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

Louisiana Construction Law and News Update

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Construction Law Update

Prevention *is* the cure

In a case handled by this firm for the general contractor, the federal court in New Orleans ruled pursuant to the general conditions of the prime contract that the stoppage of work following Hurricane Katrina allowed the general contractor to terminate the contract. In *Roy Frischhertz Construction Co., Inc. v. The Audubon Commission*, 2007 Bankr. LEXIS 3495 (E.D.La.), the general contractor on a restaurant construction project in Audubon Park in New Orleans was in the middle of the job when Hurricane Katrina ravaged the city. Asserting that the government effectively prevented the contractor from returning to the job for a period in excess of 30 days following the mandatory evacuation ordered in advance of Katrina's landfall, RFCC invoked the termination clause in Section 14.1.1 of the AIA-A201 (1997) General Conditions of the Contract for Construction. That clause provides for unilateral termination by the general contractor "if the Work is stopped for a period of 30 consecutive days through no act or fault of the Contractor," including issuance of orders by public authorities or acts of government which cause the work stoppage.

At trial, the general contractor placed in evidence various evacuation and other orders issued by the city which prohibited or substantially limited the return of citizens and others to New Orleans for more than 30 consecutive days surrounding Hurricane Katrina. In opposition, the project owner asserted that the general contractor's inability to perform work at the site was not comprised of 30 "consecutive" days. In support of this position, the project owner argued that sporadic visits by one individual or another to the job site during the 30-day period countered the contractor's contention, and introduced evidence that a company related to the general contractor had performed work during the same period time – albeit in Jefferson Parish and consisting of demolition work. Accepting the arguments of the general contractor and allowing termination of the general contract, the court held that the contractor's few visits to the job site during the 30-day period – which were principally to examine the damage to the work and to retrieve equipment – did not constitute a resumption of the work or otherwise entail that the work could have been resumed during the hiatus. Likewise, the court found that the ability of the related company to perform demolition work in the adjacent parish was neither the same type of "skilled work required for the Audubon project" nor being conducted in a parish subject to the same stringent evacuation orders during the relevant time.

In keeping with the unilateral termination provisions in the general conditions, the contractor was also awarded by the court all contract sums past due and owing to it, with legal interest as appropriate.

The future is here!

In keeping with the notion that, "You should be careful what you wish for, lest it come true," settlement agreements at issue in *State of Louisiana v. Meyer & Associates, Inc*., 2007 La. App. LEXIS 1840 (3rd Cir.), placed the general contractor in an untenable position in regard to subsequent claims made against it for the construction of the Cyprus Bend Conference Center near Many, Louisiana. In the settlement agreements – entered into between the general contractor and subcontractors responsible for gypsum board, suspended ceilings, metal framing, roof installation and fiberglass reinforced plastic panel assembly – was contained the type of comprehensive release language which many consider "boilerplate" in the industry for settlements of certain disputes. That language in each of the settlements, in essence, provided that the parties to the settlement each released the other for all past, present and "future" claims of all types and kind "resulting from," "arising out of," "accru[ing] on account of," or "in any way relating to," the construction project.

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Letter From the Partners

We are pleased to deliver to you the latest edition of "Louisiana Construction Law and News Update." This newsletter is provided to keep you and your company current on legal topics that affect the construction industry. The firm hopes you find this information insightful and relevant to your work.

The newsletter is published on a quarterly basis by the firm and is distributed to the construction industry. We encourage suggestions and ideas for articles from our readers so that this publication can be as current and useful as possible.

We appreciate the opportunity to provide this newsletter to you. If you know of others in the industry whom you think might enjoy receiving the publication, please let us know so that we can add them to our industry list.

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Surety Decisions and Non-Louisiana Cases

APAC-Southeast, Inc. v. Coastal Caisson Corp., 2007 U.S. Dist. LEXIS 70195 (N.D.Ga.)

