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

A Production of The Harmonie Group
Construction Law Committee

Vol. IV No. 1 (April, 2015)

INTRODUCTION

This First Edition of 2015, Vol IV, No. 1, contains some interesting decisions on bid ambiguity and verbal contract changes. There are also cases on the continuing saga of CGL insurance coverage (or not) for construction defect claims. Another case specifies the requirements for a False Claims Act ("FCA") claim in a construction context.

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- The Editor

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NATIONAL FOCUS

BID AMBIGUITY

Matter of: Pate Construction Co. Inc, 2014 U.S. Comp. Gen. B-410211 LEXIS 329 (November 17, 2014).

Pate Construction protested an Air Force award on a project to replace hot water lines at the U.S. Air Force academy. Pate argued the RFP was ambiguous with respect to pricing. Their price was at the upper range of the RFP estimate, and the government awarded the contract to a lower priced bidder. The RFP contemplated a single contract with two line item numbers. The government contended that the two line items were different parts of one basic contract, and that the separate prices added up to one total bid price. Pate's interpretation was that each line item stood alone as a project and bid accordingly.

The Comptroller General adopted the government's reading of the RFP. The two line items together formed the basis for one single project. The parties appeared to concede, overall, that the RFP was subject to more than one reasonable interpretation, but in that circumstance, a bidder cannot make unilateral assumptions about ambiguous bid terms and then expect relief when the other contracting party does not accept that interpretation. The best advice is for the bidder to challenge or question an alleged ambiguity prior to bid, and because Pate did not seek clarification earlier, or pre-bid, its bid protest was disallowed.

BID PROPOSAL: WORK DAYS AND HOURS

Matter of: Walsh Construction Co. II, LLC, 2014 U.S. Comp. Gen. B-410015 (September 25, 2014).

Walsh Construction protested a contract award for construction at West Point. The Army rejected Walsh's proposal as "unacceptable" and awarded the job to a higher priced bidder. The Army argued there were weaknesses in Walsh's proposed scheduling, including lack of sufficient information on schedule constraints.

The project schedule was an important factor since the contractor had to avoid disrupting normal military academy functions. Specifically, there were "no work" days and set project hours, and the RFP required bidders to demonstrate compliance with anticipated non-work dates and times. Walsh's proposal did not recognize the no work days and did not meaningfully address the scheduling constraints, and Walsh's "unacceptable" bid rating was upheld.

CONTRACTOR MEANS AND METHODS

Columbia Construction Co. v. GSA, CIVBCA 3258 (January 20, 2015).

Columbia Construction was general contractor on a project to modernize the IRS facility in Andover, Massachusetts. The contract directed Columbia to provide a security system with cabling "concealed or in conduit". Columbia planned to install the security wiring in cable trays under the raised access flooring system and above the dropped ceiling, and prepared its bid with this option in mind. The GSA rejected this method and insisted that Columbia install the wiring in conduit. Columbia sought an adjustment of nearly $500,000.00 for an alleged contract "change".

Columbia argued that its method of installing the security cable was "concealed" because once the cabling was placed under the floor/above the ceiling it was hidden by building materials. Columbia also pointed out that the GSA's position was inconsistent with the fact that it allowed communications cable to be "concealed" in essentially the same fashion.

The Civil Board of Contract Appeals held in favor of Columbia that the GSA unreasonably stopped Columbia's planned installation, and had to pay an increased price for demanding cable installation in conduit. The contractor's chosen means and methods were reasonable, effective, and within the specifications that the security cable be installed "concealed" or in conduit.

FALSE CLAIMS ACT

U.S. ex. rel. Terry D. McLain v. Fluor Enterprises, Inc., 2014 U.S. Dist. LEXIS 159976 (November 13, 2014.

This recent Fifth Circuit case reviews a line of cases holding that there is not necessarily False Claims Act ("FCA") liability in ordinary "breach of contract" situations, and not unless some certificate of compliance or performance is a prerequisite for payment. This case holds that claimants under the FCA need to point to actual false certifications relating to a claim for payment that was thereby rendered fraudulent. There is no liability under the FCA for a false statement unless it is used to get a "false claim" paid.

In the two cases in question, one case was held inappropriate for the FCA because the dispute was handled in a normal breach of contract fashion. Another case, however, was not dismissed, because of representations that a party's subcontractors had met all state certification requirements, and this statement was allegedly fraudulently used to avoid re-payments to FEMA.

Generally, however, the referenced cases downplay a theory of FCA liability when claims are essentially based on breach of contract. A defendant must be alleged to have made a particular false, material fraudulent certification with respect to payment, or knowingly attempted to deceive the government about the nature of the services or material provided, for which payment is sought.

INTEGRATED DESIGN AND CONSTRUCT (IDC)

Kiewit-Turner, JV v. Department of Veteran Affairs, 2014 CIVBCA 3450 LEXIS 370 (December 9, 2014).

The VA contracted with Kiewit-Turner for services on a project in Colorado with an estimated construction cost at award of $583 Million. This was an early attempt by the VA to use an "integrated design and construct" contract. Kiewit-Turner discovered that the design for the medical center campus

was both incomplete and over budget. As a result, Kiewit-Turner was held entitled to suspend work due to the government's material breaches of contract.

