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

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Construction Law Committee

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INTRODUCTION

Welcome to our first edition (Vol. III) of 2014. A number of readers have mentioned that they find this resource useful and interesting, and we welcome and appreciate comments and feedback.

Many of the cases and commentary in this edition apply rules of "strict construction" to construction contract provisions, payment bond claims, and state bidding and lien statutes. These are all good reasons to consult with local Harmonie attorneys in order to comply with state-specific statutes, regulations, and requirements.

- The Editor
April 2014

INDEX OF TOPICS COVERED

NATIONAL FOCUS

COMPUTATION OF COSTS AND DAMAGES

Appeal of: RLB Contracting, Inc., ASBCA No. 57638 (January 3, 2014).

The Corp of Engineers contracted with RLB to enlarge a levee in Louisiana. Before excavation changes were made which re-aligned the project, increased the moisture level of the material, etc. RLB asserted a total cost claim measured by the total cost of excavation and compact fill work, plus markup, minus the amount paid for the work. The basic total cost formula is the difference between the bid cost of the contract and the actual total cost to perform the contract as changed.

The Board of Contract Appeals rejected the total cost theory for a number of reasons, including the facts that there was no fixed total dollar bid since the bid had been based on a dollar amount per cubic yard, and apparently there was really no accurate estimate of the cubic yards actually placed/ displaced. As a result, the Board voted to make an award on the basis of a "jury verdict" which awarded approximately $2,150,000.00.

NATIONAL FOCUS

JOINT VENTURES ON GOVERNMENT CONTRACTS

Appeal of WorleyParsons International Inc., ASBCA No. 57930 (December 20, 2013).

The Corp of Engineers awarded a contract to a joint venture made up of Parsons and WorleyParsons. The contracting officer issued a decision against WorleyParsons for alleged non-compliance, and this decision was appealed for lack of jurisdiction. The Contract Disputes Act ("CDA") permits appeals of decisions against a contractor relating to a contract, and a "contractor" is a party to a federal government contract. The problem in this case was that WorleyParsons was not the contractor on the contract; the joint venture was the actual contracting party. Therefore, the Corps' decision against the one party to the joint venture was void.

A joint venture has an independent existence from its partners. The joint venture was the entity with whom the government contracted and was in privity. The Board of Contract Appeals also noted that the federal government historically has opposed efforts by joint venture partners to claim independent privity, rights to sue, etc. from joint venture contracts with the government, and such attempts by component partners to a joint venture to pursue claims in their own names have historically been dismissed and disfavored. This decision against only one component party to the joint venture was not within the Corps' jurisdiction or the CDA because it was not made against the party contracting with the government which was the joint venture entity.

NATIONAL FOCUS
GOVERNMENT CONTRACTS - WRITTEN SETTLEMENTS

Sigma Construction, Inc. v. U.S., 2013 U.S. Ct. Fed. Cl. Lexis 1451 (September 30, 2013).

Sigma, the contractor, claimed that the government owed it a substantial equitable adjustment following a "termination for convenience" of a roofing contract on a federal building in California. Sigma claimed that a $485,000 settlement it negotiated with the contract officer over the telephone was a binding, oral contract with the government. The U.S. Court of Federal Claims disagreed.

The court noted that FAR regulations require certain documentation including an executed SF Form 30. The contracting officer had also sent Sigma a letter that confirmed the negotiated settlement amount, but stated it was to be determined to be acceptable under a settlement agreement to be issued as a final supplemental modification to the contact. This indicated to the Court that a formal contract modification would be necessary, and that the oral agreement alone did not create a final, binding settlement.

The Court further pointed to longstanding precedent that a contracting officer does not have authority to waive statutory or regulatory requirements, and that even if there was an alleged oral agreement the government was not necessarily bound by agents acting beyond their authority and contrary to regulation. In short, the oral negotiated settlement was not deemed adequate as a final, binding contract settlement with the government.

HAWAII

ARBITRATION AGEEMENT- QUESTIONS OF FACT

Safeway Inc. v. Nordic PCL Construction, Inc., 2013 Hawaii App. LEXIS 626 (October 30, 2013).

