

# COMMON SENSE CONTRACTING

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## Change Order Disputes

**531** Changes, especially to complex projects, are common in the construction industry. Unfortunately, it is not unusual for the parties to dispute the reasonable price for performing the changed work. In that context, a work stoppage (walking off the job) might be an option, which an aggrieved party would consider. The decision in *Fru-Con/Fluor Daniel Joint Venture v. Corrigan Bros., Inc.*, 154 S.W. 3d 330 (Mo. App. 2004) illustrates several of the risks faced by the parties if a dispute regarding change order pricing results in one party walking off the job.

### Change Order Disputes – Work Stoppage

In the *Fru-Con* case, Fru-Con/Fluor Daniel Joint Venture (“Fru-Con”) undertook construction of a paper factory in Cape Girardeau County, Missouri, for Proctor and Gamble.

## Notice to Florida Licensed Contractors

For many contractors licensed in Florida, August 31, 2006, is the deadline for obtaining your mandatory continuing education (“CE”) credits. Smith, Currie & Hancock LLP is an approved course sponsor (Provider No. 0000998) by the Florida Construction Industry Licensing Board (FCILB), and we are planning several programs between now and the end of August, 2006.

Currently, we have courses scheduled in the following locations:

August 3-4	Atlanta (Marietta) Georgia
August 10-11	Birmingham, Alabama
August 22-23	Fort Lauderdale, Florida
August 24-25	Tampa, Florida

These programs will allow you to meet your 14 hours of continuing education required to renew your Florida contractor’s license including the mandatory **Workplace Safety, Worker’s Compensation, Business Practice** and the recently added **Advanced FBC Building Structural Code Summary** requirement. More importantly, these courses will emphasize practical project documentation, risk avoidance, critical clauses such as the no damages for delay and pay-if-paid provisions as well as effective construction dispute resolution techniques.

If several of your key personnel hold Florida licenses, an in-house program may be more cost efficient. For more information on these FCILB sanctioned courses, please contact Tom Kelleher at Smith, Currie & Hancock LLP, telephone 404/582-8016; fax 404/688-0671; or e-mail [tjkelleher@smithcurrie.com](mailto:tjkelleher@smithcurrie.com).

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Fru-Con entered into two subcontracts for pipe fabrication and mechanical work with Corrigan Bros., Inc. (“Corrigan”); the “Papermaking Contract” and the “Balance of Plant Contract.”

The applicable changes clause read as follows:

(The Joint Venture) may, at any time, by written instruction. . . direct [Corrigan] to make changes, additions, deletions concerning the Subcontract Work, and [Corrigan] shall promptly proceed in compliance with such written instruction. . . . An increase or decrease in the Subcontract Price resulting from such changes shall be agreed upon in writing by the parties hereto. (emphasis added)

During performance, Fru-Con made substantial changes to the scope of Corrigan’s work through written change orders. The parties had significant disputes regarding the amount Fru-Con proposed to pay for the change orders on the Papermaking Contract work and when payment would be made. Eventually, Corrigan stopped work and left the project.

#### **Breach Claims and Proof of Damages**

Fru-Con sued Corrigan, alleging that Corrigan breached the subcontracts by not completing the scope of work. Corrigan counterclaimed for breach of contract, cardinal change and/or abandonment, quantum meruit, and intentional or negligent misrepresentation. The trial court held that Corrigan breached the Papermaking Contract by walking off the job due to the dispute related to the change order pricing but found that Fru-Con had underpaid Corrigan by \$345,152.74 on the same contract. The trial court did not award completion costs to Fru-Con because it found that Fru-Con, in its damages claims, failed to distinguish between work remaining to be performed under Corrigan’s contract and unresolved change order work.

The trial court held that the parties mutually abandoned the Balance of Plant Contract because the contract called for work to be completed by February 1, 1999, but Corrigan could not even start until approximately that date. Also, Fru-Con made “a multitude of changes” and issued 258 revised drawings amounting to 132% of the initial drawings.

