delay” clauses for unreasonable delays the parties did not contemplate at the time of contract execution. The court here found there were issues of fact whether the delays encountered were reasonable, and whether the parties contemplated them at the time of the agreement. In essence, the court held that the “no damages for delay” clause was enforceable in Guam, but the “unreasonably long delay” exception might apply, and summary judgment was denied as inappropriate.

## **National Focus**

### **Deleted Work – Payment Claims**

*Contract Management Inc. v. Babcock & Wilson Technical Services Y-12, LLC*, 2013 U.S. Dist. LEXIS 1673 (E.D. Tennessee, January 4, 2013)

Contract Management Inc. (CMI) was hired to rehabilitate water lines at an energy complex in Oak Ridge Tennessee. Congress deleted a portion of the project funds which deleted several of the pipes on which CMI was to perform work. The parties disputed how the change should affect the subcontract price. The contractor computed the deduction by taking the amounts CMI quoted for each of the four deleted pipes and asserted that CMI should receive the remaining price for the one remaining pipe. CMI objected to this calculation because its overall management costs and overhead had been included within the four deleted line items. CMI had distributed its personnel, labor, and management costs among all five proposed water lines.

CMI argued that the better calculation would be to start with the full subcontract price for all labor and materials and then factor in its management costs and overhead. The court agreed with this approach but calculated the numbers somewhat differently. The court concluded that the modifications should have reduced CMI's price by approximately \$470,000.00 which was slightly different than CMI's own calculation. The court essentially awarded CMI approximately 75% of the total amount CMI sought for modifications at issue.

CMI's argument was aided by subcontract language that suggested its subcontract was for a lump sum which justified working from the full subcontract price for labor and materials and then adding in management and overhead costs rather than using line item calculations. This case was one involving contract language interpretation and calculations since there was no argument but that the parties had to go along with the contract deletions that came from the congressional budget which were not the "fault" of either party.

## **National Focus**

### **Government Contracts - Bid Evaluation**

*Matter of Clark Construction Group, LLC*, 2012 U.S. Comp. Gen. B- 407334.2 (December 18, 2012)

A disappointed bidder, Clark Construction, alleged that the government mis-evaluated its proposal for military construction projects in Alabama and Florida. Clark argued that the Corps of Engineers could not have reasonably awarded the contract to another bidder whose price was nearly \$6 Million higher than Clark's, but the Comptroller General upheld the bid award and denial to Clark. Under the RFP, the

government did have an obligation to rationally explain why the higher-rated proposal was superior, but it was not obligated in all cases to quantify the value or level of the technical superiority.

For example, Clark argued that the Corps' focus on projects that were military construction was improper since the RFP said that diverse types of construction could be used to demonstrate relevant performance. The Comptroller rejected this argument because project diversity was understood within the context of the RFP's focus on military construction. Clark also argued that it had highly rated performance on past projects which should have resulted in higher grade for past performance. The Comptroller ruled that evaluation of past performance is largely a matter of agency discretion.

In essence, the Comptroller found that the Corps' bid evaluation and explanation for differentiating between the bidders was reasonable and Clark's bid protest was denied. The government had to explain and justify accepting the higher bid, but within that justification there is some level of deference and discretion accorded to the bidding agency.

## **National Focus**

### **“Pay If Paid” Clauses Defined and Explained**

*Transtar Electric, Inc. v. A.E.M. Electric Services Corp.*, 2012 Ohio App. LEXIS 5147 (December 14, 2012)

A clause is a “pay if paid” clause only if it explicitly states an intent to shift risk of nonpayment from contractor to subcontractor. Otherwise, it may be interpreted as “pay when paid” clause. The subcontract in this case stated that receipt of payment by contractor from the owner was a “condition precedent” to payment from the contractor to the subcontractor for that work. The trial court interpreted this as a “pay if paid” clause, but the Ohio appellate court disagreed and reversed.

Many courts start their analysis with a presumption that prime contractors should bear the risk of owner nonpayment. Several states including North Carolina, Wisconsin, Illinois, Maryland, Missouri, New York, and California have either enacted legislation or by judicial decision held “pay if paid clauses” void as against public policy. Courts will generally interpret such clauses as “pay when paid” clauses. The judicial analysis stresses that, if the parties intend to shift risk of nonpayment to the subcontractor, that intention must be clearly stated and unambiguous in the subcontract.

