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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 – jstewart@bhbmlaw.com or **Stuart Richeson** at (504) 585-7839 – sricheson@bhbmlaw.com.

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CITY OF NEW ORLEANS HireNOLA ORDINANCE

The City of New Orleans adopted a new ordinance entitled, "HireNOLA." The ordinance applies to any contract to which the City is a party for construction, alteration or demolition of public buildings or public works in excess of $150,000.00 executed on or after the ordinance becomes effective. It applies not only to the City, but all of its boards, commissions, and public benefit corporations. Under the ordinance, prime contractors and their subcontractors are

required to make good faith efforts to achieve specified percentages of work hours performed on covered projects by Local Workers, Disadvantaged Local Workers, and Louisiana Apprentices who are Disadvantaged Local Workers. The goals are as follows:

Year Effective Date That Contract is Advertised for Bid	Participation Goals (in %) Local Workers/Disadvantaged Local Workers/Louisiana Apprentices Who Are Disadvantaged Local Workers
2016	30%/10%/10%
2017	35%/15%/15%
2018	40%/20%/20%
2019	45%/25%/25%
2020	50%/30%/30%

The term Disadvantaged Local Worker is defined in the ordinance. It means a local worker, i.e., any person domiciled in Orleans Parish, who (i) at the time of commencing work on a covered project has a household income equal to or less than 50% of area median income, adjusted for household size, of the New Orleans-Metairie-Kenner Metropolitan Statistical Area, or (ii) faces at least one of the following barriers to employment: (1) is eligible to receive public assistance; (2) suffering from chronic unemployment; (3) being custodial single parent; (4) having a prior arrest or conviction; (5) being homeless; (6) having been emancipated from the foster care system; or (7) being a veteran of the U.S. Military.

The City is not to enter into an applicable contract that is not supported by documentation establishing that the prime contractor has met the local hiring goal or commits to demonstrating good faith efforts to meet the goals, and commits to implementing the First Source provisions of the ordinance. The First Source provisions require that contractors and subcontractors utilize the City as its first source for recruitment, referral and placement of all new hires for employment opportunities created by an applicable contract. They must notify the City of their specific needs for new employees through the use of a specified form, at least five business days before advertising the employment opportunity to the general public.

The City has discretion to provide a waiver of specific local participation goals either at the request for proposal or bid stage or after award of the contract if the contractor can establish that despite its best efforts, it is determined by the City, the contractor was unable to meet the local

hiring participation goals established. The Office of Work Force Development, or its successor, shall have primary responsibility for general oversight, administration, compliance, monitoring and enforcement of the ordinance, and shall provide employee recruitment, referral and placement services to contractors. Further, the Office of Work Force Development shall promulgate rules and regulations with respect to the ordinance and other rules and regulations as may be necessary for implementing and carrying out its provisions. The program shall become effective upon the promulgation of the rules and regulations. Ordinance, City of New Orleans, Mayor Council Series No. 26607, Calendar No. 30,925.

LIABILITY OF AN ENGINEER

An engineer argued in support of a motion for summary judgment that any claim against him individually must be dismissed since he acted as an agent and officer of his corporation. The trial court granted the motion. The claimant appealed.

The claimant argued the engineer was not protected from individual liability under L.R.S. 12:1174C of the architectural-engineering corporation law. The statute provides:

> Nothing in this Chapter shall be construed as in derogation of any rights which any person may have against an incorporator, subscriber, shareholder, director, officer, employee, or agent of the corporation, because of any fraud practiced upon him, or because of any breach of professional duty, or other negligent or wrongful act, by such person, or in derogation or any right which the corporation may have against any such persons because of any fraud practiced upon it by him.

The court of appeal found the question of whether a professional architect or engineer is subject to individual liability as a result of the statute was one of first impression by the courts. It stated:

> It is problematic as to whether the language of the statute supports the plaintiff's argument and if the state legislature intended to create a professional architect/engineer malpractice cause of action.

The court, however, found it did not have to reach that issue because of a letter signed by the engineer stating, "I have prepared and reviewed these plans for this specific location and have approved them as a professional engineer and bear the liability that comes with that approval."