On appeal, Corrigan argued that (1) the parties abandoned the Papermaking Contract prior to Corrigan leaving the job; (2) Fru-Con breached the Papermaking Contract by rejecting Corrigan’s reasonable pricing proposals and wrongfully terminated the Papermaking Contract after Corrigan “suspended” performance; and/or (3) Fru-Con effected a cardinal change. The Missouri Court of Appeals rejected all of these arguments, holding that Corrigan should have abided by the change order procedure set forth in the contract. “The contract provided

that [Fru-Con] could require Corrigan to begin change order work before the parties had agreed on the price for work.” The court sidestepped the cardinal change argument but noted that neighboring states declined to adopt the cardinal change doctrine.

In its appeal, Fru-Con argued that it was not obligated to allocate the cost of completion between base contract work and change order work. The basis of that assertion was the fact that the Papermaking Contract provided for the subcontractor’s failure to complete its work by authorizing Fru-Con “to take over or cause others to take over any work being performed or to be performed under the Subcontract.” Fru-Con argued that this takeover clause made Corrigan responsible for the cost of performance of every change order issued before it stopped work. The court of appeals rejected that argument. Rather, the court of appeals concluded that a more logical interpretation was that Corrigan was responsible for the cost of completing the base contract work, but not for unresolved (disputed) change orders. Since Fru-Con’s cost records did not distinguish between the two categories, its damages claim was rejected in full.

#### **Comment**

This case shows how difficult it is to walk off a job. The court held Corrigan to the change order clause even though Fru-Con was not paying for the work (due to the pricing dispute) and was making sweeping changes to the work. Corrigan’s abandonment argument as to the Papermaking Contract failed because Fru-Con did not act in a manner inconsistent with an intent to be bound by the contract. Similarly, this decision illustrates the risks associated with tracking completion costs. The failure to distinguish between base contract work and change order work resulted in a total denial of the completion costs claim even though the subcontractor (Corrigan) had breached the contract by abandoning the project.

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## **The “Internet Applicant” and Federal Contractors**

**532** The regulations implemented by the Office of Federal Contract Compliance Programs (OFCCP) require that certain federal contractors and subcontractors maintain records and collect data regarding the race, gender and ethnicity of its employees and applicants for employment. On October 7, 2005, the OFCCP issued final

regulations regarding an employer's obligation to maintain records and collect data relating to "Internet applicants." On February 6, 2006, these new regulations went into effect.

This article reviews which federal contractors and subcontractors must comply with the OFCCP's recordkeeping and data collection requirements. It also explains the definition of an Internet applicant and the record keeping and data collection requirements. Finally, it addresses the challenges presented by an employer's use of the Internet and electronic data technologies in its recruiting and hiring practices.

### Who Must Comply with the Internet Applicant Rule?

Any federal government contractor or subcontractor who is required to maintain an affirmative action plan pursuant to the provisions of Executive Order 11246. This order generally applies to supply and service contractors with 50 or more employees and a government contract of \$50,000 or more, as well as contractors and subcontractors performing any federal construction contract or federally assisted construction contracts in excess of \$10,000. As part of their affirmative action programs, contractors are required to analyze personnel activity data, including applicant flow data, to determine whether there are selection disparities. The collection of applicant flow data has become increasingly burdensome on contractors in light of the evolving trends in hiring practices.

In the past, employers maintained applicant flow data by requesting that applicants, who came to their place of employment and filled out an application, to voluntarily fill out an equal opportunity form indicating their race, gender, and ethnicity. This traditional way of applying for a position may have produced a limited number of applications and applicant flow data. When employers began accepting resumes by mail in response to job advertisements, an employer was met with the challenge of obtaining demographic information on applicants who may never have entered their workplace. Many employers were faced with the added duty of mailing an equal opportunity form to the applicant to be voluntarily filled out and sent back to the employer. The opportunity to mail in a resume for a position increased the number of applicants for each advertised position, and consequently the applicant flow data.

Since the rise of electronic data technologies, however, many applicants apply for positions via the Internet. The ease of using the Internet to apply for a position has led to the present day reality where employers may receive thousands of applicants for one advertised position. Many of the applicants submit their resume for any position that

may come available, and therefore, may not be qualified for a particular vacant position. As a result, a large number of individuals who send their resume to an employer through the Internet are not considered by most employers to be real applicants, but simply individuals who are mass e-mailing their resume. The OFCCP is aware of this reality and has developed new regulations to guide an employer in determining when an individual who "expresses an interest" in working for an employer through the Internet should be considered an applicant.

