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Florida's Revised Right to Cure Law

538 Florida, like several other states, has a notice and right to cure statute governing construction defect litigation. Chapter 558, Florida Statutes, creates a pre-suit procedure to resolve construction defect claims. During its 2006 session, the Florida Legislature significantly expanded the scope of this notice and right to cure statute.

History & Procedure

Florida first enacted Statutes, §§ 558.001 through 558.005, commonly referred to as the notice and right to cure statute in 2003. Florida's right to cure statute was intended to reduce the need for litigation. Interestingly enough, the detailed nature of the claims process almost mandates that any owner, who has a construction defect claim, hire an attorney to comply with the conditions precedent to suit set forth in the statute.

The alternative dispute resolution mechanism of Chapter 558 commences upon a claimant filing a notice of claim with the contractor, subcontractor, supplier, or design

professional that the claimant asserts is responsible for the defect, and should provide the contractor, subcontractor, supplier, or design professional with an opportunity to resolve the claim without resort to further legal process. Section 558.004 details the procedures and timelines under which the parties must attempt to resolve the alleged construction defects upon receipt of a notice of claim. Any person receiving a notice of claim under this chapter must be given the opportunity to inspect and repair the alleged defects. The person receiving notice under this chapter may also forward a copy of the notice of claim to each entity, e.g., a subcontractor, which it reasonably believes is responsible for each defect specified in the notice of claim.

A claimant may not file an "action" subject to Chapter 558 without first complying with the notice requirements set forth therein. An "action" is defined as "any civil action or arbitration proceeding for damages or indemnity asserting a claim for damage...by an alleged construction defect." If a claimant files an action alleging a construction defect without first complying with the requirements of Chapter 558, upon motion by a party to the action, the court shall abate the action, without prejudice, and the action may not proceed until the claimant has complied with such requirements.

Projects Covered

Originally, Chapter 558 applied to residential properties, including condominiums. A "claimant" was defined as a homeowner, including a subsequent purchaser, tenant, or association, who asserts a claim against a contractor, subcontractor, supplier, or design professional concerning a construction defect. A "dwelling" was specifically limited to a single-family house, manufactured or modular home, duplex, or unit in a multifamily residential building designed for residential use including common areas owned or maintained by an association. Until 2006, these statutory definitions have remained largely intact.

Conversely, the applicability of Chapter 558 has significantly changed since the statute was first enacted.

Since its inception, Chapter 558 has contained a notice of claim warning for inclusion in direct contracts with an owner as defined under the statute. However, the question of whether this notice of claim warning is mandatory, thereby invoking the procedures of Chapter 558, depends on which version of the statute is applicable and when the cause of action accrued.

The 2003 version of the statute provided that upon entering into a contract for the sale, design, construction or remodeling of a dwelling, the contractor, subcontractor, supplier or design professional *shall* provide notice to the owner of the contractor's, subcontractor's, supplier's, or design professional's right to offer to cure construction defect or pay to settle the alleged construction defects before a claimant may commence an action. Section 558.005, Fla. Stat. (2003) (emphasis added). The effective date of the original statute was May 27, 2003, and it applied to all actions accruing on or after the effective date. Section 7, Chapter 2003-49, Laws of Florida. Therefore, it seemed clear that the Florida Legislature intended the notice of claim warning, and therefore the process of Chapter 558, to be mandatory.

In 2004, the Florida Legislature amended Section 558.005 significantly impacting the statute's scope by adding what is commonly referred to as the "opt-in provision" to the statute. The 2004 version provided that the provisions of the Chapter shall control every contract for the design, construction or remodeling of a dwelling entered into on or after July 1, 2004, *which* contained the notice warning. Section 558.005(1), Fla. Stat. (2004) (emphasis added). This version of the statute implies that the provisions of Chapter 558 would not apply to a contract that did not contain the notice of claim warning. Therefore, the parties

to the contract had the "option" of invoking Chapter 558 by including the notice of claim warning in the contract.

The 2004 version of the statute applied to all actions **accruing** on or after July 1, 2004, and all actions **commenced** on or after July 1, 2004. Section 558.005(4), Fla. Stat. (2004). The 2004 version of the statute further provided that the chapter applied to all actions accruing before July 1, 2004, but not yet commenced as of July 1, 2004, and failure to include the notice requirements of this section in a contract entered into prior July 1, 2004, did not operate to bar the procedures of this chapter from applying to all such actions. Section 558.005(4), Fla. Stat. (2004).

There is no definition of the term "accrued" anywhere in Chapter 558, and there has been no published case law on the statute since its inception. However, Chart A is a basic guideline as to whether the statute applies based on the plain terms of the various versions of the statute.

The 2006 Amendment

During the 2006 session, the Florida Legislature again amended Chapter 558 significantly expanding the scope of the statute to include construction defects in any real property, not just residential property. The term "homeowner" has been replaced with the term "property owner". The term "claimant" is defined as a property owner, including a subsequent purchaser or association, who asserts a claim for damages concerning a construction defect. The term "dwelling" has been replaced with the terms "real property" or "property". Finally, "real property" and "property" have been expanded to include any land that is improved and the improvements on such land, including fixtures, manufactured homes, or mobile homes. There is a specific exception for public transportation projects.

