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Old Case Teaches New Tricks

Eight years after completion of the wharf project, Zachry and the Port of Houston continue to slug it out in the appellate courts and continue to refine Texas construction law along the way. In the latest appellate opinion, the Court of Appeals details the general contractor's control of the means and methods of their work without interference from a governmental entity. It also supports a subcontractor's use of a pass-through claim as a cost efficient way to recover damages.

By now most of us are familiar with the project and the previous decisions. Zachry sued the Port claiming breach after the Port denied Zachry the right to continue construction using its frozen cutoff wall. The Texas Supreme Court upheld the jury's \$20 million verdict for Zachry, ruling that the Port's "no damages for delay" clause would not bar Zachry's claim in light of the Port's active interference with Zachry's work. The Supreme Court then sent the case back to the Court of Appeals to consider other arguments that the Port had made.

That led to the most recent decision. In December, 2016, the Houston Fourteenth Court of Appeals ruled in favor of Zachry on all issues and affirmed the jury verdict. In doing so, the Court of Appeals provides several lessons or reminders on Texas Construction law.

Contractor Controls the Means & Methods

The Port breached the Contract by requiring Zachry to revise and resubmit its proposal to construct the extension with the freeze wall. The opinion focuses on Zachry's status as an independent contractor and its right to control the means and methods of its work. The Port argued that its submittal process allowed it to require Zachry to find an alternative means, but the Court ruled that the Port did not have this authority. The Court determined the frozen cut off wall was within Zachry's chosen means and methods. When the Port disallowed this methodology, the Port breached the Contract.

Notice Requirement Inapplicable to Breaches in the Contract

The Court also addressed notice requirements in the contract. The Port argued that Zachry's claim failed when Zachry did not follow a contractual notice requirement to give five days written notice of any interpretation of the Contract that Zachry believed constituted a change to the contract. The Court rejected this argument, ruling that the Port's action was not a change, but a breach. The Court explained that the Port's interpretation would convert nearly any breach of the Contract by the Port into a "change". The Court concluded the notice provision was inapplicable to breaches of the contract.

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The Court went on to say that if the notice provision applied to the Port's breach, it would be void under Section 16.071 of the Texas Civil Practices and Remedies Code. That provision voids a contractual condition precedent to the right to sue unless it provides at least 90 days' notice. Thus, the Court's opinion provides support for claimants who are claiming breach and seek to void short notice provisions by invoking CPRC § 16.071.

Prior Breach Precludes Reliance on Procedural Provisions

The Court further buttressed its position by ruling that even if the notice section applied to breach of contract claims, the Port's breach of contract relinquished the Port's contractual procedural rights concerning change orders and claims for additional costs. This means that the Port's breach precluded it from invoking procedural clauses to bar Zachry's claims for damages.

Immunity Does Not Bar Pass-Through Claims

The Court also ruled on a subcontractor pass-through claim. Pass-through claims are claims brought by the general contractor on behalf of its subcontractors against the owner. This device can reduce litigation and a subcontractor's cost to pursue claims for unpaid work.

The Port argued it had immunity from any pass-through claims under Chapter 271 of the Texas Government Code. The Court held that under the waiver section of the statute (i.e. § 271.152), governmental immunity does not bar pass-through claims. The Court explained that if governmental entities were entitled to immunity for pass-through claims, it would discourage subcontractors from bidding projects and in turn leave the general contractor with fewer choices, which goes against the very purpose of § 271.152.

This decision should promote competition on public projects. Contractors have one more reason to believe that they can control the means and methods of the work without interference from the governmental entity. Subcontractors may also be more inclined to bid these types of projects knowing that a pass-through claim may provide a vehicle for recovery in a more efficient manner that may reduce litigation cost.

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