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CONSTRUCTION LAW BRIEF

ON THE HORIZON, REVISIONS TO THE LOUISIANA PRIVATE WORKS ACT : *"The More Things Change, The More They Stay the Same"*

All persons associated with non-public construction projects in Louisiana are affected by, and should be familiar with, the Louisiana Private Works Act. La. R.S. 9:4801, et. seq. ("PWA"). The two fundamental policies behind the implementation of the PWA summarized are:

1. To protect those who contribute to the improvement of immovable property by ensuring that the owner does not benefit from their labor without compensating them; and

2. To incentivize the owner to take reasonable steps to ensure that contractors and suppliers are paid.

The PWA was first enacted in 1981 and was based upon the work and recommendations of the official advisory law revision commission and, the law reform agency and legal research agency of the State of Louisiana – The Louisiana Law Institute. Over the last thirty years, numerous amendments and revisions to the PWA have resulted in piece-meal changes to certain provisions that lead to confusion, ambiguity, and potential traps for the unwary.

Recognizing the undesirable effects of the many revisions, the 2012 Louisiana Legislature has once again turned to the Louisiana Law Institute for its recommendations to simplify and better organize the provisions of the PWA.

On February 15, 2013, the Louisiana Law Institute issued its report to the Legislature stating, "…to restore the integrity and in cohesiveness of the act, the law institute feels that more comprehensive review of the act as a whole is warranted, particularly with respect to the numerous changes that have been enacted over the last three decades." Based upon the February report, the changes being considered are not expected to be "wholesale revisions" with "far-reaching substantive effects." Rather, the focus will be to eliminate the ambiguities and inconsistencies resulting from the last thirty years of legislative revision.

Presumably, upon completion of its study, the Law Institute is expected to provide recommendations for specific revisions to the PWA. The February report does not provide a comprehensive list of provisions being evaluated; however, a review of the eight questions set out in the report suggests that several revisions may be on the horizon.

The eight questions are:

1. **Should a contractor who has filed a timely Notice of Contract with proper surety bond attached be afforded a simple means of causing the cancellation of record of a Statement of Claim or Privilege?**

   - Stated differently, if a payment bond is filed at the start of the job, why should a contractor have to obtain a second bond to "bond off a lien"?

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2. **Should the notice provisions of the Act be consolidated in a central location and adjusted to better accomplish their intended purpose?**

   - Currently the PWA contains approximately seven provisions requiring a claimant to provide notice to an owner or contractor; however, the period of time within which such notice must be given varies as does the triggering event. Consolidation and uniformity would eliminate these "traps for the unwary" contained in the current PWA.

3. **Should a contractor under a construction contract of more than $25,000.00 be deprived of any privilege upon the immovable if he fails to file a timely Notice of Contract?**

   - Most of the PWA privileges that arise from the timely filing of a statement of claim and privilege are given retroactive effect to the date the Notice of Contract was filed or the date work commenced. The time period between the start of work and the expiration of the period of time to file a statement of claim and privilege is often measured in years. During this interval the privileges that arise under the PWA are essentially "hidden liens" even though they do not appear of record.

   - Possible revisions include:

     - Reducing the penalty for not filing the Notice of Contract to the loss of the retroactive effect of the contractor's statement of claim and privilege, instead of the loss of the privilege altogether;

     - Requiring the Notice of Contract be filed by the lender or title attorney.

4. **Should language be added to the Act making explicit that a personal claim against an owner is extinguished if the claimant fails to take the necessary action to preserve his privilege?**

   - The PWA establishes two separate but related rights. It creates a "claim" (a cause of action) in favor of a subcontractor or laborer against the owner and the contractor in the absence of contractual privity. It also establishes a privilege on the owner's immovable property to the extent of the value of work performed. The privilege arises out of the timely filing of a statement of claim and privilege. Some courts have held that the failure to timely file the statement of claim and privilege only results in the loss of the privilege and **does not** result in the loss of the claim.

     - The Law Institute will study and provide its recommendation as to whether the loss of the privilege should result in the loss of the claim also.

5. **Should an outside time limitation be placed on the filing of a Statement of Claim and Privilege when a timely Notice of Contract has been filed, just as an outside time limitation exists when no Notice of Contract is filed?**

   - Current PWA provisions are counterintuitive.

     - Under the PWA now, if a Notice of Contract is timely filed, the person to whom a claim or privilege is granted under the PWA has thirty days after the filing of a notice of termination to file a statement of claim or privilege. If the owner does not remember to file the notice of termination, the period for filing statements of claim and privilege never commences to run.

     - If a Notice of Contract is not filed, the period of time to file a statement of claim or privilege is sixty days from the notice of termination, substantial completion, or abandonment of the work.