A general contractor – APAC – on a roadway project in DeKalb County, Georgia, filed suit in federal court against a subcontractor – Coastal – which sought to avoid responsibility for drilled-shaft foundation subcontract work for which it had submitted a subcontract bid. Alleging theories of promissory estoppel and breach of an oral agreement, APAC argued that it had relied upon Coastal's bid in preparing the general contractor's principal bid, and that the subcontractor was seeking to escape from its bid because of equipment scheduling problems and, more likely, because the subcontractor had discovered that "its subcontract bid was too low." In its defense, Coastal argued that its bid had been effectively rejected by the general contractor when APAC sent its standard form subcontract for the subcontractor to sign – a form which contained terms that were different from the language in Coastal's bid.

Noting that the APAC subcontract form differed from Coastal's bid on matters of distribution of risk, standby rates in the event of delay and the recovery of certain incremental costs for unanticipated subsurface conditions, the court ruled in favor of the subcontractor, releasing it from its bid, on the basis of the standard rule of offer and acceptance: "Unless the acceptance is unconditional and without variance from the offer it is of no legal effect as an acceptance and operates as a rejection and a counteroffer." For its part, APAC argued that Coastal knew both that it would be required to execute the general contractor's standard form subcontract and that the terms of that subcontract would not mirror Coastal's bid. The court rejected this contention, stating that it was improper for the general contractor to assume – because the subcontractor knew that the general contractor would not accept the bid unconditionally – that "unconditional acceptance was not a prerequisite to formation of an enforceable contract." The court distinguished the case from one in which a general contractor **first** unconditionally accepted the subcontractor's bid and thereafter submitted a nonconforming subcontract for signature.

Hunt Construction Group, Inc. v. Allianz Global Risks U.S. Insurance Company, 2007 U.S. Dist. LEXIS 57799 (S.D.Ind.)

Weather delays and related damage on a project to construct a library for the City of Memphis sparked a general contractor's claim against its builder's risk policy. Of the roughly $3.4 million claim, the builder's risk insurer agreed to pay only $400,000, prompting the general contractor's federal court suit. The insurer sought summary judgment on two claims of the general contractor: (1) amounts charged by the city Memphis to the general contractor for the city's "direct costs" related to the delayed completion of construction; and (2) the general contractor's claim to be reimbursed for its premium costs in extending during the delay the same builder's risk policy it was suing.

The court ruled in favor of the insurer on both of the claims, dismissing those. On the matter of the city's "direct costs," the court uncovered that notwithstanding the *force majeure* nature of at least part of the delays, the city would have been entitled to charge the general contractor liquidated damages – but refrained from doing so. Instead, the city opted to charge the general contractor the so-called "direct costs" incurred by the city because of the delays. Refusing to recognize the re-characterization of those charges by the general contractor and the city, the court considered the reimbursement of the "direct costs" to be "a payment to avoid liquidated damages." As liquidated damages were a category of contractor damages excluded in the builder's risk policy, that portion of the claim was dismissed. On the insurance premium costs, the court declared those to be "soft costs," for which type of damages builder's risk policies typically require a special endorsement (which was lacking in this case). The court also rejected the general contractor's arguments that the builder's risk premiums were a "supply" as that term is contemplated in the builder's risk policy.

Gaudette v. Conn Appliances, Inc., 2007 Tex. App. LEXIS 7315 (9th Dist.-Beaumont)

Texas continues to lead the nation in interesting cases regarding mold exposure. This matter involved allegations of negligent installation of a refrigerator in the plaintiffs' home, for which the plaintiffs alleged harm to their pulmonary, nervous, immune, digestive, and "other systems" from toxic mold and fungi. The defendant sought summary judgment against the plaintiffs, rooting that motion principally in a request to exclude the expert testimony offered by the plaintiffs regarding health effects allegedly suffered by the plaintiffs from exposure to the mold and fungi. The expert – a medical doctor – treated the plaintiffs for their maladies and concluded that "their symptoms resulted from molds in their home… from indoor exposure to mycotoxins." Defendant urged that the doctor's diagnoses of mold-related health problems (characterized by the court as "autoimmune

