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Louisiana First Circuit Holds that Private Works Act Surety Cannot Raise Pay-if-Paid Defense

Authors: Mark W. Frilot, Mark Mercante, Nicholas Ray Pitre

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The Louisiana First Circuit recently held that a Private Works Act payment bond surety cannot raise a pay-if-paid provision in its principal's contract as a defense to a claim against the bond.

Bear Industries, Inc. v. Hanover Insurance Co. involved the construction of a Wal-Mart Supercenter in New Roads, Louisiana. The plaintiff, Bear Industries, Inc. (Bear), supplied materials for the project to a subcontractor, Amtek of Louisiana, Inc. (Amtek). Bear, Amtek, and Hudson Construction Company of Tennessee (Hudson), the prime contractor, entered into a joint check agreement under which Hudson issued all payments to Bear by joint check to Amtek and Bear.

Because of a dispute between Amtek and Hudson, Hudson stopped making payments, and Bear filed a Louisiana Private Works Act statement of claim and privilege. Bear later filed suit against Amtek and Hanover Insurance Company (Hanover), the surety that furnished the payment bond for the project on behalf of its principal, Hudson.

The trial court ruled in favor of Bear and against Hanover and Amtek and held that Hanover could not rely on a pay-if-paid clause in Hudson's contract with Amtek as a defense to Bear's claims. The trial court reasoned that "Hanover's liability under the Private Works Act differs from conventional surety principles." Specifically, the trial court found that a Private Works Act bond is statutory, and, "[a]s such, safeguards required for the bond by the Act would be read into the bond, and provisions in the bond, not required by the Act, would be read out of the bond." In support of its conclusion, the trial court cited *Glencoe Education Foundation, Inc. v. Clerk of Court & Recorder of Mortgages for the Parish of St. Mary*, a Public Works Act case holding that "because the [pay-if-paid] contractual provision on which the surety relied was contrary to the purpose of the Public Works Act, the surety, which had issued a statutory bond, could not assert a 'pay-if-paid' clause in a principal's subcontract as a defense to payment of sums owed to subcontractors who have performed work and supplied materials on a public construction project."

On appeal, the First Circuit affirmed the trial court's ruling and held "that the 'pay-if-paid' defense is not available to Hanover under the Private Works Act." The court reasoned that "[a]llowing a surety to assert a 'pay-if-paid' clause to defeat payment to a subcontractor on the basis that the contractor has not received full payment from the owner, where the owner has escaped liability to the subcontractors by relying on the payment bond, would render the protections afforded to laborers and suppliers on private works projects set forth in the Private Works Act meaningless."

If you have any questions about this matter, please contact a member of Baker Donelson's [Construction Group](#).