BUILDING SOLUTIONS®

WATT TIEDER

WATT, TIEDER, HOFFAR & FITZGERALD, L.L.P.

Attorneys at Law

Spring 2015

Inside...

The newsletter of
Watt, Tieder, Hoffar & Fitzgerald, L.L.P.

visit us on the web at
www.watttieder.com

BUILDING SOLUTIONS

Maintain Protection For Your Trade Secrets

by Mark Rosencrantz, Partner

Introduction

Some of the most well-known and best-selling products in the world are protected by trade secrets. Famous examples include the recipe for Coca-Cola Classic, the 11 herbs and spices used by Kentucky Fried Chicken, and the recipe for Bush's Baked Beans. Other famous trade secrets include the formula for WD-40, the process by which a book is included on The New York Times' Best-Seller List, and Google's search algorithm, which determines search results and the order in which you receive them every time you run a Google search.

However, being famous or well-known is not a requirement for something to be a trade secret. For example, the customer lists for many successful businesses are trade secrets. Computer software can be a trade secret, as can proprietary bidding systems, manufacturing techniques, and marketing strategies.

Because trade secrets help companies make money at their competitors' expense, attempts to obtain them by wrongful means are far from unusual. As a recent study from The Center for Responsible Enterprise and Trade and PricewaterhouseCoopers recently explained:

> Numerous actors - foreign intelligence services, competitors, transnational criminal organizations, hacktivists and malicious insiders - target and steal companies' trade secrets for various reasons. Social engineering schemes such as tailored spear-phishing campaigns that implant malware to steal trade secrets, or duping employees into revealing sensitive corporate information, exemplify the means by which these actors engage in trade secret theft. Constantly evolving technologies in smart phones, laptops, and tablets that employees use for work provide additional means for threat actors to access a company's secrets. Threat actors' motivations are equally diverse. Some seek personal financial gain, while others hope to advance national interests or political and social causes.

As attempts to steal or misappropriate trade secrets have increased, related litigation has followed suit. A 2014 article in *Inc. Magazine* explained that: "the number of trade secret cases in U.S. federal courts doubled between 1988 and 1995, doubled again from 1995 to 2004, and is projected to double again by 2017."

Although litigation can be an important tool in the fight to protect trade secrets, companies in all industries should consider implementing systems to keep trade secrets from leaking to outside parties, and to prevent the need for litigation. Taking such precautions can result in substantial savings, as well as avoiding the risk that trade secrets will become public, and their protections lost.

Trade Secrets Overview

Trade secrets in the United States are largely governed by state law. However, if a trade secret relates to interstate or foreign commerce, or if it is being stolen for a foreign power, the Federal Economic Espionage Act of 1996 (18 U.S.C. §§1831 and 1832) authorizes federal criminal and civil penalties for trade secrets misappropriation. At the state level, 48 states (New York and Massachusetts are the two holdouts), the District of Columbia, Puerto Rico, and the U.S. Virgin Islands have all adopted the Uniform Trade Secrets Act ("UTSA").

Under the UTSA, trade secrets can include information, formulas, computer programs, devices, methods, techniques, processes, or other similar items that:

- Their owners derive independent economic value from because they are not known to the public;
- The public cannot get through appropriate legal means; and
- Their owners take reasonable efforts to keep secret.

Trade secret protection lasts as long as the secret stays secret. Unlike patents or copyrights, which have expiration dates, trade secrets can remain valuable property for decades. One such example is the recipe for Coca-Cola. Owners of trade secrets have a variety of remedies to stop the misappropriation of trade secrets under the UTSA. The most important remedies are: injunctive relief, in which a court can order a person or company to immediately stop using trade secrets and to return all copies to their rightful owner; monetary damages for lost sales and other harm, which in egregious cases can be doubled; and awards of attorneys' fees.

Easy Ways To Lose Protection

As more and more information is moved to computers, and more business is being done online, it is becoming much easier for trade secrets to be stolen or misappropriated through computer hacks and other electronic means. Given that scenario, computer software should be updated regularly with firewalls and other defensive measures, and programs put into place to ensure that information is not copied and released to third parties.

In today's digital age, however, there are numerous pitfalls in protecting trade secrets that have nothing to do with technology. Consider the following scenario that incorporates facts from several recent court decisions. A company decides to outsource manufacturing or bid preparation work to a third party. Because the firm receiving the outsourced work needs access to trade secret information to perform the work, the parties sign a typical non-disclosure agreement ("NDA") that provides all trade secrets will remain the property of the company that originally owned them. The NDA also allows a party disclosing trade secrets to stamp them confidential or proprietary to make sure there is no confusion.

Although the two companies sign the NDA, a number of documents are given to the outsource company that are inadvertently not marked confidential and do not contain any other notice that they have to be kept secret. Further, the outsource company does not require its employees to sign agreements that they will keep trade secret materials confidential. Compounding the risk of dissemination, the outsource company has several independent contractors work on the project who are not full time employees.

Ultimately, some disgruntled employees and independent contractors at the outsource firm leave and open a new business with trade secret information they took in violation of the NDA signed by their previous company. After the owner of the trade secrets files a lawsuit, the judge determines that the information in question has lost its status as a trade secret. In making this ruling, the judge notes that the plaintiff failed to take reasonable efforts to keep the information secret. For example, the information was not designated as confidential or proprietary. Further, the NDA did not require the company that received the information to have each employee and independent contractor sign an agreement acknowledgement that they too were subject to the NDA's restrictions.

Another situation that commonly arises is when companies create a joint venture or strategic partnership and share confidential information to create a response to a request for proposals. In such cases, each member of the joint venture might see their partners' confidential pricing materials, bidding methods, proprietary software, and other similar items. Unless careful contracting and information protection programs are employed, trade secret protection can be easily waived in such situations.

Companies also need to be careful about how much access employees are given to company data and information. If confidential information is freely available to all employees regardless of whether they need to use it as part of their job, a court could use that fact as a factor in deciding that a company did not take reasonable efforts to keep the information secret.

Protect Yourself

Companies who believe they have information that qualifies as trade secrets should consider implementing systems to make sure they keep such information as secret as possible. Although there is no "one size fits all" program for protecting confidential information that will fit every company, the following are commonly used strategies:

- Companies should require their employees (and any independent contractors with access to confidential information) to sign a carefully drafted NDA, which prohibits the employees and independent contractors from utilizing proprietary corporate information except where such use is in furtherance of the companies' business interests. Employees and independent contractors should sign such NDAs no later than their first day of work, and they should be required to reaffirm their obligations under the NDA in exchange

...continued on page 4

for every pay raise or promotion they receive.

- NDAs should be executed with third parties restricting the use of the disclosing companies' confidential and proprietary information. Although legal counsel should be sought in drafting the NDA, such an agreement should typically require the receiving party to ensure that its employees have read and will abide by the terms of the NDA. Further, care should be taken in making sure that information that is disseminated under the NDA is marked consistent with the terms of the NDA.

- Even in the absence of an NDA, sensitive documents should always be stamped as "confidential," and the most important marked as "highly confidential." Electronic versions as well as hard copies should have these designations.

- Do not allow anyone to send out Excel spreadsheets, Word files, or other electronic materials that allow the recipient to determine a formula or how calculations were performed. Instead, require that all documents going to outside parties be in .pdf.

- Password-protect important computer files and limit as much as possible the number of people who have the password.

- Use strong passwords that are changed periodically.

- Make sure computer systems have strong firewalls and other protections that are regularly updated.

- Require employees to carry identification badges.

- Restrict all non-employees' access to company premises by using visitor identification cards and requiring all visitors be accompanied by an employee outside of your reception area.

- Store sensitive records and materials in a separate locked room. If you have such a room, consider requiring a key card or a fingerprint for access.

Conclusion

Trade secrets can be one of the most important assets a company owns. With advance planning, they can continue to be important weapons for years to come.

Know Your Title Insurance: How A Construction Lender Can Protect Its Interests When A Project Collapses

by Eric M. Liberman, Associate

Developing a construction project from the ground up is no small feat. A large construction project can require years of work and millions of dollars in up-front costs before the land attains any additional value. While the developer must put up some money, typically the brunt of the financing burden falls on a lender. In exchange for its investment, the lender receives a security interest in the project, but when a project goes belly up early in development, the site is rarely worth anywhere near the money that was spent on construction. Also, many states have mechanic's lien statutes that grant contractor claims a higher priority on the property than the lender's security interest. To ameliorate these risks, many lenders look to title insurance. These lenders, however, must exercise a great deal of vigilance and proper judgment or risk ending up with little to show from their investments but empty, turned out pockets.

In the recent decision *BB Syndication Servs., Inc. v. First Am. Title Ins. Co.*, No. 13-2785, 2015 WL 1064156 (7th Cir. Mar. 12, 2015), a construction lender sought indemnification under its title insurance policy. Two and a half years into the project, realizing that cost overruns would cause construction costs to greatly exceed the original financing, the lender cut off loan disbursements and the developer filed for bankruptcy. The lender's standard-form title-insurance policy contained a provision known as Exclusion 3(a), which excludes coverage for liens that are "created, suffered, assumed or agreed to" by the insured lender. The 7th Circuit determined that the lender had "created" the mechanics liens by cutting off funding and thus, the insurer had no duty to indemnify the lender under Exclusion 3(a). After the dust settled in the bankruptcy proceeding and the contractors had gotten their due, the insured lender who fronted $61 million on the project walked away with only $150,000.