Safeway hired Nordic to construct a retail store in Honolulu. Following construction, there was water infiltration. Safeway sought to litigate the issue, but Nordic demanded arbitration pursuant to a contractual provision. Safeway contended that a set of supplemental contract conditions had deleted the arbitration clause. The court first focused on the question of alleged ambiguity of the arbitration question. The court concluded that it was not the arbitration clause that was ambiguous, but the questionable "incorporation by reference" clause as to whether (or not) the parties agreed to incorporate the "Supplementary Conditions" which may have deleted the arbitration clause. The appellate court agreed with the trial court that there were issues of fact about the parties' intent to incorporate the Supplemental Conditions. An evidentiary hearing was ruled to be the most appropriate means to resolve these "disputed facts."

In short, the courts concluded that upon a disputed motion to compel arbitration, where there were genuine issues of material fact as to the existence of an arbitration agreement, the trial court may resolve the issues through an evidentiary hearing, and the case was remanded back to the trial court for that purpose.

INDIANA

CONTRACT TERMINATION FOR NON-PAYMENT

Ellerman Construction Inc. v. Ohio Farmers Insurance Co., 2013 U.S. Dist. LEXIS 148689 (S.D. Ind., October 16, 2013).

A contractor on a National Parks Service contract failed to pay the sub-contractor (Ellerman) an outstanding balance, and the sub-contractor terminated the sub-contract and sought recovery for breach of contract and on a Miller Act claim. The contractor claimed that the sub-contractor failed to complete the project and, as a result, the contractor had to hire a more expensive contractor to complete the job. The court ruled that, nonetheless, the sub-contract permitted the sub-contractor to terminate the agreement for non-payment for 60 days or longer. Therefore, events that occurred after termination were not relevant to the current dispute which centered around whether the contractor breached the sub-contract by failing to timely pay the sub-contractor for work performed, which the court ruled was the case.

Notwithstanding disputed issues regarding set-offs and contract performance, under the strict terms of the sub-contract, the sub-contractor was entitled to summary judgment on its Miller Act and payment bond claims.

KENTUCKY

"NO DAMAGES FOR DELAY" CLAUSE VOID

U.S. f/u/b/o Forest B. White, Jr. Masonry Inc. v. Safeco Insurance Company of America, 2013 U.S. Dist. LEXIS 160067 (W.D. Ky. November 8, 2013).

The masonry subcontractor performed work for a general contractor on a construction project at Fort Campbell, Kentucky. During the project, the masonry work was delayed or suspended through no fault of the masonry contractor. Eventually, the masonry sub-contractor sought several avenues of recovery, including a Miller Act claim and a claim against the payment bond. The surety defended citing a no damages for delay clause, but the court struck down that clause for at least two essential reasons:

First, the court held the no damages for delay clause was void under the Miller Act and related federal statutory language at 40 U.S.C. §3133.

The court also found the clause void under Kentucky Revised Statutes § 3731.405(2)(C) which bars any provision purporting to waive, release or extinguish the right of a contractor or sub-contractor to recover for delays in performing the contract that are, in whole or in part, within the control of the contracting entity.

LOUISIANA

BID REQUIREMENTS STRICTLY CONSTRUED

*Command Construction Industries, LLC v. City of New Orleans,*2013 La. App. LEXIS 2139 (October 23, 2013).

Durr Heavy Construction won a contract award from the City of New Orleans. Command Construction sought to compel the City to award Durr Heavy Construction the project, alleging that Command was the lowest bidder. A trial court rejected Command's request for injunctive relief. Command's base bid was lower than Durr's due to a "clerical error" as Durr revised its base bid (to below Command's.) The

explanation was that Durr's original bid mistakenly included not only the base bid plus all three alternate bid items.