This revision takes effect as of October 1, 2006. The statute has retained the "opt-in" provision and applies to all contracts entered into on or after the effective date. The expansive definitions contained in the new version of Chapter 558 means that the statute now encompasses nearly all commercial construction projects in Florida. Therefore, it will become increasingly important for members of the construction industry to become familiar with the statute and make an informed decision as to whether the requirements of Chapter 558 should be included in the contract documents.

Conclusion

The impetus behind Chapter 558 was to reduce the need for litigation to resolve construction disputes. In theory, the goal of having parties attempt to resolve disputes prior to litigation should be encouraged. However, the reality remains that the various amendments to the statute almost mandate the hiring of an attorney just to determine whether

CHART A

Actions accruing prior to May 27, 2003

Chapter 558 does not apply.

Actions accruing between May 27, 2003, and July 1, 2004

*Chapter 558 is mandatory and applicable
irrespective of whether the direct contract contains the
notice of claim warning.*

Actions accruing after July 1, 2004

*Chapter 558 only applies if the parties to the contract
have "opted-in" by including the notice of claim warning
as part of the contract.*

or not the statute actually applies to a specific contract. The 2006 amendments significantly expanded the scope of the statute such that every member of the construction industry in Florida must be aware of the statute and its potential application to every residential and commercial construction project in the state.

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Liquidated Damages and Phased Contracts

539 Introduction

Liquidated damage provisions are very common in construction contracts. Typically, these provisions express an agreement between the owner and contractor fixing a sum of money, which the contractor will pay the owner as damages for each day of delay in contract completion. These provisions are included due to the inherent difficulty in determining an owner's actual damages for delayed completion of a construction project. In theory, as with all provisions in a contract, the liquidated damages provision and the calculated per diem rate of delay damage are negotiated terms. In reality, however, there is very little negotiation or agreement regarding this contractual provision and, generally, the owner will estimate an amount to cover any additional costs related to a delay in completion and insert it in the contract with little contractor participation. Liquidated damage provisions are regularly enforced, and most jurisdictions now presume these clauses to be valid. As noted by one court:

The modern trend is to look with candor, if not with favor, upon a contract provision for liquidated damages when entered into deliberately between parties who have equality of opportunity for understanding and insisting upon their rights, since an amicable adjustment in advance of difficult issues saves the time of courts, juries, parties, and witnesses and reduces the delay, uncertainty, and expense of litigation.

Goργο Constr. v. Stein, 99 N.W.2d 69 (Minn. 1959). As such, the contractor challenging the enforcement of a liquidated damages provision bears the burden of demonstrating that the clause should not be enforced.

Because a fundamental principle of contract law is that a party should not be put in a better position than it would have been in had the other party properly performed its contractual obligations, a liquidated damages provision will not be enforced if it amounts to a penalty for breach of

contract. The stipulated sum must be reasonably proportionate to the probable loss resulting from the delayed completion of the project. *See Georgia Income Property Corp. v. Murphy*, 354 S.E.2d 859 (GA. Ct. App. 1987). Recently, the Armed Services Board of Contract Appeals ("ASBCA") evaluated a liquidated damage clause in the context of a phased contract. *Pete Vicari General Contractors, Inc.*, ASBCA No. 54982, 06-1 BCA ¶ 33,136. In affirming the imposition of liquidated damages on earlier phases of a project even though the last phase was completed on schedule, the ASBCA illustrated the importance of carefully reviewing the terms of a liquidated damage provision, assessing the reasonableness of the stipulated sum, and, to the extent there is a disagreement as to the sum, the necessity of challenging it *prior* to entering into the contract.

Factual Background

In May 1998, Pete Vicari General Contractors, Inc. ("Vicari") was awarded a contract for the construction of two new buildings and renovation of an existing building at a naval air station. Pursuant to the terms of the contract, the work was to be performed in three successive phases: (1) Phase A – Site work; (2) Phase B – Construction of Base Civil Engineering Building; (3) Phase C – Renovation of Building 149. The contract contained specific completion dates for each phase of the project with the final completion date set as not later than 881 days after the notice to proceed. The liquidated damages clause included daily rates for delay in completing each of the phases as follows: (1) Phase A - \$200.00; (2) Phase B - \$2,113.00 and (3) Phase C - \$352.00.

The notice to proceed was issued on June 5, 1998 and Vicari commenced work on the project. Although the contract was modified on at least three occasions to extend the completion dates for each of the three phases, Phases A and B were completed 62 and 33 days late, respectively. Vicari, however, completed Phase C prior to the completion date – 41 days early. When the project was completed, the government paid Vicari the balance due on the contract price less \$12,400 for 62 days delay in completion of Phase A and \$67,616 for 32 days delay in completion of Phase B. Vicari submitted a claim to the contracting officer demanding "a complete recovery of liquidated damages charged to Vicari for Phase B in the amount of \$69,729", among other things. The contracting officer did not issue a decision and, thus, Vicari's claim was deemed denied. Vicari appealed the deemed denial to the ASBCA.

Decision on Appeal

On appeal to the ASBCA, Vicari moved for summary judgment on that part of its claim demanding release of the liquidated damages withheld for late completion of Phase

B. In support of its motion, Vicari argued: (1) liquidated damages can be assessed only for the overall delay in contract completion; and (2) by withholding liquidated damages for the late completion of Phase A (i.e. 62 days), the government had exceeded the total days for which damages were due. The board rejected the contractor's arguments.