This article discusses the operation of title insurance on a construction project, explains the state of the law regarding Exclusion 3(a), and provides some important considerations to aid construction lenders in avoiding a *BB Syndications*-like result.

Title Insurance In Construction

Typically, a developer will put up a percentage of the budgeted costs of a construction project and seek the balance via a line of credit from a lender. To protect the interests of the lender, most deals are structured to prevent the developer from drawing on the letter of credit until exhausting its own cash outlay, which ensures that the developer has sufficient skin in the game. Beyond the original cost of purchasing the land, most of the costs on a construction project come from the contractors' and subcontractors' labor and material costs. As these builders reach predetermined milestones, they submit bills to the developer, who then draws on the letter of credit for payment. If circumstances arise that increase the projected costs beyond the original financed amount and the loan goes "out of balance," lenders typically have the right either to demand additional cash contributions from the developer or to cut off the financial spigot. When the lender pulls the line of credit, the developer, who still owes the builders for work performed since the last payment, must often seek relief through bankruptcy. The unpaid builders then receive a lien on the property for the unpaid portion of their work performed. Depending on the duration since the last payment distribution, these costs can be very significant. For instance, in *BB Syndication*, the builders acquired $17 million in liens on the property, even though the unfinished project sold for only $10 million in the judicial auction.

In an effort to avoid such results, lenders can purchase a title insurance policy, which covers defects in title and lien priority for as long as the lender holds a security interest in the property. Unlike most insurance contracts that provide coverage for prospective events, title insurance protects the insured for defects arising *prior* to the policy issuance. Thus, if a mechanic's lien has arisen on a project prior to the effective date of the title insurance policy, the risk of non-recovery is shifted from the lender to the insurer. Since title insurance protects only against liens arising prior to the policy's purchase, however, the lender will typically re-up the policy periodically to cover the ongoing work performed on the project. Each time the lender updates this policy, the insurer performs a date down title search to determine if any new liens have accrued since the previous policy update. Oftentimes, lenders designate the title insurer as the disbursing agent for requested draws by the developer. Following is a simplified breakdown:

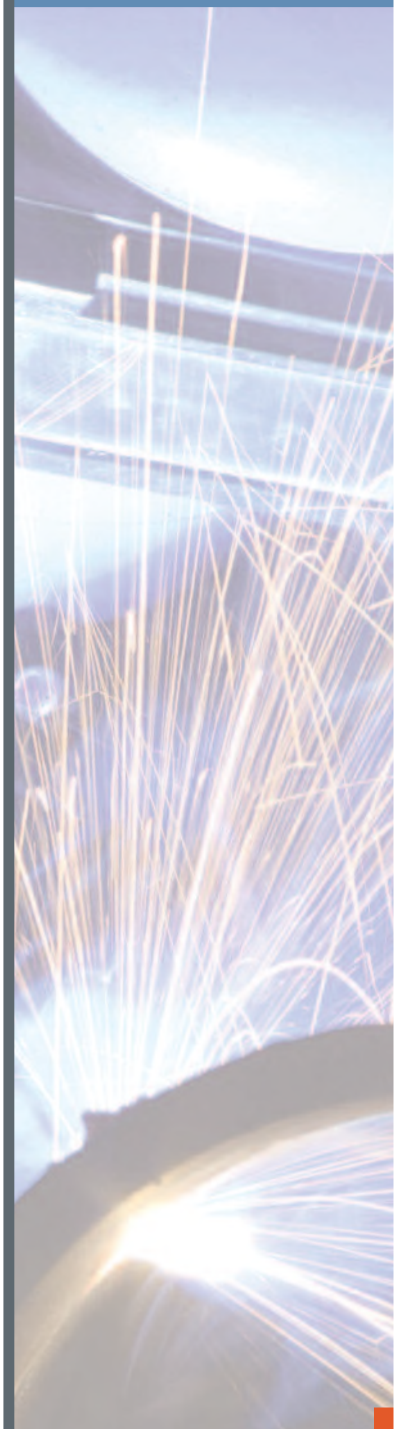
- The builder performs work and bills the developer.
- The developer seeks to draw on its line of credit from the lender.
- The lender distributes the requested funds to the title insurer.
- The title insurer then verifies that the builder is properly paid, obtains lien waivers, and updates the title insurance policy.

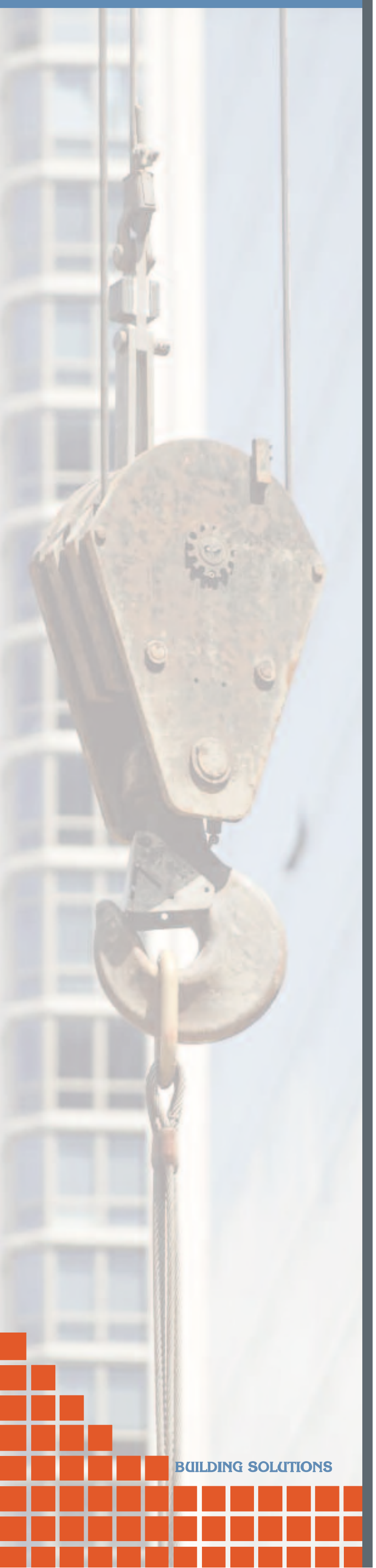
Differing Interpretations Of Exclusion 3(a)

BB Syndication addresses the interpretation of the most litigated clause in the standard-form title-insurance policy, Exclusion 3(a), which excludes from coverage defects and liens "created, suffered, assumed or agreed to" by the insured. Courts in different jurisdictions have interpreted this clause to substantially different results when a lender cuts off funding due to a busted project budget. For instance, in *Bankers Trust Co. v. Transamerica Title Ins. Co.*, 594 F.2d 231 (10th Cir. 1979) and *Brown v. St. Paul Title Ins. Corp.*, 634 F.2d 1103 (8th Cir. 1980), the Tenth and Eight Circuits determined, generally, that liens arising when a lender fails adequately to fund construction work completed prior to the developer's default were "created" or "suffered" by the insured lender for purposes of Exclusion 3(a). These decisions appeared to create a bright line rule that precluded recovery by the lender.

The Seventh Circuit, however, determined that Exclusion 3(a) requires some fault on the part of the insured. In *BB Syndication*, the court found that the lender's fault in creating the mechanics lien stemmed from the lender's failure to pull funding earlier. Because the lender was in the best position to monitor the progress and cost estimations of the work, it was the lender's responsibility to cut off funds, or to

...continued on page 6





demand additional contributions from the developer, when the lender *first had knowledge* that the project loan was out of balance. Over a year before the lender ceased financing, the contractor informed the lender that design changes had created significant projected overruns, and this information would have granted the lender the right to pull the financing. At the time, the lender had only disbursed $5 million, an amount exceeded by the value of the undeveloped land. The court held that the lender's failure to discover and prevent the cost overruns prompted the builders to continue work which "created" the disputed liens.

Additionally, the Sixth Circuit has carved out an exception for lenders that have fully disbursed their original loan commitments. In *Am. Sav. & Loan Ass'n v. Lawyers Title Ins. Corp.*, 793 F.2d 780, 786 (6th Cir. 1986), the court determined that earlier decisions in the Eighth and Tenth Circuits impliedly required some form of wrongdoing on the lender's behalf to fall under Exclusion 3(a), and that the lenders in those cases were culpable for failing to pay out all the funds they had committed to loan. Thus, once a lender has fully paid the committed funds, there is no wrongful act in cutting off funding based on an out of balance loan. The Eighth Circuit also adopted this reasoning in *Chicago Title Ins. Co. v. Resolution Trust Corp.*, 53 F.3d 899, 904 (8th Cir. 1995).

Considerations For Savvy Construction Lenders

There are numerous ways that a construction lender can avoid the *BB Syndication* lender's fate. First, a lender that diligently monitors the construction will be better equipped to recognize that the loan is out of balance before the significant construction costs have accrued. A shrewd lender will build mechanisms into the lending agreement that provide the opportunity to perform due diligence on the project financing prior to construction, and to actively monitor the budget as construction progresses. Site access rights and periodic financial reporting requirements can keep the lender abreast of any potential overruns or significant changes.

