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ATTORNEYS AND COUNSELLORS AT LAW

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Louisiana Supreme Court deals serious blow to public entities' ability to disregard deviations in public bid

The Louisiana Supreme Court in *Broadmoor v. Ernest N. Morial New Orleans Exhibition Hall Authority*, 867 So. 2d 651 (La. 2004), ruling on a bid dispute involving Phase IV of the New Orleans Convention Center, accepted the arguments of the second low bidder and required the public authority's rejection of the bid of the low bidder, determining that the low bidder's bid contained irregularities which the public entity could not legally waive. The second low bidder, Broadmoor, attacked the bid of low bidder, Yates/Landis (a joint venture), alleging, among other things, the former's failure to:

- Include with its bid a certificate of insurance or other proper evidence of insurability
- Attend pre-bid meetings
- Purchase a proper set of bidding documents
- Submit a corporate resolution of authority

In October, 2003, the Attorney General issued an opinion concluding that the alleged deviations, to the extent they existed, could not be waived by the public authority. Upon issuance of that ruling, Broadmoor filed suit in Civil District Court in New Orleans, which court denied Broadmoor's request for injunctive relief despite the Attorney General opinion.

Broadmoor sought writs from the Louisiana Fourth Circuit Court of Appeal, which reversed the trial court and granted the injunctive relief. Yates/Landis and the public authority filed applications for a writ of certiorari to Louisiana Supreme Court, which applications were accepted by the high court.

Relying on a portion of the Louisiana Public Bid Law, La. R.S. 38:2212 (A)(1)(b), which provides that the provisions of the Public Bid Law, as well as "those stated in the advertisement for bids, and those required on the bid form shall not be waived by any public entity…" affirmed the injunctive relief granted by the Court of Appeal. The Supreme Court found that, to the extent that each of the enumerated items was specifically required by the bid documents, the failure to provide or fulfill any of the missing requirements was fatal to the Yates/Landis bid.

Two of the seven justices of the Supreme Court disagreed with the majority holding. In her dissent, Justice Knoll remarked that the Court's judgment did not properly account for the ability of a public entity to exercise discretion and interpret its own specifications, and that such interpretation should not be disturbed under judicial review unless the authority abused its discretion (in other words, mere error by the public authority should not be the basis for judicial undoing of selection of a low bidder). Along the same lines, Justice Weimer believed that the case did not involve a waiver by the public authority but, rather, an interpretation by the authority of its bid requirements. In essence, the dissenting justices thought it inappropriate for a court to substitute its judgment on an interpretation of the public authority's bid documents when the public authority was perfectly capable of making

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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

MCI Constructors, Inc. v. Hazen and Sawyer, P.C., 310 F. Supp. 2d (M.D.N.C. 2004)

Before the court was a statute of limitations defense asserted by a surety based upon a provision of the contract which declared that the performance bond "…must be valid until one year after the date of issuance of the Certificate of Substantial Completion." Suit having been filed more than a year after substantial completion, the surety sought dismissal of the claims against it. The court, however, rejected the surety's interpretation of the contract language, on the basis that the surety's interpretation of the contract language required the public owner to sue the surety at the same time it asserted a claim. In other words "…the City could not wait to see whether [the surety] would honor the claim, but would be forced to sue immediately. Conversely, [the surety] could avoid liability by failing to process a claim within the one-year period." The court held that, at most, the contract required "submission" of a claim within one year of substantial completion, a requirement which had been met by the public entity.

United States Fidelity & Guaranty Company v. Diggs, 2004 WL 32917 (E.D. La)

Defendant, an indemnitor on a general agreement of indemnity, sought to avoid liability under the GAI for amounts totaling in principal $488,497.45. The defendant argued that although she signed the GAI, she did so only as a witness, attesting to the signature of her husband. The court analyzed the terms of the GAI and noted the following: a) the husband had signed on behalf of the corporation and also in his personal capacity; and b) the defendant, along with the corporation and her husband, were listed as the "undersigned" parties on page one of the GAI, and the defendant signed in the appropriate blank for an indemnitor (as opposed to a witness). The court noted that the defendant also provided her address and social security number as is required in the GAI of indemnitors (and not mere witnesses). Applying Louisiana law, the court found the contract in question unambiguous and held the defendant liable.

