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Construction Lien Remedy Not Available For Improvements On “to-be-installed” Trade Fixtures

In a recent Court of Appeals decision, *Controls Group, Inc. v Hometown Communications Network, Inc.*, the Court of Appeals dismissed a subcontractor’s construction lien claim finding that the subcontractor had not provided an “improvement” as defined under the Michigan Construction Lien Act.

In *Controls Group*, a lessee hired a contractor to transport, refurbish and install used printing presses in a printing facility. The contractor subcontracted with Controls Group to supply parts and equipment to perform technical support to complete the upgrade of inking components of the presses. When the contractor failed to pay the Controls Group, Controls Group recorded a construction lien on the property and then foreclosed on its lien. The trial court dismissed Controls Group’s claim on the basis that the Construction Lien Act did not apply. Controls Group appealed.

As noted by the appellate court, the construction lien act allows a subcontractor who provides an improvement to real property a construction lien. The Act

defines improvement as: The result of labor or material provided by a contractor, subcontractor, supplier or laborer, including but not limited to, surveying, engineering and architectural planning, construction management, clearing, demolishing, excavating, filling, building, erecting, construction, altering, repairing, ornamenting, landscaping,

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paving, leasing equipment or installing or affixing a fixture or material, pursuant to a contract.

The appellate court in *Controls Group* focused on whether Controls Group’s improvement impacted the real property and whether the lessee intended the printing presses to be permanent accessions to the property, as opposed to trade fixtures that may be moved upon conclusion of the lease. The court concluded that because Controls Group merely supplied materials and technical support to upgrade items

that were to be installed, the Construction Lien Act did not apply. The court reasoned that Controls Group did not itself install or affix the presses or take any other action directly impacting the realty. The court was also persuaded that the printing presses were not intended to be permanent fixtures, but rather were personal property of the lessee.

The *Controls Group* case is a reminder to those contractors providing improvements, especially in leased facilities, to carefully consider the type of work being provided and whether that work may involve a permanent fixture or a trade fixture. For instance, upgrading electrical service to a structure is an improvement; however, installing a new switch on a trade fixture may not qualify as an improvement. In such circumstances, the contractor should determine whether any other security for payment is advisable.

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AGC LEGAL BRIEF

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Mission Statement of the Legal Advisory Committee

To advise and educate Members on legal issues affecting the construction industry through a forum for attorneys to exchange information about construction industry issues, undertaking projects and presenting educational programs in areas where a legal perspective would be beneficial to Members, and reviewing significant legal issues, legislative developments and public policies to assist the Chapter in formulating action plans.



Contractor Gets Another Bite At Unforeseen Conditions Claim

A differing site condition is a physical condition, other than the weather or another act of God, discovered on or affecting a construction site that differs in some material respect from what reasonably was anticipated. Differing site conditions may include unanticipated, excessive muck or rock or artificial subsurface structures such as undocumented utilities. “Unforeseen conditions” or “differing site condition” clauses are common place in private and public construction contracts. Indeed, in 1998 the Michigan Legislature enacted a statutory provision that effectively inserts a differing site conditions clause in public contracts that exceed \$75,000.

The purpose of these provisions is to allow contractors to submit more accurate bids by eliminating the need for contractors to inflate

their bids to account for contingencies that may not occur. The owner benefits from such provisions as it does not pay for an unnecessary contingency in the contractor’s bid. Still, these provisions can prove to

“Unforeseen conditions” or “differing site condition” clauses are common place in private and public construction contracts. Indeed, in 1998 the Michigan Legislature enacted a statutory provision that effectively inserts a differing site conditions clause in public contracts that exceed \$75,000.

be a stumbling block to the unwary contractor if not properly followed.

Such was the case in *Triangle Excavating Company, Inc. v Covert*

Township, a matter recently considered by the Michigan Supreme Court.

In that case, Triangle Excavating, contracted with Covert Township to install several miles of water main. The

Township’s project engineer supervised plaintiff’s work. During excavation, Triangle encountered unmarked utility cables meandering through the job-site.

Consequently, Triangle had to move the excavation to the opposite side of the street because of the obstructions. Triangle did not stop its work upon discovering the unforeseen conditions.

Instead, Triangle continued to work and did not make a written request for additional compensation until 13 days after it first encountered the conditions.

Contractor Gets Another Bite At Unforeseen Conditions Claim (Continued from page 1)

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The parties' contract contained a fairly standard "unforeseen conditions" clause that required Triangle to provide notice if Triangle believed that it encountered conditions of an unusual nature that differed "materially from conditions ordinarily encountered and generally recognized as inherent in the work of the character provided for in the Contract Documents." The contract further provided that if Triangle encountered such a condition it should notify the Township and the engineer in writing and stop work until receiving a written notice to proceed.

After the Township refused to provide additional compensation, Triangle sued the Township. In the suit, Triangle sought damages including the contract balance, additional compensation for unforeseen difficulties during the excavation and unjust enrichment because the Township had accepted the benefits of Triangle's work without paying for the work.

