The ***Construction Law Update*** is published by Baldwin Haspel Burke & Mayer, LLC for the benefit of its clients and others having an 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 covered in this newsletter, please contact **John Stewart, Jr.** at jstewart@bhbmlaw.com or (504) 585-7846.

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APPLICABILITY OF BUILDING CODES

In considering a claim for damages as a result of a fall at a hotel, the First Circuit Court of Appeal noted buildings that pre-date the promulgation of building codes are "grandfathered in," meaning existing structures not in compliance with the new codes are not required to comply with them unless there is a major renovation. *Primeaux v. Best Western Plus Houma Inn*, 2018-0841 (La.App. 1 Cir. 2/28/19), 274 So.3d 20.

PEREMPTION AND RELATION BACK

The Rapides Parish School Board sued its architect and contractor for damages related to a fire sprinkler head. The sprinkler head activated causing flooding in a portion of a school. A certificate of substantial completion was executed and recorded on August 17, 2012. The lawsuit was filed on December 26, 2014. An amended petition was filed on December 20,

2018 adding new allegations. The architect and contractor filed exceptions of peremption. The architect argued the new claims against it were perempted under L.R.S. 9:5607. The contractor argued the new claims against it were perempted under L.R.S. 9:2772. Each statute provides for a five-year peremptive period. The date for the beginning of the peremptive period of each is the date on which the certificate of substantial completion was recorded, August 17, 2012. The trial court ruled some of the claims were perempted, but not others. The architect and contractor and School Board appealed.

The trial court found the claims which were not dismissed related back to the filing of the original petition under C.C.P. art. 1153, and were not perempted. Art. 1153 provides that when an action or defense asserted in an amended petition arises out of the conduct, transaction or occurrence set forth, or attempted to be set forth in the original pleading, the amendment relates back to the date of filing of the original pleading. The court of appeal found that except for the new claims allowed by the trial court as being fairly related to the timely filed initial claims, the additional claims were perempted.

The judgment of the trial court was affirmed. *Rapides Parish School Board v. Zurich American Insurance Company*, 2019-312 (La.App. 3 Cir. 8/21/19), 279 So.3d 981, *writ denied,* 2019-01470 (La. 11/12/19), 282 So.3d 226.

PEREMPTIVE STATUTE FOR CONTRACTORS APPLIES TO ANY PERSON INVOLVED IN CONSTRUCTION ACTIVITIES

Sixty-Three Twenty-Four Chef Menteur Highway, LLC ("6324") entered into a purchase agreement whereby Phoenix Development Group, LLC would purchase property it owned. The purchase agreement was contingent upon 6324 providing clear title to the property. Decatur Hotels, LLC, a subsidiary of Phoenix, contracted with J.B. Russell & Son Construction Co., Inc. to perform work at the site. Russell subcontracted part of the work to Southeastern Commercial Roofing Company, Inc. 6324 was unable to provide clear title to the property and the sale was not completed. 6324 regained possession of the property on April 21, 2006 after work had been performed by Russell and Southeastern. On March 13, 2007,

6324 sued Phoenix and Decatur for damage to the property. Russell and Southeastern were not named as defendants until August 28, 2017. Russell and Southeastern filed exceptions contending the claims were perempted under L.R.S. 9:2772. The trial court sustained the exceptions and dismissed the claims against Russell and Southeastern. 6324 appealed.

L.R.S. 9:2772 provides a five-year peremptive period for actions against contractors. 6324 argued the peremptive period did not apply to Russell and Southeastern because it did not engage their services. The court of appeal found the argument was without merit. L.R.S. 9:2772(B)(3) states that except as otherwise provided, the peremptive period extends to every demand, whether brought by direct action or for contribution or indemnity or by third party practice, and whether brought by the owner or by any other person. The court of appeal found the peremptive period is applicable regardless of which entity engaged the services. Although 6324 did not directly contract with Russell and Southeastern, the fact Decatur engaged those entities did not negate the applicability of the peremptive period.

The judgment of the trial court was affirmed. *Sixty-Three Twenty-Four Chef Menteur Highway, LLC v. Phoenix Development Group, LLC,* 2019-0243 (La.App. 4 Cir. 7/31/18), 276 So.3d 585.

DAMAGES FOR RESTORATION OF PROPERTY

Entergy Louisiana, LLC obtained a right-of-way agreement from Allan Company-Golden Meadow, LLC to construct, maintain and operate an electric transmission line on marshland owned by Allan. The marshland was damaged by marsh buggies and other equipment used by Entergy to repair damages to the transmission line which occurred as a result of Hurricane Katrina. Allan sued Entergy to recover the damages to its property. The property that was damaged was valued at less than $5,000.00. The estimated cost of restoration exceeded $3 million. The district court granted summary judgment in favor of Entergy and dismissed Allan's claim for restoration damages. Allan appealed.

Entergy relied on the Louisiana Supreme Court decision in *Roman Catholic Church of the Archdiocese of New Orleans v. Louisiana Gas Service Company*, 618 So.2d 874 (La.1993). In

that decision the Supreme Court held, as a general rule of thumb, when a person sustains property damage due to the fault of another, he is entitled to recover damages including the cost of restoration that has been or may be reasonably incurred, or, at his election, the difference between the value of the property before and after the harm. If, however, the cost of restoring the property in its original condition is disproportionate to the value of the property or economically wasteful, unless there is a reason personal to the owner for restoring the original condition or there is a reason to believe that the plaintiff will, in fact, make the repairs, damages are measured only by the difference between the value of the property before and after the harm. If a building, such as a homestead, is used for a purpose personal to the owner, the damages ordinarily include an amount for repairs, even though they might be greater than the entire value of the building.

The Louisiana First Circuit Court of Appeal held there was nothing in the *Roman Catholic Church* decision limiting the personal reasons contemplated therein to an owner's desire to enjoy and live in his home. The decision does not require that an owner's personal reason for repairing the property be related to a homestead use.

The evidence indicated the Allan Company members have used the property for recreation and family getaways for many decades, and an inference could be drawn that at least some members have deep emotional ties to the property that will motivate them to restore the property given the potential long-lasting effects of the current damage. Similarly, an inference could be drawn from Allan's longstanding conservation efforts and attempts to preserve the marshland property.

The court found there was a genuine issue of material fact as to whether Allan would likely repair the damaged property preventing summary judgment. The judgment of the district court granting summary judgment was reversed. *Lafourche Realty Company, Inc. v. Entergy Louisiana, Inc.*, 2017-0849 (La. App. 1 Cir. 7/10/19), 281 So.3d 680, *writ denied*, 2019-01269, 281 So.3d 675.