The ASBCA began its analysis by reviewing the language of the contract to determine the applicability of the liquidated damages clause to the dispute. The board determined that the contract specifications clearly mandated that the contract work be performed in three successive phases and specified the time period in which each phase was to be completed. In addition, the ASBCA noted that the liquidated damages clause of the contract specified different rates for each phase and did not set a single rate for the entire contract. These express conditions of the contract coupled with the government's reservation of rights to assess liquidated damages for the delay in completion of the preceding phase of the contract work, which was included in each modification extending the completion date for each phase, evidenced an agreement between the parties that liquidated damages applied to the interim completion dates for Phases A, B, and C. Accordingly, the board found no merit to Vicari's contention that the liquidated damages clause applied only to late completion of the entire contract and that no liquidated damages were due for the delayed completion of Phase B.

A secondary argument raised by Vicari was that the daily rate for delay damages with respect to Phase B was not a reasonable estimate of the damages sustained or proportionate to the actual loss resulting from the delay in completing that phase of the project. Specifically, Vicari pointed out that the daily rate of \$2,113.00 for Phase B delays was excessive and disproportionate to the rate specified for Phase A, \$200.00 per day, given that a day of delay in completion of Phase B would cause no greater delay in completing the new buildings than a delay in completion of Phase A. While the board recognized Vicari's contention as plausible, it, nonetheless, rejected the argument for want of conclusive evidence in that regard. According to the ASBCA, based on the record, there was no way of determining whether the Phase B rate was unreasonably high or whether the Phase A rate was unreasonably low. Moreover, because the government was able to demonstrate that the daily rates were determined in accordance with Naval Facilities Engineering Command manual, it was presumed reasonable and Vicari had the burden of proof to rebut the presumption. Because Vicari offered no evidence that the Phase B rate was an

unreasonable estimate of the resulting damages for delayed completion, Vicari's appeal was denied.

Comment

The ruling in *Pete Vicari General Contractor, Inc.*, while not altering the legal landscape with respect to the application of liquidated damages clauses, is interesting in that it implicitly held that a contractor challenging the daily rate for liquidated damages must do so pre-bid. That is, the board specifically found that Vicari did not allege, "nor did the record reflect that it protested the specified liquidated delay damages rates as unreasonable when it bid the contract." In other words, in the absence of evidence to the contrary, it seems the ASBCA viewed the liquidated damages clause as an agreed upon term of the contract to which the contractor was bound. To avoid such unintended consequences, contractors should carefully review any liquidated damages clause in an agreement and assess whether the daily rate is reasonable and proportionate to the damages an owner will likely incur as a result of a delay in completing the project. In addition, to the extent there is disagreement as to the per diem amount, any objections or challenges thereto should be made pre-bid.

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Payment Bond Claim Notice Excused

540 The federal Miller Act and many state laws based on the Miller Act require general contractors on most public works projects to post a payment bond for the benefit of subcontractors and suppliers on those projects. Those payment bonds provide a substantial assurance of payment for the subcontractors and suppliers on public works jobs. However, the payment bond statutes also put certain requirements on those who claim under a payment bond. A recent Nebraska Supreme Court case, *Gerhold Concrete Company, Inc. v. St. Paul Fire & Marine Insurance Company*, 269 Neb. 695, N.W. 2d 665 (2005), addressed one such requirement in state and federal public works payment bond statutes.

Nebraska law requires, as does the Miller Act, that subcontractors and suppliers who contract directly with a subcontractor on a public job, rather than with the general contractor, (often referred to as "second-tier subs") must give written notice of their payment bond claims to the general contractor within a set period of time after the last

date on which the claimant provided work or materials on the job. A second-tier sub who fails to give the required notice on time loses the right to make a claim under the payment bond. The notice requirement gives the general contractor, who may know nothing about the second-tier sub, notice of the claim in time to withhold payment to the contractor's own subcontractor(s) responsible for that claim.

In the *Gerhold* case, Gerhold Concrete Company, Inc. ("Gerhold") supplied concrete to CMS, Inc. ("CMS"), a subcontractor to the general contractor, First Dakota Enterprises, Inc. ("First Dakota"), on a Nebraska public works job. St. Paul Fire & Marine Insurance Company ("St. Paul") was the payment bond surety. Although it contracted with CMS, Gerhold contended that it told First Dakota that Gerhold's bid included discount prices that were good only if First Dakota agreed to use Gerhold as the sole concrete supplier on the job. Gerhold said First Dakota agreed to that condition, but First Dakota denied that it did so.

Gerhold sued under the payment bond after CMS failed to pay for concrete supplied on the job. Gerhold's plant manager testified at trial that he told First Dakota's project manager that Gerhold would stop delivering concrete "if it did not receive payment," and that the project manager replied that if Gerhold kept supplying concrete "First Dakota will take care of it." Gerhold continued to deliver concrete to the job, and First Dakota paid Gerhold's invoices submitted after that conversation, but denied that it agreed to pay the past-due invoices. First Dakota and St. Paul asserted that Gerhold had no bond claim because it failed to give the required second-tier sub's written notice of its unpaid invoices. Gerhold asserted that First Dakota's agreement to pay the unpaid invoices relieved Gerhold of the obligation to provide written notice. The jury found in favor of Gerhold. St. Paul appealed.