The appeals court ruled under the Louisiana Public Bid Law that a public entity has no discretion to determine, after bids have been submitted, whether a requirement is substantive or non-substantive, waiveable or non-waiveable. Bids are properly rejected for failure to comply with solicitation requirements such as bid calculation or presentation errors. Therefore, Durr's initial bid did not need to be rejected, but the city was required to consider Durr's bid as originally presented. Therefore Command was the lowest responsible bidder, and the contract was improperly awarded to Durr. The appellate court remanded the case to allow Command to pursue a damages claim.

LOUISIANA

LIEN FILING REQUIREMENTS STRICTLY CONSTRUED

J. Reed Constructors Inc. v. Roofing Supply Group, LLC, 2013 La. App. LEXIS 2244 (November 1, 2003).

Roofing Supply provided roofing materials on an "open account" to a sub-contractor on a school project. Roofing Supply made several deliveries over a period of four months, but a large unpaid amount of over $250,000 accrued. Roofing Supply filed a lien in the amount of the unpaid balance. However, the district court and appellate court ruled the lien was untimely.

The Louisiana Lien Law requires a materialman to submit notice of non-payment on or before 75 days of the last day of the month in which material was delivered. Roofing Supply contended the statute did not require multiple notices of non-payment, but rather the one lien notice given within 75 days from the last day of the last month in which material was delivered was sufficient.

The sub-contractor countered arguing that the statute requires notice to be provided within 75 days of each separate month in which materials are delivered. The trial court and appellate court agreed with the latter reasoning and found that the statute required notice before 75 days from the last day of the month in which material was delivered regardless of the month of delivery or the number of deliveries. The 75 day notice period commenced on the last day of each month of delivery.

Practice Note Comment:

One problem in this case may have been that materials were delivered on an "open account." Apparently, each order of roofing materials was handled as a separate purchase order. Each purchase order contained a separate payment date. Therefore, it was easier to argue that each order represented an independent contract even though all the orders related to the one project and relationship. Perhaps if Roofing Supply used one single purchase order extending over a period of time, or for the duration of the contract, it would have had a better argument with respect to the contract period and the extended date and time of deliveries.

MARYLAND

CONTRACT NOT COMPLETED BY NEGOTIATIONS

International Waste Industries Corp. v. Cape Environmental Management, Inc., 2013 U.S. Dist. LEXIS 178141 (D. Md., December 19, 2013).

Waste Industries and Cape Environmental engaged in negotiations that brought them "very close" to finalizing an agreement for work on a government project in Afghanistan. However, after Cape secured the job, it selected a different subcontractor for the work. International Waste claimed this was a breach of a binding contract between them. The U.S. District Court disagreed. There must be an offer and an acceptance to create a contract, and, here, that was not created. The fact that Cape used International Waste's bid in preparing its own bid for the project also did not constitute actual acceptance of International Waste's proposal.

Although an actual purchase order was transmitted and signed, the court did not see that document as a binding contract because many material terms were still subject to ongoing negotiations. In addition, it appears that the parties contemplated a final written agreement, and there is a strong argument against finding a binding agreement when the parties themselves expect a subsequent final contract document. In short, although the parties were "extremely close" to finalizing an agreement, they did not get there.

MICHIGAN

SURETY LIABILITY

Northline Excavating, Inc. v County of Livingston, 2013 Mich. App. LEXIS 1658 (October 15, 2013).

Hanover Insurance supplied a performance bond for Northline on a sewer installation project in Livingston County. The County eventually terminated the contract for default, but a trial court limited the surety's responsibility for damages to the face amount of the performance bond, $251,035.00.

Michigan law states that a surety is liable only for the amount of the performance bond. There are some limited exceptions largely based on bond language, and Hanover argued that one of them applied here which provided that the county should be entitled to enforce "any remedy" available to it. The Court ruled that the county misinterpreted the word "remedy" which refers to a right to pursue any cause of action, but did not define or expand the damages or bond amount the County could pursue and collect. This provision did not expand or change the surety's liability beyond the performance bond amount.

MINNESOTA

INTERVENTION

Westfield Insurance Co. v. Wensmann, Inc., 2013 WL 6569952 (Minn. Ct. App., December 16, 2013).