CLAIM BY A SUBSEQUENT OWNER AGAINST AN ARCHITECT / ENGINEER FOR DAMAGES RELATING TO DESIGN WORK

An architect/engineer moved for summary judgment which was denied by the trial court and moved for reconsideration of the denial. See the decision in *Cotton Exchange Investment v. Xcel Air Conditioning,* 16-17543 (E.D. La. 5/3/19), 2019 WL 1983926, with respect to the motion for summary judgment which was reported in the July 2019 edition of the *Construction Law Update*. (http://bhbmlaw.com/construction-law-update-july-2019/)

The court discussed the Louisiana subsequent purchaser rule. The rule holds that a subsequent owner of property has no right of action against a third party for damage the third party inflicted prior to the subsequent owner's acquiring the property, absent an assignment or subrogation of the prior owner's personal right of action. The doctrine holds that because the damage was inflicted before the subsequent purchaser had any legal interest in the property, the subsequent purchaser did not personally sustain the injury, and therefore, has no personal right of action against the tortfeasor. As to damages actually suffered by the vendor before the sale, they are personal to him and cannot be recovered by the purchaser without an express subrogation. According to the architect/engineer, the rule prevented the subsequent owner from bringing claims for damages allegedly inflicted prior to the sale of the hotel to the present owner.

The court disagreed. The complaint alleged the architect/engineer's design caused the hotel to sustain water and moisture damage that manifested during the ownership of the property by the subsequent owner. It was this allegation upon which the court based its denial of the motion for summary judgment. Louisiana law recognizes the existence of a duty of care owed by design professionals to persons with whom the design professional does not have privity. In such a case, absent privity of contract, a cause of action cannot be asserted based on breach of contract; however, this does not preclude asserting a claim for damages based on the wrongdoer's tort.

The subsequent owner's ability to sue the architect/engineer is limited. Where the damage sued for is the defectively performed work itself, the action is strictly contractual and only those

who are in privity with the wrongdoer have an action against him; however, where the damage sued for is not the defective work, but is instead damage caused by the defective work, a tort action is proper when the elements for delictual recovery are present.

The motion for reconsideration was denied. In reaching its decision, the court cited jurisprudence where the same result was obtained with respect to claims of contractors. *Cotton Exchange Investment v. Xcel Air Conditioning,* 16-17543 (E.D. La. 7/10/19), 2019 WL 3006401.

RESPONSIBILITY FOR ADDITIONAL COSTS

A developer who served as a general contractor sought payment of additional costs. A contract provision stated that the developer would be responsible for all construction costs for the project exceeding a certain amount, except for unforeseen or uncontrollable costs such as asbestos or environmental mitigation and necessary site cleanup. Another provision stated that if the costs exceeded the specified amount, the developer would bear the risk and be responsible for all such costs over and above that amount.

The court of appeal agreed with the trial court that the developer underestimated the cost of the building materials based upon its error in initially providing an accurate square footage of the completed project which did not invoke the "unforeseen or uncontrollable costs" exception. Instead, the matter was governed by the section of the contract which provided that the developer would bear the risk and be responsible for all such construction costs over and above the amount of its estimate. The judgment of the trial court granting summary judgment in favor of the owner was affirmed. *Village Shopping Center Partnership v. Kimble Development, LLC*, 18-740 (La.App. 5 Cir. 4/24/19), 271 So.3d 376.

DAMAGES FOR RESTORATION OF PROPERTY AND ATTORNEY FEES

A contractor had a written contract with property owners to excavate dirt for a road project. It also had an oral contract to restore the property. The contractor, according to the property owners, dumped asphalt, dirt, concrete, wood and trash on the property and filled the excavated

dirt pit with worthless dirt, debris, concrete, wood and trash from elsewhere. The property owners sued the contractor for damages for failure to properly restore the property. A jury returned a verdict in favor of the property owners in the amount of $5,559,000.00 to remove the debris and restore the property, plus attorneys fees of $2,200,200.00. The contractor appealed.

The primary issue on appeal was whether the court used the proper standard for awarding damages to the property. The contractor contended a tort theory should apply which would take into consideration the use of the property and its value. The property owners, on the other hand, contended there was a breach of contract to restore the property, irrespective of its use and value. The court of appeal agreed with the property owners and found the contractor breached its contract to restore the property. The value of the land was irrelevant. The jury award for damages was affirmed.

The court of appeal found it was an error to award attorneys fees based on the agreement to excavate the dirt rather than the oral agreement to restore the property, which was silent as to the issue of attorneys fees. In the absence of a statutory requirement or a contract for attorneys fees, they cannot be awarded. C.C.P. art. 1472 requires the payment of attorneys fees in the event a party fails to admit the genuineness of a document or the truth of any matter with respect to which a party requests an admission, and the party requesting the admission thereafter proves the genuineness of the document or truth of the matter. There was a request that the contractor admit the existence of buried debris, a fact it could not reasonably deny, but did. The issue of buried debris, in addition to other issues, was a significant fact, and attorneys fees were awarded by the court of appeal under C.C.P. art. 1472 in the amount of $1,000,000.00. *Fontenot v. Gilchrist Construction Company, LLC*, 19-21 (La.App. 1 Cir. 10/9/19), 281 So.3d 761.

THIRD PARTY DEMAND ALLOWED

The Louisiana Fifth Circuit Court of Appeal distinguished earlier Louisiana Supreme Court jurisprudence with respect to third party demands, finding those earlier decisions stand for the

proposition an indemnity claim is premature until there is a determination that payment has been made or loss sustained. They do not stand for the proposition there is a prohibition from simply asserting a claim for indemnification in a third party demand. In the matter at hand, the question concerned the filing of a cause of action and the presentation of substantive claims which would be decided on the merits of the principal demand. The distinction is, apparently, a party can file a third party demand, but cannot attempt to enforce or prosecute it until the principal demand is tried. A motion to dismiss the third party demand was denied. *Dean v. Entergy Louisiana, L.L.C.*, 10-887 (La.App. 5 Cir. 10/19/10), 2010 WL 9447498.

THIRD PARTY DEMAND FOR INDEMNITY REJECTED

An engineer was sued by a contractor for the defective design of gear reducers which were manufactured by another party. The engineer filed a third party demand against the manufacturer for indemnity. The United States District Court for the Eastern District of Louisiana dismissed the third party demand finding the claims against the engineer were for its alleged fault and were not for the engineer's passive, technical or vicarious liability. The engineer could not be held liable unless it actually failed to properly design the project. Under Louisiana Civil Code articles 2323 and 2424, each tortfeasor who does not conspire with another person to commit an intentional or willful act may only be held liable for his own degree of fault and may not be held solidarily liable with any other person for damages attributable to the fault of such other person. This regime was found by the court to apply to products liability cases. Indemnity permits a party not actually at fault, whose liability results from the fault of others, to recover from those parties at fault. The claims against the engineer did not present such a scenario. *Fucich Contracting, Inc. v. Shread-Kuyrkendall and Associates, Inc.*, 18-2885 (E.D. La. 12/17/19), 2019 WL 6877646.