To have a true “pay if paid” clause, many courts require specific mention that the subcontractor assumes the risk of non-payment by the owner. Language to create a “pay if paid” clause might be that “...subcontractor expressly acknowledges that subcontractor will never be paid in full, or at all, to the extent [the] contractor is not paid by the owner.” In short, courts often require that the subcontractor expressly assume the risk of owner non-payment. In the present case, the Ohio appellate court said this looked like a “pay when paid” clause, and did not clearly and unambiguously indicate an intent to shift risk of non-payment to the subcontractor.

It may not be enough to use terms such as “condition precedent” because that (alone) does not conclusively confirm that the subcontractor is ultimately looking to the owner for payment. Using the “condition precedent” language might be seen as attempting to establish a “pay if paid” clause, but some courts, such as this one in Ohio, are refusing to enforce such a clause as a “pay if paid” clause. Other courts limit or strike down “pay if paid” clauses for lack of disclosure to the subcontractor of the risk of owner non-payment.

Of course, there may be other remedies available to a subcontractor confronted by a “pay if paid” clause under state lien laws, and proceeding against payment bonds, which might provide alternative avenues to recovery.

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## **National Focus**

### **Government Contracts – Recovery of Dispute Resolution Costs**

*Tip Top Construction, Inc. v. Patrick R. Donahoe*, 2012 U.S. App. LEXIS 19683 (Federal Circuit, September 19, 2012)

The contractor sought approximately \$10,000.00 in additional costs associated with a change the government made to an HVAC system on a postal facility in the U.S. Virgin Islands. The amount essentially consisted of consultant and legal fees incurred in preparing and presenting the change estimate. A court earlier ruled the contractor was not entitled to the balance because it had nothing to do with performance of the changed work or “contract administration” and were “just” litigation costs.

The main question was whether Tip Top’s costs were claim preparation costs as the government contended or contract administration costs. The Court of Appeals sided with the contractor. A contract administration cost is one incurred with a genuine purpose of materially furthering the negotiation process even if negotiations eventually fail and a claim is later pursued. The Court ruled that these costs were genuine administrative and claim preparation costs concerning estimates and pricing over the changed work. The consultant and attorney directly involved themselves in the cost review and price negotiations and the Court held that these types of fees are recoverable even if the negotiations concerning a change order fail and litigation or actual claims are filed.

Even though the amount involved in this case was very small, the lesson for government contractors is that costs incurred in reacting and responding to change orders and changes in the scope of work may be recoverable as valid contract administration costs. In this case, the consultant and attorney were directly involved in estimating the claim, reviewing the government's response, and in the negotiations over the price of the changed work and were not simply brought in at a last or final minute to prepare and submit a claim.

## **National Focus**

### **Miller Act 'Public Work' Defined By Government's Use**

*Gatlin Plumbing & Heating, Inc. v. Welty Building Co., Ltd.*, 2013 U.S. Dist. LEXIS 25863 (N.D. Indiana, February 26, 2013)

Gatlin Plumbing alleged that a project to construct a Department of Veteran Affairs Outpatient Clinic in Indiana was "established to serve the interest of the general public" and that the federal government provided funding and was the project's initiator/ultimate operator. The defendant sought to dismiss the plaintiff's claim for Miller Act recovery.

The Miller Act, 40 U.S.C. §§ 3131, *et seq.* requires a person to furnish to the government both a performance and a payment bond before awarding any contract of more than \$100,000 for the "construction, alteration, or repair of any public building or public work of the Federal Government..." However, at a minimum, the federal government (or its direct agent) must be a contracting party.

In determining whether a project is a public work, as the Act does not specifically define it, the courts consider whether the federal government is "an obligee to the bond", "an initiator or ultimate operator" of the project, "the owner or intended owner of the property on which the work is performed", and/or "funding source for the project". In the instant case, the record indicated that the federal government was not a party to the construction contract, an obligee under any bond, or owner of the land on which the clinic was to be built. The court therefore reasoned that the VA project did not constitute a public work, and the plaintiff's Miller Act claim was defeated on the merits.

