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WHAT DOES YOUR CONTRACT SAY?

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August 3, 2011



INTRODUCTION

“What does the contract say?”

That is the question most of you have heard numerous times from your attorneys in response to a question regarding particular rights or obligations on a project. That is because, under well-settled Louisiana law, the contract is the law between the parties. LA. CIV. CODE ANN ART. 1983 (2010). It is essential that contracting parties know and understand all of the terms of their contract, as well as the practical consequences thereof. Indeed, “knowledge is power”, and a keen understanding of contractual provisions and their effects might provide a strategic edge in the negotiation process, or in the least provide a roadmap of landmines to avoid. Further, without knowledge of the terms, parties can inadvertently create disputes by failing to honor all obligations to which they have agreed or may fail to exercise all rights that they have been given.

Although not intended as a comprehensive enumeration of all potential contractual clauses and issues that might arise, the purpose of this presentation is to highlight some provisions of which contracting parties should “be aware”. Otherwise, your contract provisions may become something you will “beware”.

I. CONTRACT SCOPE AND HIERARCHY

Likely the most elementary of the crucial contractual provisions are those that are sometimes overlooked – What is to be performed and by whom? Ignorance of those essential provisions can be catastrophic.

A. What Is Included in Your Contract?

Since the contract is the “law between the parties”, the contract documents provide the text of those laws. To understand the terms, you must consider that a contract not only includes the terms contained in the “signed agreement,” such as an AIA A101, but also the terms of any other document incorporated by reference. *Russellville Steel Co., Inc. v. A & R Excavating, Inc.*, 624 So. 2d 11 (La. App. 5 Cir. 1993). In other words, to fully understand each party’s rights and obligations, it is imperative to not only know and understand the terms of the signed agreement, but also the terms of all other documents that have been incorporated into that agreement. Documents incorporated by reference are as much a part of the signed agreement as if they had been re-written in the agreement.

Most contracts have a provision defining, at least generally, what documents make up the “contract documents” (which are all of the documents included in the contract by reference). For example, the AIA form A101-2007, Standard Form of Agreement between Owner and Contractor, lists all contract documents in Article 1, as does the AIA form A401-2007, Standard Form of Agreement between Contractor and Subcontractor. These articles incorporate by reference: conditions of the contract (general, supplementary and others), drawings, specifications, addenda issued prior to execution, other documents listed in the agreement and modification issued after execution.

1. Review the Enumeration of Plans, Specifications, Proposals, and Other Documents to Confirm Accuracy.

While there may be a general “contract documents” provision listing all documents to be considered as part of the agreement, there also may be a specific provision enumerating and listing the contract documents, such as the AIA Form 101, Article 9 or AIA Form 401, Article 16. Regardless of whether there is only a general provision or a more specific listing, it is crucial that both contracting parties agree on and understand not only the documents being incorporated, like drawings, specifications, etc., but the specific drafts that are being incorporated. The usual practice is to reference the documents by name and draft date. A better practice is to initial the specific documents that are to be considered incorporated so that there is no dispute as to what was intended to be incorporated. It is easy to have misunderstandings where there are multiple drafts and revisions to drafts being circulated before the contract is executed, as some may have the same date or different/outdated drafts may have inadvertently been used for revisions.

Many contractors on private projects include limitations in their bid proposals. However, if those proposals are not specifically incorporated into the final contract, a court likely will determine later that those limitations do not apply. It is imperative that the bid proposal (or at least the specific limitations contained in the proposal) be incorporated by reference into any final contract, even though the document was exchanged in the bidding process and formed a basis of the contractor’s willingness to perform the work. Louisiana law recognizes that when a contract can be interpreted through its four corners, the parties are not allowed to reference extraneous documentation. LA. CIV. CODE ANN. art. 1848 (2010); *See Sanders v. Ashland Oil, Inc.*, 696 So. 2d 1031, 1036 (La. App. 1 Cir. 1997) (stating “[c]ontracts, subject to interpretation from the instrument's four corners without the necessity of extrinsic evidence, are to be interpreted as a matter of law, and the use of extrinsic evidence is proper only where a contract is ambiguous after an examination of the four corners of the agreement”). This issue becomes more critical when the contract also contains an “integration” or “merger” clause providing that the contract represents the entire agreement between the parties and supersedes any prior negotiations or agreements. *Condrey v. SunTrust Bank of Georgia*, 429 F.3d 556, 564 (5th Cir. 2005) (stating “by its very definition, an integration or merger clause negates the legal introduction of parole evidence”). A sample integration clause is set forth below:

This Subcontract and the Contract Documents, insofar as they relate in any part or in any way to the Work undertaken herein, represents the entire and integrated agreement between the parties hereto, and supersedes prior negotiations, representations or agreements, either written or oral, and any additions or changes to this Subcontract shall be in writing.

2. Review Statute and Code References that Might Be Included by Reference – Federal Labor Standards, Owner’s Guidelines, Policies, etc.

Some contracts may also incorporate non-traditional documents, such as owner guidelines for how work in occupied buildings will be performed or the prime contractor’s drug testing procedures. Other contract provisions may incorporate by reference labor standards,

specific statutes and codes, as well as a variety of other standards. Examples of various inclusion by reference clauses are below:

Subcontractor acknowledges he has read Contractor's "Hazard Communications", Policy Number 201, Effective Date 1-01-93. This policy is made a part of this Subcontract Agreement as if attached, and Subcontractor agrees to enforce provisions of this policy on his employees and his Subcontractors' and vendors' employees. The Subcontractor and will abide by all requirements of the program where it is more stringent than Subcontractor's program.

The Subcontractor acknowledges he has read Contractor's "Corporate Safety and Health Policy (Program)", Policy Number 100, Effective Date 11-01-92. This policy is made a part of this Subcontract Agreement as if attached, and Subcontractor agrees to enforce provisions of this policy on his employees and his Subcontractors' and vendors' employees. The Subcontractor also agrees to abide by any job site procedures on site access, parking or other site specific requirements the Contractor may establish.

The Subcontractor acknowledges he has read Contractor's "Substance Abuse/Self-Help Referral Policies (Program)", Policy Number 110, Effective Date 3-01-92. This policy is made a part of this Subcontract Agreement as if attached and Subcontractor agrees to enforce provisions of this policy on his employees and his Subcontractors' and vendors' employees. Under the policy, Contractor has the right to request random testing at the Project site, and in cases of accident of Subcontractors' employees and his Subcontractors' and vendors' employees.

3. Understand Any Incorporation of Other Contracts and Assumptions of Duties.

Most subcontracts include a provision that incorporates by reference the prime contract between the owner and the prime contractor. This is understandable and expected from the prime contractor, inasmuch as the subcontractor is agreeing to perform a portion of the work that the prime contractor has agreed to perform for the owner.

The issues that usually arise in assuming duties in the prime contract are that (1) a copy of the prime contract is not provided to the subcontractor; (2) the incorporation is not limited to how the prime contract affects the work being performed by the subcontractor; and/or (3) the incorporation language is not bilateral.

While it is best for the subcontractor to avoid having the prime contract incorporated into its subcontract, it is not likely that the subcontractor can escape such incorporation. An example of an incorporation provision that is problematic for the subcontractor is set forth below:

The Subcontractor shall be bound to the Contractor by all terms and conditions of this Subcontract and, except as otherwise provided herein, by all terms and conditions of the Prime Contract between the Owner and Contractor, which is incorporated by reference into this Subcontract and is an integral part of this Subcontract. The Prime Contract includes, but is not limited to, the Agreement between the Contractor and the Owner; all general, supplementary, special conditions; all drawings, specifications, details, and standards; all addenda, modifications, and revisions to any of the foregoing; and all other documents or requirements incorporated into or referenced by the foregoing. The Subcontractor shall assume toward the Contractor all the obligations and responsibilities which the Contractor, by the Prime Contract, assumes toward the Owner. In the event of an ambiguity or conflict in payment or other provisions between the Prime Contract and the Subcontract, this Subcontract shall govern.