Furthermore, a lender can specifically draft around Exclusion 3(a) through the use of a Seattle Endorsement. With this endorsement, the title insurer specifically agrees not to invoke Exclusion 3(a) based on either (1) the insured's refusal to disburse the full amount of the loan proceeds, or (2) if the loan proceeds are insufficient to cover the financed work. In essence, when a lender purchases the Seattle Endorsement, the title insurer agrees *a priori* that the lender's failure to disburse funds is not an action that gives rise to subsequent mechanic's liens.

It seems, also, that some courts consider whether the title insurer acted as the disbursing agent. A title insurer acting as disbursing agent can better protect its own interests by taking a more active role in monitoring the project financing. However, courts merely see this as one non-dispositive factor that helps weigh in the favor of the insured lender.

Finally, *Lawyers Title* may seem to encourage a lender who knows a project loan is out of balance to continue funding the project until the lender's full loan commitment is satisfied. For instance, if a lender finds out late in the project that the financing will no longer cover the project cost, rather than cutting the funding promptly, the lender may be encouraged to continue to fund the busted project in an attempt to recover from the insurer by avoiding Exclusion 3(a). This seems like a risky proposition, however, since courts have deemed the failure to promptly cut off funding as the "bad act," which creates the mechanic's liens.

Conclusion

The *BB Syndication* case highlights several of the pitfalls that could trip up an unwary construction lender. Title insurance can certainly provide protection, but it is not a panacea. Courts have varying opinions as to whether and to what degree title insurance provides protection if a lender pulls the financing on an out of balance loan. Thus, a wise construction lender must take a proactive role in monitoring the budget and progress on the project and must exercise sound, prompt business judgment.

Performance Bonds North Of The Border: A Primer In Performance Bond Issues And Defenses In Canada

John E. Sebastian

Eric B. Kjellander

by John E. Sebastian, Senior Partner and Eric B. Kjellander, Associate

Many attorneys and surety claims representatives in the United States focus solely on domestic matters; however, to the extent an issue arises in Canada, it is useful to have at least a rudimentary understanding of how Canadian courts analyze performance bond claims. With that in mind, this article will provide a basic overview of Canadian courts' treatment of performance bond issues and defenses.

The Canadian Court System

The Canadian Court System consists of four basic levels of courts. The first level is the provincial or territorial courts similar to a circuit court or district court in the United States. These courts handle the vast majority of the cases filed in the Canadian legal system. Next are the superior courts. The superior court is the highest level court in each province. Typically, these courts handle the more serious crimes, but they also take appeals from the provincial or territorial court judgments. On the same level as the superior courts is the Federal Court. The Federal Court deals with matters specified in federal statutes. The third level consists of the appellate level for both the provincial courts and the Federal Court. Finally, the Supreme Court of Canada functions as the final court of appeal in Canada.

Canadian Performance Bonds

Similar to the standard industry forms such as the American Institute of Architects A312 Bond form, Canada has certain industry standard bonds such as the Canadian Construction Documents Committee 220 bid bond form ("CCDC 220") and the 221 performance bond form ("CCDC 221"). Like in the United States, the terms contained in standard bond forms have been drafted by the industry and judicially interpreted. Non-standard bond forms are still widely used, however, and provide considerably less certainty to the parties as to the meaning or interpretation of the terms. Canadian owners view payment and performance bonds as a form of security to ensure the contractual obligations are performed. In most cases, the owner will elect to require the penal sum of the bond to be either 50 percent or 100 percent of the contract amount.

For Canadian bond forms, if the principal properly performs, the bond and the surety's obligations are null and void. Moreover, as a condition precedent, the obligee must have promptly and faithfully performed the contract. Generally, the standard industry forms in Canada allow for several performance options for the surety once the principal is declared in default: remedy the default; complete the contract; or tender a new contractor to complete and ensure sufficient funds are available to pay the new contractor, less the remaining contract funds. Other options include financing the principal and tendering the penal sum.

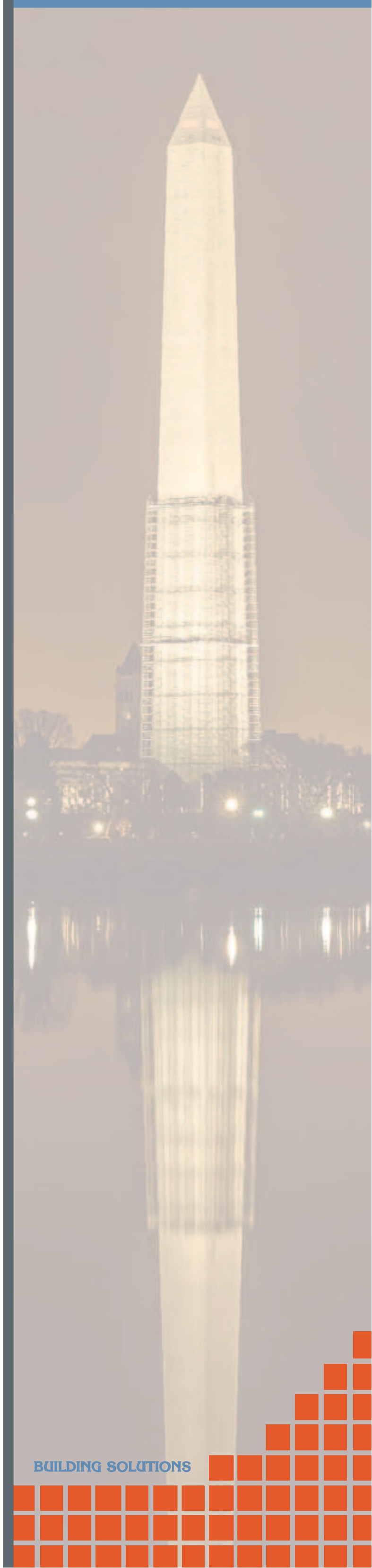
Recognized Surety Defenses

In Canada, like the United States, the surety may have several surety specific defenses. In fact, Canadian courts have cited to cases interpreting the Miller Act as persuasive authority regarding surety defenses. For example, the obligee's failure to satisfy contract terms such as the payment obligations may forfeit the rights the obligee has under the bond.

- <u>Overpayment Or Premature Payment Defense</u>

In *Mulgrave (Town) v. Simcoe & Erie Gen. Ins. Co.*, the surety issued a performance bond for the construction of a water system for a town. After the contractor began performance under the contract, the town alerted the surety that the contractor was in default and required the surety to honor its obligation. [1977] 73 D.L.R. (3d)

...continued on page 8



272 (N.S.C.A.). The completion date had been extended twice without the surety's consent, and the contractor had been paid by the town more than what the contract allowed. The appellate court noted that it was difficult to find, under this particular set of facts, that the surety had been prejudiced by two short extensions totaling five months; however, the court found the issue of overpayment dispositive, finding that the town's overpayment, which included full payment for items that still contained numerous deficiencies, removed the incentive of subcontractors or suppliers to finish the work and was a substantial alteration to the bonded obligation. The court, in especially relevant language, applied and adopted the following principal:

> Any alteration in the form of the agreement between the principals, or an alteration of any provision thereof (as distinct from a variation of the work in making of which is provided for by the original contract and contemplated by the contract and guarantee), will discharge the surety, unless it is self-evident that such alteration cannot prejudice him.

Id. at ¶3 (quoting from Hudson's Building and Engineering Contracts, 10th ed. (1970) p. 809).

Moreover, the court recognized that the exhaustion of the contract funds, in a manner inconsistent with the terms of the contract, prejudiced the surety, as the surety's collateral, the remaining contract funds, had been depleted.

- <u>Material Alteration To The Bonded Obligation May Discharge The Surety</u>

A material change to the bonded obligation, absent a benefit to the surety, will relieve the surety of its obligation under the bond. *Holme v. Brunskill*, [1878] 3 Q.B.D. 495. In *Holme*, a yearly farm tenancy was secured by a bond. After a dispute between the landlord and the principal, the landlord ordered the principal off the land. The landlord and the principal then negotiated a change to the contract, including a significant adjustment to rent and a return of certain land covered by the bond. Later, the landlord attempted to call upon the bond, and the surety argued the obligation had been materially altered. The court noted that a material change can discharge a guarantee as long as the material change occurs without the consent of the guarantor, with the qualification that a change that is beneficial to a surety does not discharge the surety. The court stated that it is not for a judge or jury to decide the materiality of the alteration in the contract, but that "the surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding the alteration, and that if he has not so consented he will be discharged." *Id.* at 505.

In *Doe v. Canadian Surety Co.*, the court recognized and adopted the holding of *Holme* in the construction context. [1937] S.C.R. 1. In *Doe*, the defendant contractor entered into an agreement with the plaintiff to build a church. The surety issued a bond to guarantee the performance of the contractor to construct the church. The contract required the contractor to submit to the architect an application for each payment, with receipts and vouchers showing payments for materials and labor. The contractor did not fulfill these requirements. Despite the principal's failure to properly submit pay applications, the owner continued to pay and the architect continued to approve payments to the contractor regardless of the progress on the project. The surety was never notified of the delay in the project, the parties' disregard of the payment terms, and issues related to subcontractor claims. The court stated that the materiality of a change or alteration in a contract is for the surety to decide, although if it can plainly be seen that the change or alteration is unsubstantial or necessarily beneficial to the surety, then the surety should not be discharged. The court concluded that:

> It seems very plain that the plaintiffs should have brought in the surety and explained the whole matter to it and any arrangement or adjustments that were to be made, either with the sub-contractors or with the contractor himself leading to a final acceptance of the work and the payment of the balance of the contract moneys, should have been made, under all the special circumstances of the case, with the knowledge and consent of the surety. It cannot fairly be said that it was self-evident that these positive acts of the principal in dealing with the contract were not to the prejudice of surety, and in the absence of any notice or knowledge on the part of the surety these acts operated to discharge the surety.