The letter, according to the court, created a genuine issue of material fact as to whether a claim existed against the engineer in his individual capacity rendering summary judgment inappropriate. Summary judgment in favor of the engineer was reversed. A concurring opinion found mere status as a shareholder, officer and/or agent of an engineering corporation did not automatically insulate an engineer for liability for his or her own negligence, and for that reason, the district court committed legal error in dismissing the claims against the engineer individually. *Harbor v. Davie Shoring, Inc.*, 2015-0238 (La.App. 4 Cir. 9/23/15), 176 So.3d 619.

LIABILITY OF A MEMBER OF AN L.L.C.

Jennifer Diane Nunez contracted with Pinnacle Homes, L.L.C. to build a home in Cameron Parish. Allen Lenard, a state licensed residential and commercial construction contractor, signed the contract in his capacity as the sole member of Pinnacle. The contract provided that the work would comply with all applicable national, state and local building codes and laws. The Cameron Parish Police Jury issued a permit providing the base flood elevation of the home. The house did not meet the elevation required under the permit and the flood insurance rate maps for Cameron Parish. Nunez sued both Pinnacle and Lenard. After a trial on the merits, Pinnacle was found liable for breach of contract, and Lenard personally liable on the ground of professional negligence under L.R.S. 12:1320(D). Pinnacle and Lenard appealed. The court of appeal affirmed. An application for a writ of certiorari was granted by the Louisiana Supreme Court.

The statute providing for limited liability companies shields individual members, managers and employees of an L.L.C. from liability with certain exceptions. The exceptions at issue are specified in L.R.S. 12:1320(D). It states:

> Nothing in this Chapter shall be construed as being in derogation of any rights which any person may by law have against a member, manager, employee, or agent of a limited liability company because of any fraud practiced upon him, because of any breach of professional duty or other negligent or wrongful act by such person, or in derogation of any right which the limited liability company may have against any person because of any fraud practiced upon it by him.

The focus of the alleged liability was the exception for "any breach of professional duty or other negligent or wrongful act by such person."

The first issue reviewed by the Supreme Court was whether Lenard was a "professional" within

the meaning of the statute on the sole ground that he was a contractor, individually licensed by the State of Louisiana. The Supreme Court held Nunez failed to show Lenard was such a "professional." As a contractor, Lenard was not engaged in a "profession" as would be generally understood.

The next issue was whether Lenard committed a "negligent or wrongful act" for which he could be held personally liable. In a prior decision, the Supreme Court articulated four factors to consider in determining personal liability for negligent or wrongful acts:

> 1) Whether a member's conduct could be fairly characterized as a traditionally recognized tort;
>
> 2) Whether a member's conduct could be fairly characterized as a crime, for which a natural person, not a juridical person, could be held culpable;
>
> 3) Whether the conduct at issue was required by, or was in furtherance of, a contract between the claimant and the L.L.C.; and
>
> 4) Whether the conduct at issue was done outside the member's capacity as a member.

In considering the first factor, the court held it could not say Lenard's alleged fault could be fairly characterized as a tort. There was no showing he owed a duty to Nunez with regard to the elevation outside of the obligations of the contract. A showing of poor workmanship arising out of a contract entered into by an L.L.C., in and of itself, is insufficient to establish a "negligent or wrongful act" arising under the statute. Nunez failed to show Lenard owed her a separate tort duty susceptible to a finding of personal liability. He could not be held personally liable for a breach of contract or for poor workmanship. That obligation arose from the contract entered into by Pinnacle.

As to the second factor, there was no showing, after analyzing the permit ordinance, Lenard violated a criminal statute. The third factor involved a determination of whether Lenard's conduct was in furtherance of the contract between Nunez and the L.L.C. If the reason a member is engaged in the conduct at issue is to satisfy a contractual obligation of the L.L.C., then the member would more likely qualify for the protections of the general rule of limited liability. Nunez failed to show Lenard's acts or failures to act did not arise in furtherance of the contract. His supervision of his employees with regard to the proper elevation of the house, or checking the elevation himself, were acts required by, or in furtherance of, the contract between

Nunez and the L.L.C. Finally, as to the fourth factor, the court held Lenard's alleged failures to act fell within the context of his membership in the L.L.C., and were not undertaken in a personal capacity.

The judgment of the court of appeal was reversed insofar as it found Lenard personally liable. *Nunez v. Pinnacle Homes, L.L.C.*, 2015-0087 (La. 10/14/15), 2015 WL 5972529.

