

PUBLICATION

Formal Notice of Default Necessary to Start Peremptive Period for Public Owner's Claims Against Performance Bond Surety

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Construction project participants sometimes disregard contractual formalities, particularly in the "heat" of a project dispute. However, consequences can and often do arise in those circumstances, and sometimes the parties do not realize those consequences until many years after a dispute first arises.

In its recent [decision](#) in *Lamar Contractors, LLC v. SRF Group Consulting, LLC*, No. 22-CA-213 (La. App. 5 Cir. 2/1/23); 2023 WL 1426836, the Louisiana Fifth Circuit held that the peremptive period for a public owner's claims against a prime contractor's performance bond surety did not commence, because the owner had not formally placed the prime contractor in default or complied with the default provisions of the performance bond.

Lamar Contractors, LLC (Lamar) was the prime contractor for the construction of the St. James Parish District 5 Multi-Purpose Recreation Building Welcome Park, located in and owned by St. James Parish (the Parish). Travelers Casualty and Surety Company of America (Travelers) provided the performance bond (Bond) in favor of the Parish under the Louisiana Public Works Act. Following disputes between Lamar and the Parish, Lamar stopped work, and on July 15, 2015, Lamar unilaterally recorded a Notice of Termination. Lamar filed suit against the Parish shortly thereafter, and on January 16, 2016, the Parish filed a reconventional demand against Lamar alleging breach of contract and defective work. On June 18, 2021, the Parish amended its answer and reconventional demand to assert a claim against Travelers on the Bond.

Travelers filed an exception of peremption, urging that the Parish's claim against Travelers was untimely and perempted under La. Rev. Stat. § 38:2189:

Any action against the contractor on the contract or on the bond, or against the contractor or the surety or both on the bond furnished by the contractor, all in connection with the construction, alteration, or repair of any public works let by the state or any of its agencies, boards, or subdivisions shall prescribe 5 years from the substantial completion, as defined in R.S. 38:2241.1, or acceptance of such work, whichever occurs first, or of notice of default of the contractor unless otherwise limited in this Chapter.

Because Lamar had not substantially completed the work and because the Parish had not accepted the work, the issue was whether the third trigger for the start of the peremptive period — "notice of default of the contractor" — had occurred. Although the Parish had not issued Lamar a formal notice of default, Travelers argued that the Parish's January 18, 2016, reconventional demand against Lamar in the suit evidenced the Parish's default, so the Parish's June 18, 2021, claim against Travelers (more than five years after January 18, 2016) was untimely and perempted. The Parish contended that because it had not issued Lamar a formal notice of default, the peremptive period under La. Rev. Stat. § 38:2189 had not started. The trial court agreed with Travelers and granted the exception.

The Fifth Circuit reversed. The court noted that, although the Public Works Act defines the other two triggers for start of the peremptive period (acceptance and substantial completion), the statute does not provide "requirements for the form of the contractor's notice of default, nor specification on how the notice should be

served and recorded." *Id.* at *5. And although the court found that Lamar's actions met the definition of "contractor's default" under the Bond, the Parish did not take any of the actions required under the Bond to formally place Lamar in default. *Id.* at *7 – *8. Therefore, the court found that the applicable trigger for the start of the preemptive period — the Parish's formal default of Lamar — had not occurred, so the preemptive period for the Parish's claims against Travelers had not started. *Id.* The court further found that its ruling did not run contrary to the policies of La. Rev. Stat. Ann. §38:2189 because its ruling would not expose Travelers to liability on the Bond for an indeterminate amount of time. *Id.* at *8 – *9.

Bottom Line

The Fifth Circuit's decision in *Lamar* reminds us that project participants should vigilantly comply with contractual formalities, even in the heat of project disputes, because adverse consequences can arise long after a dispute first arises.

If you have any questions about this topic, please contact [Mark W. Frilot](#) or any member of the Baker Donelson Construction Group.