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Louisiana Construction Law Update

The **Construction Law Update** is published by Baldwin Haspel Burke & Mayer, LLC for the benefit of its clients and others having interest in the construction industry. It includes discussions of Louisiana state and federal court decisions, legislative developments, and tax issues concerning construction-related matters. For further information on the decisions and legislative developments, contact **John Stewart, Jr.** at (504) 585-7846 - jestewart@bhbmlaw.com or **Stuart Richeson** at (504) 585-7839 – sricheson@bhbmlaw.com.

At the end of this newsletter, you will find a section titled *Tax Law Alert*. It contains a snippet from Baldwin Haspel Burke & Mayer's most recent **Tax Law Alert**, which provides information on updates and changes in tax law on both the state and federal level. To subscribe to BIBM's electronic **Tax Law Alert**, please visit www.bhbmlaw.com/subscribe. For information on tax-related issues, please contact **Matt Miller** at (504) 585-7867 - mmiller@bhbmlaw.com, or **Andrew Sullivan** at (504) 585-7734 – asullivan@bhbmlaw.com.

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INTERPRETATION OF AN AMBIGUOUS CONTRACT

The Louisiana Fourth Circuit Court of Appeal interpreted a construction contract to determine who, either the contractor or the owner, would bear the risk of the deductible for a builders risk insurance policy. The deductible was \$367,029.00. The court held the contract provision was susceptible to more than one interpretation, and was, therefore, ambiguous.

The contract was prepared solely by the owner, a public entity. In resolving the issue, the court concluded the contract must be interpreted against the party who furnished its text, in this case the owner, and in favor of the contractor. Summary judgment granted by the trial court in favor of the contractor, and awarding to it the amount of the deductible, was affirmed. *Landis Construction Company, LLC v. St. Bernard Parish*, 2014-0096 (La. App. 4th Cir. 10/22/14), 2014 WL 5394485.

REQUIREMENTS OF A BID FORM FOR A PUBLIC WORKS PROJECT MAY NOT BE WAIVED EVEN THOUGH THEY EXCEED STATUTORY REQUIREMENTS

The Terrebonne Parish Consolidated Government advertised for bids for a roadway embankment project. The bid form, which was part of the bid documents, required that an Attestation Clause regarding past criminal convictions of bidders be submitted by each bidder, as opposed to the lowest bidder as required by the Public Bid Law, within ten days after the opening of the bids. LA Contracting Enterprise, LLC (“LACE”) was the apparent low bidder. The second low bidder was Byron E. Talbot Contractor, Inc., and the third Phylway Construction, LLC. Phylway challenged the responsiveness of the LACE and Talbot bids, and requested that the Parish award the project to it. Talbot submitted its Attestation Clause after the ten-day time period. The Parish awarded the project to LACE noting that it submitted its Attestation Clause with its bid documents before bids were opened, and it did not, therefore, violate the requirement.

Phylway filed a petition seeking a writ of mandamus to compel the Parish to reject the bids of LACE and Talbot and award the project to it, and also requested a temporary restraining order and an injunction against the Parish to restrain and prohibit the execution of any contract with LACE or Talbot. The trial court found that LACE’s bid was non-responsive because it lacked the required articles of organization requested in the bid specifications; it did not discuss the Attestation Clause submitted by LACE. The trial court entered judgment denying Phylway’s request for injunctive relief and a writ of mandamus, and ordered that the Parish award the project to Talbot, finding, although Talbot had not filed its Attestation Clause within ten days of the bid opening, it filed it before the hearing wherein it was determined to be the low bidder. Talbot’s bid was, accordingly, considered responsive. Phylway appealed.

The court of appeal held the Parish was bound by its advertised requirements and bid form, even though they exceeded the requirements of the Public Bid Law, as long as the statutory requirements were met. It was, therefore, bound by its requirement that each bidder submit the Attestation Clause within ten days after the opening of the bids. The court of appeal found the trial court erred in finding Talbot was the lowest responsive, responsible bidder and in denying the injunctive and mandamus relief sought by Phylway. The court noted the record did not reflect whether the project proceeded with Talbot; therefore it was not known at the time whether the injunctive and mandamus remedies were still available to Phylway. Since Phylway timely sought an injunction, it might be entitled to recover damages. *Phylway Construction, LLC v. Terrebonne Parish Consolidated Government*, 2013-1589 (La.App. 1 Cir. 9/5/14), 2014 WL 4384151.