DAMAGES FOR FAILURE TO COMPLETE A CONSTRUCTION PROJECT

The Louisiana Fourth Circuit Court of Appeal, applying Civil Code art. 2769, held that a homeowner was entitled to judgment against a contractor for costs to complete a construction contract. The court found the contractor would not complete the job, and the homeowners were forced to hire another contractor to complete construction. The court awarded the homeowners $192,690.00, the costs incurred for another contractor retained to complete the project, which was offset by $75,600.00, the amount remaining to be paid the original contractor if it had completed the work. *Wirthman-Tag Construction, L.L.C. v. Hotard*, 2014-1394 (La.App. 4 Cir. 8/19/15), 176 So.3d 429.

WRITTEN EVIDENCE OF THE AUTHORITY OF A PERSON SIGNING A BID FOR A PUBLIC WORKS PROJECT

The Public Bid Law, L.R.S. 38:2212, requires that the signature on a bid must be that of a corporate officer listed on the most current annual report on file with the Secretary of State, or that of any member of a limited liability company or other legal entity listed in the most current business records on file with the Secretary of State. Written evidence of the authority of the person signing the bid must be provided at the time bids are submitted. In this instance, written evidence was not provided at the time the bid was submitted. The failure to do so violated the Public Bid Law and the bid instructions resulting in the rescission of the notice of award to the bidder. *Dynamic Constructors, LLC v. Plaquemines Parish Government*, 2015-0271 (La.App. 4 Cir. 8/26/15), 173 So.3d 1239, *writ denied*, 2015-1782 (La. 10/30/15), 2015 WL 6684553.

FAILURE TO PAY A SUBCONTRACTOR RESULTED IN A FINDING OF NEGLIGENCE REDUCING DAMAGES

A subcontractor's contract was terminated for its failure to perform the work. The Fourth Circuit Court of Appeal held the failure of the general contractor to pay the subcontractor resulted in the subcontractor's inability to complete the work. The court of appeal found the failure to pay the subcontractor played a substantial role in causing the subcontractor's breach of contract, and was

negligence. Damages sought by the general contractor against the subcontractor for breach of contract were reduced in proportion to the general contractor's negligence. The Louisiana Supreme Court granted an application for a writ of certiorari. It has not yet rendered a judgment. *Lamar Contractors, Inc. v. Kacco, Inc.*, 2014-1360 (La. App. 4 Cir. 7/1/15) 174 So.3d 82, *writ granted*, 2015-1430 (La. 11/20/15), 2015 WL 8228085.

ADDITIONAL TIME TO COMPLETE A PROJECT AND CURE DEFICIENCIES NOT ALLOWED

An owner discharged a carpenter as a result of substandard work. There was expert testimony the work was not structurally sound. The court of appeal held, in the absence of contractual provisions to the contrary, there was no obligation on the part of the owner to allow a contractor, who has breached his undertaking by the performance of unskilled and unsuitable work, additional time or an opportunity to rectify his work. The court found the owner established the existence and nature of the defects alleged, and the defects were due to the faulty workmanship of the carpenter. The judgment of the lower court dismissing the owner's claim for damages for breach of contract was reversed. *Brenner v. Zaleski*, 2014-1323 (La. App. 4 Cir. 6/3/15), 174 So.3d 76.

VALIDITY OF DECISIONS MADE BY THE ARCHITECT AND RECOVERY OF ATTORNEYS FEES

The United States District Court for the Eastern District of Louisiana recently reviewed the validity of a decision made by an architect. The issue was the denial of a change order request. A contract provision stated that the decision of the owner or the owner's designated representative as to the true construction, meaning and intent of the plans and specifications would be final and binding on the parties. The architect was designated as the owner's representative. The contract also included a clause providing the owner's designated representative, the architect, would be the final arbiter of disputes. The court held such clauses are binding and enforceable upon the parties to a construction contract, unless the architect's decision is manifestly erroneous or rendered in bad faith. The court found the architect's decision was not clearly erroneous, and there was ample support for its position. There was no evidence the architect acted in bad faith or that the decision was arbitrary.

The contract provided that in the event it became necessary for the contractor to collect any deficiency from the subcontractor by legal action, the subcontractor agreed to reimburse the contractor for its reasonable attorneys fees and costs incurred in connection with such an action.

The general contractor was not successful with respect to all of its claims, and the court awarded attorneys fees and costs only insofar as the claims were successful.