## **National Focus**

### **Differing Site Conditions Claim- Soil Contamination**

*Skanska USA Building, Inc. v. U.S.*, 2013 Ct. Fed. Cl. LEXIS 201 (March 21, 2013)

Skanska USA Building Inc. (Skanska) was the general contractor on a U.S. Army Corps (Corps) project to construct nine buildings at Fort Lewis in Washington. While performing the earthwork portion of the contract, Skanska accumulated a stockpile of 15,000 cubic yards of soil that it was contractually required to

dispose of. Skanska planned on recovering hauling costs by selling the excavated material, and therefore didn't include the disposal expense in its contract price. However, when a Corps' test detected lead in the soil, Skanska was unable to sell the soil, as planned. Skanska submitted a claim to the Corps seeking \$148,500 in "compensation for costs associated with encountering contaminated soils." The Corps refused to pay. Skanska then filed a differing site conditions claim.

Skanska had to demonstrate that the discovery of lead contamination was a differing site condition. It argued that it satisfied all three elements of a Type II condition: (1) the presence of lead in the soil was unknown, (2) unusual, and (3) materially different from what is ordinarily encountered in similar work. The Corps argued that the contract's differing site conditions clause was inapplicable, however, Skanska was successful in demonstrating that (1) the contract documents did not disclose the lead contamination; (2) nor did the site inspection reveal the lead contamination; and (3) an estimator with 17 years of experience in the Fort Lewis region found lead contamination to be an unusual condition.

The Corps failed to provide any evidence contradicting Skanska's establishment of all three elements of a Type II condition. The court, therefore, granted summary judgment in the contractor's favor on the differing site conditions claim. The Corps had contractual authority to dictate where its contractor placed unwanted excavated materials, but by failing to invoke its authority, it ended up paying for Skanska's additional disposal costs.

## **National Focus**

### **Bid Evaluation - Agency Discretion**

*Matter of: Koontz Electric Company, Inc.*, 2013 U.S. Comp. Gen. B-407946 LEXIS 67 (April 5, 2013)

Koontz Electric Company, Inc. (Koontz) protested the award made for a U.S. Army Corps of Engineers (Corps) project at Chief Joseph Dam in Bridgeport, Washington. Koontz claimed that its \$6.8 Million proposal, which was \$860,000 less than the awardee's, was misevaluated and that the agency made an unreasonable best-value decision. Specifically, Koontz focused on the Corps' evaluation of its proposal under two technical subfactors: corporate experience and design experience.

The project involved designing, manufacturing, and installing eleven excitation systems for hydropower generation. The exciters in the system had to employ two different techniques to regulate voltage, due to the generator configurations involved. Therefore, under the corporate experience subfactor, the project solicitation required that offerors show successful implementation of the two techniques simultaneously. The Corps gave Koontz's proposal an "unacceptable" rating under the corporate experience subfactor, as Koontz had shown experience with one or the other voltage technique, but not both.

Under the design experience subfactor, offerors were required to "clearly demonstrate" relevant experience in electrical design similar—in scope, magnitude, and complexity, to the project at hand. The

Corps gave Koontz's proposal earned a "marginal" rating for electrical design experience, concluding that "while Koontz appeared to be capable of successfully implementing both voltage techniques in its exciter design, there remained some risk of failure".

While Koontz argued that its lack of experience should have resulted in a "neutral" rating, the Comptroller General found the Corps' reasoning to be sound. The Comptroller General would only question an agency's evaluation where the agency lacks a reasonable basis or acts inconsistent with the solicitation criteria. The record, however, showed that the Corps deemed the technical advantages—and lower risk—were worth the higher cost of choosing the awardee over Koontz.

## **National Focus**

### **Surety – Takeover of Contract**

*Colonial Surety Co. v. United States*, 2013 U.S. Ct. Fed. Cl. LEXIS 36 (January 14, 2013).

Colonial Surety furnished DMA Construction Associates with payment and performance bonds for a Navy roof replacement project in Pennsylvania. The contractor ran into problems, the Navy dispersed directly to the contractor, and the Surety challenged that payment, and also sought recovery for other project costs. Colonial relied upon "equitable subrogation" to bring a Tucker Act claim for a total of approximately \$540,000.00. Numerous issues and questions of fact however led the Court of Claims to deny the parties' respective motions for summary judgment.