- Why should the filing of the Notice of Contract work to the detriment of the owner?

6. Should the Act be amended to address the level of specificity that a claimant must include in a Statement of Claim or Privilege?

- Currently, PWA requires the statement of claim and privilege to set forth *"the amount and nature of the obligation giving rise to the claim or privilege and reasonably identify the elements comprising it including the person for whom and to whom the contract was performed, materials supplied, or services rendered."* Recent cases have required more specificity in terms of what must be set forth. (i.e., a claim rejected where the amount of the claim was provided with a description of "for trim, millwork, etc" but itemized invoices were not attached).

    - The Law Institute will evaluate the degree of specificity that should be required.

7. Should the Act explicitly state that a contractor enjoys no right of subrogation to the claims and privileges of his own laborers?

- If a general contractor fails to file a Notice of Contract, it loses its privilege. However, recent cases have allowed a general contractor to assert the privilege of its laborers by way of subrogation. As such, this general contractor enjoys the priority of a laborer's privilege and outranks all competing mortgages and vendors privileges.

    - The Law Institute will evaluate the need for specific revisions to the PWA to clarify that a general contractor cannot assert though subrogation the laborer's privileges of its employees.

8. Are additional protections for homeowners warranted?

- In 2004, the Law Institute was asked by the Legislature to evaluate the inequity which exists when a homeowner pays the general contractor and then is forced to pay again if the general contractor does not pay his subcontractors or suppliers. No revisions to the PWA were recommended at that time.

- The 2012 legislative request did not specifically mention this inequity; however, the Law Institute has indicated its intention to conduct further study to determine if the protection of homeowners from the double payment potential is warranted.

- Protection measures which may be evaluated include:

    - Excluding residential work below a certain dollar value;

    - Limiting claims to those in direct contract with the owner;

    - Limiting the type of claimants who could assert such a claim;

    - Excluding homeowners altogether.

The PWA has been revised and amended in some fashion every year since it was first enacted thirty years ago. These changes have resulted in the unintended creation of ambiguity and uncertainty. The legislative recognition of these concerns and its request for further study from the Law Institute suggest that several clarifications and/or revisions to the PWA are on the horizon.

LOUISIANA'S UNIQUE RETAINAGE ESCROW REQUIREMENTS FOR CONSTRUCTION CONTRACTS

Background of Louisiana Revised Statute 9:4815

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Louisiana has a unique statute in its Private Works Act which requires owners to deposit retainage funds in an interest bearing escrow account for construction contracts over $50,000. While a number of other states have statutory provisions as to how much retainage may be withheld under a construction contract, Louisiana's statute, which does not regulate those substantive terms, instead dictates how those funds are handled during the course of the project.

The statute, found at Louisiana Revised Statute 9:4815, was added to the Private Works Act by Act 638 of 2010. While the bill as originally introduced applied to all funds withheld from periodic payments by an Owner, the final version of the Act applies only to "retainage."

Requirements of the Retainage Statute

The retainage statute applies to construction contracts over $50,000. It requires the owner to deposit funds withheld from periodic payments as retainage into an interest bearing escrow account.

The retainage statute primarily applies to commercial construction, as residential and industrial construction projects are generally included within the Act's express exclusions for single family or double family residences and various industrial facilities.

The retainage statute requires that the escrow account be under the control of an escrow agent mutually agreeable to the owner and contractor and provides specific guidelines for when the disputed and undisputed retainage funds should be released following completion of the work.

Last, the retainage statute provides a qualified immunity for the escrow agent and financial institution where the escrow account is maintained.

Limited Application

Since its introduction in 2010, this escrow requirement has been largely ignored in practice, due in large part to the absence of any penalty or enforcement mechanisms.

Waiver

It has become common practice in construction agreements executed since 2010 for the parties to waive the escrow requirements of the Act. The question of whether or not the provisions of the retainage statute can be waived has been the subject of some debate. On one hand, the language of 9:4815 is imperative. It says that the retainage, "shall be deposited by the owner into an interest bearing account." On the other side of the argument is the absence of any penalty or enforcement mechanism and the current state of Louisiana law, that the broader protections of the Private Works Act are not considered to be matters of public policy, and may be waived. There are no published decisions addressing this issue.

Prospective Amendments

In 2012, the author of Act 638 of 2010 introduced a bill that would have expressly dictated that the requirements of 9:4814 are not waivable (SB 340). He has prefiled a similar bill for the 2013 session, Senate Bill 137, which would prohibit waiver of the escrow requirements, but which would also raise the contract amount from $50,000 to $500,000.

It will be interesting to see whether SB 137 fares better in 2013 than did SB 340 in 2012.

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