The subcontractor contended the general contractor was responsible for its attorneys fees and costs for its successful claims. The court held the contract requirement for attorneys fees provided only for the recovery of fees by the contractor, and not the subcontractor. The subcontractor had filed a lien. The project was subject to the Public Works Act which allowed the recovery of 10% attorneys fees when a claimant recovers the full amount of his timely and properly recorded or sworn claim. Since the subcontractor had not recovered the full amount of its claims, it was not entitled to attorneys fees under the Act. *F.H. Paschen, S.N. Nielsen & Associates, LLC v. Southeastern Commercial Masonry, Inc.*, 2015 WL 7015389 (E.D. La. 11/10/15).

PAY-AFTER-PAID CLAUSE VERSUS PAID-IF-PAID

The payment clause of a subcontract required that the subcontractor would be paid after its prime contractor was paid. The trial court construed it as a "pay-if-paid" clause, and denied payment to the subcontractor since the prime had not been paid for the work. The Fourth Circuit Court of Appeal held it was a "pay-when-paid" provision and not a "pay-if, or unless or until-paid" condition. The clause did not explicitly recognize the possibility there might be a complete failure of payment, and the subcontractor would have to bear the risk of nonpayment to the prime. As a result, the contract was construed as requiring payment after a reasonable time. The court of appeal reversed the judgment of the trial court requiring payment to the subcontractor even though its prime had not been paid for the work. *Tymeless Flooring, Inc. v. Rotolo Consultants, Inc.*, 2014-1392 (La.App. 4 Cir. 5/20/15), 172 So.3d 145.

CONTRACT OF SALE VERSUS A CONSTRUCTION CONTRACT

The Louisiana Fifth Circuit Court of Appeal recently considered the issue of whether a contract was a contract of sale or a construction contract. If it was a contract of sale, the dispute at issue was subject to the one-year prescriptive period for redhibitory actions, and if a construction contract was subject to the five-year peremptive period of L.R.S. 9:2772. The trial court found it was a contract of sale.

The matter involved the sale and installation of windows by Window World, Inc. According to Window World, it was merely a sales company, and did not manufacture or install the windows it sells. Rather, it orders windows from the manufacturer, and as part of its service to the customer, contracts with third party installers to install the windows. The cost of installation is

included in the sales price. The court of appeal applied a three-factor test to determine whether the contract was one of sale or a contractor build. The factors to be considered are 1) in a contract to build, the purchaser has some control over the specifications of the object; 2) in a contract to build, the negotiations take place before the object is constructed; and 3) a contract to build contemplates not only that the builder will furnish the materials, but that he will also furnish his skill and labor in order to build the desired object. The court of appeal noted there was another test which it identified as the "value test." Under that test, the court determines whether the labor expended in constructing the item, or the materials incorporated therein, constitute the principal value of the contract.

In applying the three-factor test, the court found the object of the contract was not simply to sell windows, but to remove the old windows and install new ones. The court stated that to suggest the owners only desired in contracting with Window World to purchase the windows to be delivered and set aside was illogical. The installation was not incidental to the sale; it was the object of the contract. The court held that the contract was a construction contract. The judgment of the trial court was reversed. *Vicari v. Window World, Inc.*, 14-870 (La. App. 5 Cir. 5/28/15), 171 So.3d 425, *writ denied*, 2015-1269 (La. 9/25/15), 2015 WL 5944895.

REJECTION OF A CLAIM UNDER A PAYMENT BOND FOR A PUBLIC PROJECT

Jefferson Parish contracted with JaRoy Construction, Inc. to build a gymnasium at Terrytown Playground in Terrytown, Louisiana. JaRoy subcontracted the piling work to Pierce Foundations, Inc. Ohio Casualty Insurance Co. provided payment and performance bonds for JaRoy. JaRoy failed to pay Pierce. Pierce sued Ohio Casualty for payment under the payment bond. Ohio Casualty moved for summary judgment which was denied. After a trial on the merits, the trial court rendered judgment in favor of Pierce and against Ohio Casualty. Ohio Casualty appealed.