A generally acceptable incorporation provision is found in the AIA Form A401, Article 2, set forth below:

ARTICLE 2 MUTUAL RIGHTS AND RESPONSIBILITIES

The Contractor and Subcontractor shall be mutually bound by the terms of this Agreement and, to the extent that the provisions of AIA Document A201–2007 apply to this Agreement pursuant to Section 1.2 and provisions of the Prime Contract apply to the Work of the Subcontractor, the Contractor shall assume toward the Subcontractor all obligations and responsibilities that the Owner, under such documents, assumes toward the Contractor, and the Subcontractor shall assume toward the Contractor all obligations and responsibilities which the Contractor, under such documents, assumes toward the Owner and the Architect. The Contractor shall have the benefit of all rights, remedies and redress against the Subcontractor that the Owner, under such documents, has against the Contractor, and the Subcontractor shall have the benefit of all rights, remedies and redress against the Contractor that the Contractor, under such documents, has against the Owner, insofar as applicable to this Subcontract. Where a provision of such documents is inconsistent with a provision of this Agreement, this Agreement shall govern.

B. There Should be a Specific Hierarchy of Contract Documents.

Not only is it important to understand exactly which documents are incorporated into and form the terms of your contract, it is equally important to understand the relationship between and among those documents. No matter how much time and effort goes into drafting documents, there will always be conflicts between documents. Without a clause specifically delineating

which document controls in a conflict, the parties are left arguing the standard contract interpretation language -- the more specific governs over the more general. *See, e.g., Smith v. Burton*, 928 So. 2d 74 (La. App. 1 Cir. 2005); *Mixon v. St. Paul Fire & Marine Ins. Co. of St. Paul, Minn.*, 84 So. 790 (La. 1920). Of course, such concepts may lead to different results depending on whether the court determines that plans or specifications are more specific.

Some contracts simply provide that, should there be a conflict between individual contract documents, the document requiring the highest and best standard applies. There is nothing inherently wrong with resolving conflicts in this manner, but the contractor must understand that he is agreeing to this standard. Some contracts provide that if there is a conflict between the individual contract documents, the prime contractor (in the case of a subcontract) or the owner (in the case of a prime contract) gets to decide the true intent and proper construction and correct meaning of the drawings and specifications. These provisions are obviously problematic for the party that does not get to make the determination.

It is best for all parties to include a specific clause delineating the hierarchy of documents, and to let the documents speak for themselves, without reserving either party's ability to make binding determinations. Under these circumstances, each party gets to interpret the documents, but those determinations are subject to review by a court, which review generally stimulates amicable resolutions of disputes.

II. OWNERSHIP/INTELLECTUAL PROPERTY ISSUES

Although typically not at the forefront during parties' contract negotiations, there are significant intellectual property issues of which contracting parties should be aware, including issues involving intellectual property rights regarding the design on the project and rights regarding inventions and processes developed during the project.

A. "Instruments of Service" and Intellectual Property Rights Regarding Design

Under the AIA A201-2007, "Instruments of Service" are defined as:

representations, in any medium of expression now known or later developed, of the tangible and intangible creative work performed by the Architect and the Architect's consultants under their respective professional services agreements. Instruments of Service may include, without limitation, studies, surveys, models, sketches, drawings, specifications, and other similar materials.¹

Most contracts, like the A201, typically provide that the architect and the architect's consultants are deemed the authors and owners of their respective Instruments of Service and retain all ownership rights, including copyrights:

§ 1.5.1 The Architect and the Architect's consultants shall be deemed the authors and owners of their respective Instruments of

¹ *See* A201-2007, § 1.1.7.

Service, including the Drawings and Specifications, and will retain all common law, statutory and other reserved rights, including copyrights. The Contractor, Subcontractors, Sub-subcontractors, and material or equipment suppliers shall not own or claim a copyright in the Instruments of Service. Submittal or distribution to meet official regulatory requirements or for other purposes in connection with this Project is not to be construed as publication in derogation of the Architect's or Architect's consultants' reserved rights.²

However, in some instances, an owner or contractor (if the design professional is retained by the contractor) may wish to revise or include contractual provisions in both the design contract and prime contract to provide that they instead own all intellectual property rights to the design, especially when significant fees are paid to the design professional and when the owner or contractor might possibly utilize the design or aspects thereof for future projects.

B. Indemnity Regarding Intellectual Property Rights.

Many contracts, like the A201-2007, also require the contractor to indemnify the owner and architect from damages regarding claims for infringement of copyrights and patent rights due to a contractor's failure to pay all necessary royalties and license fees:

§ 3.17 ROYALTIES, PATENTS AND COPYRIGHTS

The Contractor shall pay all royalties and license fees. The Contractor shall defend suits or claims for infringement of copyrights and patent rights and shall hold the Owner and Architect harmless from loss on account thereof, but shall not be responsible for such defense or loss when a particular design, process or product of a particular manufacturer or manufacturers is required by the Contract Documents, or where the copyright violations are contained in Drawings, Specifications or other documents prepared by the Owner or Architect. However, if the Contractor has reason to believe that the required design, process or product is an infringement of a copyright or a patent, the Contractor shall be responsible for such loss unless such information is promptly furnished to the Architect.³

In a non-AIA contract, a contractor should ensure that, like the A201-2007, the contractor is not undertaking the obligation to indemnify the owner and design professional from all claims

² See A201-2007, § 1.5.1.

³ See A201-2007, § 3.17.

for infringement of copyrights and patent rights, since some claims may arise from the design professionals' or owner's infringement in the design.⁴

C. Inventions and Processes Developed During the Project.

Although not typically at issue, contractors should also consider carefully provisions regarding the intellectual property ownership of inventions and processes developed during the project. Some owners insert provisions stating that the owner owns all intellectual property regarding all inventions and processes developed by a contractor on a project. If the contractor believes there may be new processes or inventions developed as a result of the project work, and wishes to retain all associated intellectual property rights, the contractor should strike such a provision.

III. OWNER'S SEPARATE CONTRACTORS

If an Owner will be using separate contractors for any portion of the project, it is imperative that you pay close attention to any provisions of your contract that address coordination efforts with those additional contractors. Some owners will insert provision into prime contracts requiring that the prime contractor agree to schedule its work so as to not interfere with the other owner contractors' work. While such a provision may seem innocuous at first blush, it could cause unforeseen costs to the prime contractor if such coordination efforts affect the prime contractor's productivity and ability to schedule its work in the most efficient manner.

Prime contractors should secure language limiting their obligations to accommodate owner contractors to accommodations that are reasonable under the circumstances, and should seek contract language preserving the prime contractor's ability to recover additional costs incurred due to unforeseeable or unreasonable actions by the owner's other contractors.

IV. REVIEW AND ACCEPTANCE OF SITE CONDITIONS

Typically, contractors should ensure their contracts confirm that they are not responsible for unforeseen site conditions that may arise during a project. However, some contracts might include representations that a contractor has reviewed the site and confirmed that the site is acceptable for the project work. Such a provision, while benefiting owners, can erode a contractor's ability to recover claims regarding unforeseen site conditions. Instead, contractors should limit such language to include, at most, a representation that the contractor has visited the site and is *generally* familiar with the site conditions under which the work is to be performed. For example, the A201-1997 provides such a compromise:

§ 3.2.1 Execution of the Contract by the Contractor is a representation that the Contractor has visited the site, become generally familiar with local conditions under which the Work is to

⁴ *Id.*

be performed and correlated personal observations with requirements of the Contract Documents.⁵

V. REVIEW AND ACCEPTANCE OF DESIGN

Some contracts may contain provisions stating that a contractor has reviewed the design, has confirmed that there are no errors, omissions, or inconsistencies in the plans and specifications, and that the design is appropriate for the project. Because such provisions erode or eliminate protections provided contractors under Louisiana law, contractors should avoid such provisions.