Id. at ¶24.

The court in *Truro (Town) v. McCulloch* considered the interplay of a material alteration on the underlying prime construction contract and potential payment bond claimants. [1974] S.C.R. 1129 (*sub nom. Truro (Town) v. Toronto General Insurance Co.*). In *Truro*, a contractor entered into an agreement with the town of Truro to build a school. The contractor was required to and did obtain a payment and performance bond from a surety to guarantee performance. Although work on the school was substantially complete, the contractor abandoned work due to serious financial difficulty. The obligee on the performance bond, the town, subsequently transferred all rights in the school to the school board. The surety argued that the bonded obligation had been altered based on such transfer of rights and that the surety should be deemed discharged.

Plaintiffs brought a claim against the surety under the payment bond for unpaid subcontract work. The court noted that any potential alteration of the underlying contract between the town and the contractor was unavailing as to potential payment bond claimants. The court held that there had been no change in the contract between the contractor and the subcontractor making the payment bond claim.

In response to the above line of cases, some owners have attempted to quantify a "material alteration" at the contracting stage by defining the percentage change in the contract amount, such as 25 percent, that the parties acknowledge would be a material change. Courts have rightly recognized, however, that the contract amount is not the only way to materially alter a contract, and these clauses that attempt to avoid a later claim of material alteration have proven largely unsuccessful and are not recognized as controlling the issue.

Canadian courts do recognize certain limits to the extent of a change in the material obligation. In *Five-Fifty Beatty Street Ltd. Partnership v. Markwood Construction Ltd.*, the general contractor entered into an agreement with the owners of a warehouse for renovation of the property. [1987] 17 B.C.L.R. (2d) 72. The surety issued a performance bond as well as a labor and material payment bond. The contract, incorporated in the bond, contemplated change orders. After various extensions and after the execution of numerous change orders, the total contract price increased by more than 23 percent. The surety denied liability under the bond because the cost increase constituted a material change in the risk under the bond. Notwithstanding, the court noted that the contract between the parties contemplated change orders and that there was "no language in the bond or in the contract which changed the surety's obligation if there was a variation in the price." *Id.* at ¶86. The court relied on *Hayes, Trustee of PreLoad Co. of Can. Ltd. v. Regina (City)*, where "the court held that a surety was liable under a performance bond where the surety agreed in advance to variations and alterations in the construction contract. [1959] S.C.R. 801, 20 D.L.R. (2d) 586. It remained liable where such alterations were made, although it received no notice thereof." *Five-Fifty Beatty Street* at ¶87.

- <u>Major Scope Changes Can Discharge The Surety</u>

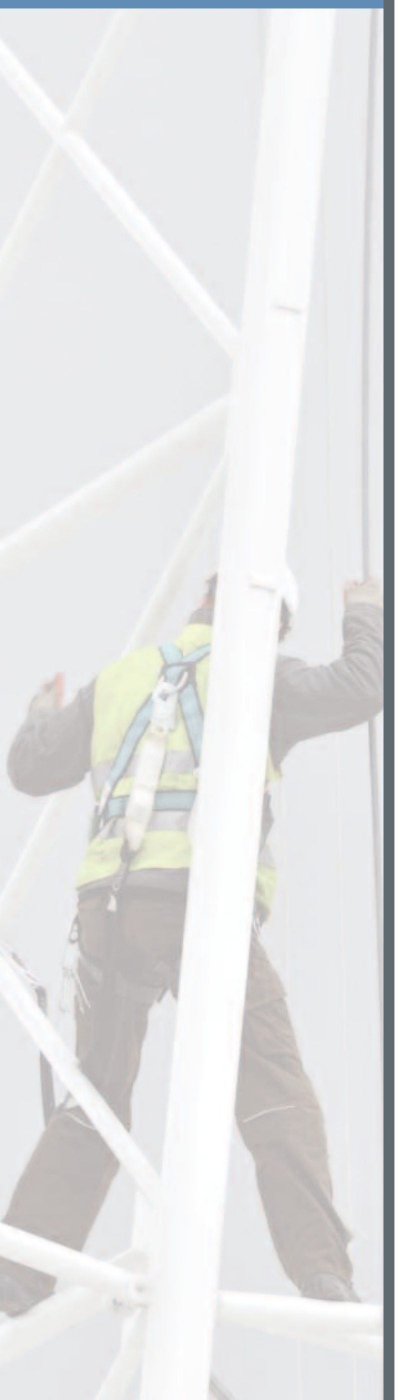
The court in *St. John's Metropolitan Area Board v. William J. Vokey & Sons Ltd.* recognized that substantial changes to the construction schedule can prejudice the surety and acknowledged that the extent of the prejudice must be examined on a case-by-case basis. [1988] 223 A.P.R. 322, 72 Nfld. & P.E.I.R. 322. In St. *John's*, the defendant, Vokey, contracted with the owner to construct certain public works and services. Vokey was required to provide a performance bond, but the Board waived that requirement and instead accepted the personal guarantee of an individual, Douglas Hunt. Vokey did not complete the work within the contracted time, but the owner allowed the contract to continue without alerting the surety of Vokey's failure to perform or of the extension. The trial court found that the delay amounted to a material variation in the agreement and dismissed the plaintiff's action. On appeal, the court stated:

> Where, as in the present case, the impugned alteration is an extension of time, the circumstances of the case must be addressed to determine whether the prolongation amounted to a mere indulgence incidental to the guaranteed contract, or a substantial variation going to the root of the contract. . . . On the other hand, there has to be some limitation to such extensions. At some point, one must encounter a threshold beyond which the surety may reasonably maintain that the agreement can no longer be the one he or she guaranteed, but another one. The guarantor cannot be taken to have accepted to be indefinitely bound to the convenience or caprice of the parties as to the time for completion of their bargain in the absence of any provision in the guarantee authorizing dealings between the contracting parties.

St. John's Metropolitan Area Board v. William J. Vokey & Sons Ltd., [1991] 287 A.P.R. 147, 92 Nfld. & P.E.I.R. 147 at ¶13.

The court then affirmed the trial court's decision to dismiss the plaintiff's action against the surety on the grounds that the original contract which bound Hunt was waived and replaced with a second contract that did not concern Hunt.

...continued on page 10



Does A Performance Bond Extend Beyond Sticks And Bricks?

Canadian courts have competing cases examining the scope of performance bonds, including the standard CCDC form. Like similar decisions in the United States, Canadian courts have struggled with whether the performance bond simply covers the structure to be built or incorporates all terms of the underlying construction contract. Historically, Canadian performance bonds have been limited to physical construction of the project; however, in *Whitby Landmark Development Inc. v. Mollenhauer Construction Ltd.*, this conventional wisdom was questioned. [2003] 67 O.R. (3d) 628, 178 O.A.C. 49. In *Whitby*, an owner entered into an agreement with the contractor to build a condominium building, and the contractor secured a performance bond from a surety. Under the terms of the contract between the owner and contractor, the owner could recover 75 percent of the savings if the cost of the project was below the price in the contract. At several points, it became clear that the work would cost less than what the parties agreed to in the contract. At one point, the parties agreed that the owner could deduct certain savings from the monthly payments to the contractor. Later, during the course of the project, the owner once again was entitled to additional savings, but this time the parties did not come to an agreement as to how the owner should acquire the savings. As a result, the contractor received full monthly progress payments and eventually owed the owner over $600,000 in cost savings. The owner sued the surety to recover the $600,000 and the court held that the bond incorporated all of the issues concerning the construction contract. In doing so, the court held the surety liable for more than just the "bricks and mortar" that accompany the construction of the work.

Just a year later, in *Lac La Ronge Indian Band v. Dallas Contracting, Inc.*, the Saskatchewan Court of Appeal disregarded the Whitby decision and reaffirmed the conventional view that the performance bond surety was simply required to guaranty the physical construction. [2005] 3 W.W.R. 199, 254 Sask. R. 6. In *Lac La Ronge*, the contractor agreed to build a sewage lagoon for Lac La Ronge Indian Band. The surety issued a performance bond to secure the contractor's performance under the contract. After the contractor failed to complete the contract on time, the plaintiff called upon the surety to fulfill its obligations under the bond. In addressing the amount of liability attributed to the surety, the court declined to extend liability to include the contractor's obligation to pay liquidated damages:

> There is no authority in the Contract to set off these amounts against the funds available to complete the contract. Once one reaches that conclusion, on what basis can the surety be made liable for these costs? They are costs incurred by the owner to "complete the Contract" but neither the original contractor nor the surety contracts to pay the owner's costs. A surety is not liable for all costs to complete the contract. A surety is only liable for those costs contemplated by the bond. . . . A surety's obligation on this point can be no greater than if it had completed the contract or had found a responsible bidder to complete it. If either of those options had occurred, Western would not be liable to the Band for the extra costs incurred by it. Accordingly, I find that the trial judge erred in holding Western liable for these amounts.