"NO WAIVER" CLAUSE

Lake Charles XXV, LLC v. United States, 2014 U.S. Ct. Fed. Cl. LEXIS 1098 (October 15, 2014).

Lake Charles agreed to design, build, and lease to the GSA an office building in Louisiana. GSA issued a notice to proceed before final construction drawings were completed and approved. When Lake Charles missed the new project deadline, the GSA terminated the contract for default. Lake Charles filed a claim for wrongful termination. The government responded that the old agreement had been superseded, and that Lake Charles was bound to the notice to proceed and the new project deadline.

Specifically, it was found that a revised agreement was entered into which waived or superseded original contract provisions. The court found that the parties essentially negotiated entirely new performance obligations and an amended contract, and it was those obligations which the GSA claimed were not fulfilled resulting in termination of the contract. The court ruled that these circumstances were not really governed by a "no waiver clause", but that the parties had entered into (essentially) an entirely new agreement with new terms and conditions.

OVERHEAD COST RECOVERY

Appeal of: Watts Constructors, LLC, 2015 ASBCA No. 59602 LEXIS 49 (January 26, 2015).

Watts was general contractor on a utilities upgrade project at Camp Pendleton. Watts incurred additional field office overhead costs due to differing site conditions and the issue was how additional overhead costs should be computed. The main issue was whether they were direct or indirect overhead costs. Watts' initial cost proposal for the differing site condition used a percentage markup for field office overhead costs, which essentially was an indirect estimate and method. When the modifications and delays continued, Watts then requested payment for associated overhead costs based upon direct daily per diem costs. FAR regulations allow a contractor to treat such costs as either direct or indirect, as long as it is done in a consistent manner. Watts initially elected to use an indirect percentage method of computation, and was not allowed to shift its cost recovery theory to a direct or per diem rate.

COLORADO

ORAL CONTRACT/AMENDMENT PRECLUDED

U.S. f/u/b/o Fisher Sanding and Gravel Co. v. Kirkland Construction, LLP, 2014 U.S. Dist. LEXIS 175458 (D. Col. December 19, 2014).

Kirkland was general contractor on a road project in Hawaii. A subcontractor alleged that Kirkland breached the agreement causing delays, accelerating work, hampering access, and failing to remit payments. Kirkland argued that the breach of contract claim was barred because the subcontractor did not give prompt written notice of alleged breaches. The agreement required the subcontractor to give Kirkland prompt written notice of any alleged contract breaches, otherwise the breach was waived. This provision was intended to give the contractor prompt notice, and allow the contractor time to investigate the claim. The Court ruled that "informal" notice arguments did not suffice. The Court strictly construed the written notice of breach provision, and granted summary judgment dismissing the claim.

LOUISIANA

ORAL CONTRACT CHANGE NOT PRECLUDED

Driver Pipeline Co. Inc. v. Cadeville Gas Storage, LLC, 2014 La. App. LEXIS 2326 (October 1, 2014).

Driver Pipeline contracted to construct natural gas pipelines owned by Cadeville Gas Storage. Driver blamed Cadeville for delays by failing to timely provide drawings, permits, materials, etc. Driver eventually submitted over 10 change orders totaling more than $3 Million. Cadeville argued that Driver had not obtained written approval prior to performing additional work or using additional materials. A trial court agreed with Cadeville that there could be no oral variation of the contract and found Cadeville not liable. However, an appeals court held there existed issues of fact whether the parties had orally modified the contract.

Cadeville cited the contract's "integration clause" purporting to require written and not oral modifications. However, the appellate court noted that this language did not necessarily prohibit a subsequent "new agreement" to be made orally. Cadeville cited cases in which integration clauses limited a party's ability to modify an agreement, but the appellate court held that a new agreement could possibly be established by oral evidence.

Cadeville also relied upon a contract provision that required Driver to give prompt written notice of any errors and claims. Driver's counterargument was that Cadeville paid for work that was not approved in writing, so again the parties had come to a new arrangement. The appellate court held there were genuine issues of material fact whether, when and how the parties modified the contract terms by oral instruction, silence or inaction.

NEW YORK

STATUTE OF LIMITATIONS/TIME TO SUE

Perini/O&G JV v. Usiminas Mecanica, S.A., 2015 U.S. Dist. LEXIS 9183 (S.D.N.Y. January 20, 2015)

Perini was the prime contractor on a bridge construction project in New York City. UMSA supplied steel deck panels for the project. When defects were found with the panels, Perini was directed to remove and repair them, and Perini then sought to recover the cost of repairs from UMSA. UMSA had delivered all the deck panels by August 3, 2006. Defects were discovered "early 2007" and in May 2007 defective welds were detected in some of the deck panels. Perini did not sue UMSA until May 11, 2011.