The issue was whether Pierce complied with the requirements of L.R.S. 38:2247. The court of appeal construing the statute held that only those claimants who have complied with the notice and recordation requirements of L.R.S. 38:2242(B) shall not be deprived of a right of action on the bond. The notice and recordation requirements of the statute are necessary conditions for a right of action on a bond. Pierce did not file a sworn statement of the outstanding balance with the public authority, and did not record any such sworn statement with the recorder of mortgages, and, thus, failed to comply with the plain language and requirements of L.R.S. 38:2247 and 2242(B). The failure of Pierce to comply with the statutes deprived it of a right of action on the bond. Ohio Casualty was entitled to summary judgment. The judgment of the trial

court in favor of Pierce was reversed, and judgment rendered in favor of Ohio Casualty dismissing Pierce's action against Ohio Casualty. The Louisiana Supreme Court granted an application for a writ of certiorari. It has not yet rendered a judgment. *Pierce Foundations, Inc. v. JaRoy Construction, Inc.*, 14-669 (La.App. 5 Cir. 3/25/15), 169 So.3d 580, *writ granted,* 2015-0785 (La. 6/5/15), 171 So.3d 938.

PAYMENT FOR WORK UPON SUBSTANTIAL COMPLETION

Diamond Cabinet Designs, LLC sued Arlisha Coxie alleging Ms. Coxie failed to pay the balance of the contract for construction work performed on her home. Diamond contended the work was substantially complete; Ms. Coxie contended otherwise.

The trial court found the work was substantially complete. In doing so, it noted that a building contractor is entitled to recover the contract price even though defects and omissions are present when he has substantially performed the building contract. "Substantial performance" means that the construction is fit for the purposes intended despite any deficiencies. The contractor has the burden of proving substantial performance. Factors to be considered in determining whether there has been substantial performance include the extent of the defect or non-performance, the degree to which non-performance has defeated the purpose of the contract, the ease of correction, and the use or benefit to the owner of the work already performed. The court found the work was substantially complete, noting any unperformed work would not prevent Ms. Coxie from living in the home. The judgment of the trial court finding the project was substantially complete was affirmed. *Diamond Cabinet Designs, LLC v. Arlisha Coxie*, 14-770 (La.App. 5 Cir. 3/25/15), 169 So.3d 601.

REJECTION OF A PUBLIC WORKS BID

In submitting a bid to the State of Louisiana through the Coastal Protection and Restoration Authority related to the preservation of barrier islands along coastal Louisiana, Great Lakes Dredge & Dock Company, LLC neglected to provide a response for an item on the unit price form. Despite the argument of Great Lakes that Coastal Protection acted arbitrarily in rejecting its bid as non-responsive, the court found the completion of all alternates and unit prices and all blanks were provisions of the contract documents that were required by the bid form. Great Lakes contended the bid documents did not indicate Coastal Protection was accepting any alternates even though prices were sought for two. The court found the mere fact that bid items were listed for alternates indicated the possibility they might be accepted, and a decision to accept any alternates would largely depend on the amount of the bid. The court rejected the contention observing that Great Lakes provided responses to all other items for the alternates.

The judgment of the trial court dismissing the petition of Great Lakes was affirmed. *Great Lakes Dredge & Dock Company, LLC v. State of Louisiana through the Coastal Protection and Restoration Authority*, 2014-0249 (La.App. 1 Cir. 11/7/14), 167 So.3d 682.

RIGHT OF AN OWNER TO TERMINATE A CONSTRUCTION CONTRACT

The Third Circuit Court of Appeal noted recently that the owner of a construction project has a statutory right to terminate a contract to build even though the contractor has commenced work on the project. The owner must, however, pay the contractor for his completed work, and such damages as the nature of the case may require. If the contractor fails to do the work he is contracted to perform, or does not execute it in the manner agreed to, he is liable in damages for losses that may ensue from his noncompliance with the contract. Where there has been substantial compliance with the construction contract, but the work is defective, the contractor may recover the contract price less whatever damages the owner may prove attributable to the breach of contract. *Transier v. Barnes Building, LLC,* 2014-1256 (La.App. 3 Cir. 6/10/15), 166 So.3d 1249.

CLAIM BY A SURETY FOR INDEMNITY AND TO REQUIRE THE DEPOSIT OF A CASH RESERVE OR COLLATERAL

A surety for a contractor sued the contractor to recover payments made pursuant to payment and performance bonds issued by it, and to require the contractor to deposit a reserve of cash or collateral which it could use to pay claims and expenses incurred for other claims. The indemnity agreement with the surety signed by the contractor and several individuals provided for indemnity for amounts paid, and the right of the surety, at its option and in its sole discretion, to require that the indemnitors set up a cash reserve or collateral to be held by the surety for payments it might make in the future. The court enforced both the indemnification requirement and the right of the surety to require the cash reserve. *Employers Mutual Casualty Company v. Precision Construction & Maintenance, LLC*, 2015 WL 5254706 (E.D. La. 9/8/15).