Id. at ¶¶ 102, 104.

Signed, Sealed And Delivered

It is well established in Canada that if only one party has signed the bond they will not be held liable. The courts will relieve them of such liability even though they intended to be held liable under the bond.

In *Magna Contracting & Management Inc. v. Newfoundland*, a general contractor sued an owner for awarding a contract to another bidder based, in part, on the general contractor's non-conforming bid, specifically, the lack of mutual consent to a bid bond. [2001] 206 Nfld. & P.E.I.R. 225, 618 A.P.R. 225. In *Magna Contracting*, the owner invited bids for the construction of a school and required each bid bond to be issued by an approved surety company. The owner provided that any incomplete tenders would be rejected, any incorrectly prepared tenders could be rejected and any tenders received after the closing date would not be considered. A contractor, the plaintiff, submitted a tender form and bid bond before the closing date for tenders. The bid bond was not signed by the contractor. Shortly after the closing date, the contractor and the bonding company contacted the owner to confirm the mutual obligation under the bond. The owner disqualified the contractor's tender and awarded the contract to another party. After ruling that it was implied in the contract that the bids would be assessed at the time of the closing, the court acknowledged that "there is a long line of authority standing for the proposition that when a bond is executed by only one of the parties intending to be liable under it, the party who has in fact signed is relieved from any liability under it." *Id.* at ¶14. The court ruled that because the bond lacked the principal's signature, it was legally unenforceable against the surety and within the owner's right to reject the bid. The court in *Magna Contracting* impliedly recognized the tripartite relationship of a bond when it noted that the failure of the contractor to execute the bond resulted in an incomplete instrument that would be unenforceable against the surety.

Conclusion

Like courts in the United States, Canadian courts review and adjudicate similar performance bond claims and recognize similar defenses as those raised south of the border. Similar to the certainty provided by standard bond forms like the AIA A312 bond form, industry standard forms in Canada like the CCDC have been drafted by practitioners and interpreted by the court. Based on the various defenses raised above, and others not discussed, Canadian courts will recognize various suretyship defenses to performance bond claims.

Albert L. Chollet, III

Case Note: When A Subdivision Bond Is More Than Just A Subdivision Bond – The Illinois Supreme Court's Recent Decision In *Lake County Grading Co., LLC v. Village Of Antioch*

Lauren E. Rankins

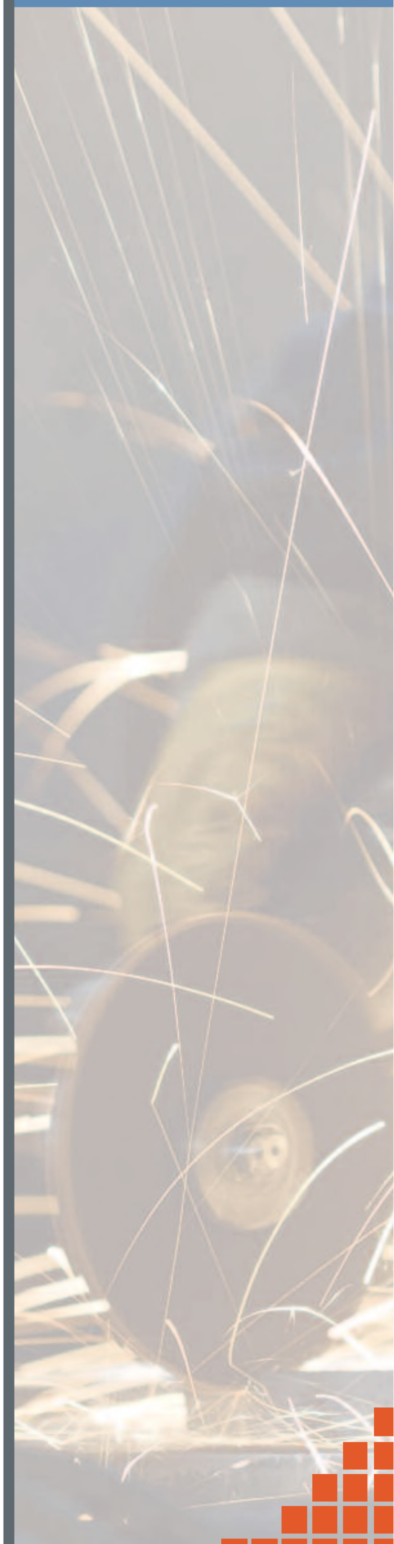
by Albert L. Chollet, III, Partner and Lauren E. Rankins, Associate

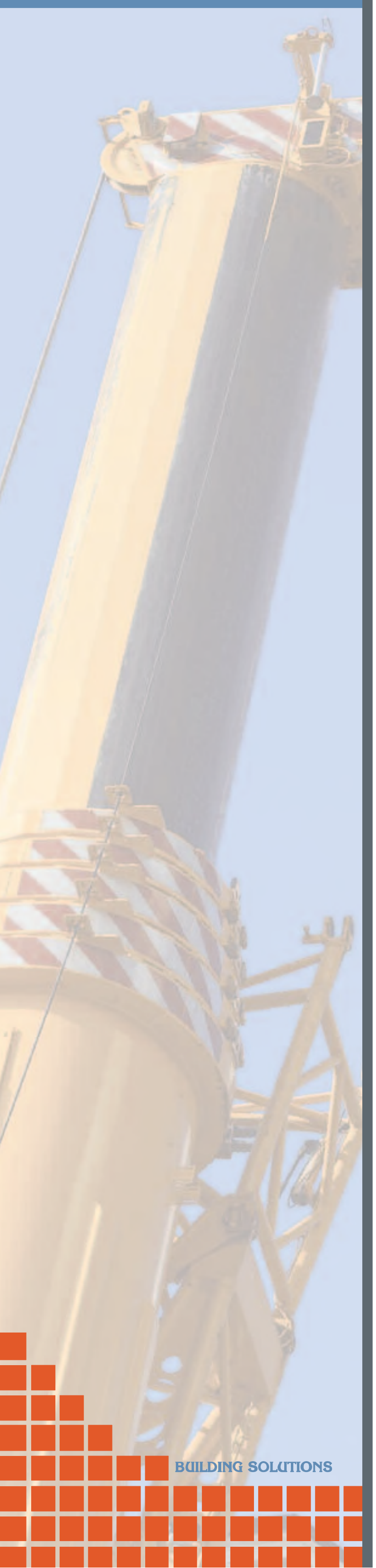
A recent Illinois Supreme Court decision has called into question the extent to which a subdivision bond surety is bound beyond the terms of its bond when the subdivision development qualifies as a public work under Illinois law. Throughout the United States, local and state governments frequently rely on specific statutory framework for enhanced community planning, coordinating the standards for public roads, right of ways, infrastructure, utilities and other similar improvements. The sources for the developer's project-specific obligations are subdivision development agreements, local ordinances and regulations, and state law.

Subdivision bonds have long been utilized to secure the performance of the developer's statutory obligations with respect to the required improvements. In most instances, the subdivision bond is akin to a performance bond and does not provide security for the developer's payment obligations to subcontractors and suppliers. Of course, there are fundamental distinctions between subdivision bonds and performance bonds with the most noteworthy being the typically broader scope of coverage for performance bonds. But the two bonds share similarities in the security provided to the obligee for the developer's faithful performance of the required improvements.

Suretyship is a contractual relationship, and the majority rule throughout the country is that interpretation of the subdivision bond is subject to the canons of contractual interpretation. As such, subdivision bonds are subject to enforcement according to their terms, applying an ordinary and plain meaning to those terms. However, if the bond is required by statute, the bond will be subject to the minimum levels of coverage and security required in the applicable statute. It is precisely this interplay between bond terms and applicable statute which led to the Illinois Supreme Court's expansive ruling concerning a subdivision bond in *Lake County Grading Co., LLC v. Village of Antioch.*

...continued on page 12





Much like the majority of other states and the federal government, Illinois has enacted a Public Construction Bond Act ("Illinois Bond Act") to govern the bonding requirements for public works projects. Specifically, the Illinois Bond Act mandates that all public entities contracting for public construction work over $50,000 require the general contractor to obtain "a bond" to secure the contractor's performance and payment obligations on the project. *See* 30 ILCS 550/1 (2014).

Regardless of the language expressed in the bond (or even the intentions of the parties), the Illinois Supreme Court recently held that a bond obtained pursuant to the Illinois Bond Act is deemed as a matter of law to contain *both* performance and payment provisions. This interpretation of the statutory language arguably imposes a sweeping and broadening effect on a surety's liability on bonds issued for public works projects in Illinois. Because of the potentially broadening effect on the surety's obligations and the rights of contractors, sureties should be aware of this recent opinion and its potential ramifications.

The 2014 Lake County Grading Decision

In *Lake County Grading Co., LLC v. Village of Antioch*, 19 N.E.3d 615 (Ill. 2014), a subdivision developer, Neumann Homes, Inc. ("Neumann") entered into two infrastructure agreements ("Agreements") to make certain public improvements on two separate subdivisions located in the Village of Antioch, Illinois ("Village"). Although the court did not elaborate on the nature of the improvements, it stated that they were for the Village's benefit. The court did not address how or by whom the development was funded.