Louisiana law provides that:

No contractor, including but not limited to a residential building contractor, as defined in R.S. 37:2150.1(9), shall be liable for destruction or deterioration of or defects in any work constructed, or under construction, by him if he constructed, or is constructing, the work according to plans or specifications furnished to him which he did not make or cause to be made and if the destruction, deterioration, or defect was due to any fault or insufficiency of the plans and specifications. This provision shall apply regardless of whether the destruction, deterioration, or defect occurs or becomes evident prior to or after delivery of the work to the owner. The provisions of this Section shall not be subject to waiver by the contractor.

La. R.S. 9:2771.

Accordingly, although La. R.S. 9:2771's protections cannot be contractually waived, those protections can be eroded if the contractor participates in the design or adopts and approves the project design. *See Hageman v. Foreman*, 539 So. 2d 678, 682 (La. App. 3 Cir. 1989); *A & M Pest Control Serv., Inc. v. Fejta Constr. Co., Inc.*, 338 So. 2d 946, 951 (La. App. 4 Cir. 1976).

Of course, contractors may receive resistance from owners regarding elimination of such provisions, and owners typically justify their resistance due to their reliance on the Contractor's experience. In such a case, the contractor might offer a compromise and adopt a provision stating that, while the contractor is not responsible for the design, the contractor is obligated to report and request clarification regarding any *known* errors, inconsistencies, or omissions in the design, similar to what is provided in the A201-2007:

§ 3.2.2 Because the Contract Documents are complementary, the Contractor shall, before starting each portion of the Work, carefully study and compare the various Contract Documents relative to that portion of the Work, as well as the information furnished by the Owner pursuant to Section 2.2.3, shall take field

⁵ See A201-2007, § 3.2.1.

measurements of any existing conditions related to that portion of the Work, and shall observe any conditions at the site affecting it. These obligations are for the purpose of facilitating coordination and construction by the Contractor and **are not for the purpose of discovering errors, omissions, or inconsistencies in the Contract Documents; however, the Contractor shall promptly report to the Architect any errors, inconsistencies or omissions discovered by or made known to the Contractor as a request for information in such form as the Architect may require. It is recognized that the Contractor's review is made in the Contractor's capacity as a contractor and not as a licensed design professional, unless otherwise specifically provided in the Contract Documents.**

§ 3.2.3 The Contractor is not required to ascertain that the Contract Documents are in accordance with applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities, but the Contractor shall promptly report to the Architect any nonconformity discovered by or made known to the Contractor as a request for information in such form as the Architect may require.

§ 3.2.4 If the Contractor believes that additional cost or time is involved because of clarifications or instructions the Architect issues in response to the Contractor's notices or requests for information pursuant to Sections 3.2.2 or 3.2.3, the Contractor shall make Claims as provided in Article 15. **If the Contractor fails to perform the obligations of Sections 3.2.2 or 3.2.3, the Contractor shall pay such costs and damages to the Owner as would have been avoided if the Contractor had performed such obligations. If the Contractor performs those obligations, the Contractor shall not be liable to the Owner or Architect for damages resulting from errors, inconsistencies or omissions in the Contract Documents, for differences between field measurements or conditions and the Contract Documents, or for nonconformities of the Contract Documents to applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities.**⁶

VI. PAYMENT ISSUES

There are many issues that may arise in connection with contract payments. It seems that owners and prime contractors continue to come up with creative ways to make getting paid more complicated.

⁶ See A201-2007, §§ 3.2.2, 3.2.3, and 3.2.4 (emphasis added).

A. “Pay when Paid” v. “Pay if Paid” Clauses

Prime contractors routinely seek to limit their payment obligations to subcontractors to situations where the prime contractor has been paid by the owner. Obviously, a prime contractor does not want to fund the project for the owner in the hope that it eventually gets paid. Louisiana courts, however, draw a distinction between “paid when paid” clauses and “paid if paid” clauses. *Vector Elec. & Controls, Inc. v. JE Merit Constructors, Inc.*, 2006 WL 3208462 (La. App. 1 Cir. 2006). If the court determines that the subcontractor payment clause is a “paid when paid” clause, the prime contractor will not be excused from paying its subcontractor, even if the prime contractor does not eventually get paid by the owner. *Southern States Masonry, Inc. v. J.A. Jones Const. Co.*, 507 So. 2d 198, 205 (La. 1987) (interpreting a “paid when paid” clause, the court stated that “normally and legally, the insolvency of the owner will not defeat the claim of the subcontractor against the prime contractor.”) However, if the court finds that the parties entered into a “paid if paid” clause, the prime contractor’s obligation to pay the subcontractor does not arise unless the prime contractor is paid by the owner. *Imagine Const., Inc. v. Centex Landis Const. Co., Inc.*, 707 So. 2d 500, 502 (La. App. 4 Cir. 1998) (interpreting a “paid if paid” clause, the court stated that “payment is to be made to the subcontractor only if actual payment is made to the contractor by the owner.”)

In order to find that a clause is a “paid if paid” clause rather than a “paid when paid” clause, the law requires that the document expressly provide that payment by the owner is a condition precedent or suspensive condition⁷ to any obligation by the prime contractor to pay the subcontractor. For instance in *Imagine Const., Inc.*, the contract language provided that “actual receipt of full payment from Owner shall be a condition precedent to the bringing of any action by Subcontractor . . . relating to Contractor's failure to make payment.” *Id.* at 502. The contract language was upheld as a valid suspensive condition. The AIA Form A401 provides only that “[t]he Contractor shall pay the Subcontractor each progress payment no later than seven working days after the Contractor receives payment from the Owner.” Under Louisiana law, this language likely is insufficient to qualify as a “paid if paid” clause. Another example of a “paid if paid” clause is set forth below:

Notwithstanding anything to the contrary in this Subcontract, in the Prime Contract, or in any bond or other document, the Owner’s approval of the Subcontract Work for which payment is requested and the Contractor’s actual receipt of payment from the Owner for such work shall both be absolute conditions precedent to any right of the Subcontractor to receive any form of payment whatsoever from the Contractor. Both progress payments and final payment to the Subcontractor shall be made only out of funds actually received by the Contractor from the Owner for progress payments or for

⁷ Black’s Law Dictionary defines “condition precedent” as “[a]n act or event, other than a lapse of time, that must exist or occur before a duty to perform something promised arises.” The Louisiana Supreme Court recognized in *Southern States Masonry, Inc. v. J.A. Jones Const. Co.*, 07 So. 2d 198, 204 n. 15 (La. 1987), that the common law term “condition precedent” is analogous to the civilian term “suspensive condition.”

final payment of the Prime Contract and only to the extent said progress payments or final payment reflect Subcontract Work which has been satisfactorily performed by Subcontractor in strict accordance with this Subcontract and which has been approved and paid by Owner.

From a subcontractor's perspective, such "paid if paid" clauses can be very onerous, as the subcontractor must meet payroll and pay its expenses, regardless of whether it has received payment from the prime contractor. Should the subcontractor be faced with a "paid if paid" clause, other than bargain away that clause, it should insure that all other rights to payments against the owner and privileges against the owner's property are preserved. In addition, the Subcontractor must insure that the owner does not get too far "in front" on the project, which ability is tied directly to the subcontractor's and contractor's ability to suspend work for non payment. Subcontractors also should attempt to limit the applicability of the "paid if paid" clause to nonpayment by the owner related to the subcontractor's work, which is a reasonable request of a prime contractor.