COSTS FOR LABOR BURDEN AND EXTENDED-FIXED JOBSITE OVERHEAD

F.H. Myers Construction Corporation contracted with the State of Louisiana Division of Administration, Office of Facility Planning and Control to renovate the Old U.S. Mint in New Orleans. Myers encountered a pre-existing concrete and wood timber substrate underneath a floor that was not shown on the plans. The substrate was incompatible with the project’s intended design features, and a new design was developed. Myers drafted change orders to remove the existing substrate and construct a new one. The State did not agree with the drafts and issued Construction Change Directives directing Myers to proceed with the work. Myers did the work, and submitted a claim to the State for its costs. The State disputed Myers’ charges for

its labor burden and extended jobsite overhead. Myers filed a petition for damages. The State reconvened seeking reimbursement for overpayment under the contract. The State moved for partial summary judgment to dismiss Myers' claims. Myers moved for summary judgment for the amount it contended was owed. The trial court denied the motion of Myers, and granted the State's motion for partial summary judgment. Myers appealed.

The Supplementary Conditions provided that the cost of work for purposes of change orders would consist of "wages paid direct labor personnel, delineating a labor burden markup for applicable payroll taxes, worker's compensation insurance, unemployment compensation and social security taxes." They also allowed for "other documented direct costs." The court of appeal found the Supplementary Conditions did not limit the labor burden markup to the specifically enumerated items, but genuine issues of material fact remained in determining which items claimed by Myers would be compensable under the contract.

The Supplementary Conditions provided that the contractor would be due extended-fixed jobsite overhead for time delays "only when complete stoppage of the work occurs causing a contract completion extension, and the Contractor is unable to mitigate financial damages through replacement work," and "the stoppage must be due to acts or omissions solely attributable to the Owner." Myers admitted there was not a complete stoppage of work.

L.R.S. 38:2216(H) states "any provision contained in a public contract which purports to waive, release, or extinguish the rights of a contractor to recover costs of damages, or obtain equitable adjustment, for delays in performing such contract, if the delay is caused in whole, or in part, by 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." The court of appeal held the statute contemplates that a contractor who is a party to a public contract shall be able to recover for any delay that it may suffer as a result of the fault of the State entity. It also held the contract waived Myers' rights to seek damages for extended-fixed jobsite overhead for any delay short of a complete stoppage of work contrary to the statute. The contract provision was found to be unenforceable.

Summary judgment in favor of the State was reversed. Since genuine issues of material fact remained to determine what was compensable under the contract, the matter was remanded to the trial court for further proceedings. *F.H. Myers Construction Corporation v. The State of Louisiana, Division of Administration, Office of Facility Planning and Control*, 2013-2153 (La.App. 1 Cir. 6/18/14), 2014 WL 3702302, writ denied, 2014-1793 (La. 11/7/14), 2014 WL 6464484.

TAX LAW ALERT

TAX INCREASE PREVENTION ACT OF 2014

Congress recently passed the Tax Increase Prevention Act of 2014 ("TIPA"), which President Obama signed into law on Dec. 19 2014. As explained in further detail below, the Act extends (or reinstates), for one year, a number of expense and deduction provisions, including the Internal Revenue Code (the "Code") Section 179 expense and phaseout limits and 50% bonus depreciation.

A. Bonus First-Year Depreciation Extended

Prior to the enactment of TIPA, Section 168(k) allowed an additional first-year depreciation deduction (commonly referred to as the bonus depreciation deduction) equal to 50% of the adjusted basis of qualified property acquired and placed in service after December 31, 2011, and before January 1, 2014 (or before Jan 1, 2015 for certain long-production-period property and transportation property).

TIPA extends the 50% bonus depreciation for one year so that it applies to qualified property acquired and placed in service before January 1, 2015 (or before Jan. 1, 2016 for certain long-production-period property and transportation property).

B. Increased Section 179 Expense

Under Code Section 179, certain taxpayers may elect to expense (subject to statutory limitations) the cost of new or used tangible personal property placed in service during the tax year in the taxpayer's trade or business. The maximum annual expense amount under Section 179 is generally reduced dollar-for-dollar by the amount of Section 179 property placed in service during the tax year in excess of a specified investment ceiling.

For the 2013 tax year, the maximum expense amount under Section 179 was \$500,000 and the investment-based phase-out amount (or investment ceiling) was \$2,000,000. Prior to the enactment of TIPA, for the 2014 tax year, the maximum expensing amount under Section 179 was scheduled to drop to \$25,000 and the investment-based phaseout amount was scheduled to drop to \$200,000.

TIPA retroactively extended (for the 2014 tax year) the increased \$500,000 maximum expense amount under Code Sec. 179 and the increased \$2 million investment-based phaseout amount.