Pursuant to the Agreements, Neumann was required to obtain surety bonds in the amount of the total cost of the public improvements. Neumann, as principal, obtained the required surety bonds for the benefit of the Village, as obligee. Each bond provided in relevant part:

> [The P]rincipal [Neumann] shall *perform and complete* * * * improvement(s) to * * * development in accordance with either the plan(s)/specification(s)/ agreement * * * then this obligation shall be void * * *. This bond will terminate upon written acceptance of the improvements by the obligee [Village] to the principal [Neumann] and/or surety [Fidelity & Deposit Company of Maryland].

(Emphasis added). Throughout the litigation, it was undisputed that the bonds did not contain any specific "payment bond" language which guaranteed payment to the subcontractors who performed labor or provided materials.

Neumann entered into an agreement with Lake County Grading Company, LLC ("Lake County Grading"), to perform certain grading work required under the Agreements. Lake County Grading completed its work but was not paid in full. Subsequently, Neumann defaulted on the Agreements with the Village and declared bankruptcy. Lake County Grading served Neumann and the Village with notices of a lien claim against public funds pursuant to 770 ILCS 60/23 and notices of a bond claim pursuant to 30 ILCS 550/1, 2.

Lake County Grading eventually filed a five-count amended complaint against the Village seeking to recover payment. Counts I and III were lien claims for public funds and count V was a claim for unjust enrichment. These counts were ultimately dismissed and not part of the appeals. Counts II and IV, the only counts at issue, alleged third-party-beneficiary breach of contract against the Village for work Lake County Grading performed on the two subdivisions. Specifically, Lake County Grading alleged that the Village breached its contract with Neumann because the Village failed to require that surety bonds obtained by Neumann contain sufficient payment bond language for the benefit of the subcontractors as mandated under Section 1 of the Illinois Bond Act. The Village denied liability, countering that Section 1 of the Illinois Bond Act mandated that both performance and payment provisions were impliedly written into the bond as a matter of law. The Village argued that Lake County Grading's claim was barred because Lake County Grading failed to give notice within the statutorily required period for a payment bond claim under the Act. Lake County Grading did not dispute that it made notices of claims outside the statutory time limit for payment claims but argued that such limitations are only applicable to a suit on the bond and since no payment bond was procured a suit on the bond was not available.

The trial court agreed with Lake County Grading on this issue and the appellate court affirmed. The lower courts reasoned that the language found in Section 1 of the Illinois Bond Act – deeming the bond to contain both performance and payment provisions – only applies after the public entity satisfies the predicate condition of requiring the general contractor to obtain the payment bond.

On appeal, the Illinois Supreme Court first turned its attention to the interpretation of the Illinois Bond Act. Section 1 of the Illinois Bond Act provides, in relevant part:

> Except as otherwise provided by this Act, all officials, boards, commissions, or agents of this State, or of any political subdivision thereof, in making contracts for public work of any kind costing over $50,000 to be performed for the State, or of any political subdivision thereof, shall require every contractor for the work to furnish, supply and deliver a bond. . . . The amount of the bond shall be fixed by the officials, boards, commissions, commissioners or agents, and the bond, among other conditions, shall be conditioned for the completion of the contract, for the payment of material used in the work and for all labor performed in the work, whether by subcontractor or otherwise.
>
> * * *
>
> *Each such bond* is deemed to contain the following provisions whether such provisions are inserted in such bond or not:
>
> "The principal and sureties on this bond agree that all the undertakings, covenants, terms, conditions and agreements of the contract or contracts entered into between the principal and the State or any political subdivision thereof will be performed and fulfilled and to pay all persons, firms and corporations having contracts with the principal or with subcontractors, all just claims due them under the provisions of such contracts for labor performed or materials furnished in the performance of the contract on account of which this bond is given, when such claims are not satisfied out of the contract price of the contract on account of which this bond is given, after final settlement between the officer, board, commission or agent of the State or of any political subdivision thereof and the principal has been made."

30 ILCS 550/1 (Emphasis added). Section 2 then provides that there is no right of action under the Illinois Bond Act unless the claimant files a verified notice of claim within 180 days after the date of the last item of work or the furnishing of the last item of materials.

The court reasoned that the plain language of Section 1 mandated the procurement of "a bond" which was "deemed to contain" both performance and payment provisions "whether such provisions are inserted in such bond or not." It noted that the paragraph did not require the procurement of a performance *and* payment bond, just "a bond." The court also highlighted that the statute stated the amount of "the bond" is to be fixed by the public official and "the bond" is conditioned upon the completion of the contract and the payment of labor and materials. It ultimately held that:

> [R]egardless of the actual language contained in a public construction bond procured in accordance with section 1, the legislature has unambiguously provided all such bonds are deemed to contain both completion and payment provisions as a matter of law. Simply put, we cannot envision a clearer indication of legislative intent concerning the question before us than the language contained in paragraph three that "[e]ach such bond is deemed to contain the following [payment and completion] provisions whether such provisions are inserted in such bond or not."

The dissent disagreed with the majority's interpretation of Section 1, stating that it contradicted the plain language of the statute, as well as its purpose and history. The dissent also reasoned that the majority's opinion and interpretation is contrary to the common sense application of the statute and creates confusion with regard to the issuance of future public construction bonds.

The dissent first noted that the third paragraph of the statute begins with the clause "[*e*]*ach such bond* is deemed to contain the following provisions whether such provisions are inserted into the bond or not." (Emphasis added). It reasoned that the phrase "[e]ach such bond" refers back to the type of bond previously described in the first paragraph; *i.e.*, bonds conditioned for the completion of the project and the payment of labor and materials. Following that phrase is specific language that provides that the surety is obligated to guarantee completion of the project and payment to subcontractors. The dissent reasoned that in order to avoid rendering portions of the statute meaningless or redundant, the third paragraph must be interpreted as simply clarifying the obligations of the surety in cases where the wording of a bond itself may be ambiguous. The dissent stated that the clarifying language of the third paragraph cannot be interpreted as altering or changing the nature of the bond procured

...continued on page 14

BUILDING SOLUTIONS

between the parties because this could lead to absurd and unjust results. The dissent further noted that the purpose of the Illinois Bond Act is, in part, to protect the subcontractors, and to adopt the majority's interpretation runs contrary to that purpose. In order to further the purpose of the Illinois Bond Act, a subcontractor should be able to file suit against a public entity for failing to ensure the proper procurement of a bond that guarantees for the completion of the project and the payment of labor and materials.

Unfortunately, the court never clearly discussed how the subdivision development project in this case qualified as a public works project subject to the Illinois Bond Act. Certainly, by its own terms, the Illinois Bond Act requires that the owner enter into a "contract[] for public work of any kind costing over $50,000." There is legal authority in Illinois which supports the argument that this requires not only public ownership of the land being developed, but also the use of public funds to pay for the contract improvements. For example, development of private land which is subsequently dedicated to the public for public use gives rise to private lien rights in Illinois as opposed to rights to assert a claim against public funds. However, the court in *Lake County Grading* did not clearly articulate the standard for determining what constitutes a "public work" subject to this Act.

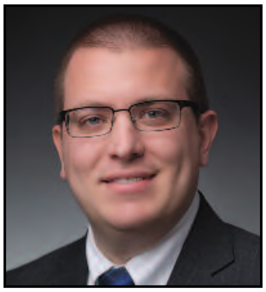
The Practical Impact Of *Lake County Grading* On Subdivision Bonds Issued For Public Works Projects In Illinois

In *Lake County Grading*, the Village did not require the contractor to obtain a performance and payment bond but only a bond to secure faithful performance of the improvements. Thus, it was the intention of the parties and the understanding of the surety that the bond would only obligate the surety to complete the project if the contractor failed to do so. In *Lake County Grading*, there is no indication that the parties ever intended to furnish a payment bond to guarantee payment to the subcontractors. Nevertheless, the court's ruling was that every bond subject to Section 1 of the Illinois Bond Act is deemed to contain such language regardless of the nature of the bond that has actually been obtained.

This ruling is noteworthy for sureties because it arguably could drastically expand their obligations under traditional subdivision bonds when a project is subject to the Illinois Bond Act. Despite the unambiguous language in a bond and the intent of the parties, a surety could potentially be held liable for payment obligations it never contemplated on outstanding subdivision bonds in Illinois. Of course, the court's opinion is silent concerning the implication of payment provisions in instances where a surety furnishes both a performance and a payment bond for a project. In such a case, the court's opinion could lead to unintended results if taken to its logical end. Moreover, the court's opinion does not extend to privately owned projects.

In Illinois, sureties are now confronted with the possibility of having issued subdivision bonds with the expectation of liability being limited to performance guarantees in the bond only to learn later that, due to the Illinois Bond Act, the bond is subject to the broader guarantee of securing payment obligations as well. This drastic change to the surety's expectations concerning its voluntary undertaking deserves attention at both the underwriting and claims levels to monitor and determine risk on existing and future subdivision bonds. Additionally, *Lake County Grading* is already inviting claims by opportunistic claimants against performance bonds with more favorable terms, leaving substantial ground for argument on a case-by-case basis over the applicability of the Bond Act and the reach of the court's opinion. It is necessary for the court to provide much needed clarity to its sweeping generalization and ruling in *Lake County Grading* in order to lend predictability to the industry and avoid unjust outcomes.