When a Surety notifies the government it is invoking its rights to recover contract proceeds, the government becomes a stakeholder with duties to the Surety. To avoid a technical default termination, the parties here executed a contract modification whereby the Navy agreed to make future payments payable to the contractor but in the care of Colonial and send them to Colonial's address. The court ruled that there were genuine issues of fact whether the Surety's right to equitable subrogation attached under either the performance or payment bond.

It was first unclear whether Colonial's performance bond obligations were ever triggered since the Navy never terminated the contractor for default, and the contractor actually did complete the project. Although the record indicated that contractor did not perform completely and without many problems, the Court ruled there was not enough evidence to determine whether the Surety's performance bond liability had been triggered.

With respect to the payment bond claim to assert equitable subrogation under that bond, Colonial had to prove it had paid all of the outstanding claims. This raised other outstanding issues of fact as to what lien claimants had been paid and what amounts.

Colonial tried a last argument that it had an actual direct contract with the Navy under the contract modification the parties executed or an implied in fact contract. The court ruled there were issues of fact whether the contract modification was actually a new contract signed by all three parties or was simply a modification or extension of the original contract which was only between the contractor and the Navy. In short, there were numerous issues of fact as to whether and what extent the Surety had “taken over” the contract and displaced the contractor, as opposed to “assisting” the contractor and the Navy to move the project towards what was ultimately a completion.

## **Connecticut**

### **Insurance Coverage For Subcontractor’s Faulty Workmanship**

*Scottsdale Insurance Co. v. R.I. Pools Inc.*, 2013 WL 1150217 (2d Cir., March 21, 2013)

Several of the pool company’s customers sued the company particularly for packing, flaking and deteriorating concrete. The pool company had installed the pools but subcontracted with three other companies to supply and inject the concrete into the forms. The pool company’s commercial general liability policy excluded damages caused by its own work, but made a possible exception for damages caused by work done by a subcontractor.

Scottsdale brought a declaratory judgment action seeking a ruling that it had no obligation to defend and indemnify the pool company. The District Court in Connecticut granted the insurance company’s motion for summary judgment finding that Scottsdale had no duty to defend or indemnify the pool company because the allegedly faulty workmanship could not be considered an accident covered under the policies. The Second Circuit reversed saying the trial court had not considered the exception for subcontractor work. The appellate court said that the trial court’s analysis essential read the subcontractor exception out of the policies. Scottsdale had paid the defense costs before filing the declaratory judgment action. The Second Circuit vacated and remanded the judgment and denied Scottsdale’s request for reimbursement for defense costs it had already expended.

## **Georgia**

### **Contract Payments – Conditions Precedent**

*SCI, Inc. v Engineered Concepts Inc.*, 2013 U.S. Dist. LEXIS 5512 (Northern District Georgia, January 14, 2013)

SCI Inc. was hired as a subcontractor to perform \$4 Million worth of site work on an apartment complex in Gulf Port, Mississippi. The contractor agreed to pay \$300,000.00 in additional compensation but refused to pay arguing that SCI failed to satisfy conditions precedent to payment. The subcontract

required sworn statements, affidavits, receipts, releases, and waivers of lien to support an additional payment application.

SCI conceded that it had not submitted the required documentation for the payments it was demanding. It first argued that the contract was not clear on what the subcontractor had to do with the contract documentation, but the court disagreed finding that it was clear that SCI had to submit the documents to the contractor to justify payment. SCI next argued that the contractor had not actually requested the documentation but the record showed there had been in fact requests for final waivers and releases for the payments. Thus, even though the subcontractor potentially stood to gain \$300,000.00, the court granted summary judgment dismissing SCI's claims.

This case is a good example of what happens in litigation when a party seeking additional compensation, a change order, or extra work payments, does not comply explicitly (or in substance) with contract terms and conditions precedent for payment applications.

## **Georgia**

### **Extra Work – Change Order Written Consent**

*U.S. f/u/b/o Duncan Pipeline, Inc. v. Walbridge Aldinger Co.*, 2013 U.S. Dist. LEXIS 45982 (Southern District Georgia, March 29, 2013)

General contractor Walbridge Aldinger Company (Walbridge) subcontracted with Duncan Pipeline, Inc. (Duncan) to supply labor and material for a water distribution system on a U.S. Army Corps of Engineers (Corps) project at Fort Stewart, Georgia. During the project, Walbridge allegedly ordered Duncan to perform work outside the subcontract's scope—namely installing bell restraints, performing additional excavation work, and remobilizing crews. Duncan claimed that Walbridge had actual notice of the problems that formed the basis of its claims, that the project specs were defective, and the resulting damage was unforeseeable. Walbridge, however, refused to pay Duncan's \$1.2 Million claim for additional work and loss of productivity.

