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Louisiana Legislature Grants Sureties the Right to Raise Contractor Defenses, Including "Pay-If-Paid"

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Governor Landry recently signed into law two legislative acts that should allow Private Works Act and Public Works Act payment bond sureties to rely on defenses available to their general contractor principals in defense of sub-tier payment claims, including "Pay-If-Paid" provisions contained in the general contractors' subcontracts. However, the acts carve out an exception for claims made by material suppliers.

Specifically, La. Acts No. [758](#) (effective 8/1/2024), and [761](#) (effective 6/19/2024), add the following language into the Private Works Act, the Public Works Act, and the statutes governing claims on DOTD-owned projects:

"Except as provided [below], nothing in this Part shall be construed to preclude a surety ... from asserting any defense to the principal obligation that its principal could assert except lack of capacity or discharge in bankruptcy of the principal obligor."

By incorporating this conventional suretyship principle into Private and Public Works Act statutory bonds, these amendments should, consistent with the intent expressed during legislative hearings, abrogate Louisiana appellate court decisions in *Glencoe Educ. Foundation, Inc. v. Clerk of Court & Recorder of Mortgages for the Parish of St. Mary*, 2010-1872 (La. App. 1 Cir. 5/6/11), 65 So. 3d 225 (holding that the surety on a Public Works Act payment bond could not rely on the general contractor's "Pay-If-Paid" clause in defense of a subcontractor's payment claim because allowing the surety to do so would contravene the Public Works Act's purpose), and *Bear Industries, Inc. v. Hanover Insurance Company*, 2017-0301 (La. App. 1 Cir. 1/4/18), 241 So. 3d 1159 (holding that a Private Works Act surety could not raise the "Pay-If-Paid" clause contained in the principal obligor's subcontract to defeat a subcontractor's payment claim because the surety "was not entitled to read into its bond a safeguard that is not required by the Private Works Act[.]").

The basis of both *Glencoe* and *Bear Industries* was that, because Private Works Act and Public Works Act payment bonds are both "statutory bonds" that must conform to their respective statutory requirements, a surety cannot assert a "Pay-If-Paid" clause contained in the principal obligor's subcontract when doing so would defeat the purpose of the Private and Public Works Acts.

As amended, the Private and Public Works Acts clarify that the laws may not be read to preclude the surety from raising "any defense to the principal obligation that its principal could assert except lack of capacity or discharge in bankruptcy[.]" This amendment eliminates *Glencoe* and *Bear Industries*' premise that allowing payment bond sureties to rely on the general contractor's "Pay-If-Paid" clause, or other contractual defenses, is contrary to the Public Works Act and the Private Works Act.

However, the acts create an exception to the rule for claims made by material suppliers. Specifically, the amendments obligate the surety to make payment on a material supplier's payment claim no later than 10 days after the material supplier sends a "payment notice" where:

1. The material supplier's claim is for the price of movables delivered in conformity with the specifications provided in the order for such materials;
2. The material supplier sends notice of nonpayment to the general contractor, surety, and owner at least 45 days after delivery of the material; and
3. The material supplier has not been paid in full within 90 days of delivery of the material.

The exception appears applicable to any material supplier who qualifies as a "seller" under the Private Works Act or a "materialman" under the Public Works Act and statutes governing claims on DOTD-owned projects.

Notably, the amendments seem to require that the surety make payment within 10 days from the *mailing* of the payment notice rather than 10 days from the surety's *receipt* of the notice.

If you have questions about this recent legislation or other construction-related legal issues, please contact [Mark W. Mercante](#), [Mark W. Frilot](#), [Max C. Hadley](#), or any member of Baker Donelson's [Construction team](#).