Watt Tieder newsletters are posted on our website, www.watttieder.com, under the Resources Tab. If you would like to receive an electronic copy of our newsletter, please contact Peggy Groscup at: **pgroscup@watttieder.com**



Big Changes Proposed For Small Business Regulations

by Mitchell A. Bashur, Associate

Introduction

The Small Business Administration ("SBA") has recently proposed significant changes to the federal small business regulations. These proposed changes, if implemented, will affect contractors doing business with the federal government whether they are small businesses, partner with small businesses, or are looking to increase contract awards by taking part in the proposed expanded mentor/protégé program.

The first group of proposed regulatory amendments implements the National Defense Authorization Act of 2013 and was published on December 29, 2014. These proposed changes include modifications to the limitations on subcontracting, which limits the amount of work a small business can subcontract if it is awarded a contract as a small business set-aside.

The second group of proposed regulatory amendments was published on February 5, 2015. In it, the Small Business Administration proposes an overhaul of the Small Business Mentor Protégé Program. It further proposes to change the rules on small business joint ventures.

Taken together, these proposed changes will significantly alter the small business landscape in an environment that is increasingly focused on awarding contracts with a goal of reaching small business participation numbers.

Proposed Changes To The Limitations On Subcontracting Rule

The limitations on subcontracting rule provides that an awardee of a small business set-aside can only subcontract a certain percentage of work to other contractors. The calculation of this percentage depends on the type of work primarily being performed, with different rules applying for service contracts, supply contracts, general construction contracts, and special trade construction contracts.

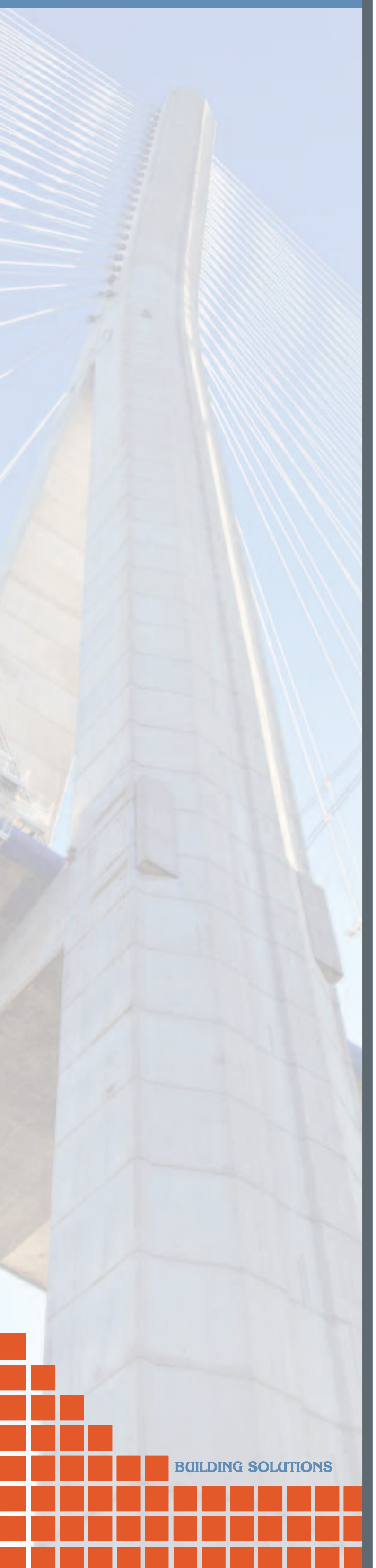
The first change in the proposed regulation is how the rule will be calculated for service and supply contracts. For those contracts, the amount of subcontracting allowed by the small business would be fifty percent of the amount paid by the government. This is a significant change from the current method, which allows subcontracting of fifty percent of the cost of personnel or the cost of manufacturing the supplies. For general contracting, the formula remains fifteen percent of the amount paid by the government, and for special trade construction the formula remains twenty-five percent of the amount paid by the government.

The most significant change, however, is that the proposed regulations would add an exception for "similarly-situated entities." Thus, two or more small businesses can team together to perform the required percentage of the work on a small business set-aside, and subcontract out the balance to other than small business and be in compliance with the regulations. Finally, the proposed regulations create substantial penalties for violations of the limitations on subcontracting. Penalties of the greater of $500,000 or the dollar amount spent over the permitted ceilings would be added for businesses that violate the limitations on subcontracting.

Proposed Changes To The Small Business Mentor/Protégé Program

Currently, the SBA administers one mentor/protégé program related to the 8(a) Business Development program. The program has proven to be a successful way for emerging businesses to learn from seasoned contractors, with both enjoying the economic benefits of the partnership. The emerging business can bid on a solicitation it would have been otherwise unable to fulfill while the mentor gains access to 8(a) and small business set-asides. In addition to the SBA's 8(a) mentor/protégé program, thirteen agencies have their own form of the

...continued on page 16



program. In 2010, Congress gave the Small Business Administration authority to create mentor/protégé programs for other socio-economic groups such as women-owned small businesses and Historically Underutilized Business Zones ("HUBZones"). Then in 2013, Congress, in the National Defense Authorization Act, authorized the Small Business Administration to create mentor/protégé programs for all small businesses and directed the SBA to create rules for the agencies' (except Department of Defense) mentor/protégé programs.

In response, the SBA has proposed a "universal" mentor/protégé program available to all small businesses. The 8(a) mentor/protégé program will remain separate in the regulations, but the SBA proposes to make the universal mentor/protégé program identical to the 8(a) mentor/protégé program.

Under the universal mentor/protégé program, a business is eligible to be a protégé if it qualifies as a small business under its primary North American Industry Classification System ("NAICS") code. A business will qualify as a mentor under the proposed regulations if it is a "for-profit business concern that demonstrates a commitment and the ability to assist small business concerns." A mentor may generally only have one protégé at a time, but the SBA may authorize up to three concurrent protégés if the mentor "can demonstrate that the additional mentor-protégé relationship will not adversely affect the development of any of the protégés." A business may not serve as both a mentor and protégé at the same time. The mentor/protégé relationship is created through a written agreement "identifying specifically the benefits intended to be derived by" the protégé that is approved by the SBA before the businesses can receive any benefits under the program. The mentor/protégé agreement will last for three years and will be subject to annual review by the SBA. Finally, the mentor may own an equity interest of up to forty percent in the protégé in order to raise capital for the protégé.

After the SBA approves a mentor/protégé agreement, the businesses may then jointly bid on small business set-asides through the formation of joint ventures, provided the protégé qualifies as small under the NAICS code assigned to the solicitation. The joint venture may also be considered "small" for any socioeconomic category for which the protégé qualifies, such as Women-Owned Small Business or HUBZone.

Under its 2013 authority, the SBA also had the chance to create guidelines for the agencies' mentor/protégé program. The SBA did not propose regulations establishing guidelines for the agencies' mentor/protégé programs, but rather sought comments on whether there is "a "continuing need for other small business mentor/protégé programs once SBA's various mentor-protege programs are implemented." It will be interesting to see if the final regulations supercede the agencies' programs and what guidance will be given to those already approved by those programs.

Proposed Changes To Small Business Joint Ventures

The proposed regulations not only significantly expand the mentor/protégé program, they also change what form of joint venture the mentor and protégé can form to pursue contracts. First, the proposed regulations specify that "any joint venture must be in writing." While this has always appeared to be the case, there was some confusion as to whether "informal" joint ventures did not have to be reduced to writing.

Second, the SBA sought comments on whether "informal" joint ventures should be permitted at all. An "informal" joint venture is one in which the joint venture is reduced to writing, but there is no separate legal entity formed and filed with a state. From the proposed regulations, it appears that the SBA is inclined to eliminate the informal joint venture option.

Third, the SBA's proposed rule would eliminate "populated" joint ventures. A "populated" joint venture is one that has its own personnel that belong to the joint venture and operates independently of the joint venture members. The proposed rule addresses the issue that it was difficult to apportion work between the mentor and protégé and ensure that the protégé actually benefited from the arrangement for "populated" joint ventures. The proposed rule would retain the existing exception that the joint venture can have its own employees who perform administrative functions and it will be considered an "unpopulated" joint venture.

Conclusion

The changes proposed by the SBA to the federal small business regulations are substantial and will affect all contractors providing goods or services to the federal government. While these rules are only proposed and may change during the comment period (particularly given the open-ended questions the SBA has asked), they afford insight into the SBA's thinking on the parameters of the final rules to be issued.

William C. Vis International Arbitration Moot Team

This past March, Daniel Rodriguez travelled to Jordan and Hong Kong to serve as an instructor and a coach training teams in preparation for the annual William C. Vis International Arbitration Moot. For the past two years, Daniel, along with his co-coach Matt Brown, associate counsel for the Institute of International Banking Law and Practice, have volunteered to coach teams from Afghanistan to compete in this competition, often referred to as the "World Cup" of international commercial law.

During the inaugural year of the Afghan training program, Daniel and Matt coached just one team comprised of four law students from Kabul University. This year, three of those students, Duniya Stanikzai, Rohila Burhanzoi, and Nabila Barmaki returned to help coach the now expanded group of students representing Afghanistan. The program has now expanded to twenty students from three Afghan universities: Kabul University, Kardan University and American University of Afghanistan (AUAF).