B. Other Prerequisites to Payment

Other issues affecting both the prime contractor's and subcontractor's ability to secure payment for their work are conditions imposed with submitting payment applications. One such onerous condition is that of proving payment to those down the chain before being entitled to payment from the owner or prime contractor. These clauses essentially require that the lower-tier contractor fund the job. A better middle ground is to require proof of payment to subcontractors and vendors to the extent of previous payments received. It is also reasonable for prime contractors and subcontractors to obtain, "conditional releases" which are not effective unless and until the funds are distributed.

Prime contractors and subcontractors also should pay close attention to adjectives describing their work in connection with payment provisions. For example, prime contractors and subcontractors should be careful agreeing to language requiring payment for work that has been performed only in "strict accordance" with contract documents. More problematic is language that provides that payment will be made only if the work has been performed to the satisfaction of the owner or prime contractor or only if it has been accepted by the owner or prime contractor. This concern also applies if the approval or acceptance of the architect is required before payment. It is better to agree to language providing that the work will be performed in accordance with contract documents and do not allow a specific individual to make a binding determination of what work is "in accordance."

C. Evidence of Owner's Ability to Pay

A critical issue for both prime contractors and subcontractors is the owner's ability to fund the project. With more and more project-specific entities being formed, and financial institutions perfecting their privileges on project property, contractors are left generally trusting that they will be compensated for their effort. A key provision relating to this issue requires the owner to provide the prime contractor with proof of funding. This proof most likely would be in the form of approved financing from a lender. Subcontractors generally have no right to

contractually require proof of financing from the owner, but can require that the prime contractor obtain such proof.

It is in the prime contractor's best interest to have, as a prerequisite to beginning work, a requirement that the owner provide proof of the owner's ability to pay. In addition, the prime contract should allow the prime contractor to seek additional proof through out the project should the prime contractor have reasonable cause to believe funding issues have change. Not only should the prime contractor require that the owner supply proof of the project's financial viability, but the prime contract should specifically provide for the prime contractor's right to suspend its work until the proof has been provided, as well as to terminate the contract should the proof not be provided within a specified period of time.

VII. CLAIMS

Like the payment provisions discussed above, provisions governing a contractor's or subcontractor's claims are important and warrant attention. Contractors and subcontractors should be aware of provisions concerning the timing and presentation of claims as well as limitations on claims that can be asserted.

Clauses setting forth notice requirements in construction contracts generally state that a contractor must give certain timely notices to the owner of events giving rise to claims for additional compensation or damages. Most typical is a notice requirement regarding delays to the contractor's performance. Many times such clauses require written notice delivered to a specified address within a certain period of time. *See O & M Const., Inc. v. State, Div. of Admin.*, 576 So. 2d 1030, 1045 (La. App. 1 Cir. 1991) (contractor's delay claim rejected on alternative bases of failure to provide notice and failure to prove delay). Louisiana courts have generally held that the terms of the contract bind the parties; if the notice provision is clear and unambiguous, it will be enforced. *Equitable Real Estate Co. v. National Surety Co.*, 63 So. 104, 107 (La. 1913); *Pamper Corp. v. Town of Marksville*, 208 So. 2d 715 (La. App. 3 Cir. 1968), *writ denied*, 210 So. 2d 509 (La. 1968); *Meaux v. Southern Constr. Corp.*, 159 So. 2d 156 (La. App. 3 Cir. 1963), *writ denied*, 162 So. 2d 9 (La. 1964).

Nevertheless, the parties may tacitly revoke notice clauses through their actions. Failure to insist on compliance with notice requirements may waive all or a part of the notice requirements. *See Nat Harrison Assoc, Inc. v. Gulf States Utilities Co.*, 491 F.2d 578, 583, *reh'g denied*, 493 F.2d 1405 (5th Cir. 1974); *Compagna v. Smallwood*, 428 So. 2d 1343, 1348 (La. App. 4 Cir. 1983); *Pelican Elec. Contractors v. Neumeyer*, 419 So. 2d 1, 4-5 (La. App. 4 Cir. 1982), *writ denied*, 423 So. 2d 1150 (La. 1982).

Another clause commonly found in construction contracts is a "no damage for delay" clause. At first blush, some "no damage for delay" clauses may seem to violate public policy in that they state that no claim shall be made or allowed for damages that arise out of certain types of delay, even some delays caused or controlled by the owner. The Louisiana Supreme Court, however, has found that such clauses are not necessarily against public policy. *Freeman v. Dep. of Highways*, 217 So. 2d 166, 170-71, 175-76 (La. 1968).⁸ Despite this, due to the possibility of

⁸ Louisiana's Public Works Act, however, provides that "[a]ny provision contained in a public contract which purports to waive, release, or extinguish the rights of a contractor to recover cost of damages, or obtain

severe or harsh results which may result from the use of a “no damage for delay” clause, such clauses are strictly construed. *U.S. Indus., Inc. v. Blake Constr. Co.*, 671 F.2d 546, 544 (D.C. Cir. 1982).

Some contracts also provide for limitations and caps regarding amounts that can be included in claims. For example, some contracts provide limitations regarding the overhead and profit that can be charged for extra work, depending on whether the work is performed by the contractor or subcontractor. One such example of such a clause is below:

The Contractor and Subcontractor shall be due job-site and home office fixed overhead and profit on the Cost of the Work, but such overhead and profit shall not exceed a combined total of 10% of the direct cost of any portion of work. Additionally, when all or substantially all (as defined in the next sentence) of the Work reflected on a Change Order is to be performed by one or more Subcontractor, the Prime contractor shall not be entitled to charge Overhead and Profit on the Subcontractor’s Overhead and Profit. For purposes of this Section, “substantially all” shall mean 95% of the value of the Work reflected on the Change Order, excluding the Prime contractor’s fixed job site overhead costs, bond premium costs and insurance costs.

Some contracts also include waivers of consequential damages. In such a case, although such provisions are not typically disfavored, contracting parties should ensure that the damages waived are clearly and accurately defined. One such example is found in the A201-2007:

§ 15.1.6 CLAIMS FOR CONSEQUENTIAL DAMAGES

The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes

- .1 damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and
- .2 damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit except anticipated profit arising directly from the Work.

equitable adjustment, for delays in performing such contract, if such delay is caused in whole, or in part, by the acts or omissions within the control of the contracting public entity or persons acting on behalf thereof, is against public policy and is void or unenforceable.” La. R.S. 38:2216 (H).

This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination in accordance with Article 14. Nothing contained in this Section 15.1.6 shall be deemed to preclude an award of liquidated damages, when applicable, in accordance with the requirements of the Contract Documents.⁹

Finally, in addition to the contract itself, contractors and subcontractors should pay careful attention to provisions of other contract documents that may result in a waiver of claims. For example, change orders might include language similar to the language below:

Acceptance of this Change Order will concede and acknowledge receipt of payment for any and all project changes, delays, or charges of any kind to date associated with the referenced project, monetary or otherwise.

In such circumstances, execution of the change order might effectively waive any delay or extra work claims currently pending or remaining to be fully negotiated between the parties.

On the other hand, despite inclusion of notice or waiver provisions, a party might nevertheless claim that the contract has been modified and waiver or notice provisions have been modified. For example, even where the original contract contains a provision that the owner is not liable unless change orders are in writing, construction contracts may be modified orally. *Pelican Elec. Contractors v. Neumeyer*, 419 So. 2d 1, 4-5 (La. App. 4 Cir. 1982), *writ denied*, 423 So. 2d 1150 (La. 1982); *see also Wisinger v. Casten*, 550 So. 2d 685, 687 (La. App. 2 Cir. 1989); *Grossie v. Lafayette Constr. Co.*, 306 So. 2d 453, 455-56 (La. App. 3 Cir. 1975), *writ denied*, 309 So. 2d 354 (La. 1975); *Anzalone v. Gregory*, 334 So. 2d 504, 506-7 (La. App. 1 Cir. 1976).