Because the document was found to be unambiguous, the court would not look beyond the "four corners of the document" to ascertain the parties' intent when entering the agreement or signing the document. The court also refused the defendant's arguments that the agreement in regard to her should be rescinded because of error, declaring that any failure on the part of the defendant to read the contract is considered negligence, not error. Finally, suggestions that the surety had misrepresented the purpose and consequences of signing the agreement were rejected by the court upon its finding that the defendant could have ascertained the truth about the import of the document without difficulty, inconvenience or any special skill (as the defendant failed to "simply read the document").

MPACT Construction Group, LLC. v. Superior Concrete Constructors, Inc., 802 N.E. 2d 901 (Ind. 2004).

A general contractor sued by one of its subcontractors sought to enforce an arbitration clause but was refused relief by the Indiana Supreme Court. In the matter, the general contract – an AIA form – called for arbitration of disputes between the general contractor and owner of the project. The general contractor, however, did not use an AIA form (the standard AIA subcontract document – A401 – contains an arbitration clause) for its subcontract, but had within its subcontract a clause which incorporated the terms of the general contract by reference "as applicable to the work" of the subcontract. The court held that the quoted reference was not a sufficiently distinct incorporation of the arbitration clause and would not compel the subcontractor to arbitrate its claims against the general contractor. While a dissenting opinion was written wherein a justice expressed the thought that the matter should be arbitrated as arbitration is becoming more of a custom in the industry, we believe there is no plausible reason for failing to include a simple arbitration clause – which can be merely a sentence or two – in any agreement in which arbitration is desired. Forms for such clauses are readily available from almost any arbitration service provider, as well as from counsel.

such a determination – even though that determination might turn out to be one with which a judge or judges may not agree.

This case is important in that it is the first clear pronouncement by the Louisiana Supreme Court on the cited language from the Louisiana Public Bid Law. The case strongly suggests two things:

- "Waiver" by any public entity of any item that is specified in the bid specifications will more than likely be subject to injunction in the courts. Although for many years the decisions of the lower state appellate courts have been tending to suggest this result, in practice public entities have continued to attempt to work around the cited statutory language in an effort to preserve bids where the deviation was considered minor, albeit a definite failure to be responsive to the bid specifications or the bid laws.
- Courts may look beyond a public entity's purported interpretation of the bid specifications to determine if, in fact, the public entity has actually waived the requirements of its bid documents.

The foregoing raises critical issues both in terms of the responsibility of public entities to draft clear and easy-to-follow bid documents, and the obligation of bidding contractors to ensure that every aspect of the bid document is followed in their bid. As the bidding process, by its nature, typically involves last minute activity on the part of bidders, we expect litigation to increase in this area. Has it come to the point that any bidding contractor should have a lawyer review its bid? At a minimum, we hope that this decision prompts public entities to reconsider their bid specifications and work toward a clearer, more uniform set of documents – not simply locally, but statewide – so that bidders need not guess at the import of the terms and conditions of those documents.

Just the fax…or e-mail

Louisiana Revised Statute 38:2212 (C)(2)(a) was amended in 2003 to provide that public entities issuing addenda modifying plans and specifications within seven days prior to the bid must transmit copies of the addenda to all "prime bidders" which have requested bid documents pursuant to the public bid law by either facsimile transmission, e-mail or hand-delivery. The transmission must be completed within 24 hours of the issuance of the addenda. The addenda must also be mailed to such prime bidders which have requested the documents. In response to the change in the law, Jefferson Parish requested an interpretation by the Attorney General of certain portions of the legislation.

Regarding transmission of large blueprints or plan sheets, the Attorney General opined that if the plan sheets cannot be efficiently or economically transmitted by facsimile or e-mail, then the only other available method of delivery – hand delivery – must be used. The only alternatives to the public entity if it does not wish to hand deliver the document (which, as you might imagine, could be an expensive and difficult proposition to undertake if a bidder resides in a location far removed from the parish) is to "extend the bid opening to allow for issuance of the addenda by regular mail…" or cancellation of the bid. The Attorney General declared that it believed that use of a "computer program" (which is not technically "e-mail") to transmit the addenda would be inappropriate, as the statute does not specifically allow for that. In its opinion, the Attorney General also notes that if the public entity selects one of the electronic methods to transmit documents, it is responsible only for transmitting those. The public entity is not responsible for ensuring receipt by the bidder, at least not in the event that non-delivery is caused by bidder's computers or fax machines not working properly.