The Supreme Court of Nebraska noted on appeal that Nebraska law required a subcontractor to give written notice of its payment bond claim to the general contractor when the subcontractor had "*a direct contractual relationship with a subcontractor but no contract, express or implied, with the contractor.*" The Nebraska Supreme Court found that federal cases decided under the similar language of the Miller Act held that a subcontractor was not required to give notice of its payment bond claim to a general contractor who had agreed to pay for the work or materials under that claim. Since the jury found that First Dakota agreed to pay the past-due invoices if Gerhold's continued to supply concrete, the Nebraska Supreme Court held that Gerhold was not required to give First

Dakota written notice of its payment bond claim for those invoices.

The Nebraska Supreme Court, in *Gerhard, supra*, noted several cases holding that a second-tier sub was excused from giving written notice of its bond claim to the general contractor, as required under the Miller Act and similar state statutes, only when the general contractor had promised to pay for the work or materials for which the second-tier sub was making its claim. In contrast, the Nebraska Supreme Court noted a Georgia case, *Huddleston Concrete Co. v. Safeco Ins. Co.*, 186 Ga. App. 531, 368 S.E. 2d 117 (1988), that construed language identical to the Nebraska statute as excusing a second-tier sub from giving notice of its payment bond claim, if it could show that its contractual dealings with the general contractor were sufficient to put the contractor on notice as to the claim. In *Huddleston*, the Georgia Court of Appeals said that both goals of the payment bond statute – i.e. giving subs and suppliers on public works jobs a bond claim for non-payment, while also giving the contractor timely notice of those claims – were served when the second-tier sub's "contractual relationship" with the contractor, whatever it is, is sufficient to give him actual or constructive notice of the subject claim." Thus, Georgia law excuses a subcontractor or supplier from giving written notice of its payment bond claim when its contractual relationship with the contractor is sufficient to put the contractor on notice as to the claim. A direct promise by the general contractor to pay the claim need not be shown.

Comment

The Nebraska Supreme Court held in *Gerhold* that, whether under the lenient Georgia approach or the direct-promise-to-pay approach of other jurisdictions, there was sufficient evidence to find that Gerhold had a contractual relationship with First Dakota sufficient to excuse Gerhold from giving written notice of its payment bond claim for the past-due invoices. Thus, Gerhold could recover on its payment bond claim despite giving no notice.

The lesson which general contractors and others can take from *Gerhold* is that courts have given more than one construction to the written notice requirements for second-tier subs under the Miller Act and similar state statutes. A contractor or subcontractor who knows the approach taken in the jurisdiction where it is working on a bonded public works job will be better able to know the type of payment bond notice required for that job.

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Georgia Public Bid Law "Construed"

541 Georgia local governments, much like most state and federal agencies, are required to award contracts for public works construction using a competitive bid procurement system. Under Georgia law, public works construction contracts “shall be awarded to the lowest *responsible* and *responsive* bidder whose bid meets the requirements and criteria set forth in the invitation for bids”. O.C.G.A. § 36-91-21(b)(4) (emphasis added). Generally, “responsibility” determinations are made after bids are opened and involve consideration of experience, financial capacity, prior performance, bonding capacity, and other identifiable standards. A “responsive bidder” is defined by Georgia law as “a person or entity that has submitted a bid or proposal that conforms in all material respects to the requirements set forth in the invitation for bids or request for proposals.” O.C.G.A. § 36-91-2(12). Generally, a requirement is material if it affects price, quality, time of performance, or scope of work. Responsiveness is determined at the time of bid opening.

Contractors wishing to challenge awards by local governments have frequently disputed the responsiveness of the apparent low bid and gone to court to obtain an independent judicial determination of whether the bid satisfies the statutory criteria for award. A recent decision by the Georgia Supreme Court may signal an end to this practice; and may, without further statutory revision, arguably grant local governments unfettered control to determine responsiveness and ultimately the award of public works contracts. *R.D. Brown Contractors, Inc. v. Board of Education of Columbia County*, 626 S.E.2d 471 (Ga.2006).

In *R.D. Brown*, the Board of Education of Columbia County (“Board”) issued an invitation for bids for the construction of a new school. The invitation stated that bids would be publicly opened at 2:00 p.m. on a specified date and location and that “[a]long with the bid a list of all major subcontractors . . . must be provided.” No changes to this list were permitted following bid submission without the Board’s prior approval. In addition to these requirements, the invitation reserved the Board’s statutory authority to “waive technicalities and informalities.”

R.D. Brown submitted a bid for \$11,318,000 and McKnight Construction Co. submitted the low bid in the amount of \$11,259,000. McKnight Construction Co.’s bid, however, did not include a list of major subcontractors as required by the invitation to bid. The Board viewed the listing requirement as immaterial and voted to accept McKnight Construction Co.’s bid. R.D. Brown immediately filed suit alleging that the low bid was non-responsive and requesting

the court to issue an injunction prohibiting the Board from awarding the contract to McKnight Construction Co. The trial court denied the request for an injunction and R.D. Brown appealed to the Georgia Supreme Court.

The Supreme Court’s decision is troubling not so much because of the ultimate result, but because of the analysis offered to support the decision. While many Georgia trial courts have held to the contrary, it is unremarkable based on the facts of the case that R.D. Brown’s request for an injunction was denied. Evidence that McKnight Construction Co. submitted the required list of subcontractors within two hours of bid opening and that any delay in the construction of the school would be catastrophic because the school being replaced had already been sold was introduced. Trial courts are permitted to weigh the equities in determining whether to grant injunctions. This, however, was not the end of the Georgia Supreme Court’s analysis.