WRIT OF MANDAMUS TO COMPEL PAYMENT FOR A PUBLIC WORKS CONTRACT

Wallace Drennan, Inc. contracted with St. Charles Parish to replace existing metal culverts on Canal #10. The contract provided that an engineer would approve each application for payment. The engineer approved the applications. St. Charles Parish refused to pay for all of the work which was encompassed by the applications, contending it overpaid Drennan. Drennan filed a petition for a writ of mandamus to compel full payment. St. Charles Parish filed an exception of

no cause of action to the petition arguing mandamus was not an appropriate remedy. The trial court granted the exception. Drennan appealed.

The court of appeal held mandamus to compel payment of sums due under a contract was the appropriate remedy under L.R.S. 38:2191D. The petition for the writ stated a cause of action for payments. If there were disputes as to the amounts owed, that was a factual issue, and not relevant for determining whether Drennan properly asserted a cause of action. The actual amount owed, if any, could be determined on the merits at the hearing on the petition. The judgment of the trial court was reversed, and the matter remanded. *Wallace C. Drennan, Inc. v. St. Charles Parish*, 14-89 (La. App. 5 Cir. 8/28/14), 164 So.3d 186.

COMPARATIVE FAULT AND CONRIBUTION FOR A BREACH OF CONTRACT CLAIM

The United States District Court for the Eastern District of Louisiana has held that while comparative fault is available as a defense to a claim in negligence, it is not a defense to a claim for breach of contract. As a result, if parties are solidarily liable for breach of contract, they are entitled to seek contribution from each other. *Hanover Insurance Company v. Plaquemines Parish Government*, 2015 WL 4167745 (E.D. La. 7/9/15).

AUTHORITY TO SIGN A CONTRACT AND ENFORCEMENT OF A LIMITATION OF LIABILITY PROVISION IN THE CONTRACT

Plaquemines Parish contracted with Sizeler, Thompson, Brown Architects to design a community center. Sizeler retained Southeast Engineers, LLC to provide structural engineering services for the project. Plaquemines Parish sued Sizeler alleging it failed to properly design the project. Sizeler filed a demand against Southeast representing it was responsible for all or part of Sizeler's alleged liability. Southeast moved to enforce a provision in its contract with Sizeler that purported to limit its liability in the event it breached the contract.

Sizeler argued that the individual who signed the contract on its behalf lacked authority to do so. The court assumed the individual lacked actual authority to execute the contract, and examined the question of whether the individual who signed the contract had apparent authority. Apparent authority is a doctrine by which an agent is empowered to bind his principal in a transaction with a third person, although the principal has not actually delegated this authority to the agent. In order for the doctrine to apply, the principal must first act to manifest the alleged mandatary's authority to an innocent third party. The third party must reasonably rely on the mandatary's manifested authority. The manifestation of authority need not be express. Rather, apparent

authority arises when the principal has acted so as to give an innocent third party a reasonable belief the agent had the authority to act for the principal.

Southeast was required to prove that Sizeler acted in some way to demonstrate that the individual who signed the contract had the authority to bind Sizeler to the contract terms. Southeast did not provide the required evidence. It failed to meet its burden to prove the individual had apparent authority to execute the contract.

That conclusion was not fatal to Southeast's motion. It also argued Sizeler ratified the contract. Ratification is a declaration whereby a person gives his consent to an obligation incurred on his behalf by another without authority. Ratification may be express or tacit. Tacit ratification results when a person, with knowledge of an obligation incurred on his behalf by another, accepts the benefit of that obligation. A tacit ratification results when a principal of a corporation acquires knowledge of an unauthorized contract and fails to repudiate it within a reasonable time.

The court found Sizeler ratified the contract. It made an initial payment to Southeast upon signing the contract as the contract required. It was clear in doing so Sizeler was fulfilling one of its obligations under the agreement. Sizeler availed itself of the benefits of the contract for approximately seven years. Its knowledge of the contract, combined with its failure to repudiate it for more than seven years, resulted in the conclusion the contract was ratified.