Under UCC 2-725, the general statute of limitations for breach of contract is four years and begins to run when breach occurs. Since the panels were delivered no later than August 2007, claims for breach of contract were deemed untimely. However, a claim of breach for failing to correct defective work was timely. The cracks were discovered May 2007, so UMSA's failure to pay for the required repairs took place within the four year limitations period. UMSA attempted to characterize its repair and replacement obligation as being a warranty claim, and argued that any breach of warranty occurred when the panels were delivered to the project. However, New York law differentiates between a claim for breach of warranty which accrues upon delivery, and a claim for a contract breach which arises when the equipment malfunctions.

Perini also made three claims for breach of warranty under the purchase order, prime contract, and other warranties which were held to be untimely since they accrued upon the delivery date. While many of the claims were dismissed as "untimely", the breach of contract claim for failure to correct, repair and replace defective work under the terms of the purchase order was held to be timely, essentially because that accrued upon equipment malfunction and failure as opposed to product delivery.

NEW YORK

CONSTRUCTION DEFECT NOT COVERED DUE TO "YOUR WORK" EXCLUSION

Erie Insurance Company v. Radtke, 2015 N.Y. Slip Op. 1922 (2nd Department, March 11, 2015).

Homeowner commenced an action against home builder for damages from a home construction project. Insurance coverage litigation ensued with the trial court holding that Erie Insurance was not obligated to defend, indemnify or otherwise provide insurance coverage to the contractor for the claims. This decision was affirmed on appeal. The claims were excluded because they arose out of work performed by the insured (or its contractors or subcontractors), and also because the alleged defective work constituted work that had to be restored, repaired or replaced because it was incorrectly performed. "Your work" and "repair work" exclusions were cited to affirm denial of coverage. This case was handled for Erie Insurance by Hurwitz & Fine, P.C., The Harmonie Group attorneys for Upstate New York.

PENNSYLVANIA

INSURANCE COVERAGE TRIGGERS

Penn National Mutual Casualty Insurance Co. v. John D. St. John, 2014 Pa. LEXIS 3313 (December 15, 2014).

In April 2004, cows at a dairy farm began to suffer various health and reproductive problems, and two years later the farm owners discovered defective welds and piping that allowed contaminated waste water to infiltrate the freshwater drinking system for the herd. A jury found the plumbing contractor (LPH) liable for $3.5 Million in damages. Penn National alleged it was only liable under LPH's first (of four) CGL insurance policies that ran from July 2003 - July 2006. The trial court applied a "first manifestation rule" that an occurrence triggers coverage under a CGL policy when the effect of a negligent act first manifests itself in a manner that would put a reasonable person on notice of damage to personal property. It ruled, inter alia, that this occurred in April 2004 when a problem became apparent due to decreased milk production.

An intermediate appellate court affirmed the trial court decision, with one dissenting judge, rejecting other "gradual progression" or "multiple/continuous triggers" theories of damages. The state Supreme Court affirmed the trial court ruling, also with a dissent, that the first manifestation rule governed.

Penn National maintained that the first manifestation was April 2004 when milk production decreased. The farm owners argued that the full effects of the damage did not manifest until March 2006 when the cows developed noticeable physical symptoms. The Supreme Court held that the CGL policies plainly that coverage was triggered when bodily injury or property damage occurs during the policy period and the initial manifestation of injury was the trigger for coverage. Therefore, coverage was triggered in April 2004 and was only as to the first Penn National policy in effect from July 1, 2003 to July 1, 2004. The minority/dissent argued that an occurrence can be a continuous or repeated exposure as opposed to a discrete one-time event, and that in similar situations other jurisdictions have applied multiple trigger or "continuous occurrence" theories to trigger or increase available coverage.

WEST VIRGINIA

CONSTRUCTION DEFECT NOT COVERED BY CGL INSURANCE

Westfield Insurance Co. v. Carpenter Reclamation, Inc.,2014 U.S. Dist. LEXIS 130752 (W.D. W. Va. September 18, 2014)

Carpenter Reclamation, in performing excavation work for a new elementary school, blasted deeper than required by the project specifications, and had to place additional fill under foundations and wall footings. Class A fill was specified, but Carpenter apparently placed Class B fill in some locations. Carpenter

sought insurance coverage from Westfield Insurance, the company that provided a CGL insurance policy for the work, to defend the owner's claims. Coverage was refused based on arguments that the allegations of allegedly defective work did not constitute a claim for property damage, and did not arise from a covered "occurrence". Westfield Insurance argued that there was no other damage to tangible or personal property, and there was no claim seeking to recover for "loss of use" of any property or building.

Under West Virginia law, defective workmanship can give rise to a covered occurrence under a CGL policy. However, the defective workmanship must cause some other bodily injury or property damage. The District Court, applying West Virginia law, held there was no coverage for the allegedly defective work.

First, the Court concluded that there was no covered occurrence because overblasting was an expected or foreseen event done intentionally as part of the work, and could not be "accidental". The District Court also held that the damaged or excessively blasted bedrock could not constitute covered "property damage" also because blasting the bedrock was part of the very work Carpenter was to perform. Therefore, there was no covered property damage, and the insurance company was not required to defend or indemnify Carpenter against defective work claims asserted by the school district/owner.