Federal court upholds consumption rule in lien suit

In a matter in which our firm defended the surety – *Rowley, Hansell-Petetin v. Mid-Continent Casualty, Inc.*, 2004 WL 614500 (E.D. La.), suit was filed under the Public Works Act for materials allegedly furnished to a public school project (school furniture was involved). At issue were several hundred thousand dollars of materials alleged to have been delivered to the job, but which were not actually incorporated into the project. The court denied the motion for summary judgment of the plaintiff against the surety, finding that the plaintiff had not proven the incorporation of the materials into the construction (the statute requires incorporation of the materials into the project). The court also rejected the notion that the obligation of the surety might be expanded beyond the statutory requirements of the Public Works Act for a payment bond surety. The court noted that Louisiana law on the subject contains a read-in, read-out rule which entails that the liability of the surety may not be extended beyond the statute setting forth the required terms of a payment bond on a public project.

Arbitrate this!

The problem of an aggrieved party on one side to an arbitration clause was handled in the case of *Lincoln Builders, Inc v. Raintree Investment Corporation Thirteen*, 866 So. 2d 326 (La. App. 2nd Cir. 2004). In the matter, plaintiff moved to lift a court order which held that certain litigation against the defendants be stayed pending arbitration. Plaintiff argued that the decision of the defendant parties not to pay the arbitration tribunal's fees – which resulted in the dismissal of the arbitration – constituted a waiver by the parties of their obligation to arbitrate disputes and should allow the matter to proceed in court. The plaintiff contended that when it learned that the defendant did not pay its portion of the substantial bill of the arbitration tribunal, it became incumbent upon the plaintiff to pay the entirety of the bill (which was alleged to be $71,791.00) in order to keep the arbitration open. The trial court denied the relief requested by the plaintiff, declaring that the contractual arbitration clause remains valid and that the plaintiff's recourse upon the defendants' failure to pay their portion of fees to

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the tribunal was to seek an order from the court directing that the arbitration proceed "in the manner provided for in their arbitration agreement…." (presumably including an order by the court that the defendants pay their arbitration fees).

Attack on public bid held timely even six months after contract award

Is it ever too late to seek injunctive relief on a public bid? In *G.D. Womack Trenching, Inc. v. Maitland Water System, Inc.*, 870 So. 2d 579 (La. App. 3rd Cir. 2004), the Third Circuit, as part of its ruling, held that a suit filed six months after the aggrieved bidder became aware of all the facts relating to the bid – including receipt of notice that an award of the contract had been made – did not preclude a suit for injunctive relief under the Louisiana Public Bid Law. Rather than directing its focus to the time plaintiff knew it might have a case (the court even noted that the plaintiff gave "no reason for the delay" in filing suit), the court chose to concentrate on the fact that the public owner (DOTD) had a stop work order in place and that work on the project had not begun when suit was filed. Although the bidder which had been awarded the project defended on the basis that it had already purchased materials for the job, the Court of Appeal agreed with the trial court that payment for the materials could be arranged so that the original successful low bidder could be "returned to its original position" with regard to the materials. This case presents somewhat of a departure from many other cases in which the issue of timeliness of a suit for injunctive relief on a public bid has been handled much more stringently, including, in some cases, declaring the cutoff for filing suit as the time that the award of the contract was made by the public entity.

Upcoming Construction and Labor Law Seminars

Trends and Advancements in Cell Tower Site Concealment (Shorecliff Communications/CTIA Tower Summit), September 15, 2004, Venetian Hotel and Casino, Las Vegas, Nevada, 9:00 a.m. - 1:00 p.m.

Construction Law in Louisiana (LSU), October 29, 2004, McKernan Law Auditorium, LSU Law Center, Baton Rouge, Louisiana, 9:00 a.m. – 4:45 p.m.

Comprehensive Construction Law in Louisiana (Lorman Education Services), November 4, 2004, Sheraton New Orleans Hotel, 500 Canal Street, New Orleans, Louisiana, 9:00 a.m. – 4:30 p.m.

Employment Closure and Termination (Lorman Education Services), November 19, 2004, New Orleans, Louisiana, 9:00 a.m. – 4:30 p.m.

Construction Delay Claims Seminar (Lorman Education Services), February 23, 2005, New Orleans, Louisiana, 9:00 a.m. – 4:30 p.m.

These 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 sense. Understanding these issues and choices and being prepared for potential problems are the best ways to avoid pitfalls. We sincerely hope you can attend one of these seminars. Additional information on the seminars can be obtained by contacting Dan Lund at Shields Mott Lund (504-581-4445) or online at www.lorman.com for the Lorman sponsored programs.

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