The contract provided that the total liability of Southeast to Sizeler would be limited to $50,000.00 or the total amount of compensation received by it, whichever was greater. The court found the limitation of liability provision was valid and enforceable, and the total liability of Southeast to Sizeler was limited to the sum of $50,000.00. Further, the contract provided Sizeler could not recover any special, incidental, indirect or consequential damages. The court found this provision precluded Sizeler's claims for defense costs and attorneys fees. Thus, while Sizeler might recover from Southeast damages according to the limitation of liability, it may not recover from Southeast any consequential damages, including defense costs and attorneys fees.

Sizeler's insurer asserted a claim against Southeast, claiming to be subrogated to Sizeler's rights according to the insurance contract. The insurer argued that as a non-party to the contract between Sizeler and Southeast, it could not be bound by its terms. The court disagreed. It found that any rights the insurer acquired through subrogation were subject to the same limitations that existed when those rights were owned by Sizeler. *Hanover Insurance Company v. Plaquemines Parish Government*, 2015 WL 4394079 (E.D. La. 7/1515).

PRESCRIPTION OF CLAIMS AGAINST AN ENGINEER

Plaquemines Parish hired Catco General Contractors to construct a community center in Boothville, Louisiana. It hired Sizeler, Thompson, Brown Architects to provide architectural drawings for the project. Sizeler, in turn, hired Southeast Engineers, LLC to provide structural engineering services. Plaquemines Parish sued, among others, Southeast for defective work. Southeast contended the Parish's negligence claims were prescribed under the one-year prescriptive period for tort claims.

C.C. art. 3493 provides that when damage is caused to immovable property, the one-year prescriptive period commences to run from the date the owner of the immovable acquired, or should have acquired, knowledge of the damage. The inquiry was whether the Parish acquired actual or constructive knowledge of the negligence of Southeast more than one year before the lawsuit was filed. The court found Plaquemines Parish had reason to believe the building was damaged long before it sued Southeast.

Plaquemines Parish contended it only recently discovered additional acts of negligence on the part of Southeast. The court found the prescriptive period ran with respect to constructive knowledge of any negligence claims against Southeast, and the fact that it recently acquired actual knowledge of some of its alleged errors was irrelevant.

Plaquemines Parish also contended the continuing tort doctrine was applicable and served to bar application of the prescriptive period. In order for the doctrine to apply, the cause of the injury must be continuous giving rise to successive damages. If it is discontinuous and terminates, even though damage persists, the theory does not apply. Here, the alleged tort terminated when Southeast finished working on the property. While the damages allegedly caused by Southeast's negligence might be continuing, the tort itself was completed long ago. Accordingly, the continuing tort doctrine did not apply.

Next, Plaquemines Parish represented the acknowledgment by Southeast's co-obligors interrupted prescription. Prescription is interrupted when one acknowledges the right of the person against whom he had commenced to prescribe. It may be interrupted tacitly, and there is no form requirement for an acknowledgment. A tacit acknowledgment occurs when a debtor performs acts of reparation or indemnity, makes an unconditional offer or payment, or lulls the creditor into believing he will not contest liability. Mere settlement offers or conditional payments, humanitarian or charitable gestures, and recognition of disputed claims will not constitute acknowledgments. The court found there was no evidence there was an

acknowledgment within one year of the date the lawsuit was filed, and Plaquemines Parish could not avail itself of that defense.

Although the tort claims against Southeast were prescribed, the court found the breach of contract claim was not. Plaquemines Parish contended it was a third party beneficiary to the contract between Sizeler and Southeast, and the longer prescriptive period for contract claims was applicable. The court found Plaquemines Parish, as the owner, was a third party beneficiary to the contract between Sizeler and Southeast for engineering services, and the contract claim was not prescribed. *Hanover Insurance Company v. Plaquemines Parish Government*, 2015 WL 4197579 (E.D. La. 7/10/15).

QUALIFICATION STATEMENTS

The Attorney General issued an opinion that a public entity may not require potential bidders on a public works project to complete AIA Document A305 or the Engineer Joint Contract Documents Committee EJDC Qualification Statement C-451 providing for background information with their bids. The apparent low bidder may, however, be required to submit the documents. Attorney General Opinion 15-0139 (11/30/15).