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After the execution of settlement agreements, claims were made by the project owner against the general contractor related to alleged mold and moisture intrusion in the conference center. Among the parties the general contractor sought to join in the court litigation as third-party defendants were the subcontractor parties to the aforementioned settlement documents. In response to being sued, the subcontractors filed peremptory exceptions with the court seeking to be dismissed from the case, which were granted by the court. According to the court, even though there was no evidence that the settled disputes contemplated in any manner the new mold and moisture intrusion claims by the project owner, and although the settlements could not have specifically spoken to the new claims – as those were unknown at the time of the settlements – the unrestricted language in the settlement agreements releasing all "future" claims related to the project did exactly that. The court rejected additional arguments by the general contractor that by "future" claims the releases intended to affect only prospective claims about which the parties had significant information at the time of the execution of the settlement agreements.

Policing the policy: Louisiana First Circuit enhances arbitrator's role as gatekeeper

Citing to the "the strong public policy, both in Louisiana and nationally, favoring arbitration and the enforcement of arbitration agreements," the Louisiana First Circuit Court of Appeal in *Arkel Constructors, Inc. v. Duplantier & Meric Architects, L.L.C.*, 2007 La. App. LEXIS 1459 (1st Cir.), overruled defenses of arbitration waiver and sent a somewhat-developed matter in litigation to arbitration. In the case, the Court of Appeal accepted supervisory writs from the trial court's refusal to refer the case to arbitration (noting that the 2006 amendments to Louisiana Code of Civil Procedure Article 2083 entail that the code article can no longer serve as the basis for immediate appeal of such matters), despite the fact that the applicant (a subcontractor) had initiated its own lawsuit in state court and thereafter agreed to consolidate that suit with another suit, from which consolidated matter the subcontractor now desired to be extricated.

Although there was significant evidence that the subcontractor had taken actions by which it may have waived its right to require arbitration of its disputes, the Court of Appeal reversed the trial court's finding of waiver. In so doing, the court held that the matter of whether waiver had occurred is "not for the judge, but for an arbitrator to decide," once it is determined that a valid arbitration agreement exists and the particular issues would ordinarily be referable to arbitration under that agreement. The 3-2 decision of the panel included a sharp dissent, with the opposing judges urging that: (1) the Louisiana Arbitration Law (La. R.S. 9:4201 *et seq*.) maintains the court's authority to "determine whether a party applying for a stay of proceedings pending arbitration has defaulted, and thereby lost the right to stay," and (2) based on prior case law, the subcontractor's unilateral decision to initiate its claims in litigation rather than arbitration was clear waiver of the right to arbitrate (as opposed to cases wherein litigation had been commenced principally because one party refused to arbitrate).

"People want economy and they will pay any price to get it."

Lee Iacocca

Recent changes to the Louisiana Public Bid Law governing public contracting for professional services (such as services performed by architects, engineers and landscape architects) was the subject of an opinion of the Louisiana Attorney General (Opinion No. 07-0185, 2007 La. AG LEXIS 210) issued to the St. Bernard Port, Harbor and Terminal District. Act 407 of the 2006 Legislative Session of the Louisiana Legislature amended Louisiana Revised Statute 38:2318.1 to create, as the Attorney General put it, a "No Bidding of Design Professional Services Policy." In pertinent part, the statute reads, at subsection A:

> It is the policy of the state of Louisiana, its political subdivisions, and agencies to select providers of design professional services on the basis of competence and qualifications for a fair and reasonable price. Neither the state nor any of its political subdivisions or agencies may select providers of design services wherein price or price-related information is a factor in the selection.

Notwithstanding the change in the law, St. Bernard, desiring to request price quotes from engineering firms seeking to perform work for the public entity, sought clearance from the office of the Attorney General on the practice. According to the Attorney General, the change in the law – because it prohibits considering price information in the selection of professional service providers – also prohibits public entities from requesting price quotes from professional services firms. The Attorney General never sorts out in the opinion how the consideration of the ultimate price as being "fair and reasonable" (from the above-quoted language from the statute) is supposed to fit into the selection process. Instead, the Attorney General suggests that public entities might consider creating a "fee schedule" setting the "fair and reasonable" rates for particular services (which would assist the public entity also in establishing budgets for particular projects).

