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Construction Law Update

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CONSTRUCTION LAW UPDATE

1. Introduction

Case law updates in construction is always a relevant and important topic. There are many authors who do an outstanding presentation with this topic to that end, much of the specific cases being addressed in this paper were initially covered by Gregory M. Cokinos and Anthony Vlahos of Cokinos, Bosien & Young, who gave a similar presentation to the Houston Bar Association Construction Law Section on May 19, 2011. Mr. Cokinos and Mr. Vlahos have been gracious in letting me base my presentation on theirs.

A. Unexpected Site Conditions

In *MasTec North America, Inc.*, the First Court of Appeals found that even though the contractor submitted a lump sum bid and agreed to assume the risk of unexpected site conditions, the owner was liable for defective specifications because the contract required the owner to exercise due diligence in preparing the specifications.¹

MasTec North America, Inc. (MasTec) won a bid to replace gas pipelines owned by El Paso Field Services L.P. (El Paso) between Victoria and Nueces Bay.² In the contract, El Paso represented that it had exercised due diligence in locating all foreign crossings within the right-of-way.³ Notwithstanding El Paso's duty, MasTec agreed to perform a site inspection and rely solely on its investigations in preparing its bid.⁴ Pursuant to its contractual obligation, El Paso prepared the specifications and listed a total of 280 crossings.⁵ Prior to finalizing its bid, MasTec inspected the right-of-way for foreign crossings using the documents prepared by El Paso.⁶ During construction, MasTec encountered, at considerable expense, approximately 794 foreign crossings.⁷ El Paso refused to compensate MasTec for the extra costs it expended due to the additional crossings, and MasTec brought suit.⁸ At trial, the jury found that El Paso failed to exercise due diligence as promised.⁹ However, the judge entered a judgment notwithstanding the verdict in favor of El Paso given the contract provisions concerning the allocation of risk and the fact that MasTec submitted a lump sum bid.¹⁰ MasTec subsequently appealed.

The issue on appeal was whether the interpretation of a "due diligence" provision improperly shifted the risk of costs associated with the unidentified foreign pipeline crossings to MasTec.¹¹ The court of appeals relied upon the Supreme Court's decision in

¹ 317 S.W.3d 431 (Tex. App.—Houston [1st Dist.] 2010, pet. filed).

² *Id.* at 435.

³ *Id.* at 434.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 435.

⁷ 317 S.W.3d 431, 434 (Tex. App.—Houston [1st Dist.] 2010, pet. filed).

⁸ *Id.* at 436-37.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 446.

*Hollerbach v. United States*¹² in holding that MasTec was not required to assume the risk of differing site conditions because the contract required El Paso to exercise due diligence in locating and listing all the foreign crossings in the specifications.¹³ According to the court: “if El Paso had wished to leave open the matter of foreign crossings to the independent investigation of MasTec, El Paso could have simply left the due diligence provision out of the contract.”¹⁴ Therefore, MasTec’s representation that it was familiar with the site was limited by El Paso’s representation that it would exercise due diligence in preparing the specifications.

B. Ambiguities in the Scope of Work

In *C. A. Walker, Inc. v. Total Roofing Services, Inc.*, the general contractor C.A. Walker, Inc. (Walker) retained Total Roofing Services (TRC) to perform roofing work related to the construction of a grocery store.¹⁵ The contract defined the scope of work as follows:

07410 COMPOSITE METAL PANELS, 07415 METAL ROOF PANELS, 07510 BUILT-UP ASPHALT ROOFING, 07511 ROOFING TESTING & INSPECTION SERVICE FOR BUILD-UP ASPHALT ROOFING, 07620 SHEET METAL FLASHING AND TRIM AND 7720 ROOF ACCESSORIES included the following items: furnish and install composite metal panels, metal roof panels, built-up asphalt roofing, roofing testing & inspection service for build-up asphalt roofing, sheet metal flashing and trim and roof accessories as shown per the above referenced plans and specifications[,] engineering and layout for the roofing & metals scope of work.¹⁶

The scope of work’s section on “007410 COMPOSITE METAL PANELS” further stated that “the application of composite metal panels included both exterior and interior composite metal panels.”¹⁷

Shortly after work began, a dispute arose concerning whether TRS was responsible for buying and installing the composite metal panels that were not part of the roofing system.¹⁸ Walker asserted that the scope of work required TRS to purchase and install all the composite metal panels for the structure, including the panels on the building facade. TRS on the other hand, took the position that it was only responsible for the panels that were to be installed as part of the store’s roofing system.¹⁹ In the end, Walker purchased

¹² 223 U.S. 165, 172 (1914).

¹³ *MasTec N. Am., Inc.*, 317 S.W.3d at 455-56.

¹⁴ *Id.* at 446.

¹⁵ ----S.W.3d----, No. 03-08-00175-CV, 2010 WL 1508070, at*1 (Tex. App.—Austin Apr. 13, 2010, no pet.) (mem. op).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

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