The Vis Moot "problem" typically addresses one main procedural issue and one main substantive issue. This year the substantive issue dealt with letter of credit law and avoidance principles under the UN Convention on Contracts for the International Sale of Goods (CISG). The procedural issue focused on the particular mechanics of emergency arbitration and other interim relief under the UNCITRAL Model Law and the rules of The ICC International Court of Arbitration.

On The Road To Hong Kong - Training And Practice In The Middle East

In preparing for the main competition in Hong Kong, which would include over 100 other teams from around the world, the three Afghan teams first traveled to Amman, Jordan to participate in a three day training workshop, followed by a two day "pre-moot," a practice competition among the teams. Students from Iran, Saudi Arabia, Iraq, Tunisia, Kuwait, Qatar, and Jordan all participated in the five day program organized by the United States Department of Commerce and sponsored by the Bahrain Chamber of Dispute Resolution.

Daniel, Matt, and Janet Checkley, a fellow attorney/consultant, led the three day training workshop for over fifty students. During this time they addressed questions regarding the substantive and procedural issues, and taught effective oral advocacy skills and techniques.

During the pre-moot competition, AUAF advanced to the semi-final round, only to be eliminated by the eventual pre-moot champion, Dar-al-Hekma from Saudi Arabia.

Competing And Learning In Hong Kong

While the other teams from the Middle East Pre-Moot competed in the Vienna arm of the competition, the three Afghan teams all travelled to Hong Kong to compete in the Vis Moot East.

Daniel and Matt accompanied the Afghan teams to continue coaching them as each team competed in four general rounds, facing teams from Russia, Australia, The United States, Japan and India, as well as many other countries.

While in Hong Kong, Daniel and Matt also served as arbitrator-judges for several rounds of the competition alongside practicing arbitrators from around the world.

As part of the competition, panels and talks were organized in the evenings to discuss various aspects of international arbitration law, with one highlight being a "Tea House Debate" over the utility/desirability of emergency arbitration. These events provided a unique opportunity for practitioners and arbitrators from around the world to frankly discuss and debate some of the novel issues currently facing the international arbitration community.

A View To The Future

The true goal of the Vis Moot is to provide a hands-on education in matters of arbitration and international commercial law, as well as to provide a forum for members of the international legal community to share ideas and perspectives on the law. In this regard, the Afghan involvement in the competition was a rousing success. That success can be measured by the fact that there are now twenty-four future (and current) Afghan attorneys who have all had the opportunity not only to explore the workings of international arbitration, but also to gain experience analyzing and employing international law to resolve a commercial dispute: experience that is especially desirable as Afghanistan seeks to rebuild itself after decades of war and conflict.

...continued on page 18

The goals for the Afghan Vis Program going forward include possible expansion to other universities in Afghanistan, with this year's competitors stepping up to help coach and organize those teams for next year's competition.

Worth noting is that three of the students from this year's AUAF team will be attending schools in the United States this fall to work toward receiving L.L.M. degrees in international arbitration. Those schools include Fordham University, Columbia University, and the University of the Pacific.

As to the three women who competed last year and coached this year, all three have had multiple job opportunities in Afghanistan as a result of their experience in the Vis: Duniya will be working as counsel for the newly formed Afghan Chamber of Dispute Resolution (ACDR); Nabila will be working in the office of the President of Afghanistan; and Rohila is working with USAID/FAIDA at the Ministry of Womens Affairs and has been offered a scholarship to seek an L.L.M. in international arbitration from the Swiss International Law School.

A recent documentary film "Afghan Dreams," which explores the path of that first Kabul University Vis Moot team has recently been featured at the Sundance and Tribeca film festivals.

FIRM NEWS

Watt Tieder Launches Updated 50 State Survey

Watt Tieder is proud to introduce our updated 50 State Survey Of Key Issues Related To Construction & Engineering Contracts, which addresses major issues that arise in all aspects of contracting in all 50 states. The 50 State Survey is an interactive website available at your desktop as well as on all mobile devices. To learn more, visit us at www.watttieder.com.

Appointments

Keith C. Phillips has been selected to serve as the Jurisdictional Council Member for the United States on the Inter-Pacific Bar Association. Keith previously served as the Chairman of the International Construction Projects Committee.

Christopher Wright has been named as a Vice Chairman of the International Construction Projects Committee of the Inter-Pacific Bar Association.

Mitchell A. Bashur recently was appointed as a 2015-2016 Vice-Chair of the ABA's Small Business and Other Socio Economic Programs Committee. The Committee brings together the brightest attorneys active in the small business realm to monitor, review, and comment on issues and regulations related to small business and socioeconomic policies such as labor standards and affirmative action. As part of his previous participation on the Committee, Mitchell assisted with drafting comments on the Small Business Administration's proposed regulations implementing the National Defense Authorization Act of 2013.

Watt Tieder Welcomes Two New Associates

Mitchell A. Bashur joins the McLean, Virginia office. Mitchell's practice will focus on government contracts, small business issues, construction litigation and suretyship. Before joining the firm, Mitchell was an associate at a government contracts boutique and focused on small business issues and bid protests. Mitchell also clerked for the Senior Judges at the District of Columbia Court of Appeals and then worked as a staff attorney at the office of the Court of Appeals. During law school, Mitchell was a Notes Editor on the George Mason Law Review and worked for a white collar criminal defense firm.

Mitchell's practice includes helping clients navigate complex small business regulations with a focus on helping clients partner with small businesses through the Small Business Administration's Mentor/Protégé program and ensure compliance with the small business regulations when acting as a subcontractor to a small business under a small business set-aside award. Mitchell also practices broader government contracts issues from bid protests to Boards of Contract Appeals claims to government investigations and is a member of the Boards of Contract Appeals Bar Association.

Jonathan R. Wright joins the McLean, Virginia office. Jonathan's practice will focus on complex commercial construction disputes in state and federal courts across the United States. He represents owners, general contractors, subcontractors and sureties in various disputes arising out of construction-related contracts. Prior to joining the firm, Jonathan represented commercial landlords and national retail tenants in commercial real property litigation in Maryland and Virginia. He also represented national and regional banks in creditor's rights matters throughout the region.

Upcoming And Recent Events

"Application of the Federal Acquisition Regulations to Fixed Price Construction Contracts," April 17, 2015; Virginia Beach, Virginia; **Lewis J. Baker** and **Timothy E. Heffernan** presented to Skanska USA Civil Southeast.

Camara Brasileira da Industria da Construcao (CBIC) in partnership with the Confederation of International Contractors Association (CICA) and the Inter-American Federation of the Construction Industry's (FIIC) International Meeting, April 27, 2015; Brasilia, Brazil; **Christopher Wright** spoke on "Dispute Prevention and Resolution of PPP Contracts."

Inter-Pacific Bar Association (IPBA) Annual Conference, May 4-8; Hong Kong, China; **Christopher Wright** spoke on Multi-Tier Dispute Resolution.

ABA TIPS Fidelity and Surety Law Committee, 2015 Spring Workshop, May 7-8, 2015; LaJolla, California; **John E. Sebastian** spoke on the Federal Government and the Performing Surety. John is also a chapter author of the new **Bond Default Manual**, which was the subject of the program.

ABA Forum on Construction, Plenary Session I, October 8-9, 2015; Austin, Texas; Shelly L. Ewald to speak on "Plenary 1: Has Arbitration Fulfilled its Promise? Both Sides of the Debate."

Publications

Illinois Construction Law, 2015; co-authored by **John E. Sebastian, Frank J. Marsico, Albert L. Chollet, III, Eric B. Kjellander**, and **Lauren E. Rankins.**

BUILDING SOLUTIONS®

WATT TIEDER

WATT, TIEDER, HOFFAR & FITZGERALD, L.L.P.

Attorneys at Law

WATT TIEDER

WATT, TIEDER, HOFFAR & FITZGERALD, L.L.P.

8405 Greensboro Drive, Suite 100
McLean, Virginia 22102

PRSRT STD
US POSTAGE
PAID
PERMIT #6418
DULLES, VA

8405 Greensboro Drive
Suite 100
McLean, Virginia 22102
(703) 749-1000

2040 Main Street
Suite 300
Irvine, California 92614
(949) 852-6700

10 South Wacker Drive
Suite 2935
Chicago, Illinois 60606
(312) 219-6900

6325 S. Rainbow Boulevard
Suite 110
Las Vegas, Nevada 89118
(702) 789-3100

1200 Brickell Avenue
Suite 1800
Miami, Florida 33131
(305) 777-3572

1215 Fourth Avenue
Suite 2210
Seattle, Washington 98161
(206) 204-5800

HFK Rechtsanwälte*
Maximilianstrasse 29
D-80539 Munich, Germany
Phone 011 49 89 291 93 00

**Independent Law Firm*

Global Construction &
Infrastructure Legal Alliance
91, rue du Faubourg Saint-Honoré
75008 Paris, France
Phone 33 (0)1 44 71 35 97

The Watt, Tieder, Hoffar & Fitzgerald newsletter is published quarterly and is designed to provide information on general legal issues that are of interest to our friends and clients. For specific questions and concerns, the advice of legal counsel should be obtained. Any opinions expressed herein are solely those of the individual author.

Special Thanks to Editors, **Robert G. Barbour, Keith C. Phillips, William Groscup** and **Heather Stangle**.

BUILDING SOLUTIONS