News and Notes

American Institute of Architects A201-2007 has arrived!

The general conditions which are a part of so many construction contracts have been revised and were released for general use on November 5, 2007. As has been customary with prior revisions, old versions of the general conditions document will no longer be available in original form from AIA, and other contract document forms now available from AIA will refer only to the new version of A201. As such, contracting parties must be careful when using these copy-righted forms to ensure that the forms in hand properly correspond by version to each other.

The revised general conditions form provides challenges to contracting parties to adapt to the substantive changes that have been made in the document. Major changes have been made in the areas of mandatory arbitration, consolidation of arbitration proceedings, time limits on claims, and optional appointment for the project of an arbiter (called an "Initial Decision Maker," or "IDM") to address party disputes.

More details on the changes to the general conditions (as well as to the alterations made in 2007 to other AIA contract forms) can be found at the AIA website: www.aia.org (see the press release therein entitled: "American Institute of Architects (AIA) Releases 2007 Update to AIA Contract Documents™").

Sonny Shields Named Among Top Construction Lawyers in New Orleans

The firm is pleased to announce that its partner, Lloyd "Sonny" Shields, has been listed on the roster of "The Best Lawyers in America," as reported in New Orleans Magazine in its November, 2007, edition, for construction law, and on the roster of "SuperLawyers" in the areas of construction/surety and construction litigation as published in Louisiana Life magazine. Congratulations Sonny!

Construction Law Seminars and Publications

Shields Mott Lund L.L.P. is pleased to announce an upcoming construction law seminar:

Managing Construction Projects (Lorman Education Services), July 18, 2008
Raleigh, North Carolina - 8:30 a.m. - 4:30 p.m.

Our seminars are designed to address the legal issues that the construction industry faces and to zero in on the options that make the best legal advice. Understanding these issues and choices and being prepared for potential problems are the best ways to avoid pitfalls. Additional information on the seminar can be obtained by contacting Sonny Shields at Shields Mott Lund (504-581-4445), or from Lorman at www.lorman.com.

The partners are pleased to have authored and to announce the release of the ***Louisiana Construction Law Book***, a complete and current reference tool for contractors, surety companies, insurers, owners and design professionals in construction industry disputes – or if seeking to avoid disputes while working in Louisiana.

Published by HLK Global Communications of Vienna, Virginia, the easy-to-use 286-page comprehensive manual will help guide you through the Louisiana statutes and case law governing public works and private construction projects of any size. Topics covered in the book include contract drafting and interpretation, lien claims and enforcement of or defense against those, ordinary claims and disputes on the job (including changes in the work, delay and acceleration claims and claim documentation and preparation), differing site conditions, available damages and remedies, public works bidding and bid disputes, surety bonds, different types of insurance, licensing, statutes of limitation, collection strategies, alternative dispute resolution methods and others. For more information, please go to http://www.constructionchannel.net/law_books/Louisiana.asp.

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and/or neuropathic problems") from indoor exposure to alleged mycotoxins were "junk science," urging that no scientific or medical evidence supports those theories.

Affirming the trial court's grant of summary judgment and the exclusion of the medical doctor's testimony, the Court of Appeal accepted defense arguments that up to and including 2006, "every major medical and governmental group that has examined the… issue" had "roundly rejected" the theories espoused by the doctor. Those groups included the National Academy of Sciences, the Institute of Medicine, the Center for Disease Control and Prevention (CDC), the National Institute of Occupational Safety and Health (NIOSH), the American Academy of Allergists & Immunologists, the American College of Occupational and Environmental Medicine, and two Texas medical associations. Despite noting that it "should not foreclose the possibility that advances in science may require reevaluation of what 'good science' is in future cases," the court, declaring itself constrained to utilize what is "generally accepted in the current scientific community" in order to render judgment, ruled in favor of the defendant.

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