A waiver of contractual provisions or requirements may also arise from the actions of the parties. *See, e.g., Big "D" Dirt Services, Inc. v. Westwood, Inc.*, 94-1234 (La. App. 3 Cir. 1995), 653 So. 2d 604. The defense of implied waiver often succeeds when one party has failed to protest a breach of the contract and has continued to perform subsequent to the other party's breach. *Keating v. Miller*, 292 So. 2d 759, 761 (La. App. 4 Cir. 1974). As with other affirmative defenses, the burden of proof is on the party claiming waiver, who must show that the other party had knowledge of its contractual rights and intentionally waived them. *Michel v. Efferson*, 65 So. 2d 115, 119 (La. 1952); *V.P. Owen Constr. Co. v. Dunbar*, 532 So. 2d 835, 837 (La. App. 4 Cir. 1988); *Hemenway Co., Inc. v. Bartex, Inc.*, 373 So. 2d 1356, 1360 (La. App. 1 Cir. 1979), *writ denied*, 376 So. 2d 1272 (La. 1979).

VIII. LIEN ISSUES

Some contract provisions can significantly limit or affect a party's right to assert claims and privileges under the Louisiana Private Works Act, La. R.S. 9:4801, *et seq.*

⁹ A201-2007, § 15.1.6.

First and foremost, a contractor or subcontractor should ensure there is no lien waiver provision in their contract. If so, Louisiana law typically supports enforceability of such waivers, and generally, even where a waiver is included in a subcontract, courts have held that owners can be third party beneficiaries of the lien waiver. *Shaw Constructors v. ICF Kaiser Engineers, Inc.*, 395 F.3d 533 (5th Cir. 2004). Nevertheless, there are some instances in which courts have not enforced lien waivers. For example, in *Shaw*, the U.S. Fifth Circuit held that, when it became evident that a prime contractor was not going to perform under the subcontract (*i.e.*, pay the subcontractor) and had materially breached the subcontract, the subcontractor was entitled to consider the subcontract dissolved, and as a result, the lien waiver, which was part of that subcontract, was no longer effective or enforceable. *Id.* at 539-50.

General contractors and subcontractors also should be aware that a Private Works Act claim against an owner is only secured by a privilege on the interest of that owner in the property on which the project is being constructed. La. R.S. 9:4806(C). The claims against an owner are “limited to the owner or owners who have contracted with the contractor or to the owner or owners who have agreed in writing to the price and work of the contract of a lessee, wherein such owner or owners have specifically agreed to be liable for any claims granted by the provisions of La. R.S. 9:4802.” La. R.S. 9:4806(B). Accordingly, if the “owner” under a contract is a lessee, a contractor’s or subcontractor’s claims might only be secured by an interest in the lease unless an appropriate acknowledgment has been executed by the actual property owner.

Further, similar to the claims provisions discussed above, some contracts contain certain time limitations and conditions precedent that must be met before a lien can be filed. For example, one subcontract included the following provision:

Subcontractor agrees not to initiate, file, or cause to be filed any lien, lawsuit, statement of claim, privilege, encumbrance, any claim under the Public Works Act, any lien under the Private Works Act, or any other claim or encumbrance (hereinafter “lien”) in any way related to the work performed on any piece of immovable property including any piece of property upon which the subcontractor supplied materials, performed work, or rendered services, unless each and every one of the following steps are performed by the subcontractor prior to the lien or suit being filed:

- a. Subcontractor must send Contractor certified mail (return receipt requested) demanding payment for work performed and must provide written proof that payment is owed (this includes, but is not limited to, proof of insurance, each and every notarized draw request, copies of all payments previously made by Contractor, all correspondence between the subcontractor and any other person or entity relating to the work or services performed or attempted by the subcontractor, and any other relevant documents or information including e-mails) and allow Contractor at least 30 days to evaluate the claim made by subcontractor;

- b. Subcontractor must strictly comply with each and every term and condition contained elsewhere in this contract;
- c. Subcontractor must comply with parts “a” and “b” set forth above and then wait for the 30 days to elapse set forth above in part “a”;
- d. After subcontractor complies with parts “a,” and “b,” and “c” and waits for the 30 days to elapse, subcontractor must then initiate and conduct non-binding formal mediation with Contractor in accordance with the Louisiana Mediation Act at the sole pre-paid expense of the subcontractor (Contractor will have the sole right to select the mediator and mediation company for the mediation which will take place at a location of Contractor’s choosing);
- e. If the claim made the subcontractor is not settled in the mediation process set forth above, subcontractor must then send Contractor a certified letter, return receipt requested, indicating that the subcontractor intends to file a lien and/or suit (hereinafter “Notice of intent to file lien or suit”) at the expiration of 30 days from the date Contractor actually receives the certified “Notice of Intent to File Lien or Suit”;
- f. At the expiration of the 30 day “Notice of Intent to File Lien or Suit” period set forth in part “e” above, subcontractor must obtain a bond and present a bond for the full amount of the lien and/or suit the subcontractor intends to file plus 25% from a good and solvent surety;
- g. Subcontractor must then present the proposed bond to Contractor via certified mail so that Contractor may have at least 10 business days to review the proposed bond to determine if the bond is sufficient;
- h. If Contractor accepts the bond provided by the subcontractor, the subcontractor may then file a lien or suit if and only if the lien or suit is proper and lawful.

Contractor agrees that it will not file any lien or suit unless each and every one of the steps listed in “a” through “h” are complied with prior to the lien or suit being filed.

Although the example above is quite extreme, contractors and subcontractors should be wary of any provisions that require them to jump through a multitude of hoops before asserting their lien rights.

IX. TERMINATION

One of the most important contract clauses addresses the criteria for terminating the contract. Generally, these provisions contemplate two types of terminations -- terminations for cause and terminations for convenience.

A. For Cause by Owner

The first issue to be addressed in a termination of the contractor for cause provision is the grounds for termination. Typically, these grounds include:

§ 14.2 TERMINATION BY THE OWNER FOR CAUSE

§ 14.2.1 The Owner may terminate the Contract if the Contractor

- .1** repeatedly refuses or fails to supply enough properly skilled workers or proper materials;
- .2** fails to make payment to Subcontractors for materials or labor in accordance with the respective agreements between the Contractor and the Subcontractors;
- .3** repeatedly disregards applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of a public authority;
- .4** fails to furnish the Owner with assurances evidencing the Contractor's ability to complete the Work in compliance with all requirements of the Contract Documents;
- .5** fails after commencement of the Work to proceed continuously with the construction and completion of the Work for more than ten (10) days, except as permitted under the Contract Documents; or
- .6** otherwise is guilty of substantial breach of a provision of the Contract Documents.¹⁰

It is important for the contractor to review the grounds for termination in the contract to determine if they are reasonable and acceptable. It also is important to insure that the provision does not allow the owner or architect to unilaterally determine whether a ground for termination exists.

If a contractor is terminated for cause, the owner usually reserves the right to take over the work, including material and equipment of the prime contractor, to accept assignment of subcontracts and to withhold any further payment under the contract until the work is completed. In fact, the terminated contractor usually is liable for any costs to complete the work in excess of what would have been paid under the contract. For example:

¹⁰ Based on A201-2007, § 14.2.1.