### New Regulations

Under the OFCCP's regulations, an "Internet applicant" is defined as a job seeker applying for work through the Internet or related electronic data technologies from whom contractors must solicit demographic information. An individual will be considered an "Internet applicant" if they satisfy the following four criteria: (1) the individual submits an expression of interest in employment through the Internet or related electronic data technologies; (2) the contractor considers the individual for employment in a particular position; (3) the individual's expression of interest indicates the individual possesses the basic qualifications for the position; and (4) the individual at no point in the contractor's selection process prior to receiving an offer of employment from the contractor, removes him/herself from further consideration or otherwise indicates that (s)he is no longer interested in the position. After the first two criteria of the definition are met, the recordkeeping requirements attach. After all four criteria are met, the obligation to solicit demographic (i.e., race/ethnicity/gender) information attaches.

For those positions for which the contractor does not consider any electronic submissions, the traditional OFCCP recordkeeping standards apply. The traditional OFCCP recordkeeping standards indicate that the definition of an "applicant" or "candidate" depends upon the contractor's recruitment and selection procedures. When a contractor considers expressions of interest via both the Internet (or related technologies) and paper applications, the above Internet applicant rule applies.

The "basic qualifications" which an applicant must possess means qualifications that the contractor advertised to potential applicants or criteria which the contractor established in advance. If the contractor has established standard procedures that job seekers must follow in order to express an interest in employment, the contractor does not have to consider those individuals who do not follow those procedures. Similarly, if the applicant does not specify a particular position for which they are applying, the contractor does not have to consider their application. Finally, if there are a large number of expressions of

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interest, the contractor may limit the number of individuals it considers by using random sampling, absolute numerical ceilings, or other data management technologies, provided the sampling procedure is appropriate.

When a contractor “considers the individual for employment in a particular position” it means that the contractor assesses the substantive information provided in the application, cover letter or resume with respect to any qualifications involved with a particular position. A contractor may conclude that an individual has removed him/herself from the selection process based on the individual’s express statement or passive demonstration of disinterest. For example, declining an interview, or repeatedly failing to respond to telephone inquiries or e-mails about his or her interest in a job. A contractor may also conclude there is a lack of continuing interest based on information contained in the expression of interest. For example, the location of the work or salary requirements.

### Recordkeeping Requirements

Contractors are required to retain the expressions of interest it considers, even those that did not come from Internet applicants, for possible OFCCP review. A contractor must also retain records of all the basic qualifications used to develop a pool of Internet applicants. Furthermore, they must maintain records identifying job seekers contacted regarding their interest in a particular position. For those contractors who set up internal resume databases, they must maintain a record of each resume added to the database, along with the date, and the position applied for. When searches are conducted on both internal and external databases, contractors must maintain records regarding the search criteria they used. The OFCCP will rely on census and other labor market data to assess all of the above hiring practices for potential discrimination and will carefully review the contractor’s basic qualifications.

In addition, for each Internet applicant that satisfies all four criteria listed above, the contractor must solicit demographic (i.e., race/ethnicity/gender) information from each individual. The decision to provide demographic information left is up to the individual on a voluntary basis. Contractors are only required to solicit the information, not to obtain it.

With today’s internet culture, the Internet Applicant rule’s recordkeeping requirements are intended to provide meaningful data that the OFCCP will use to enhance its enforcement of nondiscrimination laws. For contractors who use the Internet or related electronic data technologies to conduct hiring of employees, the new regulations impose cumbersome and time consuming duties that may result in incomplete data or noncompliance. Many employers resort to tracking only the data of individuals who are actually

hired for employment, rather than those who are considered for employment. Most OFCCP investigators will identify this practice fairly quickly in an audit of hiring practices and can impose stiff penalties for noncompliance.