GENERAL CONTRACTOR HELD TO BE A BUILDER UNDER THE NEW HOME WARRANTY ACT

The New Home Warranty Act (NHWA) provides exclusive remedies, warranties and peremptive periods as between builders and owners relative to home construction. The

Louisiana Third Circuit Court of Appeal held in a suit by the owner of a home against their general contractor that the general contractor met the requirements of a "builder" under the NHWA, and was afforded the protections of the law even though the "owner" did not sell the property to another who was the claimant. *Palermo v. Homes and More, Inc.*, 19-295 (La.App. 3 Cir. 12/18/19), ____ So.3d ____, 2019 WL 6886709.

DISMISSAL OF THIRD PARTY DEMAND REVERSED

An engineer instructed a contractor to temporarily cease work, and several months later instructed him to proceed with the work as originally planned. The contractor initially asserted claims for delay damages in a series of demand letters to the owner. The owner requested that the engineer review the claims and make recommendations, which the engineer did. The engineer recommended payment. The owner disputed the engineer's recommendation and refused to pay the contractor any amount. The contractor sued the owner. The owner filed a third party demand against the engineer for indemnification. The engineer filed a peremptory exception of no cause of action to dismiss the third party demand, which was granted by the trial court. The owner appealed.

The first issue considered by the court of appeal was whether the third party demand satisfied C.C.P. art. 1111 providing for third party demands. Article 1111 states that the defendant in a principal action may bring in any person, including a co-defendant, who is his warrantor, or who is or may be liable to him for all or part of the principal demand. The court found the principal demand of the contractor included not only the delay damages claim, but also a request for a determination that the owner was bound by the engineer's recommendation regarding the amount of delay damages owed. The contractor's claims provided a root from which the owner's third party demand against the engineer could grow. The court held to the extent that defective performance by the engineer of its agreement with the owner exposed the owner to liability to the contractor, the owner's third party demand against the engineer based on that alleged defective performance fit nicely within C.C.P. art. 1111.

Next, the court considered the indemnity provision in the agreement between the owner and

the engineer. It provided that the engineer would indemnify and hold harmless the owner for "loss of life or injury or damages to person or property, growing out of, resulting from, or by reason of any negligent acts, errors, and/or omissions, by the engineer." The engineer argued the owner's claim was solely an economic loss claim and that such claims are not covered by the indemnity provision because it is not a "loss of life or injury or damages to person or property." The court held the word "property" in the indemnity agreement was arguably ambiguous. Given the ambiguity created by the use of that word, coupled with the procedural posture of the case (an exception of no cause of action), the court found the owner stated a valid contractual indemnity claim. The decision of the lower court granting the exception was reversed, and the matter remanded. *Couvillion Group, L.L.C. v. Plaquemines Parish Government*, 2019-0564 (La.App. 4 Cir. 12/11/19), ____ So.3d ____, 2019 WL 6769614.

LIABILITY FOR DAMAGE TO ADJACENT PROPERTY

The owner of a property hired a contractor to perform renovation work. An adjacent property owner alleged that work caused damage to its property and sued for the damages. The Louisiana Second Circuit Court of Appeal analyzed Civil Code article 667 which provides that although a proprietor may do with his estate whatever he pleases, he cannot make any work on it which may deprive his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him. The court found although there was no evidence of substandard conduct on the part of the property owner or its contractor, proof of negligence is not required to recover under art. 667. The property owner, or proprietor, is responsible not only for his own activity, but also for that carried on by his agents, contractors and representatives with his consent and permission. The adjacent property owner established its claim that damage resulted to its property which was caused by the construction activity. The proprietor who undertook the construction activity failed to take all necessary precautions to protect its neighbor and was liable for the damages.

The contractor was working as an independent contractor whose work caused the damage. Under L.R.S. 9:2773, the contractor, for purposes of art. 667, would be liable as the surety for the owner of the property on which the work was performed only to the extent the property

owner could not satisfy the damages awarded. *Cash v. Delhi Office Building, LLC*, 53-006 (La.App. 2 Cir. 9/25/19), 280 So.3d 1275.

TWO-CONTRACT THEORY OF IMMUNITY UNDER THE WORKERS' COMPENSATION LAW

Broadmoor, LLC contracted with Air Comfort, Inc. for part of its work. Air Comfort, in turn, contracted with Waynco Sheet Metal, Inc. An employee of Waynco was injured and sued Broadmoor for damages. The United States District Court for the Eastern District of Louisiana considered whether the two-contract theory applied and Broadmoor was immune from liability under the workers' compensation law. The court held in order for the two-contract theory to apply, there must be a showing: (1) the defendant entered into a contract with a third party; (2) pursuant to that contract, work must be performed; and (3) in order for the defendant to fulfill its contractual obligation to perform the work, defendant entered into a subcontract for all or part of the work performed. The court held the two-contract theory applied and Broadmoor was immune. The fact the contract between Air Comfort and Waynco was oral was not important and did not change the fact work was subcontracted to Waynco. *Alexander v. Broadmoor, LLC*, 04-3326 (E.D. La. 3/21/06), 2006 WL 8456122.

CERTIFICATE OF SUBSTANTIAL COMPLETION SATISFIES REQUIREMENT OF THE PRIVATE WORKS ACT FOR A NOTICE OF TERMINATION OF THE WORK

The Louisiana First Circuit Court of Appeal found that a certificate of substantial completion satisfies the requirement of the Private Works Act for a notice of termination of the work for purposes of determining whether a lien is timely filed if the requirements of L.R.S.9:4822(E) are met. In this instance, it satisfied the requirements of L.R.S. 9:4822(E) that the document reasonably identify the immovable upon which the work was performed and work to which it relates, and if the work is evidenced by a notice of contract, reference is made to the notice as filed in the record, together with the names of the parties to the contract, and further, that the document be signed by the owner or its representative, and certifies the work had been

substantially completed, or the work had been abandoned by the owner, or the contractor is in default under the terms of its contract. Although the lien was timely filed, the claimant did not institute an action to enforce the lien within the one-year period required by law. The claim under the Private Works Act was held to be perempted. *Landco Construction, LLC v. Precision Construction & Maintenance, LLC*, 2019-0403 (La.App. 1 Cir. 11/15/19), ____ So.3d ____, 2019 WL 6045347.

CLAIM ON AN OPEN ACCOUNT

The Louisiana First Circuit Court of Appeal, following earlier Louisiana Supreme Court jurisprudence, held there is no requirement that there be one or more transactions between the parties, nor is there any requirement that the parties must anticipate future transactions, for an open account to exist and for purposes of liability under the open account statute, L.R.S. 9:2781. A violation of the statute subjects the debtor to attorneys fees for the prosecution and collection of a claim when judgment on the claim is rendered in favor of the claimant. A violation occurs when a person fails to pay on an open account within thirty days after the claimant sends written demand therefor correctly setting forth the amount owed. *SBL Construction, LLC v. Eymard*, 2018-1691 (La.App. 1 Cir. 11/12/19), ____ So.3d ____, 2019 WL 5884389.