C. Sales and Use Taxes

TIPA provides taxpayers who itemize deductions with the ability to elect to deduct state and local sales and use taxes instead of state and local income taxes. Prior to the enactment of TIPA, this election was not available for taxpayers during the tax years beginning after December 31, 2013.

2015 ESTATE TAX EXEMPTION

In late October, the Internal Revenue Service announced that the estate-tax exemption will increase to \$5,430,000 per individual in 2015; up from \$5,340,000 per individual in 2014 due to an inflation adjustment. The top estate tax rate on amounts in excess of the exemption remaining at forty percent (40%).

LOUISIANA BUSINESS CORPORATION ACT

On May 30, 2014, Governor Bobby Jindal signed the Business Corporation Act ("BCA") (Act No. 328, 2014 Reg. Session). As the first comprehensive revision of Louisiana's business corporation law since the current statute was originally adopted in 1968, the BCA replaces the entire Business Corporation Law (Chapter 1 of Title 12). The BCA will take effect on January 1, 2015 and will be codified as La R.S. 12:1-101 et seq.

The BCA is based on the Model Business Corporation Act, which was written by the Committee on Corporate Laws of the American Bar Association's (ABA) Business Law Section. Approximately thirty (30) states, including all states in the Southeast, have adopted all or substantially all of the Model Act. While the BCA and the Model Act are significantly longer than the current Louisiana Business Corporation Law, lawmakers hope that the additional detail will address issues and/or questions that have arisen under the current law.

Some notable changes made to existing law by the BCA include the following:

- The BCA's default shareholder vote for the approval of extraordinary corporate transactions, such as business combinations or amendments to the articles of incorporation, requires a majority of the corporation's outstanding voting power. Current law mandates a vote of two-thirds (2/3) of the voting power present.
- The BCA will indemnify, by default, the corporation's directors and officers from liability to the corporation and its shareholders for money damages relating to any act or failure to act as a director or officer. Yet liability for a breach of fiduciary duty, the intentional infliction of harm on the corporation or shareholders, the payment of unlawful dividends, or an intentional violation of criminal law is not protected. If a corporation would like to reject this limitation of liability, it must "opt out" affirmatively through a statement in the articles of incorporation.
- The BCA eliminates the concept of legal capital and treasury shares as well as the requirement of stated capital and capital surplus. However, the law retains a "dual insolvency" standard, under which dividends cannot be paid if the corporation will not be able to pay its debts as they become due or if its total assets would be less than its total liabilities plus any amount needed to satisfy the liquidation preference of preferred stockholders.
- The BCA allows the issuance of shares in exchange for promissory consideration.
- The BCA makes it easier for shareholders to exercise dissenters' rights as a general matter. Where they apply, the BCA entitles dissenters to the arms' length fair value of their shares, excluding discounts for minority status or lack of marketability. In limited circumstances, appraisal rights function as a shareholder's exclusive remedy and foreclose the shareholder's ability to bring a fiduciary duty suit challenging a transaction.
- The BCA provides an oppressed shareholder with a withdrawal remedy if the corporation's practices, considered as a whole over an appropriate period of time, are "plainly incompatible" with a genuine effort by the corporation to deal fairly and in good faith with the

shareholder. If the remedy applies, the shareholder may withdraw from the corporation and require the corporation to buy all of his shares at fair value.

- The BCA validates transactions between a corporation and its directors or officers, known as "self-dealing" transactions, if the requisite procedures are followed. Contrastingly, current Louisiana law provides a mechanism for approval of these transactions but does not validate them if the required approvals are obtained. It merely provides that they are not automatically voidable.
- The BCA permits written unanimous governance agreements among shareholders. These may contain provisions that deviate from governance provisions of the BCA, such as the total elimination of the board of directors or a limitation of its powers.
- The BCA eliminates the limitation under current law on the term of a voting trust.
- The BCA implements the Model Act's universal demand rule, which replaces the current law's demand futility doctrine for derivative suits. As a result, a board composed of a majority (or committee) of disinterested directors may obtain a dismissal of the suit if the directors determine in good faith after reasonable inquiry that it is not in the corporation's best interests.
- The BCA contains a set of unified filing rules articulating the signing, notarization, and filing procedures to be followed when filing a document under the BCA with the Secretary of State. Electronically-filed documents need not be notarized.
- The BCA reduces the "grace-period" for failure to file an annual report from three (3) years to ninety (90) days. If the report is not filed timely after notice from the Secretary of State, the corporation's existence terminates but may be reinstated during the three-year period following termination.

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