

CONSTRUCTION LAW UPDATE

July 2008

WHAT'S UP AT THE CAPITOL?

By Aileen M. Leipprandt, Attorney

Recently the Michigan Legislature has visited several prompt pay and related issues in proposed legislation from the House of Representatives. Although this legislation is early in its formation, it contains several modifications to existing law which are important to note.

Smith Haughey will continue to monitor the progress of these bills and report any significant developments.

House Bill No. 6173

This bill pertains to contracts for more than \$50,000 for public buildings and/or for certain units of government. It would require "construction managers," defined as entities acting primarily in an administrative or managerial fashion that procure one or more contracts on behalf of a governmental unit, to submit both performance and payment bonds in an amount determined by the governmental unit for which the contract was being secured. Such contracts would have to be in writing.

The Bill would also expand the category of people who could bring claims under the payment bonds by redefining "claimant" to include people furnishing labor, supplies, equipment, or material "used in the performance of a contract for all or

part of the construction, alteration, demolition, or repair of a public facility." In any action under this section, the prevailing party could recover reasonable costs and attorney fees. If the finder of fact were to determine that there was no good faith basis for the nonpayment claimed, the claimant would be entitled to recover 12 percent interest on the amount found to be due, from the date payment was due until the date payment was made in full.

House Bill No. 6174

This bill, as proposed, would apply to all contracts between governmental entities (or construction managers) and contractors for improvements costing more than \$75,000 and being paid for by public funds or by special assessment.

First, in order to claim additional costs or time due to an abnormal physical condition in, on, or beneath the improvement, a contractor would have had to provide the governmental entity (or the construction manager) with written notice of the condition before disturbing it.

Second, in the absence of an explicit disclaimer or disavowal of such information being provided, contracts for covered improvements would be read to include information describing the physical conditions present on, in, or under the

site of the proposed improvement, or information from which such conditions could be derived. It would also be presumed that such information was provided or offered to bidders prior to their submission of bids.

Finally, any provision in the improvement contract purporting to waive the rights of the contractor to recover costs or damages for unreasonable delay in performing the contract, where such costs or damages were caused by acts or omissions of the governmental entity (or a construction manager or agent acting on its behalf, or an employee of any of them) and due to causes within its (or their) control, would be unenforceable.

House Bill No. 6175

First, the Bill would define “subcontractor” as a person *other than a laborer or supplier*, who performs any part of the construction contract pursuant to a contract between him or her and a person other than the government agency.

Second, in contracts where governmental entities were using construction managers to enter into contracts with contractors, the Bill would require the construction manager to submit the contractor’s payment request to the public agency at the time specified in the contract, or within 15 days of receipt of the payment request, whichever is earlier.

Third, construction managers or public agencies not making a timely progress payment would be required to pay interest on amounts past due, as well as on attorney fees and other costs, with the next payment.

Fourth, a public agency or construction manager would be able to retain only 5 percent of the dollar value of completed work until the work was 90 percent complete. After the work was 90 percent complete, the public agency or

construction manager could retain up to 1 percent of the value of the completed work in any case, and only up to 5 percent if the public agency or construction manager determined that the contractor was not making satisfactory progress. The 5 percent limit could not be increased by using other contract provisions.

Fifth, contractors would be required to pay their subcontractors the pro rata share of interest received on retained funds within seven days of receipt.

Finally, if a party challenges a mediator’s decision on retained funds, the prevailing party would be entitled to costs and attorney fees.

House Bill No. 6176

First, this Bill would make it a felony for a contractor, subcontractor, or construction manager who, with intent to defraud, retained any part of any payment made to him or her for any purpose other than paying laborers, subcontractors, or materialmen, while any amount owed or potentially owed under the contract remains unpaid.

Second, this Bill would increase the penalty for such a crime to not less than 50 percent of the monetary amount at issue, or between six months and three years of imprisonment, or both.

Third, the Bill would allow individual corporate officers or company representatives who participated in or permitted the fraud to be held liable to any individual damaged by the fraud for the full amount fraudulently detained. The damaged person would also be entitled to \$500 or costs and attorney fees, whichever is greater.

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NEW DECISION PROVIDES MORE LENIENCY IN THE RIGHT OF ACTION UNDER THE PUBLIC WORKS BOND STATUTE

By Steven K. Stawski, Attorney

In order for a claimant who is not in a direct relationship with a contractor to have a right of action upon a payment bond, he must meet the requirements set forth in the public works bond statute. The statute states that the claimant must, among other things, provide the contractor with written notice of the amount claimed within 90 days of the last day of work and/or the last day materials were provided.

However, in the recent case of *Applegate, Inc. v John M. Olson Co*, the Michigan Court of Appeals held that in an action on a surety bond, the amount claimed does not need to be included in this written notice, as long as other evidence of the general contractor's knowledge of the amount claimed is sufficient to satisfy the portion of the 90-day notice requirement.