MILLER ACT COVERAGE FOR REPAIR COSTS AND ATTORNEYS FEES

The United States District Court for the Western District of Louisiana held that the surety of a general contractor for a federal project is responsible, pursuant to the Miller Act, for the contractual obligations the general contractor owed to a claimant who leased equipment to a subcontractor. The contract required the repair of any damage to the equipment and/or any missing parts or accessories. The court noted the surety was free to prohibit either party from agreeing to this term, but because it did not, there was no reason to discard the obligation of liability. The surety could not avail itself of the rental agreement's exclusion of liability for repairs due to ordinary wear and tear because it conceded the repairs in question were not clearly for ordinary wear and tear.

The rental contract included the obligation of the lessee to pay all costs and reasonable attorneys fees incurred by the lessor in filing suit to recover payments due. The court held the lessor could enforce the contractual provision for attorneys fees against the surety. *United States of America for the Use and Benefit of Regency Construction, Inc. v. J.H. Parker Construction Co., Inc.*, 02-1707 (W.D. La. 10/4/2005), 2005 WL 8174302.

FEDERAL GOVERNMENT CONTRACTOR IMMUNITY DEFENSE

A contractor contracted with the Corps of Engineers to remediate an area adjacent to the Industrial Canal. Plaintiffs who sued the contractor for flooding caused during Hurricane Katrina as a result of the failure of the flood wall at the east bank of the Industrial Canal contended the contractor failed to fulfill its state law duty of due care when it excavated and backfilled two specific areas. The contractor claimed it was immune from suit under the federal government contractor defense. In order for a contractor to claim the defense, (1) the government must have approved reasonably precise specifications; (2) the equipment must have conformed to those specifications; and (3) the supplier/contractor must have warned of those equipment dangers that were known to the supplier/contractor but not the government. The immunity is derived from the government's immunity from suit where the performance of a discretionary function is at issue.

Plaintiffs claimed the contractor must prove two prerequisites prior to invoking the defense. The first was that if the government does not enjoy discretionary function exception immunity for a particular task or project, then the government contractor should not enjoy a derivative of the immunity. Second, they argued that only when the state imposed duty of care (that conduct that is the asserted basis of the contractor's liability) is precisely contrary to the duty imposed by the government contract should the contractor defense displace state law. The court rejected those arguments and issues finding they were encompassed by the first prerequisite, i.e., the government must have approved reasonably precise specifications.

In considering whether the specifications were reasonably precise, the court held the government need not prepare the specifications to be considered to have approved them.

Substantive review is adequate. The specifications need not address the specific defect alleged; the government need only evaluate the design feature in question. Here, the court found no reasonable person could find there was not substantial give and take in the confection of the plans used to accomplish the project. The Corps of Engineers was intimately involved in all stages of the planning. Further, the plans were reasonably precise. Extensive government involvement in the design, review, development and testing of a product, as well as extensive acceptance and use of the product following production, is evidence that the product generally conformed with the government approved specifications. Plaintiffs made absolutely no showing that the contractor did not perform its task in accordance with the specifications. The Corps found no deficiencies in the performance of the contract and ultimately accepted the project in its entirety.

The final prerequisite requires that the contractor warn the government about dangers that were known to the contractor but not to the government. The court held the government contractor defense does not require a contractor to warn the government of defects about which it only should have known. A government contractor is only responsible for warning the government of dangers about which it has actual knowledge. The motion for summary judgment filed by the contractor was granted. *In Re Katrina Canal Breaches Consolidated Litigation*, 05-4182 (E.D. La. 12/15/08), 2008 WL 11509213.

ENFORCEMENT OF A FORUM SELECTION CLAUSE

A subcontract contained a forum selection clause which stated the agreement would be governed by the law of the State of Louisiana, and the subcontractor submitted to the venue and jurisdiction of the Eastern District Court of Louisiana, a federal district court. The subcontractor contended the forum selection clause was unenforceable and did not apply, and the court lacked personal jurisdiction over it. It was alleged the liens the subcontractor filed in the Virgin Islands violated the subcontract and the Virgin Islands lien law.

The federal district court stated it must first determine if the clause was mandatory or permissive. A forum selection clause is mandatory only if it contains clear language specifying

that litigation must occur in a specified forum, i.e., the jurisdiction must be exclusive. A permissive form selection clause is only a contractual waiver of personal jurisdiction and venue objections if litigation is commenced in the specified forum. The forum selection clause stated only that the subcontractor submits to the venue and jurisdiction of the court, and did not state, for example, that it exclusively submits to the court's jurisdiction. The court found the clause was permissive, and the subcontractor contractually waived any personal jurisdiction or venue objections in the court if the clause was enforceable and applied to the claims against the subcontractor.

Under federal law, a forum-selection provision in a written contract is *prima facie* valid and enforceable unless the opposing party shows that enforcement would be unreasonable. It is unreasonable where (1) the incorporation of the forum selection clause into the agreement was the product of fraud or overreaching; (2) the party seeking to escape enforcement will for all practical purposes be deprived of his day in court because of the grave inconvenience or unfairness of the selected forum; (3) the fundamental unfairness of the chosen law will deprive the plaintiff of a remedy; or (4) enforcement of the forum selection clause would contravene a strong public policy of the forum state. Here, the subcontractor did not meet its burden. The court found the clause was valid and enforceable.

The next issue was whether the forum selection clause applied to the plaintiff's claims against the subcontractor. The subcontractor argued it did not since each claim did not relate to the subcontract. To determine whether the subcontract's forum selection clause applied to each claim, the court must look to the language of the parties' contracts to determine which causes of action are governed by the clause. The scope of a forum selection clause is not limited to claims for breach of the contract that contains the clause. Forum selection clauses extending to all disputes that relate to or are connected with the contract are construed broadly. Here, the clause broadly stated the subcontractor submitted to the venue and jurisdiction of the Eastern District Court of Louisiana, and must, at a minimum, include breach of contract claims and tort claims relating to the subcontract. Even if the claims sounded in both contract and tort, they may nonetheless fall within the scope of the subcontract's forum selection clause. The claims were found by the court to fall within the scope of the clause. The court concluded the

claimant met its burden of establishing that the court may exercise personal jurisdiction over the subcontractor in the matter presented. *Citadel Recovery Services, LLC v. T.J. Sutton Enterprises, LLC*, 19-12271 (E.D. La. 11/5/19), 2019 WL 5725055.