According to Walbridge, Duncan waived any potential claims the subcontract did not already bar by signing nine "partial unconditional waivers" and failing to provide timely notice by its claims. Walbridge also alleged that Duncan's claim was barred its failure to provide timely notice. The subcontract required Duncan to submit a written itemized quote within 14 days of the receipt of an order to perform changed work. Duncan did not provide written notice of its claims until more than eight months after Walbridge allegedly ordered the additional work.

Reading the subcontract for the parties' intent, the court determined that the purpose of requiring prompt notice of and a quote for additional payment claims was to give Walbridge a chance to satisfy its obligations with the Corps. More importantly, the subcontract explicitly stated that Duncan was not entitled to payment for additional work or work that deviated from the specs without written authorization from Walbridge, which it never received. Thus the court granted summary judgment in favor of Walbridge on the additional compensation claims.

## Louisiana

### **Miller Act- Recovery of Profits**

*Fisk Electric Co. v. Fidelity and Deposit Co. of Maryland*, 2013 U.S. Dist. LEXIS 20056 (E.D. Louisiana, February 14, 2013)

The U.S. Army Corps of Engineers hired Benetech, L.L.C. (Benetech) as the prime contractor on a project to construct a pumping station in Louisiana. Under a purchase order agreement with Benetech, Fisk Electric Company (Fisk) purchased and delivered to the project a diesel generator, however Benetech never paid Fisk for it. Fisk then sought payment from Benetech's Miller Act sureties. The Miller Act sureties paid Fisk \$2 Million, however, they refused to pay the remaining \$710,922 due under the purchase order agreement.

The Benetech-Fisk purchase order outlined that Fisk would agree to supply the generator for \$2,655,005, however, the parties later settled on a total purchase price of \$2,710,792, which included engineering costs, interest, overhead, profit, and shared savings. Fisk alleged that the shared savings aspect was an incentive for it to purchase the generator on the open market, and Fisk later succeeded in purchasing the generator from another supplier for \$2,090,800.

The sureties argued that the balance in question was not recoverable under the Miller Act because it was attributable to savings rather than labor or material, however, courts have shown that shared savings, specifically, are recoverable under the Miller Act. The sureties had no evidence to refute Fisk's contention that it did seek payment from Benetech, nor could they show that Fisk knew (or should have known) that Benetech would never pay. Fisk did notify the sureties of the non-payment and sought recovery after the requisite 90 days under the Miller Act had passed, and therefore Fisk established that it was entitled to recover the \$710,922 remaining balance.

## Maryland

### **Liquidated Damages**

*Cuesport Properties, LLC v. Critical Developments, LLC*, 2013 Md. App. LEXIS 12 (Maryland Court of Special Appeals, February 27, 2013)

Cuesport Properties, LLC sold a commercial condominium unit to Critical Developments, LLC. Under the terms of the agreement of sale, Cuesport was to build a demising wall between Critical Developments' unit and an adjacent unit. Cuesport agreed to complete the wall within thirty days of closing and, if it failed to do so, to pay liquidated damages in the amount of \$126 per day until completion.

The wall was finished on time, but construction was performed without a building permit, and the wall did not comply with the county code. Nearly five months later, Critical Developments arranged for the wall to be made code compliant. At least 260 days elapsed from the date of the contractual deadline for

completion of the demising wall to the date that Critical Developments' contractor brought the wall into compliance. Critical Developments sued Cuesport for breach of contract.

The court entered judgment in favor of Critical Developments and awarded liquidated damages for the 260 days that had elapsed from the date of the contractual deadline until the date that the wall modification was complete. Cuesport appealed, however, the court rejected Cuesport's first argument that the per diem damages provision was an unlawful penalty. The court also disagreed with Critical Development's construction of Cuesport's equitable considerations argument. The court found that the problem concerned application of a per diem liquidated damages clause when a contractor has abandoned a project. The problem was that a per diem liquidated damages provision cannot be construed to go on operating forever because this would make the provision a penalty.