The Georgia Supreme Court held that the Board had the power to determine waivable technicalities and what constituted material conformity with the invitation for bids. This holding was premised on the facts that (1) no statute, regulation or ordinance required the subcontractor list; (2) the only place such a provision appeared was on the invitation for bids prepared by the Board; and (3) the invitation for bids did not state or suggest that the subcontractor listing requirement was material. In other words, when the genesis of a requirement is with a public owner, the public owner – not a reviewing court – is the proper body to determine whether non-compliance with the specification is material or a technicality the public owner may waive.

Comment

Contractors bidding on public works projects in Georgia should beware: The *R.D. Brown* decision provides local governments with an unprecedented level of control and discretion over the procurement process. The vast majority of local government officials are sure to act conscientiously in evaluating bids. However, the discretion granted in *R.D. Brown* may foster or provide the opportunity for favoritism by local government officials, an attribute sought to be avoided through Georgia’s and other competitive bid statutes. In addition, the lack of consistency in determining what is a “material” term of a solicitation can subject the public bid system to criticism. Concerned contractors should contact their respective state legislatures to urge that judicial review over matters of responsiveness be preserved.

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Bid Mistake – South Carolina Permits Upward Bid Correction

542 In *Martin Engineering, Inc. v. Lexington County School District One*, 615 S.E.2d 110 (S.C. 2005), the Lexington County School District One (“School District”) received bids for additions and renovations to Lexington High School. Immediately after the bids were opened, the lowest bidder for the project, Sharp Construction, advised the School District that it had inadvertently failed to include a roofing subcontractor’s price in its overall bid. Sharp Construction requested that it be allowed to correct its bid by adding the roofing cost (approximately \$613,000) to its bid or, alternatively, to be permitted to withdraw the bid. After the School District allowed Sharp Construction to revise its bid, which did not affect Sharp Construction’s status as the lowest bidder leaving it almost \$462,000 below the second lowest bidder, Martin Engineering (“Martin”). Martin sought an injunction against the School District’s actions.

The relevant section of the School District’s procurement code provided that corrections or withdrawal of inadvertently erroneous bids before or after award, or cancellation of awards or contracts based on such bid mistakes may be permitted where appropriate. The procurement code required that a bidder submit a written request to either correct or withdraw a bid, which written request must document the fact that the bidder’s mistake was clearly an error that would cause the bidder substantial loss. Additionally, in order to ensure the integrity of the competitive sealed bidding process, the procurement code acknowledged that a bidder would not be permitted to correct a bid mistake after bid opening if such a correction would cause the bidder to have the low bid unless the mistake, in the School District’s judgment, was clearly evident from examining the bid document.

Martin Engineering, as the second lowest bidder, argued that because an error with Sharp Construction’s bid was not clearly evident by examining the bid document, no correction was permissible. The South Carolina Supreme Court rejected this argument, however, and held that the express language of the procurement code indicated that only a correction which causes the bidder to **become** the low bidder requires that the mistake be clearly evident from examining the bid document. The court noted that while it is mindful of the need to preserve the integrity of the bidding process, here, it found no violation of the procurement code. Martin Engineering had not shown that the procedures followed by the School District rendered the upward correction to the bid unfair or unjust,

nor had Martin demonstrated in what manner the bid correction was prejudicial to the School District or to fair competition. The court allowed the upward bid correction and held that such a correction addressed an error that would result in substantial loss to Sharp Construction (a \$613,000 loss) without altering the status of the lowest bid on the project.

Practical Pointer

Upon discovery of a bid mistake, a contractor should immediately notify the owner or contracting official and submit a written request for a modification or withdrawal of the bid. Request an immediate conference with the owner or contracting official to discuss the bid mistake. The contractor’s written request for modification or withdrawal must comply with the express requirements of the applicable procurement code or statute, point out any mistake concerning an important or “material” aspect of the work, and demonstrate that the proposed correction will not prejudice the owner’s interests or adversely impact the integrity of the bidding process or fair competition. If the proposed bid correction involves an upward change that does not alter which bid is lowest, it may be possible to advocate the type of bid correction relief permitted in this case.

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Environmental Site Assessments – New Standards

543 New federal standards and practices for conducting “all appropriate inquiries” to qualify for certain landowner protections from liability under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) will become effective on November 1, 2006. In response to the changes, contractors engaging in commercial construction should request from the owner and expect to see additional and more thorough reports of environmental site investigations as part of their pre-bid due diligence efforts.

Under CERCLA, a landowner may be held strictly liable for costs to clean up environmental contamination of its land. In other words, a party may be responsible for clean-up costs based solely on the party’s ownership of the contaminated property, without regard to the party’s fault or involvement in the contamination. However, a potentially responsible landowner can protect itself from liability by availing itself of certain defenses available under CERCLA, such as the “innocent landowner defense,” the “bona fide

prospective purchaser” defense, and the “contiguous property owner” defense. To qualify for these defenses, a party must comply with certain due diligence-like requirements, including conducting “all appropriate inquiries” into past uses of the property, potential sources of contamination, and presence of contamination on the property.