### 90-Day Reprieve for Technical Recordkeeping Violations

The Department of Labor announced a ninety (90) day period following the February 6, 2006 effective date during which it will not cite a contractor for a purely technical record keeping violation. The contractor, however, must (1) demonstrate that it is taking reasonable steps to update its systems to comply with the rule, including a projected date of compliance, and (2) collect and maintain records according to the established procedures consistent with OFCCP’s recordkeeping requirements that existed prior to the Internet applicant final rule.

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## Florida: Public Payment Bond Notice Requirements

**533** Sometimes payment bond forms are not given detailed attention by owners, contractors, or even surety companies. In the public contracting context, the form of a payment bond may be dictated by the owner, or the owner may merely direct in the contract documents that the contractor must provide a payment bond for the project. In the former situation, the contractor submits the owner-created bond form to its surety, and generally the surety will approve the same. In the latter situation, the contractor may rely on a payment bond form provided by its surety company to comply with this requirement. In either situation, the owner may not have confirmed that the bond form complies with Florida’s statutory requirements, the contractor may not have reviewed the terms of the bond and Florida law, and the surety may not be aware of Florida-specific requirements for such bonds.

### Avoiding Statutory Notice and Time Requirements

A recent decision by the Florida Supreme Court, *American Home Assurance Company v. Plaza Materials Corporation*, 908 So. 2d 630 (Fla. 2005) (hereinafter “*Plaza Materials*”), should prompt all those involved to carefully review payment bonds issued for Florida public projects. Contractors on public projects in Florida in excess of \$250,000 are required to provide a payment bond that states, on its face, the statutory provision under which it is issued, the notice to contractor and notice of nonpayment

requirements in the statute, and the applicable statute of limitations. Under Section 255.05, Florida Statutes, a claimant must provide notice to the contractor that it intends to look to the bond for payment within 45 days after beginning to furnish labor, materials or supplies, and must also provide, if it has not been paid, a notice of nonpayment to both the contractor and the surety within 90 days of final furnishing. A lawsuit against the surety or the contractor on the payment bond must be provided within one year from final furnishing.

In *Plaza Materials*, the Florida Supreme Court held that if the payment bond fails to state this information, a claimant may bring a claim against the bond even if it failed to provide either or both of the required notices, and even if the lawsuit is brought after the one-year statute of limitations has expired. While the claimant will still have to demonstrate that it did not have **actual notice** of these requirements, the implications of this decision are broad. In light of this decision, contractors and surety companies should pay careful attention to the form of payment bonds provided on Florida public projects. Potential claimants should likewise carefully review their options when faced with nonpayment on a public project because even if a notice or time requirement is missed, a claimant may still have a viable claim.

The *Plaza Materials* decision arose out of a Florida Department of Transportation (“FDOT”) project. Under FDOT’s contract, contractor was required to provide a payment bond in the form directed by the FDOT. The contractor and its surety complied with this requirement and provided a payment bond for the project using the FDOT’s form. FDOT’s payment bond form did not provide reference to the notice requirements of Section 255.05, Florida Statutes, and did not advise potential claimants that suit against the bond was required to be filed within one year of final furnishing of labor, materials or supplies.

The contractor subcontracted a portion of its work to a subcontractor, which thereafter obtained materials from Plaza. FDOT paid the contractor for certain work. The contractor allegedly paid the subcontractor and obtained a waiver of right to claim against the payment bond on behalf of the subcontractor and its suppliers. The subcontractor did not pay Plaza, and the subcontractor subsequently filed for bankruptcy, as did the contractor. Consequently, Plaza sought payment from the payment bond provided by the contractor and its surety. Plaza had not complied with the statutory notice requirements. In addition, Plaza did not file its suit against the payment bond within the applicable one-year period.

The surety argued Plaza’s lack of notice and untimely filing of its lawsuit before the trial court. However, the trial

court permitted Plaza to enforce its claims against the payment bond, despite the company’s lack of compliance with the statutory notice requirements and despite Plaza’s untimely filing of its lawsuit against the payment bond. Because the payment bond did not refer to the notice or time requirements of Section 255.05, Florida Statutes, the trial court concluded that the payment bond was converted to a common law bond, and the provisions of Section 255.05, Florida Statutes, were not enforceable against Plaza.