The court noted two views of this situation. First, some courts hold that a per diem liquidated damages clause is inapplicable when a contractor has abandoned the project. The second view is that when a contractor has abandoned a project, operation of a per diem liquidated damages provision is limited to a reasonable time for the plaintiff to procure completion by a substitute contractor or by the plaintiff's own efforts. Ultimately, the court affirmed the decision of the trial court, and sided with the second view.

## **Mississippi**

### **Contract Cancellation – Damages**

*DC General Contractors, Inc. v. Slay Steel Inc.*, 2013 WL 427380 (Court of Appeals, Mississippi, February 5, 2013).

DC General was hired to oversee construction of a retail store. DC General contracted with Slay Steel for structural steel under a purchase order for nearly \$1 Million. Slay Steel began purchasing material as the purchase order price was based on the then-current Steel market price. The store was delayed and Slay Steel invoiced for materials purchased in anticipation of the construction. As the delay mounted, Slay Steel was given permission to use the steel on other projects as needed. Slay Steel indicated the contract price would need to be renegotiated if this continued.

Eventually, the store owners canceled the project. DC General did pay Slay Steel for shop drawings, but Slay Steel also sought compensation for alleged losses on material purchases. Slay Steel sued DC General for breach of contract. Slay Steel argued that DC General breached the contract for failing to timely specify a delivery date, and DC General argued that it was not liable for breach of contract because letters exchanged between the parties had modified the contract. The motions were denied and the jury returned the verdict in favor of Slay Steel with a very modest amount of \$31,500.00. Both sides appealed.

Since the purchase order left open the delivery date, the court looked to the UCC which provides that a contract term may be added later as long as it is made in good faith and within limits of commercial

reasonableness. Slay Steel's witness testified that a typical time for purchase order to delivery was 10-12 weeks. The court stated that whether it was modified was a question of fact for the jury. On its cross appeal, Slay Steel argued that the jury award was too low based upon the proof presented. And that too was a jury question.

The lesson from this case is that if a construction contract begins to unravel, whether a new contract is formed or the old contract is "modified" often becomes an issue of fact, as well as the nature and extent of any alleged damages for delay and breach.

## **Montana**

### **Scope of Work – Staffing and Workforce Requirements**

*Total Industrial Plant Services, Inc. v. Turner Industries Group, LLC*, 2013 Mont. LEXIS 5 (January 15, 2013).

Turner hired Total to install insulation at a refinery in Montana. Winter weather and other delays set Total's work back and Turner requested an increase in the number of workers on the job. The parties later agreed to convert their agreement from the fixed price to time and materials. They also increased the total price tag considerably from \$4 Million to \$13 Million. Nonetheless, Total eventually claimed that Turner owed it additional compensation for labor costs. Total's claim related to work it had completed prior to the time and materials contract conversion. Turner claimed that payments made under the fixed price contract applied and covered all contract costs.

The court sided with Turner. A fixed price contract generally sets forth one fixed price for performance of the work no matter how costly it is to perform. Payments are usually made periodically based on percentage of project completion.

Total also claimed that Turner had orally promised to pay for additional labor costs incurred before the change to the time and materials arrangement. The court rejected this argument as well. A time and materials agreement provides a reimbursement for costs incurred plus a fee. The original fixed price contract required Total to furnish and pay for all labor, services, and materials, including any costs resulting in local conditions and changes to the scope of work. Unless Total had submitted and had approved a written change order, the fixed price arrangement prevailed. Thus the alleged extra costs were Total's sole responsibility under the fixed price contract.

Total's related claims for quantum merit for unjust enrichment were barred by the fact the parties had an express contract and all the work Total completed was performed in accordance with the contract.

Lastly, the Court considered whether Total's construction lien was barred by Montana's 90 day filing deadline, and the Court ruled that the lien was time barred in any event.

This case is a stark lesson on the need to timely file a mechanic's lien, and also the obligation when a contractor assumes the risk of a fixed price contract, particularly when change orders are not applied for and approved with respect to claims for extra work and costs.