REQUIREMENTS FOR PUBLIC BIDS

An advertisement to bidders for a public project required that all bidders attend a pre-bid conference. An individual appeared at the conference and listed on the sign-in sheet the entity he represented as MK Constructors. The public authority incorporated the pre-bid conference sign-in sheet as an addendum which was issued to bidders as an official bidding document. BDS Constructors, LLC was the apparent low bidder. BDS registered its trade name "MK Constructors" in the State of Texas, but was not registered as an independent entity or trade name in Louisiana or the parish in which the project was to be constructed. Additionally, that name was not on any Louisiana contractor's license or company registration. BDS had a foreign certificate of authority but it did not list or reference "MK Constructors" in this state. The court found MK Constructors did not exist in Louisiana.

Despite the testimony of the public agency's engineer that he knew the bid conference attendee who identified himself as representing MK Constructors was there for BDS, the court found there was no objective contemporary evidence that BDS attended the pre-bid conference. The engineer's interjection was prohibited by the public bid law, L.R.S. 38:2212(I), which requires that when a design professional or public entity mandates attendance by prospective bidders at pre-bid conferences as a prerequisite to bid on a public works project, all prospective bidders shall be present. The court held that BDS's bid was non-responsive because it failed to attend the mandatory pre-bid conference.

Additionally, BDS listed its name in its bid form as "BDS Constructors LLC d/b/a MK Constructors." BDS's official name with the Louisiana Licensing Board for Contractors was listed as "BDS Constructors, LLC." The court found BDS's bid was also non-responsive on this basis, as well.

Further, BDS failed to include with its bid a form required by federal regulations and the bidding documents. Even if the forum was beyond that which could be requested at the time of bidding, pursuant to the Louisiana Public Bid Law, that law was preempted to the extent it conflicted with federal law. The failure to include the form with the bid was yet another reason why the BDS bid was non-responsive. *Merrick, L.L.C. v. The Airport Authority for Airport Dist. No. 1 of Calcasieu Parish*, 2019-185 (La.App. 3 Cir. 11/6/19), ____ So.3d ____, 2019 WL 5783509.

CLAIM AGAINST AN INSURER FOR BAD FAITH DAMAGES

A contractor sued an owner for alleged increased costs resulting from breach of contract and negligence. The owner filed a third party complaint against several designers and their insurer. The policy issued by the insurer named the owner as an additional insured. The owner claimed the insurer was liable to it for damages for failing to timely pay the claim in bad faith after satisfactory proof of loss. The United States Fifth Circuit Court of Appeals held Louisiana courts have consistently excluded any party other than a named insured from recovering bad faith damages and affirmed the dismissal of the claim of the owner against the insurer for the damages. *Team Contractors, L.L.C. v. Waypoint NOLA, L.L.C.*, 780 Fed.Appx. 132 (5th Cir. 2019).

APPLICATION OF THE LOUISIANA CONSTRUCTION ANTI-INDEMNITY ACT AND THE LOUISIANA OILFIELD ANTI-INDEMNITY ACT

The United States District Court for the Eastern District of Louisiana held the exception to the Louisiana Construction Anti-Indemnity Act that applies to pipelines that transport commingled gas only applies to gas gathering lines. The Louisiana courts have used the term "gas gathering line" in conjunction only with lines that run amongst wells or between production facilities and the first processing plant. The pipeline at issue ran between processing facilities and was not a gas gathering line as the term is used in the statute. Further, the Louisiana Oilfield Anti-Indemnity Act, L.R.S. 9:2780, only applies to agreements pertaining to wells. A natural gas pipeline does not pertain to a well when the gas has been so commingled that it can no longer

be identified with a particular well. *Atlantic Specialty Insurance Company v. Phillips 66 Company*, 19-30182 (E.D. La. 10/24/19), ____ Fed.Appx. _____, 2019 WL 5468814.

RESIDENTIAL FRAUD

A contractor was convicted of residential contractor fraud under L.R.S. 14:202.1. He charged a client a deposit for the purchase and installation of windows, and, thereafter, a final payment. Both payments totaled $6,500.00. The contractor did not perform the work, and the client discovered the windows were never ordered. A jury unanimously found the contractor guilty. The trial court sentenced him to three years of active probation and ordered payment of restitution in the amount of $6,500.00. The contractor appealed. The court of appeal affirmed the conviction. *State of Louisiana v. Pinner*, 19-KA-158 (La.App. 5 Cir. 10/23/19), 282 So.3d 389.

AUTHORITY OF PERSONS SIGNING PUBLIC BIDS

The State advertised for bids for a levee repair project. The instructions to bidders with respect to the authority of the person signing the bid were not consistent with L.R.S. 38:2212(B)(5), and were more restrictive than the statute. The district court found the State was bound by the more restrictive requirements set forth in the instructions. The court of appeal affirmed. The Louisiana Supreme Court reversed finding the bid instructions were facially invalid and must yield to the mandatory statutory requirements. A public entity may not deviate from the statutory requirements. *LeBlanc Marine, LLC v. State of Louisiana*, *Division of Administration, Office of Facility Planning and Control*, 2019-0053 (La. 10/22/19), ____ So.3d ____, 2019 WL 5432115.

RIGHTS OF AN OWNER AND SURETY UNDER PAYMENT AND PERFORMANCE BONDS

An owner contended it was entitled to assert a claim against a payment bond provided by a contractor in response to a lien filed by the contractor which included amounts allegedly owed

to subcontractors. The court held the owner was not a proper claimant under the bond and had no right of action against the surety.

Additionally, the owner, in an attempt to collect against the surety under the performance bond, contended the contractor was in default as a matter of law given that it failed to meet the contract deadlines to obtain a temporary certificate of occupancy or achieve substantial completion by the specified date. The court found, contrary to the owner's contention, the performance bond provided that the owner was required to give formal notice of default before the surety's obligations were triggered. The argument the contractor was in default as a matter of law was rejected. The court also held failure of the contractor to obtain substantial completion was not an alternative to the requirement that the owner terminate the contract. The contract was incorporated into the performance bond by reference and provided the terms by which the owner could terminate the contract. It included a requirement that the owner give seven days written notice of its intent to terminate to both the surety and the contractor. The owner failed to satisfy that requirement.

Finally, the owner contended, in response to the surety's claim for the balance of the contract, it was entitled to offset any amounts due the contractor under the contract and it was not required to tender the contract balance to the surety. The court held the argument overlooked the language of the performance bond which required the owner tender the contract balance. *Roy Anderson Corporation v. 225 Baronne Complex, LLC*, 2018-0962 (La.App. 4 Cir. 9/25/19), 280 So.3d 730.

GOVERNMENT CONTRACTOR IMMUNITY AND SPOLIATION

In the context of a contractor's motion for summary judgment related to an automobile accident involving a Southeast Louisiana Drainage Project (SELA) federally funded project, the United States District Court for the Eastern District of Louisiana considered the contractor's defense of governmental contractor immunity. The court held immunity afforded contractors for conduct that complies with the specifications for a federal contract attaches if

the defendant can establish: (1) the government approved reasonably precise specifications; (2) the equipment or work conformed to those specifications; and (3) the contractor warned the government about any dangers that were known to the contractor, but not to the government.