On appeal, Florida’s Second District Court of Appeal agreed and held that the surety’s failure to include the notice and time requirements in the terms of the bond rendered those requirements unenforceable. The Second District expressly noted that its affirmance of the trial court did not require Plaza to prove “that it was misled or confused” by the surety’s failure to include the notice and time requirements of section 255.05, Florida Statutes. The Second District concluded that the Florida Legislature’s inclusion of a requirement that the payment bond expressly state the notice and time requirements in the bond itself was indicative of a legislative intent to avoid the cost and necessity of litigating complex issues of waiver or estoppel. Although the FDOT bond form did not include the statutorily required information, the Second District concluded that the surety “had the opportunity to demand that DOT utilize a bond form that complied” with the statute, but “chose not to do so.” Under such circumstances, the Second District reasoned that the surety “is simply not entitled to enforce those restrictions.” The Second District certified the matter to the Florida Supreme Court as a question of great public importance, noting that “[t]he DOT standard contract bond form is the subject of ongoing litigation throughout the state,” and that “trial courts have reached various outcomes” regarding the question.

The Florida Supreme Court presented the issue as one where neither the claimant nor the surety complied with the requirements of Section 255.05, Florida Statutes. On the one hand, the claimant failed to satisfy the statutory notice requirements and failed to file its suit within the one-year statute of limitations. On the other hand, the surety failed to comply with the statutory requirement that the payment bond include a statement of the applicable notice and time requirements. The court also observed that the statute itself contained conflicting provisions. One provision of the statute stated that regardless of the form of the payment bond, it would be deemed to be a statutory bond subject to the notice and time restrictions. However, another provision required that the payment bond include notice of the notice and time provisions of the statute. Faced with the non-compliance of both parties and the conflicting

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language in the statute, the court concluded that in order for both provisions to be given effect, a two-step approach was warranted.

Under the Florida Supreme Court's ruling, a surety company issuing a public project payment bond which fails to incorporate all statutorily required information may be estopped, or precluded, from asserting the claimant's noncompliance with the notice and time provisions of the statute if that noncompliance resulted from the failure of the bond to contain the required information. In other words, if the claimant demonstrates that the payment bond is deficient for failing to provide the required information, and that it did not have actual notice of the provisions, the surety cannot enforce the notice and time requirements of section 255.05, Florida Statutes.

#### **Comment: Dealing with Non-Conforming Bond Forms**

The *Plaza Materials* case did not address a basic underlying problem for contractors. Public projects in Florida are generally competitively bid and may include a payment bond form within the bid documents. Once the contract is awarded, how does a contractor and its surety require a public owner to alter what may be a deficient bond form? If the owner does not agree to change the bond form, the contractor and its surety may have little recourse other than advising the owner of the deficiencies in the bond form. If the owner refuses to change the form, however, there does not appear to be a method for the contractor or its surety to require the owner to do so. Public owners cannot be liened, accordingly, there is little incentive for such owners to ensure that their payment bond form is correct. A contractor should carefully review the payment bond form, if any, provided in the bid documents and raise this issue to the public owner prior to bid. The failure to do so may result in liability to suppliers the contractor never heard of, years after the project is completed.

In the event that an owner does not provide a payment bond form, contractors and sureties should review the requirements of section 255.05, Florida Statutes, and insure that the payment bond form that is used complies with the statute. The notice requirements in section 255.05, Florida Statutes are helpful to both the contractor and the surety. A contractor may not be aware that a lower tier supplier is even providing materials for the project. If the contractor is not aware a lower tier supplier is providing materials, the contractor may rely on a payment bond waiver provided by its subcontractor, as the contractor in the *Plaza Materials* case did. However, if the contractor is aware the supplier is providing materials after receiving a notice to contractor as required by the statute, the contractor can ensure that its subcontractor is including waivers from its suppliers as well. Contractors and sureties can also stay informed of

potential claimants when a notice of nonpayment is received, and can exercise control over future payments to suppliers following receipt of a notice of nonpayment from a lower tier supplier. Still, *Plaza Materials* provides almost limitless liability for years after the project's completion if the payment bond does not contain the statutory notice and time requirements.