## **New York**

### **Contract Breach - Subs Ultimatum**

*Mometal Structures, Inc. v. T.A. Ahern Contractors Corp.*, 2013 U.S. Dist. LEXIS 27797 (E.D. New York, February 28, 2013)

Prime contractor, T.A. Ahern Contractors Corp. (Ahern) awarded Mometal Structures, Inc. (Mometal) a \$1,515,000 subcontract to prepare drawings and fabricate and erect structural steel for a New York City school construction project. After waiting nine months for information necessary to fabricate the steel, Mometal set forth seven conditions on which it would continue to perform. Ahern balked and instead terminated Mometal's subcontract.

Ahern argued that its termination was proper because Mometal failed to cure the defects the contractor set forth in its notice of default, such as 1) failing to comply with the contractor's orders, 2) failing to diligently prosecute its work, and 3) ceasing work on the project and issuing demands seeking relief beyond the express terms of the subcontract and contract documents. Under the subcontract's disputed work provision, Mometal was not permitted to cease performance even if it believed the work was beyond the scope of the contract—Mometal was required to continue performing the work at issue under protest.

The record shows that Mometal did not cease performance at any time before termination of the subcontract, however, it did tell Ahern it would not fabricate or erect any steel until Ahern agreed to its seven conditions. The court concluded that Mometal therefore committed an anticipatory breach of the subcontract, as it saw Mometal's conditions as a "clear and unequivocal refusal to perform." The court awarded Ahern damages in the amount of the difference between the balance remaining on Mometal's subcontract and the amount Ahern paid its replacement subcontractor.

## **South Carolina**

### **Home Inspection Contract Limit of Liability**

*Gladden v. Boykin*, 2013 S.C. LEXIS 52 (South Carolina, March 27, 2013)

Vera Gladden entered into a contract with Palmetto Homes Inspection Services, LLC for a home inspection on a house she was purchasing. The contract contained a limit of liability clause, which limited Palmetto's liability to the home inspection fee paid by the client. After Gladden contacted Palmetto about

unreported conditions in the home, Palmetto returned the inspection fee. The Gladdens named Palmetto as one of the defendants in a suit for breach of contract for Palmetto's failure to conduct the inspection in a thorough and workmanlike manner and its failure to report defective conditions in the home. The court entered summary judgment in favor of Palmetto, finding the limit of liability clause enforceable. The Gladdens appealed.

The court found that the statutory scheme of the South Carolina General Assembly had addressed the issue of home inspections and liability for undisclosed defects in the sale of residential property. The General Assembly had provided residential home buyers with a remedy in the Residential Property Condition Disclosure Act that required such buyers be informed of defects of which the seller has knowledge. This Act imposes liability on a seller for knowingly withholding such information. Since the General Assembly had already provided specific protection for the consumer risk associated with undisclosed defects, the court deferred to its judgment.

The Court therefore found the limit of liability clause to be enforceable as it was not so oppressive that no reasonable person would make it and no fair and honest person would accept it. The clause did not violate public policy as the legislature had protected home buyers through other statutory means.

## **West Virginia**

### **Scope of Work – Master Services Agreement**

*Elk River Pipeline, LLC v. Equitable Gathering, LLC*, 2013 U.S. Dist. LEXIS 5930 (West Virginia, January 15, 2013)

Elk River Pipeline was hired to construct a natural gas pipeline in West Virginia. The parties executed a Master Construction Services Agreement as well as a purchase order for the work. The owner deleted a large section of pipeline from the work scope and the contractor complained that this was the "easy portion" of the job and drastically affected its bid and costs. The owner refused to pay Elk River's final invoice for \$1.5 Million reflecting a footage price increase allegedly due to the changed scope of work. The Court denied the owner's motion for summary judgment due to numerous legal and factual issues.

The purchase order was supposed to define the scope of work but the court found that the purchase order itself did not identify the exact project, project location, or reference any particular drawings or specifications. The court found the purchase order ambiguous because it failed to describe the when, where, and how of the agreement.

The court also noted there was some evidence that the owner violated the agreement. The owner argued that Elk River had failed to secure a change order, but there was no such requirement in the master agreement, and there is no evidence that the owner ever issued a change order for the original deletion from the scope of work.

This case indicates the dangers of having a master construction agreement if particular purchase orders are handled informally and are not detailed, and if the parties do not follow their own contract procedures.