The first prong of the test has two requirements: (1) reasonably precise specifications; and (2) government approval, which, together, are intended to assure that the design feature in question was considered by a government officer, not merely by the contractor itself. Reasonable precision requires that discretion over significant details and all critical design choices be exercised by the government. This inquiry focuses not on the designer of the offending feature of the project, but rather on the detail of the specifications presented to the government for approval. The government need not prepare the specifications to be considered to have approved them. Government approval simply requires meaningful, substantive review of the specifications.

The issue centered on the traffic control device plan and the use of barricades, danger, warning and detour signs. The court found the plan provided detailed and precise traffic specifications such as the exact placement of traffic signs and the method of properly conducting lane closures. The court found the contractor sufficiently showed the plans and specifications governing traffic control were reasonably precise, and the Corps of Engineers meaningfully reviewed and approved the traffic specifications. The level of the review process routinely consisted of continuous back and forth between the contractor and the Corps, often requiring the contractor to provide resubmittals on the same component of work until the Corps ultimately approved the submittal. The court found the contractor satisfied its evidentiary obligations with regard to the first prong.

The second prong of the test requiring a government contractor to have performed the work in accordance with the approved specifications serves to locate the exercise of discretion in the government. Conformity may be satisfied by proof that the government supervised and controlled the implementation of its approval of reasonably precise specifications. A breach of

some general admonition against an unwanted condition does not negate a showing of a contractor's conformity with reasonably precise specifications. The oversight of the Corps of Engineers was extensive and steady. The court found the defendant contractor produced proof that the Corps not only monitored, but approved its work. The Corps approved all traffic-related submittals and modifications to the traffic control device plan implemented by the contractor. Further, the contractor was paid in full by the Corps for its work. Courts have consistently held that government payment to a contractor without setoff constitutes compelling proof that the contractor conformed to specifications. The court found the contractor submitted sufficient evidence to entitle it to summary judgment on the second prong.

The final prong of the test requires that the contractor was unaware of reasons not known to the government that would make the implementation of the specification unsafe or unreasonable. A government contractor is only responsible for warning the government of dangers about which it has actual knowledge, not constructive knowledge. The court found the contractor provided sufficient evidence it had no knowledge of any damages unknown to the Corps.

In analyzing the issues, the court found the judgment on contract immunity defense issues in *Sewell v. Sewerage & Water Board of New Orleans*, CV 15-3117 (E.D. La. 12/21/16), 2016 WL 7385701 was persuasive. There, the court, in granting summary judgment, noted reasonably precise specifications governed application of traffic mitigation measures. The court further noted that in the absence of conflicting evidence, the government's written acceptance of a contractor's work constitutes compelling proof of conformity. The court in *Sewell* rejected any contention that the SELA project at issue allowed the contractor the level of discretion needed to defeat government contractor immunity. Precatory, or generalized, contract language that could be interpreted as imparting a modicum of discretion to the contractor is insufficient to defeat the more detailed requirements and supervision detailed in the contract and subsequent documents.

The contractor contended the plaintiff was guilty of spoliation of evidence in altering digital photographs offered as evidence in opposition to its motion for summary judgment, and it was, therefore, entitled to sanctions. The court found the digital evidence was not lost, but to allow a party to avoid sanctions merely because the attempt to destroy evidence was unsuccessful would be to ignore one of the primary goals of sanctioning spoliative conduct, i.e., protecting the integrity of judicial proceedings even if authentic evidence is not successfully deleted. The court found the plaintiff intentionally altered evidence to make it appear more favorable to her case. As a result, the contractor was prejudiced in having to employ an expert witness for purposes of the issue. The court awarded to the contractor the expert's fees it incurred as a result of the alteration as a sanction on the plaintiff. *Guarisco v. Boh Brothers Construction Co., LLC*, 18-7514 (E.D. La. 10/3/19), ____ F.Supp.3d ____, 2019 WL 4881272.

WAIVER OF ARBITRATION

The Louisiana Fifth Circuit Court of Appeal held that the issue of whether a party to a contract has waived arbitration should be decided by the arbitrator. *Nelson v. H2O Hair, Inc.*, 19-193 (La.App. 5 Cir. 5/22/19), 274 So.3d 747.

INDEMNIFICATION FOR ATTORNEYS FEES NOT ALLOWED

An owner argued the provisions of its contract with a contractor, which indemnified and held it harmless from "any liability or claims" for damages incurred as a result of the negligence of the contractor related to its work, required indemnification not only for the damages, but also for attorneys fees it incurred in prosecuting its claims. Louisiana law does not permit recovery of attorneys fees, except where authorized by statute or contract. There was no statute purportedly authorizing the award of attorneys fees and the indemnity agreement made no explicit reference to attorneys fees.

The court found a contract may impose an obligation to pay attorneys fees when such a requirement is specifically provided in the contract or when the obligation is implied.

Typically, specific language beyond the obligation to pay claims or damages is required. Some courts have found an obligation to pay attorneys fees is implied by contract language referencing a duty to defend. The court found the contract at issue did not expressly require the contractor to pay attorneys fees, nor did it include any reference to a duty to defend or other obligation that implied recovery of attorneys fees was contemplated by the parties. As a result, the court held the indemnity agreement did not require the contractor to pay the owner's attorneys fees. *Cotton Exchange Investment v. Xcel Air Conditioning,* 16-17543 (E.D. La. 9/9/19), 2019 WL 4257258.

COVERAGE FOR A CONTRACTOR UNDER A CGL POLICY LIMITED

A homeowner filed an arbitration proceeding against a contractor for damages resulting from the flooding of her home and property which were attributable to the contractor's failure to follow plans and specifications. The arbitrator awarded damages to the homeowner against the contractor. The arbitration award was confirmed. The contractor sought coverage for the damages from its commercial general liability insurer.

The first issue was whether the damages were caused by an "occurrence" as required by the policy. The court found an "occurrence" included an unseen and unexpected loss. While defective construction work is not considered an occurrence, property damage caused by the defective work is. The court found the arbitration award fell within the scope of coverage and proceeded to consider the exclusions of the policy.

The policy included exclusions for damages to the insured's work and products. The insurer contended the damages fell within the products exclusion, but agreed that damage to property contained within the residence would be covered. The court held the entire residence was the "product" of the contractor and none of the damage to the residence was covered under the policy. Damages to items within the residence, however, were covered.

Damages were awarded by the arbitrator relating to storm water drainage for the house and

lot. As a result of this faulty work, the backyard was perpetually swampy and wet, impeding use and enjoyment. The damages to the lot consisted of improvements to the backyard, including catch basins, etc. The faulty drainage system was the insured's product and those damages were subject to the products exclusion. Further, those damages were subject to the impaired property exclusion, which provides that the policy did not apply to property that has not been physically injured arising out of a defect in the insured's product. The court found the impaired property provision applied since the damages were to the insured's product, i.e., the faulty drainage work.