Triangle asserted that the Township's project engineer knew that Triangle

encountered the unforeseen conditions and Triangle had given verbal notice to the engineer of Triangle's intent to request additional compensation. The trial court disagreed and dismissed Triangle's claims concerning unforeseen conditions and unjust enrichment. Triangle appealed claiming that the Township waived its right to written notice of Triangle's claim because the Township's engineer authorized Triangle to change the location of its excavation, accepted notice of Triangle's additional claims and verified the amount of the claims.

The court of appeals rejected Triangle's claim ruling that Triangle failed to comply with the clear terms of its contract with the Township. The appellate court further ruled that Triangle failed to present clear and convincing evidence of any representation or affirmative conduct by the Township that suggested the Township intended to waive the contract requirement that

Triangle immediately cease work and provide written notice of the encountered condition.

"To avoid such legal problems, contractors should carefully examine the differing site conditions clause in their contracts. Strict compliance with the procedural requirements of the differing sight conditions clause is the best course. Failure to do so may result in the unnecessary transfers or the costs and risks of such conditions from owners to contractors."

Triangle then appealed to the Supreme Court. The Supreme Court reversed the Court of Appeals, finding that Triangle presented sufficient evidence to allow Triangle to proceed to trial on the issue of whether the Township voluntarily relinquished its right to enforce the contractual requirement of written notification of the unforeseen condition.

While the Supreme Court's ruling affords Triangle the opportunity to overcome Triangle's failure to follow the clear contract requirements, Triangle faces a difficult evidentiary burden as it must present clear and convincing evidence at trial that the Township voluntarily and intentionally abandoned its contract right to written notice of a claim.

The plight of Triangle is all too common. Given constraints of schedule and weather, contractors regularly move forward with work on changed conditions without proper notice to the Owner and/or written authorization to proceed. To avoid such legal problems, contractors should carefully examine the "differing site conditions" clause in their contracts. Strict compliance with the procedural requirements of the differing sight conditions clause is the best course. Failure to do so may result in the unnecessary transfers or the costs and risks of such conditions from owners to contractors.

Court Reaffirms Limitations On Miller Act Payment Bond Requirements

The Miller Act provides a federally mandated payment bond to protect the rights of suppliers on federal construction projects. The essence of the policy underlying the Miller Act is to provide a surety who must make good on the obligation of a defaulting contractor to its suppliers of laborers and materials.

Generally speaking, to perfect a claim under the Miller Act, a bond claimant who does not have a direct contractual relationship with the general contractor (typically a sub-subcontractor) must meet three conditions before receiving payment from the Miller Act Bond. First, the claimant must give notice within 90 days of its last day of work. Second, that notice must state with substantial accuracy the amount claimed. Third, the notice must include the name of the party to whom the material or labor was supplied.

Similarly, the Michigan Public Works Act requires contractors to secure performance and payment bonds on any contract exceeding \$50,000 that involves the construction, alteration

or repair of any public building or public work of the state or various other government entities, such as townships and public educational institutions. The Michigan bond statute is modeled after the Miller Act, except that the Miller Act requires that a claimant provide notice to the general contractor of a public works project only once, within ninety days after the date when the claimant completes its work. To the contrary, under the Michigan Public Works Act the claimant must provide written notice within 30 days after supplying the first labor and materials and within 90 days after supplying the last labor and materials.

In the recent case of *Nagel Construction Inc. v Crest Construction & Excavating, LLC*, a case concerning construction at the Battle Creek Air National Guard Base, the surety issued a Miller Act payment bond. Instead of the standard notice provisions under the Miller Act, the Miller Act

bond incorporated the more restrictive notice requirements of the Michigan Public Works Act. The surety refused to pay the claimant as the claimant had not provided a *first* notice of furnishing materials as required under the Michigan Public Works

"Claimants working on a job where a payment bond is in place should be sure to request a certified copy of such bond and pay careful attention to the notice requirements. In particular, projects that are not 'public' may have more restrictive notice requirements than set forth in the state and federal acts."

Act. The claimant sued the surety for payment under the Miller Act bond.

The federal district court for the Western District of Michigan ruled in favor of the claimant holding that the surety could not impose more

restrictive notice provisions than those set forth in the Miller Act. The court reasoned that enforcing a bond which did not conform with the Miller Act would be contrary to the highly remedial nature of the Miller Act and the uniform national application of the Act.

Claimants working on a job where a payment bond is in place should be sure to request a certified copy of such bond and pay careful attention to the notice requirements. In particular, projects that are not "public" may have more restrictive notice requirements than set forth in the state and federal acts. These requirements will direct when notice must be given, to whom the notice should be given and how the notice should be given (for instance, in writing and via certified mail). Careful attention to these provisions will serve to perfect and preserve claims against the payment bond surety.