In this case, in the written notice provided by Applegate, the claimant, did not state the amount claimed. However, Applegate argued that the general contractor had knowledge of the amount

claimed. In support of this argument, Applegate presented evidence that it had provided the general contractor with its billing and payment history and a Second Notice of Reliance on Bond, and that the general contractor had created documents displaying the amount of money owed to Applegate and listing its account as an "account payable."

The Court also made a similar ruling with regard to the 30-day notice requirement of the public works bond statute. The Court held that notice to the general contractor could be inferred from other evidence including correspondence between the claimant and the general contractor and attendance by the claimant at meetings between the general contractor and other subcontractors that demonstrated the general contractor's knowledge of the labor and or materials being provided, etc.

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MECHANICAL CONTRACTOR NOT REQUIRED TO HAVE ELECTRICAL LICENSE IN ORDER TO REPLACE ENERGY MANAGEMENT SYSTEM

By Benjamin H. Hammond, Attorney

A recent court decision, *Guardian Environmental Services, Inc v Bureau of Construction Codes and Fire Safety, DLEG*, allows a licensed mechanical contractor to replace old, obsolete management systems with new electrical control systems without hiring a licensed electrical contractor.

In this case, Guardian Environmental Services, Inc. contracted with the Allen Park School District to

perform renovation work in five school buildings. In particular, Guardian was hired to replace existing pneumatic and hybrid energy management systems with direct digital control energy management systems. This work required the installation of low-voltage wiring and communications network cabling.

Guardian, a licensed mechanical contractor, believed it could perform this work itself instead of hiring a licensed electrical subcontractor to do the work.

However, a state inspector ordered Guardian to stop installing the low-voltage wiring. Shortly thereafter, the Bureau of Construction Codes and Fire Safety's Electrical Division issued a bulletin which set forth the Bureau's position that an electrical license is necessary to replace pneumatic systems with new electrical controlled systems. The Bureau's interpretation limited a mechanical contractor to repairing and replacing wiring within existing energy management systems, or replacing an old energy management system with one similar to the existing

system. Guardian appealed the decision of the Bureau, and the dispute made its way to court. The Court decided in favor of Guardian and **held that a licensed mechanical contractor need not hire a licensed electrical contractor when replacing pneumatic systems with new electric control systems.**

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NEW RULING ON REAL ESTATE TRANSFER TAX TIMING

By Robert W. Parker, Attorney

For situations where a purchase agreement includes both the sale of an unimproved lot and a contract in which the seller agrees to build a house on the property, how should the State Real Estate Transfer Tax be assessed?

In the recent case of *Lake Forest Partners 2, Inc. v Department of Treasury*, the Michigan Supreme Court considered this issue and **held that the taxes should be assessed according to the value of the lot at the time the deed is transferred.**

In this case, Lake Forest Partners 2, Inc. agreed to sell buyers unimproved lots and to subsequently build homes on those lots. In each transaction, a single purchase agreement was used. In the purchase agreements, the parties agreed that money paid to secure the sale of the lot was separate from money paid to secure the warranty deed for the property following the building of the home. Each purchaser paid the agreed-upon amount of money for the lot at the time of the execution of the purchase agreement, then, once the home was complete, paid the agreed-upon amount of money for the home. The purchasers did not receive the deed to the property until this second amount was paid.

When the deeds were recorded, Lake Forest Partners 2, Inc. paid real estate transfer taxes based on the value of the unimproved lots at the time the purchase agreements were executed. The Department of Treasury argued that, in each case, the builder should have instead paid taxes based on the total price of the lot and the home that was built on the lot.

The Michigan Supreme Court held that the builder should have paid taxes based on the value of each lot at the time that the warranty deed was transferred. Because the warranty deed was not transferred until the home was complete, and because the value exchanged for that deed included both the cost of the lot and the cost of the home, the proper basis for assessment of the transfer tax was the sum of the amount paid for the unimproved lot and the amount paid for the home upon its completion.

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NEWS & SUCCESSES



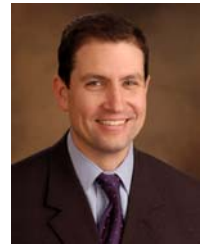
Ben Hammond received a victory on behalf of his general contractor client in a change order dispute with a paving subcontractor.



Aileen Leipprandt presented a mock arbitration for the National Association of Women in Construction.



Dan Morley spoke about contractor liens at a recent meeting of the Michigan Geothermal Energy Association..



Karl Butterer was the lead attorney on a case involving our firm's expertise in construction, employment, constitutional, and governmental law. The case was brought against our client for race discrimination resulting from the failure to award a contract to a Native American-owned contractor. Our client received several bids for the construction of a water system intake facility and awarded the contract to the only bidder having no relationship to the plaintiff firm. Karl proceeded with discovery and the judge ultimately rendered a 20-page opinion granting the motion on all four of the counts of the complaint. The court subsequently ordered the plaintiff contractor to pay our client's attorney fees.

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