A developer sued a contractor or for negligence and breach of warranty over failed decorative arches in townhouses, water infiltration and other issues. The insurance company denied coverage arguing that the

policy excluded property damage the contractor was aware of prior to the policy's effective date. The insurer sought a declaratory judgment, the contractor who was no longer in business defaulted, and a default was granted. Upon learning of the default, the developer moved to intervene and oppose the declaratory judgment, and a motion was granted to vacate the default judgment.

The appellate court ruled that the developer was entitled to intervene in the declaratory judgment action because it acted promptly and with due diligence, demonstrated a reasonable basis for its claim, and would be prejudiced if the default judgment was not vacated. Since the contractor was essentially out of business, a claim on the insurance policy might be the best if not the only source of possible recovery by the owner/developer.

MINNESOTA

BOND CLAIM REQUIRES STRICT COMPLIANCE

Safety Signs, LLC v. Niles-Wiese Construction Co. Inc., 2013 Minn. LEXIS 741 (December 4, 2013).

Safety Signs was a sub-contractor on an airport construction project who sent a notice of a payment bond claim by certified mail to both the contractor and the contractor's surety. The dispute arose because Safety Signs sent the contractor's notice of claim to the address listed on the parties' contract but not the address listed on the bond. The contractor disputed the claim and the surety denied payment.

The District Court ruled in Safety Sign's favor because the address to which it sent the bond claim notice was the one listed on the contractor's website, all of the invoices, and the project correspondence. However, this decision was reversed on appeal with a finding that the notice was fatally defective because it was not sent to the address listed on the bond, a requirement explicitly stated in Minnesota Statutes §574.31.

Safety Signs argued that the text of the law and case law required "substantial compliance" with the statute, but the court disagreed finding that service at the bond address was the exclusive statutory-directed means of giving proper notice, a decision based on a strict, literal reading of the statutory "notice" provision.

MISSOURI

NO DAMAGES FOR DELAY CLAUSES

St. Louis Housing Authority ex. rel. Jamison Electric, LLC v. Hankins Construction Co., 2013 U.S. Dist. LEXIS 176041 (E.D. Mo., December 16, 2013).

Hankins Construction was the GC on a housing authority project who hired Jamison Electric to perform the electrical work. Jamison brought multiple claims against Hankins, including for delay damages. Hankins defended on the basis of a no damages for delay clause which Jamison argued was invalid under Missouri Revised Statutes Section 34.058. The statute would prohibit such a clause in a "public works contract" which is defined as a contract of the state, county, city, etc. for the construction, alteration,

repair, or maintenance of any building. The District Court strictly interpreted the statute to bar no damages for delay clauses only in contracts in which the governmental entity is an actual party, and therefore the statutory bar did not apply in this case which was a dispute between "private" contracting parties, Jamison Electric and the GC.

Jamison argued that its subcontract was a "public works contract" because it incorporated the terms of the prime contract, but the court concluded this did not change the subcontract from private to public, or the identity of the contracting parties. The court applied the unambiguous language of the statute and held that the no damages for delay provision in the "private" subcontract between the GC and Jamison was not prohibited by the statute.

MONTANA

CHANGE ORDER NOTICE REQUIREMENTS

JEM Contracting, Inc. v. Morrison-Maierle, Inc., 2014 Mont. LEXIS 37 (January 28, 2014).

JEM Contracting was the general contractor on a road improvement project, and Morrison-Maierle was the project engineer/supervisor. JEM sued the engineer alleging detrimental reliance and fraudulent inducement because of promises allegedly made that JEM may be compensated for extra costs. From the start of the project, JEM encountered sub-surface conditions that differed significantly from the plans and specifications but its change order request was denied because of insufficient evidence and failure to follow contractual notice requirements.

JEM alleged that the engineer had promised that the contractor would be paid for the change order if it could cut costs elsewhere on the project. The court refused to address this argument because the change order was properly denied due to JEM's failure to comply with notice requirements. The contract required written notice to the owner and engineer about differing sub-surface or physical conditions within 5 days of discovery and here no notice was provided until at the earliest, some 18 days after discovery.