§ 14.2.2 When any of the above reasons exist, the Owner, upon certification by the Initial Decision Maker that sufficient cause exists to justify such action, may without prejudice to any other rights or remedies of the Owner and after giving the Contractor and the Contractor's surety, if any, seven days' written notice, terminate employment of the Contractor and may, subject to any prior rights of the surety:

- .1 Exclude the Contractor from the site and take possession of all materials, equipment, tools, and construction equipment and machinery thereon owned by the Contractor;
- .2 Accept assignment of subcontracts pursuant to Section 5.4; and
- .3 Finish the Work by whatever reasonable method the Owner may deem expedient. Upon written request of the Contractor, the Owner shall furnish to the Contractor a detailed accounting of the costs incurred by the Owner in finishing the Work.

§ 14.2.3 When the Owner terminates the Contract for one of the reasons stated in Section 14.2.1, the Contractor shall not be entitled to receive further payment until the Work is finished.

§ 14.2.4 If the unpaid balance of the Contract Sum exceeds costs of finishing the Work, including compensation for the Architect's services and expenses made necessary thereby, and other damages incurred by the Owner and not expressly waived, such excess shall be paid to the Contractor. If such costs and damages exceed the unpaid balance, the Contractor shall pay the difference to the Owner. The amount to be paid to the Contractor or Owner, as the case may be, may be certified by the Initial Decision Maker, upon application by Owner, and this obligation for payment shall survive termination of the Contract.¹¹

Other important issues involve notice of the alleged default and a reasonable time for the prime contractor to cure that default. Owners routinely also provide that if the prime contractor is terminated for cause, and that termination is later determined to be incorrect, then the termination will be deemed to be for convenience, with the termination for convenience provision controlling. Under these circumstances, it is critical that the termination for convenience provision not overly restrict the compensation to which the prime contractor is entitled.

¹¹ A201-2007, §§14.2.2, 14.2.3 & 14.2.4.

B. For Cause by Contractor

For the same reasons that the owner has a termination for cause provision (more definite understanding and enforceability of contract breaches), so should the prime contractor or subcontractor. The two critical grounds for termination by a contractor to include in the clause are (1) nonpayment and (2) delay or suspension of the work. Contractors should be entitled to terminate the contract for cause if payment has not been received within a certain amount of days. It obviously benefits the contractor to have a short period of nonpayment justifying termination because it prevents the owner from getting too far “in front” on the project. In addition, contractors should have the right to terminate the contract should the work be delayed for a specified period of time. The delay language should contemplate both a continuous delay of a certain period and a cumulative delay totaling a certain amount of time. Either circumstance can cause the contractor to incur significant costs to remain on the project ready to proceed.

C. For Convenience by Owner

Absent a provision to the contrary, Louisiana law provides the Owner with an absolute right to terminate for convenience. “The proprietor has a right to cancel at pleasure the bargain he has made, even in case the work has already been commenced, by paying the undertaker for the expense and labor already incurred, and such damages as the nature of the case may require.” LA. CIV. CODE ANN. art. 2765 (2010).

The main issue in a termination for convenience clause is the amount the contractor is entitled to be paid. Obviously, the owner wants to limit this payment and the prime contractor wants to recover as much as possible. Unless the contract provides differently, there is authority for the proposition that the contractor is reimbursed for the costs it incurred and all lost profits. When the owner terminates without cause, the owner’s liability is limited to quantum meruit plus profits the contractor would have realized and is measured by the balance payable under the contract less the amount necessary for the contractor to complete the work. *Roland v. American Casualty Company*, 80 So. 2d 387 (La. 1955).¹²

D. For Convenience by Contractor

For the same reasons as owners, prime contractors should reserve the right to terminate subcontractors for convenience. In addition, subcontracts should have provisions providing that the subcontract terminates automatically if the prime contract is terminated.

E. Subcontract Assignment Issues

Most prime contracts also have a clause allowing the owner to accept assignment of all subcontractors:

¹² However, when the owner terminates with cause, the contractor would not be entitled to lost profits and the owner may present evidence of the cost of completion of the work or correction of defective work, to reduce its liability. *Mayeaux v. McInnis*, 809 So. 2d 310 (La. App. 1 Cir. 2001).

§ 5.4 CONTINGENT ASSIGNMENT OF SUBCONTRACTS

§ 5.4.1 Each subcontract agreement for a portion of the Work is assigned by the Contractor to the Owner, provided that

.1 assignment is effective only after termination of the Contract by the Owner for cause pursuant to Section 14.2 and only for those subcontract agreements that the Owner accepts by notifying the Subcontractor and Contractor in writing; and

.2 assignment is subject to the prior rights of the surety, if any, obligated under bond relating to the Contract.

When the Owner accepts the assignment of a subcontract agreement, the Owner assumes the Contractor's rights and obligations under the subcontract.

§ 5.4.2 Upon such assignment, if the Work has been suspended for more than 30 days, the Subcontractor's compensation shall be equitably adjusted for increases in cost resulting from the suspension.

§ 5.4.3 Upon such assignment to the Owner under this Section 5.4, the Owner may further assign the subcontract to a successor contractor or other entity. If the Owner assigns the subcontract to a successor contractor or other entity, the Owner shall nevertheless remain legally responsible for all of the successor contractor's obligations under the subcontract.¹³

The primary issues in these clauses involve whether the owner agrees to pay the subcontractor for work performed before the assignment is effective, as well as whether the owner is liable for additional costs incurred by the subcontractor for the delay that usually accompanies such terminations.

X. SUSPENSION

In addition to termination clauses, most contracts also have provisions allowing the owner to suspend the work, such as the provision set forth below:

§ 14.3 SUSPENSION BY THE OWNER FOR CONVENIENCE

§ 14.3.1 The Owner may, without cause, order the Contractor in writing to suspend, delay or interrupt the Work in whole or in part for such period of time as the Owner may determine.

§ 14.3.2 The Contract Sum and Contract Time shall be adjusted for increases in the cost and time caused by suspension, delay or

¹³ A201-2007, Art. 5.4.

interruption as described in Section 14.3.1. Adjustment of the Contract Sum shall include profit. No adjustment shall be made to the extent

.1 that performance is, was or would have been so suspended, delayed or interrupted by another cause for which the Contractor is responsible; or

.2 that an equitable adjustment is made or denied under another provision of the Contract.¹⁴

The issues with suspension clauses are the compensation to which the prime contractor is entitled and the length of the suspension allowed. The general contractor should be entitled to costs associated with the suspension, including demobilization and remobilization if applicable. In addition, prime contractors should seek to include provision in the suspension clause or in their termination for cause clause allowing them to terminate the contract should the suspension be for a certain duration, either for a single suspension or in the aggregate.

XI. INDEMNITY

Contracting parties should pay special attention to all indemnity provisions contained in a contract. A few typical provisions are discussed below.

A. Lien/Claim Indemnity

Typically, contracts provide that a contractor must indemnify an owner for claims and liens filed by subcontractors and suppliers to the contractor. While not offensive in itself, and while such indemnity is nevertheless provided by law under the Private Works Act, contractors should ensure such indemnity is not applicable if the contractor has not been paid by the owner.

B. Property Damage and Injury to Employees

Typically, contracts provide that each contracting party will indemnify the other for claims arising from damage to their property and injury to their employees. While typically considered favorable for each contracting party, each party should ensure that all such provisions are truly “knock for knock” and mutually favorable.

C. Third Party Property Damages and Injury

Contractors should avoid indemnity provisions that require a contractor to indemnify an owner regarding all third party claims arising under the project, including any that arise from the owner’s fault. Instead, contractors should insist on a provision requiring the contractor to indemnify the owner only for claims arising from the fault of the contractor or a subcontractor or a supplier to the contractor.

¹⁴ A201-2007, Art. 14.3.