The amendments effective November 1, 2006 change the type and nature of the investigations constituting “all appropriate inquiries” by expanding the scope of the inquiry required. In addition, “all appropriate inquiries” must be conducted by an “environmental professional” qualified under the standards set forth in the amendments. For contractors, the most relevant change is the requirement that the “environmental professional” develop a written report of all inquiries conducted, which must include the environmental professional’s opinion regarding whether the inquiries revealed conditions indicative of releases or threatened releases of hazardous substances. Contractors should request this written report from the owner as part of the contractors’ pre-bid due diligence. The report should be easily identifiable because it must contain a declaration from the person conducting the investigation and developing the report that he or she qualifies as an “environmental professional” and that the investigation has been conducted in accordance with the applicable federal standards and practices. If a contractor discovers that the written report has identified conditions indicative of releases or threatened releases of hazardous substances, then the contractor should further request information from the owner regarding the remedial actions that have been or will be taken, the likelihood of encountering additional contamination, and any special precautions that must be taken by the contractor during construction, as well as any other relevant inquiries.

If you have any questions regarding what to expect as a result of the amendments affecting CERCLA, please contact the undersigned at (850) 878-3700.

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Florida: *Eichleay* Overhead Recovery

544 In *Broward County v. Brooks Builders, Inc.*, 908 So.2d 536, 30 Fla. L. Weekly D1846 (Fla. 4th DCA 2005) the Fourth District Court of Appeals adopted the analysis articulated by the U.S. Court of Appeals for the Federal Circuit (“Federal Circuit”) on the extent of

suspension necessary to satisfy the standby requirement for *Eichleay* overhead recovery.

Unabsorbed Home Office Overhead

Eichleay overhead is that compensation awarded to a government contractor who suffers unabsorbed home office overhead when the government delays work on a contract indefinitely but requires the contractor to remain available to resume work immediately on the government’s instruction. As home office overhead costs are expended for the benefit of the whole business and cannot be attributed or charged to any particular contract, they are fixed costs which are allocated on a pro-rata basis among various contracts. When the government delays or disrupts contract performance, the contractor’s stream of income decreases while the fixed costs allocated to that contract continue.

The Project and Its Delays

In *Brooks Builders, Inc.* (“*Brooks Builders*”), Broward County hired Brooks to build a fire station adjacent to a runway at the Ft. Lauderdale airport. The project was originally scheduled to be completed in October 2001. Although the structure itself was not complicated to build, the location, i.e., adjacent to an active runway, presented significant challenges and resulted in numerous delays. The contract expressly required strict compliance with all airport security measures, including entry and exit procedures. These security measures increased significantly after the tragic terrorist attacks of September 11, 2001.

Brooks submitted timely notifications to the county requesting extensions of time and additional compensation for delays caused by the post 9/11 delays and changes to the architectural plans. In December 2002, Brooks filed suit against the county alleging breach of contract in which it sought damages for post-9/11 delays, compensation for unpaid and underpaid work, and *Eichleay* damages. After a nonjury trial, the trial court entered a final judgment for Brooks, awarding Brooks \$1,018,912.71 in damages and \$129,223.63 in prejudgment interest.

Requirement for Suspension Clarified

Broward County challenged the award of *Eichleay* damages for home office overhead costs. On appeal, the court reiterated that Florida has adopted the federal approach to *Eichleay* overhead recovery (*Eichleay* damages). The *Eichleay* formula is utilized to equitably determine allocation of unabsorbed overhead to allow fair compensation of a contractor for government delay. *Eichleay* damages are appropriate when the contractor has proven three elements: (1) a government-imposed delay occurred; (2) the government required the contractor to “standby” during the delay; and (3) while “standing

by,” the contractor was unable to take on additional work. Once the contractor proves the first two elements, a prima facie case of entitlement to *Eichleay* damages is established, the burden of production then shifts to the government to show either (1) that it was not impractical for the contractor to obtain ‘replacement work’ during the delay, or (2) that the contractor’s inability to obtain such work, or to perform it was not caused by the government’s suspension.

In *Brooks Builders*, the Fourth District Court of Appeal adopted the Federal Circuit’s view on the extent of the suspension necessary to satisfy the standby requirement. Specifically, “the contractor must show effective suspension of much, if not all, of the work on the contract… [E]very case where this court has held a contractor to be placed on standby has involved a complete suspension or delay of all the work or at most continued performance of only insubstantial work on the contract.”

Applying this standard, the court noted that Brooks’ principal had testified that Brooks faced delays at “virtually every turn” because “either the plans were deficient and we had trouble getting a response”. When questioned as to whether work continued nonetheless, Brooks’ principal answered “We kept working the best we could. Although, I must say it wasn’t in a sufficient manner.” The court held that this did not demonstrate effective suspension of much, if not all, of the work on the contract. In addition, a trial exhibit documented Brooks’ substantial monthly invoices which appeared to suggest that work continued. Thus, it was error for the trial court to award *Eichleay* damages.

Conclusion

While fortunate to have *Eichleay* damages available in Florida state courts, the decision of the court in *Brooks Builders* is clear: such damages are not easily earned. Where some work can or does proceed under the contract, *Eichleay* damages will likely be denied.

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Notice of Differing Site Conditions

545 A recent ASBCA ruling awarded a federal government contractor damages for Type II differing site conditions even where there was no evidence of formal notice. While this is not a common outcome in

federal government contract claims, this case indicates that contractors can recover for these claims. A review of the pertinent facts shows that contemporaneous documentation of both project conditions and the conduct of the parties during the course of the work can carry the day.