The court considered whether attorneys fees were covered by the policy. The arbitrator awarded the homeowner reasonable fees and costs associated with prosecuting the claims. The insurer contended there was no coverage for the attorneys fees under the punitive and exemplary damages exclusion of the policy. The court found if the insurer intended the policy to exclude coverage for attorneys fees, the exclusion would have emphatically stated the fees were excluded from coverage and it was misplaced to assume or conclude attorneys fees are punitive damages. The insurer, alternatively, argued the attorneys fees were consequential damages of the faulty workmanship and would be excluded under the product exclusion. The court found that a plain reading of both exclusions did not address whether an award for attorneys fees was covered or excluded from coverage. A review of relevant jurisprudence revealed no support for excluding coverage under the punitive and exemplary damages exclusion, and only conflicting and ambiguous findings on whether the product exclusion would exclude such coverage. The court held there was no coverage for attorneys fees. *Atain Specialty Insurance Company v. Siegen 7 Developments, L.L.C.,* 18-00850 (M.D. La. 9/6/19), 2019 WL 4247827, *app. filed* 10/4/19.

ENFORCEMENT OF FORUM SELECTION CLAUSE

A forum selection clause in an insurance policy provided that any disagreement related to the policy would be brought in a New York court, and New York law would control the interpretation, application and meaning of the contract. As a result of flood damages, an

insured sued his insurer in a Louisiana state court. The insurer argued the forum selection clause required that the litigation be brought in New York. The insured contended the forum selection clause was invalid under L.R.S. 22:868 which provides that no insurance contract delivered or issued for delivery in Louisiana covering subjects located, resident, or to be performed in Louisiana, shall contain any condition, stipulation or agreement requiring that it be construed according to the law of another state or country, or depriving the courts of Louisiana of jurisdiction of the action.

In reviewing the issue, the Louisiana Supreme Court noted it previously held that jurisdiction and venue are distinct legal concepts. If jurisdictional requirements are met, courts throughout the state have the legal power and authority to hear the case; however, not all courts with jurisdiction are in the proper venue. The court held the statute does not prohibit the forum selection clause at issue since it chooses New York as the venue for the dispute, and does not deprive Louisiana courts of jurisdiction.

That does not mean enforcement of a forum selection clause requiring that disputes be litigated in a foreign forum will necessarily be upheld if enforcement would be unreasonable or seriously inconvenient. Inconvenience is foreseeable at the time the parties negotiate the contract. As a result, it is incumbent upon the party seeking to escape the contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will, for all practical purposes, be deprived of his day in court. The insured here failed to make the required showing. The parties to the contract were sophisticated entities engaging in a commercial transaction; they exercised contractual freedom to resolve any dispute related to the contract in a particular forum in an arms-length negotiation. *Creekstone Juban I, L.L.C. v. XL Insurance America, Inc.*, 2018-0748 (La. 5/8/19), ____ So.3d ____, 2019 WL 2041798.

CONTRACTOR IMMUNITY UNDER L.R.S. 9:2771

An injured motorist sued a contractor for alleged defects in a road project while under construction. The contractor claimed immunity under L.R.S. 9:2771, which provides that no

contractor 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 the destruction, deterioration or defect was due to any fault or insufficiency in the plans or specifications. A contractor cannot rely blindly on plans and specifications, but rather, to avoid liability, he must prove either the condition created was not hazardous or it had no justifiable reason to believe its adherence to the plans and specifications created a hazardous condition. The court of appeal found the contractor followed the plans and specifications without deviation, and did not blindly rely on them or create a hazardous condition.

The court found the plans and specifications provided to the contractor called for reflective buttons striping the lanes as well as traffic control warning signs cautioning motorists of the construction, and the contractor unquestionably complied with those requirements. The court found the contractor reasonably relied upon those conditions to alert motorists of any hazards. The undisputed facts clearly showed measures were in place to alert motorists to any hazards. The contractor neither knew nor should have known that installing a non-reflective barrier, as called for in the plans and specifications, created a hazardous condition. *Grimsley v. Liberty Mutual Insurance Company*, 52-872 (La.App. 2 Cir. 8/14/19), 276 So.3d 1142, *writ denied,* 2019-01467 (La. 11/12/19), 282 So.3d 232.

CLAIM FOR INDEMNITY UNDER A POLICY OF INSURANCE

Employees of a contractor sued the owner for damages for personal injury. The owner settled the claims and filed a third party demand against the contractor and its insurers seeking reimbursement and indemnity for the amounts it paid in defending and settling the claims. The owner was an additional insured under the contractor's policies.

The policies contained requirements which were considered conditions precedent to coverage. The conditions required, among other things, that the owner, as an additional insured, provide notice to the insurers of the plaintiffs' lawsuits as soon as practicable, and that no settlement

of a claim would be made without the consent of the insurers. Admittedly, the owner did not provide notice of the plaintiffs' claims to the insurers until after it settled all of the claims against it. The settlement was made without notice to the insurers and without their consent, in breach of the clear and explicit language of the insurance policies. Coverage for the claims was denied. *Ortiz v. Meadwestvaco Corporation*, 2018-869 (La.App. 3 Cir. 6/5/19), 274 So.3d 158.

LIABILITY INSURANCE COVERAGE

A plaintiff claimed her home was damaged by a contractor while it was being elevated and sought damages from the contractor's insurer. The homeowner acknowledged that she noticed damages to the home almost immediately after work began. The contractor's liability policy was not written until after the work was completed. The insurer contended it did not provide coverage for the damages since its policy was written on an occurrence basis, requiring that damage occur during the policy period, and contained an endorsement excluding from coverage any damage or loss that occurred prior to the policy period. The homeowner argued the property was repeatedly exposed to harmful conditions created by the insured and continuing through the date an expert inspected the home and found it was not elevated to proper levels.

The court applied the manifestation theory for coverage, as opposed to the exposure theory, finding the jurisprudence relating to the trigger of coverage for construction defects supported its use. Under the manifestation theory, property damage is considered to have occurred when it becomes manifest. Damages under the exposure theory are considered to have occurred when the act, which resulted in the damage, took place, not when it was discovered. Damage that develops over a period of time from continued or repeated exposure to injurious conditions, under the exposure theory, are considered as occurring continuously during the entire course of exposure. Even where the damage or injury was not manifested until after the insurer's policy period, if the insurer's policy period fell either at the inception or during the course of exposure, the insurer will be liable. In applying the manifestation theory, the court

found the damages were not covered by the policy. The pre-existing injury endorsement was not ambiguous and supported the proposition the policy required for coverage that any damage or loss occur during the policy period. *Mann v. Tim Clark Construction, LLC*, 2018-0961 (La.App. 4 Cir. 5/22/19), 273 So.3d 397, *writ denied,* 2019-01019, (La. 10/1/19), 280 So.3d 158.