That being said, during the 2010 Regular Session, the Louisiana Legislature enacted Act 492, which makes certain indemnity and insurance provisions in transportation and construction contracts unenforceable.

In pertinent part, Act 492 enacted a new statute, La. R.S. 9:2780.1, which provides:

Any provision, clause, covenant, or agreement contained in, collateral to, or affecting a motor carrier transportation contract or construction contract which purports to indemnify, defend, or hold harmless, or has the effect of indemnifying, defending, or holding harmless, the indemnitee from or against any liability for loss or damage resulting from the negligence or intentional acts or omissions of the indemnitee, an agent or employee of the indemnitee, or a third party over which the indemnitor has no control is contrary to the public policy of this state and is null, void, and unenforceable.

Any provision, clause, covenant, or agreement contained in, collateral to, or affecting a motor carrier transportation contract or construction contract which purports to require an indemnitor to procure liability insurance covering the acts or omissions or both of the indemnitee, its employees or agents, or the acts or omissions of a third party over whom the indemnitor has no control is null, void, and unenforceable.

La. R.S. 9:2780.1.

XII. Final/Substantial Completion

Typically, Louisiana law provides that, with the exception of funds withheld for punch list and defective work and retainage withheld to protect against project claims, the contract balance should be paid upon substantial completion. However, although a party's contract may provide consistently, the contract's definition of substantial completion might be different from what is typically understood and accepted.

Substantial completion is generally understood to be the completion stage at which an owner can use the project for its intended purpose. *O & M Const., Inc. v. State, Div. of Admin.*, 576 So. 2d 1030 (La. App. 1 Cir. 1991). Some contracts, however, define substantial completion essentially as final completion. Because, as discussed above, substantial completion typically triggers payment obligations, a contractor should ensure substantial completion is accurately defined in the contract.

XIII. Escrow of Retainage

In 2010, a new statute, La. R.S. 9:4815, was enacted, which requires owners to deposit into an interest bearing escrow account retainage withheld on contracts with a value of \$50,000

or more. The escrow agent is selected mutually by the contractor and owner, and the funds to be released to the contractor following resolution of any disputes include the accrued interest.

This is a relatively new statute and its requirements have not yet been fleshed out by the courts. Furthermore, there are industry-specific exemptions. Further still, it has not yet been tested whether the requirements of the statute are waivable by contract, but since the statute's enactment, many owners have included waiver language in their form contracts.

XIV. Insurance

Most insurance issues are best handled between the contractor and its insurance agent. The owner will specify the coverage required by the contract and the contractor should review those requirements with its agent to make sure they are possible and the cost for the coverage. Contractors should be aware, however, that if they were contractually required to obtain coverage and failed to do so, they could be personally liable for claims that would otherwise have been covered under insurance.

Another issue to consider is which party pays for builders' risk and which party is responsible for insurance deductibles. It also bears reflecting on whether the parties agree to waive subrogation for insurance claims. If subrogation is not waived, then even though there is builder's risk insurance purchased by the owner, the prime contractor's or subcontractor's insurance may ultimately be liable for all or part of the damages covered by that insurance.

XV. DISPUTE RESOLUTION

Of course, contracting parties should be aware of the dispute resolution provisions of a contract.

A. Arbitration

Under some contracts, parties select arbitration instead of litigation as the preferred method of dispute resolution. Louisiana courts consistently and rigorously enforce arbitration agreements between parties. *See* J. Calderera & Co. v. Louisiana Stadium & Exposition Dist., 98-294, p. 4 (La. App. 5 Cir. 1998), 725 So. 2d 549, 551; Russellville Steel Co., Inc. v. A&R Excavating, Inc., 624 So. 2d 11, 12-14 (La. App. 5 Cir. 1993); *Japan Sun Oil Co., Ltd. v. M/V Maasdijk*, 864 F. Supp. 561, 563 (E.D. La. 1994).

Further, if arbitration is the selected method of dispute resolution, parties should pay careful attention to who can be joined in an arbitration and in which arbitrations they can be joined. If all typical parties involved on a construction project cannot be joined into one arbitration, there is a risk of inconsistent results and additional costs due to resolution of related disputes in multiple forums.

B. Venue and Choice of Law

The method of dispute resolution provided is not the only contractual concern. Contracts also sometimes provide the venue (*i.e.*, which court) and choice of law (*i.e.*, which law will govern), and such provisions are generally enforceable. *Digital Enterprises, Inc. v. Arch*

Telecom, Inc., 658 So. 2d 20 (La. App. 5 Cir. 1995) (reasoning that the law is clear that forum selection clauses are legal and binding, and a plaintiff trying to set aside such a clause has a heavy burden); *Lirette v. Union Texas Petroleum Corp.*, 467 So. 2d 29 (La. App. 1 Cir. 1985) (stating that "[p]arties are free to contract as to the law applicable to their agreements, and such stipulations will be given effect in the courts of another state unless there are legal or strong public policy considerations justifying the refusal to honor the contract as written.")

That being said, Louisiana law does provide that, regarding both public and private construction projects in Louisiana, provisions requiring the law of another state or the dispute to be resolved in a forum of another state are unenforceable and against public policy. See La. R.S. 9:2778; La. R.S. 9:2779; La. R.S. 9:2780.1; La. R.S. 38:2196. However, courts have held that, with respect to arbitrations, those statutes are pre-empted by the Federal Arbitration Act and, therefore, arbitration clauses requiring disputes to be resolved in other forums are enforceable. *OPE Intern. LP v. Chet Morrison Contractors, Inc.*, 258 F.3d 443 (5th Cir. 2001).

C. Interest and Attorneys' Fees

Some contracts provide for the rate of interest applicable to unpaid claims and/or provide that no interest is to be paid. Accordingly, such provisions should be carefully reviewed.

Further, Louisiana law provides that attorneys' fees are not recoverable unless provided in the parties' contract or by statute. *Frank L. Beier Radio, Inc. v. Black Gold Marine, Inc.*, 449 So. 2d 1014 (La. 1984). Therefore, it is crucial to determine if a contract contains an attorneys' fees provision, and if so, if the provision is mutual or one-sided.

XVI. WARRANTIES

Contracts usually include a warranty provision. Contractors should ensure that items covered under the warranty and the warranty period, including if the warranty starts anew upon repair of an unwarranted item, are clearly defined.

XVII. RETENTION AND ACCESS TO ACCOUNTING FILES AND OTHER DOCUMENTS

It appears that more and more prime contractors and even some owners are seeking rights to audit accounting and other records. One reason to reserve the right to audit a contractor's records is to insure compliance with immigration and other employment laws, such as insuring that each employee is legally permitted to work in this country. However, prime contractors who reserve this right should be careful not to accept any duty to insure compliance or to have too much control so as to become the co-employer of the subcontractor's employees. Subcontractors should not object to reasonable intrusions into this area, but there is a fine line for determining how much access to allow to financial records. There is nothing inherently wrong with requiring access to certain financial records for cost plus jobs or change orders. However, it may be unreasonable for the prime contractor to have complete access or access in the case of lump sum projects. Examples of some overreaching provisions are set forth below:

12.4 Accounting Records. The Subcontractor shall keep full and detailed accounts and exercise such controls as may be

necessary for proper financial management under the Subcontract and the accounting and control systems shall be satisfactory to the Contractor. The Contractor and the Contractor's accountants shall be afforded access to, and shall be permitted to audit and copy, the Subcontractor's records, books, correspondence, instructions, drawings, receipts, subcontracts, purchase orders, vouchers, memoranda and other data relating to this Subcontract, and the Subcontractor shall preserve these for a period of three years after final payment, or for such longer periods as may be required by law. Subcontractor shall include this language in its sub-subcontracts so as to permit Contractor to audit the sub-subcontractors records upon good cause.