In *Parker Excavating*, ASBCA No. 54637, 06-1 BCA ¶ 33,217, the government contracted with a specialty contractor to install five miles of underground conduit as part of certain improvements at Fort Carson, Colorado. The contractor undertook to perform the work at a fixed unit price based on site conditions disclosed by the government. The contractor intended to and did, in fact, use a directional boring (or subsurface drilling) method to perform its work. After completion of the work, the contractor submitted a claim for roughly \$75,000 based on damage to its drilling equipment. The contracting officer denied this claim, concluding that the contractor had failed to document sufficiently its proper use of the drilling equipment and that it had failed to provide timely notice of its claim.

The contract incorporated standard FAR clause 52.236-2, DIFFERING SITE CONDITIONS, which provides for recovery for a Type II differing site condition (“DSC”). To recover for a Type II DSC, the claimant must establish four things. First, it must offer proof of the job site’s “recognized and usual conditions.” Second, the claimant must offer proof of the “actual physical conditions” at the site. Third, the claimant must offer sufficient proof that the conditions encountered “differed materially from the known and the usual.” Fourth, and finally, the claimant must offer adequate proof that the different site conditions “caused an increase in the [cost and/or time of] contract performance.” This FAR clause also requires the claimant to “promptly and before the conditions are disturbed give written notice to the contracting officer of the conditions encountered.” Failure to provide timely notice can be, and often is, fatal to such a claim.

In addressing both the entitlement and notice issues in *Parker Excavating*, the ASBCA set out detailed findings of fact in which, among other things, it determined that the contractor documented nineteen separate instances of “problems” with its drilling equipment during conduit installation. The Board also concluded that the contractor had presented contemporaneous evidence that the problems, which caused drilling equipment damage, were due to unforeseen and unknown obstacles encountered while drilling. These obstacles consisted mainly of asphalt, concrete, rebar and other debris indicative of construction demolition materials. The government reasoned, however, that hard rocky subsurface conditions also existed at many

site locations, conditions that the contractor knew about before submitting its final pricing. The government also considered that much of the contractor's equipment damage might have been caused by operator error, a fact that the contractor easily refuted with compelling evidence that it had independently, and contemporaneous to when the damage was occurring, operated the equipment with several different persons, including the contractor's president and the equipment manufacturer's representative, all of whom encountered the same difficulties.

The ASBCA also found that the contractor repeatedly notified government representatives of these unforeseen conditions and the associated additional costs while the work was ongoing. This "actual" notice primarily manifested itself in written correspondence between the parties, periodic quality control reports, and documented first hand observations by government representatives while the contractor was encountering the obstructions. There was also ample evidence presented by the contractor that the parties frequently discussed these obstructions and the ensuing equipment damage during the work. At one point, a government representative even instructed the contractor to "keep track of the occurrences" of encountering the construction demolition debris.

In finding that the contractor had adequately proven the existence of Type II differing site conditions, the ASBCA distinguished between existing conditions that might impede performance, such as hard rocky subsurface structures, and other obstructive conditions such as buried construction demolition debris. The Board based this decision on the contractor's underlying knowledge of such conditions before commencing work. Where it might be reasonable to conclude that a contractor had knowledge of certain subsurface conditions through information provided by the government or based on its past experience at a particular site or location, such knowledge does not extend to all underground conditions.

Likewise, the ASBCA addressed the insufficient notice issue based on compelling evidence showing actual or constructive notice of the differing site conditions encountered, finding that "[l]ack of prompt written notice is not a bar to recovery." Instead, where the government is deemed to have actual notice, it waives the strict notice requirements of FAR 52.236-2. In *Parker Excavating*, the contractor's quality control reports provided sufficient actual notice to the government of the conditions encountered. Likewise, the government was aware of the conditions through project meetings and site visits. Finally, the ASBCA concluded that the government had not come forward with sufficient evidence to establish that it was harmed in any way by a lack of the required formal written

notice.

This decision can offer some comfort to government contractors who properly and timely document ongoing construction work. Examples of such project documentation would typically include daily reports, equipment logs, inspection records, quality control reports, meeting minutes, and timely correspondence such as memos and e-mails. Although such documentation is not the equivalent of contractually required written notice (i.e., a letter), in some instances it may be sufficient especially if there is no prejudice to the other party.

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Substantial Performance Doctrine and Express Conditions Precedent

546 The Texas Court of Appeals has recently held that the substantial performance doctrine does not excuse a failure to comply with express conditions precedent to final payment. In *TA Operating Corporation v. Solar Applications Engineering, Inc.*, 191 S.W.3d 173 (Tex. App. 2005), a case arising out of construction of a truck stop, a private owner refused to make final payment to a contractor after substantial completion of the work had been achieved and the contractor had requested final payment. In refusing to make the final payment, the owner asserted that the contractor was not entitled to that payment because it had failed to comply with express conditions precedent to payment by failing to submit an all-bills-paid affidavit.

The pertinent portion of the contract provision relied upon by the owner in refusing to make final payment was as follows:

14.07 Final Payment

A. Application for Payment

...

2. The final Application for Payment shall be accompanied (except as previously delivered) by: i) all documentation called for in Contract Documents, including but not limited to the evidence of insurance; ii) consent of the surety, if any, to final payment; and iii) complete and legally effective releases or waivers (satisfactory to OWNER) of all Lien rights arising out of or Liens filed in connection with the Work.