PUBLIC BID LAW AND A HEARING IF A BIDDER IS DECLARED NOT RESPONSIBLE

The Fourth Circuit Court of Appeal was faced with the question of whether an administrative hearing can be required if there is a determination a bid was considered non-responsive as opposed to a bidder being determined not responsible. The City of New Orleans contended a bid for a tree planting and beautification project along Esplanade Avenue was non-responsive. The trial court, in considering an application for an injunction, found the bidder was not responsible. The court of appeal found an administrative hearing was not required with respect to the City's determination, but must be allowed if a bidder is found to be not responsible.

The specifications required that the contractor be a certified arborist. Despite several requests by the City following receipt of bids for proof of certification, it was not provided, and the City determined the bid was non-responsive. The bidder subsequently provided the certification. *MST Enterprises Company, L.L.C. v. The City of New Orleans,* 2015-0112 (La.App. 4 Cir. 7/29/15), 174 So.3d 195.

TAX LAW ALERT

On December 18, 2015, the Protecting Americans from Tax Hikes Act of 2015 ("PATH") and the Consolidated Appropriations Act of 2016 ("CAA") were signed by the President. As a result, several significant individual and business tax deductions, tax credits, and other important tax provisions were extended or made permanent, namely, bonus depreciation, the Section 179 deduction, the reduction in the S corporation recognition period for built-in gains tax, and the research and development credit under Section 41. Further detail about these changes and others is provided below.

CODE SECTION 168 - BONUS DEPRECIATION, MACRS DEPRECIATION FOR CERTAIN BUILDING IMPROVEMENTS AND RESTAURANTS

Code Section 168(k) provides that a taxpayer that owns "qualified property" is generally allowed an additional first-year depreciation ("bonus depreciation") deduction of fifty percent (50%) in the year that the property is placed in service provided the property is placed in service prior to the time frame specified in Section 168(k). Additionally, "qualified property" is exempt from the alternative minimum tax (AMT) depreciation adjustment, which requires that certain property depreciated on the 200% declining balance method for regular income tax purposes must be depreciated on the 150% declining balance method for AMT purposes.

To qualify for bonus deprecation and the AMT relief, prior law required that the qualified property must be placed in service before January 1, 2015 (with certain aircraft and long-production-property to be placed in service before January 1, 2016). Under the new law, the "timely-placed-in-service" requirement for qualified property is extended to January 1, 2020 (with the applicable placed-in-service period for certain aircraft and long-production-period property extended to January 1, 2021), effectively extending the bonus depreciation and AMT relief provisions for a five-year period. The new law is effective retroactively for property placed in service after December 31, 2014 (in tax years ending after December 31, 2014) and before January 1, 2020 (or January 1, 2021, for certain aircraft and long-production-period property). Accordingly, a fiscal year taxpayer that filed its 2015 tax return before the retroactive extension of bonus depreciation and AMT relief may want to consider filing an amended return if the taxpayer placed qualifying property in service during the relevant period.

The bonus depreciation deduction will begin to phase out for qualified property placed in service after December 31, 2017. 40% bonus depreciation will apply for qualified property placed in service in calendar year 2018 (and for certain aircraft and long-production period property placed in service in 2019), and 30% bonus depreciation will apply for qualified property placed in

service in calendar year 2019 (and for certain aircraft and long-production-period property placed in service in 2020). Under the new law, no bonus depreciation will be available for property placed in service after 2019 (or after 2020 for certain aircraft and long-production-period property). The alternative minimum tax relief for qualified property is not phased out.

Furthermore, the new law retroactively restores and makes permanent the 15-year Modified Accelerated Cost Recovery System ("MACRS") for "qualified leasehold improvement property," "qualified retail improvement property," and "qualified restaurant property." Thus, if a fiscal year taxpayer placed qualified leasehold improvement property, qualified retail improvement property or qualified restaurant property in service in 2015, and the taxpayer has already filed its income tax return for that period, the taxpayer should consider amending the return to make use of the 15-year recovery period for that property.

CODE SECTION 179 - EXPENSING

Generally, taxpayers may elect to treat the cost of any Section 179 property placed in service during the tax year as an expense that is not required to be capitalized for the tax year in which the Section 179 property is placed in service. Under prior law, for tax years beginning after calendar year 2014, a taxpayer's annually allowable Section 179 expense could not exceed $25,000; and, the $25,000 limit had to be phased out by the amount by which the cost of the section 179 property placed in service exceeded $200,000. Under the new law, a taxpayer's annually allowable Section 179 expense is $500,000 and the phase-out amount is $2,000,000. The new law is effective for tax years beginning after December 31, 2014.