Potential claimants on public projects can take a great deal from the decision in *Plaza Materials*. Even the most organized and well-operated suppliers and subcontractors occasionally miss notice and time deadlines. *Plaza Materials* means that even if a deadline or notice is missed, there may still be a valid claim on a public project. Because *Plaza Materials* also dispenses with one-year statute of limitations if the bond does not give notice of the same, potential claimants may also wish to review prior public projects where deadlines were missed to determine if a claim may still be viable.

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## **Delay Claims by Parallel Prime Contractors**

### **534 Background**

Delay damages, and several other issues, are examined in the case of *Angelo Iafrate Construction, LLC v. Potashnick Construction, Inc.*, 370 F.3rd 715 (8th Cir. 2004), in which a paving contractor claimed nearly \$1,000,000 in delay damages on a state highway project. The paving contractor claimed that its work was delayed by a parallel prime contractor performing the work. The grading contractor ran into financial difficulties and ultimately defaulted on its grading contract. The grading contractor's surety completed the grading about five months after the default.

The paving contractor, Iafrate, filed a claim against the State Highway Commission. The Highway Commission, which had already settled claims with the grading contractor's surety, agreed to settle Iafrate's claims in exchange for allowing Iafrate to pursue whatever rights the Commission had under the grading contractor's surety bonds. Iafrate then sued both the grading contractor and its surety. However, the U.S. Court of Appeals for the Eighth Circuit held that the rights assigned by the State Highway Commission were of no use to Iafrate, because the delays complained about were either permitted under the grading contract or were already settled, and because the grading contract gave no other basis for the paving contractor to sue either the grading contractor or its surety

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for the claimed delays.

Construction contracts may allow remedies for some delays to the work, but require the contractor to bear the costs of other delays on the job. For example, severe weather delays, earthquakes, strikes, and changes in the work frequently are recognized as delays for which adjustments will be given to the time allowed for completing the contract. A construction contract may also allow a contractor additional compensation for some kinds of delays, for example when severe weather points out an unknown flooding condition that the owner asks the contractor to correct. However, a contractor cannot assume that a time extension for bad weather, for example, will always be available on the same terms under every contract. The extent to which a contractor could foresee, avoid, or control a particular kind of delay may affect whether the owner will agree to compensate the contractor for that delay. The law generally enforces the parties' agreement on which kinds of delay will allow the contractor more time, more pay, or both. In other words, different contracts may treat specific delays in different ways.

Furthermore, each contract may specify its own terms for when and how a contractor must make a claim for an extension of time, or for additional payment. For this reason, even when a delay is compensable, a contractor can lose the right to compensation for that claim, if the contractor fails to make a request at the required time or in the required way under the contract. Thus, the contractor must look to the contract and the law in order to determine whether, when, and how a claim can be made for delays under a given contract.

#### Comment

The *Iafrate* case is an example of the obstacles that may prevent a contractor from recovering damages for delays to its work. *Iafrate* settled with the Highway Commission, receiving an assignment of its rights against the grading contractor's bonds. *Iafrate* then sued the grading contractor and its surety, claiming they breached both the duties they owed to the Highway Commission and to other contractors. The Eighth Circuit held, however, that the grading contractor's surety was not liable for delaying *Iafrate*'s work, because the surety completed the grading work within the time that was allowed under the grading contract and bond, and because the surety had already settled any issue of untimely or late completion with the grading work, so there was no claim left for *Iafrate* to pursue.

The court found that the grading work was completed on time because the grading contract allowed the surety 60 days in which to restart the work, once the grading contractor defaulted. Even though the surety completed

the grading contract 5 months after the grading contractor's default, that completion was nonetheless within the allowed contract time when all of the weather days, extensions, and the 60 days allowed the surety after a default were added up. While those additions to the grading time may have genuinely prevented the paving contractor from completing when it expected, the court seemed to imply that the additional time was agreed to in writing in the grading contract, so *Iafrate* could have anticipated the delay. In any event, the grader contractor's surety was not liable for using all of the additional time it was allowed by contract.