The documentation referred to in subsection (iii) of the

quoted provision was what the owner referred to as an “all-bills-paid” affidavit.

The contractor did not dispute that it was obligated to submit an all-bills-paid affidavit as a condition precedent to final payment or that it had failed to submit that affidavit. Indeed, the contractor could not deliver the affidavit because even as late as the trial in this matter and after, liens filed against the property by unpaid subcontractors and suppliers were still in existence. Instead, the contractor asserted that it was excused from complying with that condition precedent based on the substantial performance doctrine. The trial court agreed and entered judgment in favor of the contractor, ordering the sums recovered to be placed in trust for the benefit of lien claimants.

The owner appealed, arguing that the doctrine of substantial performance did not excuse the failure to comply with an express condition precedent to final payment. The owner acknowledged that the contractor had substantially performed the work, but asserted that where the parties to a contract had expressly conditioned final payment on submission of complete and legally effective releases or waivers of all liens filed against the project, the owner’s duty to pay was not triggered until the contractor had provided those documents.

The contractor argued in response that even though it had not submitted an all-bills-paid affidavit, it could still recover under the contract and that any other result would bring back the common law doctrine that the only way for a contractor to recover under a contract was full, literal performance of a contract’s terms. In addition, the contractor argued that the owner, by agreeing that substantial completion had been achieved, acknowledged that the contractor was in full compliance with the contract and that any express conditions to final payment did not have to be met. The contractor further argued that the owner could not expressly provide for substantial performance in its contract and also insist on strict compliance with the conditions precedent to final payment.

The Texas Court of Appeals accepted the owner’s arguments and reversed the judgment of the trial court. In reaching its opinion, the court discussed the substantial performance doctrine, its purposes and the reasons that doctrine did not apply to the express conditions precedent to payment. The court began its analysis by recounting the common law requirement of strict compliance with the terms of a contract; that any failure to comply with a contract, regardless of how minor, constituted a breach of that contract that would prevent a party from suing for damages based on that contract. The court then stated how this rule had been modified by the doctrine of substantial performance in the case of construction

contracts in order to allow contractors that had substantially performed work to sue on that contract. However, the court continued, although the substantial performance doctrine does permit contractors to sue under a contract without fully completing the contract, it does not ordinarily excuse the non-occurrence of express conditions precedent in the contract that are unrelated to the physical completion of the work. In the court’s view, the substantial performance doctrine ordinarily applied to constructive conditions precedent but not to express conditions precedent.

Comment

Under this opinion, the reach of the substantial performance doctrine is expressly limited to performance of the actual construction of the project. Any other conditions precedent to payment set forth in a contract that are not related to the performance of construction may be strictly enforced. Furthermore, even though the conclusion reached expressly limits its applicability to express conditions precedent not related to the actual work, the analysis in the body of the opinion is more broadly stated and it is not difficult to envision a subsequent opinion employing that same reasoning to reach a conclusion that the substantial performance doctrine does not apply where the contract specifically requires final completion *of the work*.

The holding also may have implications for a contractor’s rights *vis-à-vis* its subcontractors and suppliers. In this case, the contractor was not able to obtain a judgment for final payment from the owner, not even where those funds were ordered to be held in trust for the benefit of its subcontractors and suppliers, until after it had paid those subcontractors and suppliers. Accordingly, where the owner has included conditions precedent similar to those in this case, a contractor may not be able to enforce pay when paid clauses in its subcontracts, thus preventing a contractor from effectively shifting the risk of non-payment by the owner to its subcontractors.

The court noted that the result it had reached was a harsh one, but justified it on the ground that parties are free to contract as they choose. The main lesson to take from this case then is that courts are not eager to protect parties from folly freely entered into. Accordingly, it is up to parties to protect themselves and prior to entering into any contract, care should be taken to understand the risks to be undertaken so as to order affairs as best as possible in accordance with that risk.

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UPCOMING SEMINARS

Resolving Problems & Disputes on a Construction Project, September 23, 2006, Specialized Carriers & Rigging Association's Annual Crane & Rigging Workshop, Atlanta, GA. *Philip E. Beck.*

EPC and Design-Build Contracting, September 26-27, 2006, Federal Publications, Miami, FL. *James F. Butler, III.*

Contract Review Workshop, October 12, 2006, Carolinas AGC, Greenville, SC. *Robert J. Greene.*

Construction Delay, Acceleration, and Inefficiency Claims, October 18-19, 2006, Federal Publications Seminars LLC, Washington, D.C. *Reginald M. Jones.*

Tips on Successful Mediation (Dixon Hughes Construction Executive Conference), October 27-28, 2006, Georgia Branch of the Associated General Contractors of America, Asheville, NC. *Hubert J. Bell, Jr.*

EPC and Design Build Contracting, November 1-2, 2006, Federal Publications, Las Vegas, NV. *James F. Butler, III.*

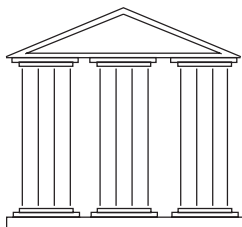
Construction Law from Contract to Closeout in Georgia, December 1, 2006, Lorman Education Services, Atlanta, Georgia. *S. Gregory Joy, Gene J. Heady, Ramsey Kazem.*

Contract Review Workshop, December 14, 2006, Carolinas AGC, Raleigh, NC. *Harry Bivens.*

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