NEBRASKA

CHANGE ORDER WRITTEN REQUIREMENTS WAIVED

Paul Reed Construction & Supply, Inc. v. Arcon, Inc., 2014 U.S. Dist. LEXIS 5660 (D.Neb., January 16, 2014).

Arcon was a subcontractor to Paul Reed Construction on a Nebraska Department of Roads project. Arcon was hired to perform crushing services on asphalt and concrete surfaces. Arcon eventually submitted invoices for more than $250,000.00 in extra costs. One of the contractor's arguments was that Arcon failed to provide timely written notice of its claim in accordance with the change order provision. Arcon argued that Paul Reed's conduct "waived" the change order written notice requirements and this argument was accepted by the District Court.

The record showed that Arcon wrote several email messages to Paul Reed about its intention to seek additional compensation, requested that Paul Reed obtain a change order from the project owner for the

additional work, and submitted multiple invoices for the extra work. Thus, there was sufficient evidence to support the finding that Paul Reed knew about the additional work and explicitly or implicitly approved it. The Court denied Paul Reed's motion for partial summary judgment on this point and held that a reasonable fact finder could conclude that Paul Reed waived written change order requirements.

TEXAS

CGL POLICY MAY COVER DEFECTIVE WORK

Ewing Construction Co., Inc. v. Amerisure Insurance Co., 2014 Tex. LEXIS 39 (January 17, 2014).

A school district sued Ewing Construction, the contractor, for alleged defective construction, and the contractor sought defense and indemnity under its CGL policy with Amerisure. The district court agreed with the insurance company and dismissed the claim, but the Texas Supreme Court reversed. The court held that coverage was not necessarily barred by the contractual liability exclusion. The contractual liability exclusion excluded coverage for bodily injury or property damage for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. An exception to the exclusion further read that the exclusion did not apply to liability for damages that the insured would have in the absence of the contract.

Amerisure argued that the contractual liability exclusion applied because Ewing contractually undertook an obligation to construct the tennis courts in a "good and workmanlike manner" and thereby assumed liability for damages if its work did not meet that standard. The contractor countered by arguing that the promise to perform in a "good and workmanlike manner" did not extend its obligations by contract or otherwise beyond any general legal duty it already had. The Texas Supreme Court held, focusing on the limited question of the contractual liability exclusion, that a general contractor who performs his construction work in a "good and workmanlike manner," without more, does not enlarge its duty to exercise ordinary care in fulfilling its contract, and thus does not assume any additional liability through the contract for damages arising out of defective work so as to trigger at least the contractual liability exclusion, which was the limited question addressed to the Texas Supreme Court.

WISCONSIN

EXTRA-CONTRACTUAL REMEDIES

Meade Electric Co. Inc. v. Milwaukee Metropolitan Sewerage District, 2013 U.S. Dist. LEXIS 149170 (E.D.Wis., October 16, 2013).

The sewer district paid Meade Electric $16.3 Million for completion of an underground landfill gas pipeline. Meade's claim involved removal of approximately 5 million gallons of wastewater from an "open cut" portion of the pipeline. Meade sued to recover for breach of contract, unjust enrichment, and quantum meruit. The case involved the distinction in the contract specifications between "removal" as opposed to "disposal" of wastewater.

Meade removed the 5 million gallons of wastewater, but the court ruled that Meade had not "disposed" of that many gallons given the exact project definitions and specifications pertaining to "disposal" of

contaminated water. The court concluded that the unit price in the contract applied only to water that was contaminated to the point it had to be "disposed of" offsite according to the specifications.

Meade was able to salvage an unjust enrichment claim to which the court concluded Meade could pursue equitable relief because that claim was not strictly governed by the specifications or the contract. Since there was no contract basis for the claims, the breach of contract claim was dismissed. However, because the claims potentially involved work which was not part of the contract, the contractor was allowed to proceed on claim for unjust enrichment.