PEREMPTION AND THE NEW HOME WARRANTY ACT

Plaintiff purchased a newly constructed home on January 3, 2011 and later that year sued the builder for defects concerning tiles in the kitchen. She amended her petition in September 2015, alleging additional defects. The New Home Warranty Act ("NHWA") provides warranties for certain defects. There is a one-year warranty for defects due to non-compliance with building standards or other defects or workmanship not regulated by building standards, and a two-year warranty for defects related to plumbing, electrical, cooling and ventilating systems, among other warranties. The NHWA provides a peremptive period of 30 days after the expiration of the appropriate warranty periods. The plaintiff argued the additional claims should relate back to the date the original claims were filed.

The NHWA provides a listing of categories of items that are excluded from a builder's warranty, unless otherwise agreed in writing. Included in the exclusionary language is any defect not reported in writing by registered or certified mail to the builder prior to the expiration of the warranty periods specified for such defect plus 30 days. Several of the defects for which recovery was sought in the amended petition fell within that provision, and were excluded from any warranty provided by the Act. *Bethancourt v. Trahan,* 2018-1002 (La.App. 3 Cir. 6/5/19), 274 So.3d 620.

PUBLIC BID AWARD PROTEST

The Ernest N. Morial Exhibition Hall Authority ("Authority") advertised for bids for its Linear Park project. J. Caldarera & Co., Inc. was the apparent low bidder. Landis Construction Co.,

LLC was the second low bidder. Landis protested the responsiveness of Caldarera's bid. The Authority awarded the contract to Landis as the lowest responsive and responsible bidder. Caldarera filed a petition for a temporary restraining order, preliminary and permanent injunctive relief, mandamus and a declaratory judgment. The trial court, following a bench trial, rendered judgment against Caldarera and in favor of the Authority. Caldarera appealed.

Several issues were raised by Caldarera in his appeal. The first concerned the finding by the Authority, which was upheld by the trial court, that Caldarera did not satisfy the bid bond requirement of Article 5.2.1 of the bid instructions that bid bonds must be "issued by a company licensed to do business in Louisiana and who is under contract with the surety company or bond insurer as a licensed agent in the state." The trial court found Article 5.2.1 was subject to several interpretations. The first was that bid bonds were required to be issued by either (1) a company licensed to do business in Louisiana and who is under contract with the surety company; or (2) a bond issuer as a licensed agent in this state and residing in this state. The second interpretation was that Article 5.2.1 required the bid bonds to be issued by a company that is (1) licensed to do business in Louisiana; and (2) under contract with either a surety company or bond issuer licensed in and residing in Louisiana to serve as its local agent. The trial court found Caldarera did not comply with either of the options. The court of appeal held that the Authority's interpretation of its bid requirements was reasonable and not arbitrary or capricious.

The bid documents called for the lowest responsible bidder to submit a preliminary project schedule and preliminary traffic plans within fourteen (14) days after the bid opening. The trial court found Caldarera did not comply with that requirement. The court of appeal held there was no error in that finding.

Caldarera alleged favoritism in the award of the contract to Landis. The basis for that claim was a subpoena issued by Caldarera to Landis and the Authority requiring the production of communications between Landis and the Authority from a certain date to the "present." The "present" was after the Authority and Landis, who intervened, were common-interest litigants.

The subpoena requested documents concerning the Authority's litigation strategy prior to trial. The Authority claimed privilege. Communications between a litigant and another party concerning matters of common interest are privileged. The claim of privilege did not show favoritism. There was no showing of favoritism as alleged by Caldarera.

Finally, Caldarera contended the award of the contract to Landis violated the Louisiana Open Meetings Law. The Open Meetings Law requires that every meeting of any public body shall be open to the public unless closed pursuant to provisions of the statute. The statute requires that a public body may hold executive sessions, but no final or binding action shall be taken during such a session. In this case, the court of appeal found the Authority held an executive session for the permitted purpose of discussing the then prospective litigation, took no formal action or binding action during the executive session, and complied with all procedural requirements under the Open Meetings Law. The decision to award the contract to Landis was made in open session and not in executive session.

The judgment of the trial court finding Landis to be the lowest responsible and responsive bidder, and denying all requests of Caldarera for relief was affirmed. *J. Caldarera & Co., Inc. v. Ernest N. Morial Exhibition Hall Authority,* 2018-0988 (La.App. 4 Cir. 8/7/19), _____ So.3d _____, 2019 WL 3719544, *writ denied*, 2019-01567 (La. 12/10/19), 2019 WL 6769311.

OWNER ENTITLED TO INDEMNITY FROM GENERAL CONTRACTOR FOR PAYMENT OF A LIEN

A general contractor failed to pay a subcontractor for work performed on a private works project. The subcontractor filed a lien and a petition against the owner and general contractor for judgment on the amount owed and enforcement of the lien. The owner entered into a settlement and release agreement with the general contractor in which it agreed to pay the subcontractor in consideration of payment of the amount of the lien and dismissal of all claims. The owner sued the general contractor for, among other things, indemnity for payment of the claim of the subcontractor and moved for partial summary judgment on the claim for

indemnity. The general contractor opposed the motion contending the owner could not claim indemnity because it wrongfully withheld payment from the general contractor and the court should defer consideration of the issue until trial.

The Louisiana Private Works Act requires that a contractor shall indemnify the owner for claims against the owner arising from the work to be performed under the contract. L.R.S. 9:4802F. The court held any liability on the part of the owner to the contractor had no bearing on its right to indemnity and the general contractor had not shown that the court should delay consideration of the motion to resolve the issue. The general contractor did not refute the owner's showing it owed a debt to the subcontractor or that the owner paid the amount claimed in indemnity toward satisfaction of the debt. The owner, thus, showed that it was entitled to indemnification under the Louisiana Private Works Act. The court granted judgment as a matter of law on the indemnity claim in favor of the owner and against the general contractor. *Matheson Tri-Gas, Inc. v. Williamson General Contractors, Inc.*, 2:16-cv-01303 (W.D. La. 7/30/19), 2019 WL 3451710.

INSURER DENIED ABILITY TO CHALLENGE AN ARBITRATION AWARD

The insurers of a party against which an arbitration award was issued sought to intervene to vacate the award. The party in whose favor the award was made attempted earlier to join the insurers in the arbitration proceeding. The insurers objected and successfully opposed their joinder. The party which obtained the award opposed the efforts of the insurers to intervene and vacate the arbitration award. The court found because the insurers were not parties to the arbitration, they lacked the procedural capacity to contest the award, and granted the motion of the successful party to confirm it. *Rain CII Carbon, L.L.C. v. Recon Engineering, Inc.,* 2018-0916 (La.App. 4 Cir. 5/1/19), 270 So.3d 785, *writ denied,* 2019-00853, (La. 9/24/19), 279 So.3d 931.

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