XVIII. STATUTORY EMPLOYER CLAUSES

Louisiana law will typically limit personal injury, negligence-based claims against a contractor to claims for workers' compensation. *See* La. R.S. 23:1032. However, contractors might effectively still have tort exposure if an injured employee asserts a direct claim against the owner and the contractor has agreed to indemnify the owner from such claims. A statutory employer clause may help to protect contractors from such a scenario, and therefore, contractors always should ensure that statutory employer clauses are included in their contracts and subcontracts.

Under Louisiana law,

A. (1) Subject to the provisions of Paragraphs (2) and (3) of this Subsection, when any "principal" as defined in R.S. 23:1032(A)(2), undertakes to execute any work, which is a part of his trade, business, or occupation and contracts with any person, in this Section referred to as the "contractor", for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal, as a statutory employer, shall be granted the exclusive remedy protections of R.S. 23:1032 and shall be liable to pay to any employee employed in the execution of the work or to his dependent, any compensation under this Chapter which he would have been liable to pay if the employee had been immediately employed by him; and where compensation is claimed from, or proceedings are taken against, the principal, then, in the application of this Chapter reference to the principal shall be substituted for reference to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the employee under the employer by whom he is immediately employed. For purposes of this Section, work shall be considered part of the principal's trade, business, or occupation if it is an integral part of or essential to the ability of the principal to generate that individual principal's goods, products, or services.

(2) A statutory employer relationship shall exist whenever the services or work provided by the immediate employer is contemplated by or included in a contract between the principal and any person or entity other than the employee's immediate employer.

(3) Except in those instances covered by Paragraph (2) of this Subsection, a statutory employer relationship shall not exist between the principal and the contractor's employees, whether they are direct employees or statutory employees, unless there is a written contract between the principal and a contractor which is the employee's immediate employer or his statutory employer, which recognizes the principal as a statutory employer. When the contract recognizes a statutory employer relationship, there shall be a rebuttable presumption of a statutory employer relationship between the principal and the contractor's employees, whether direct or statutory employees. This presumption may be overcome only by showing that the work is not an integral part of or essential to the ability of the principal to generate that individual principal's goods, products, or services.

B. When the principal is liable to pay compensation under this Section, he shall be entitled to indemnity from any person who independently of this Section would have been liable to pay compensation to the employee or his dependent, and shall have a cause of action therefore.

La. R.S. 23:1061.

An example of a statutory employer clause in a prime contract is below:

Pursuant to and in accordance with Louisiana Worker's Compensation Act, La. R.S. 23:1021, *et seq.*, including but not limited to R.S. 23:1061, Contractor and Owner agree that a statutory employer relationship exists between Owner and Contractor's employees. Contractor and Owner agree that all work performed by Contractor and its employees is part of Owner's trade, business or occupation and is an integral part of and is essential to the ability of Owner to generate the Owner's goods, products and services. Contractor and Owner agree that Owner is the principal and statutory employer of Contractor's employees. The above notwithstanding, Contractor shall remain solely and primarily responsible and liable for the payment of Louisiana worker's compensation benefits and insurance premiums to and for

its employees and shall not be entitled to any contribution or indemnity for any such payments from Owner.

Likewise, an example of such a clause in a subcontract is below:

Pursuant to and in accordance with Louisiana Worker's Compensation Act, La. R.S. 23:1021, *et seq.*, including but not limited to R.S. 23:1061, Contractor and Subcontractor agree that a statutory employer relationship exists between Contractor and Subcontractor's employees and Owner and Subcontractor's employees. Contractor and Subcontractor agree that all work performed by Subcontractor and its employees is part of Owner's and Contractor's trade, business or occupation and is an integral part of and is essential to the ability of Owner and Contractor to generate the Owner's and Contractor's goods, products and services. Contractor and Subcontractor agree that Owner and Contractor are principal and statutory employers of Subcontractor's employees. The above notwithstanding, Subcontractor shall remain solely and primarily responsible and liable for the payment of Louisiana worker's compensation benefits and insurance premiums to and for its employees and shall not be entitled to any contribution or indemnity for any such payments from Owner or Contractor.

XIX. SCHEDULES AND ABILITY TO ALTER

Prime contractors and subcontractors should be very careful when agreeing to be bound by a schedule. While the prime contractor is usually aware of the contract duration, it does not want to be caught having to complete certain aspects of the project by specific dates within that overall completion deadline, unless the prime contractor has incorporated those deadlines into the overall schedule at the beginning of the project.

Scheduling issues are more likely to arise for subcontractors. There is nothing wrong with agreeing to abide by the schedule of the prime contractor, as long as the subcontractor has been provided with that schedule before it submits its bid. It can be problematic if the subcontractor has calculated its price based on having a certain number of days to complete its work, only to find that those days have been altered. A sample scheduling provision that should be avoided by a subcontractor follows:

Section 4.

(a) The Subcontractor agrees to begin its Work when notified by the Contractor and will carry forward and complete its Work as rapidly as the Contractor may judge that the progress of the Work will permit, and so that a Subcontractor's Work will not cause delay in the progress of Contractor's Work or other branches of the

work carried on by other subcontractors. Subcontractor agrees that Contractor may require Subcontractor to prosecute some portions of the Work in preference to other portions of the Work as Contractor may specify and that multiple mobilizations may be required.

(b) Subcontractor shall be liable to Contractor for any and all actual damages incurred by the Contractor as a result of the Subcontractor's default or breach of any provision of this Subcontract, including, but not limited to, actual damages caused by Subcontractor's delay; actual damages shall include, but not be limited to, any liquidated damages, litigation expenses and attorney's fees, incurred by the Contractor as a result of Subcontractor's default, breach or delay.

(c) Contractor shall not be liable to Subcontractor for delay to Subcontractor's Work caused by the act, neglect or default of the Owner, or the Architect/Engineer, or by reason of fire or other casualty, or on account of riots or of strikes, or other combined action of the workmen or others, or an account of any acts of God, or any other cause beyond the Contractor's control.

In sum, the subcontractor should be aware of the schedule before bidding and reserve the right to seek damages for any unreasonable changes in that schedule after the work has begun, including costs and extensions of time to perform its work. Reasonable changes to the schedule should be expected by the subcontractor and normally would not result in any additional costs to the prime contractor.

XX. SET-OFF/COMPENSATION FOR OTHER JOBS

Absent an agreement to the contrary, an owner or prime contractor cannot withhold funds from one project for a claim on an unrelated project. *See Unis v. JTS Constructors/Managers, Inc.*, 541 So. 2d 278, 282 (La. App. 3 Cir. 1989) (holding that, when a prime contractor withheld payment from a subcontractor based on disputes regarding an unrelated project, such withholding was "unreasonable" for purposes of the Louisiana Prompt Pay Statute, La. R.S. 9:2784, and the award of attorneys' fees and penalties was proper). That said, there is nothing in Louisiana law that prohibits parties from allowing such set off. If a subcontractor signs an agreement allowing the prime contractor to withhold sums from one contract based on issues with another contract, the subcontractor will be bound by that agreement. An example of such a provision is set forth below:

Offset From Other Projects: If Contractor believes that Subcontractor will owe amounts as a result of any other project, Contractor has the option, but not the obligation, to deduct the amount claimed as a result of these other projects from monies which are owed or are to become owed to the Subcontractor on this project.

CONCLUSION

As reflected above, some contractual provisions might provide a windfall to one contracting party or be catastrophic to another. Accordingly, although no contracting party can be expected to see around every corner and anticipate every issue, knowledge of fundamental, typical construction contract provisions and their effects can be more crucial to a successful, profitable project than any tool or piece of equipment used.

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