The court also indicated that because *Iafrate* agreed to settle with the Highway Commission by taking an assignment of the Commission's rights, *Iafrate* was bound by the compromises the Highway Commission had made to those rights before the assignment. In fact, the Commission had initially assessed damages against the grading contractor's surety, as a result of the late completion of grading: but, when the surety appealed that assessment, the Highway Commission agreed to dismiss and forever give up its claim for delays against the surety, and to declare that the work was timely completed, in exchange for a payment of \$37,000 from the surety. All of this evidently occurred before the Commission assigned any of its rights against the surety to *Iafrate*. The court held that *Iafrate* could not sue on claims that the Commission had already settled with the grading contractor's surety.

The *Iafrate* case involved other claims asserted against both the grading contractor and its surety, such as claims that they were obligated to warn other contractors of possible delays, and to avoid injury to other contractors on the same project. The surety was successful in avoiding any liability on all such claims. The surety's ability to defend against the claims for delay damages, by using to its full advantage all of the additional time for completion available to the surety under the grading contract and by reaching a tactical settlement with the Highway Commission, was an important element of the surety's success. Contractors need to exercise the same care and sophistication when dealing with delays under their contracts.

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## Liquidated Damages Clause Waived

**535** Liquidated damages for completion delays are commonplace in both public and private construction contracts. They represent a contractual

determination by the parties setting in advance the amount of damages to be taxed in the event of a specified breach of contract, e.g., delayed completion. However, like nearly all contractual obligations, liquidated damages can be waived, or “intentionally relinquished,” by the conduct of one of the parties to the contract. This principle was reflected in the recent decision of the U.S. Court of Appeals for the Eleventh Circuit in *RDP Royal Palm Hotel, L.P. v. Clark Const. Group, Inc.*, 168 Fed. Appx. 348 (11<sup>th</sup> Cir. 1006). This case, decided under Florida law, held that an owner, by issuing “hundreds of change orders and construction change directives” to the contractor after the original date for substantial completion had passed and by failing to never set a new date for substantial completion, waived its right to later collect liquidated damages from the contractor for its alleged failure to substantially complete the project on time.

### Factual Background

Specifically, this case involved a \$30.4 million contract to build a beach resort. The deadline for substantial completion was 518 days from the date of commencement. Under the parties’ agreement, the owner was permitted to require additional work from the contractor within the general scope of the contract by issuing a change order or construction change directive. Further, under the contract, the contract price and substantial completion deadline were to be adjusted in light of change orders and construction change directives. In the event that the contractor failed to complete its work on or before the substantial completion date, the contract entitled the owner to recover liquidated damages.

Shortly after construction began, many problems arose involving the work. For example, the contractor discovered a buried sea wall and contaminated soil which delayed excavation and sheet piling operations. Hundreds of change orders were issued and the contractor made requests for time extensions during this time. The parties did not resolve the time extension requests during construction; however, the owner assured the contractor that the completion date would be appropriately extended.

The substantial completion deadline of February 28, 2000 passed and construction continued. According to the Eleventh Circuit, the owner and its design team continued to issue hundreds of change orders and construction change directives to the contractor. In turn, the contractor continued to perform. The project was eventually substantially completed in the spring of 2002.

Following issuance of the temporary certificate of occupancy, the contractor ceased performance due to nonpayment for change order work. Thereafter, the parties asserted various claims against each other, including the owner’s claim for liquidated damages for the two year

delay in substantial completion, intentional misrepresentation/fraud in the inducement and breach of the contract. The contractor counterclaimed for breach of contract, *quantum meruit*, and fraudulent inducement.

### Waiver Analysis

In its review of the claims, the Court of Appeals held that the district court was correct in its conclusion that the owner waived its right to enforce the substantial completion date and “time is of the essence” provision of the contract. Accordingly, its right to collect liquidated damages for delay was also waived. The factors relied on by the court were as follows: (1) the owner’s allowing the substantial completion date of February 28, 2000 to pass without setting a new deadline; (2) the owner’s conduct in issuing many of the hundreds of change orders and construction change directives after expiration of the initial substantial completion date of February 28, 2000. This pattern of conduct was sufficient to support the district court’s conclusion that the owner waived its right to enforce the liquidated damages provision for any date after February 28, 2000.

### Comment:

The *Royal Palm Hotel* decision represents an application of multiple factors to the concept that a contract completion date and the associated right to recover liquidated damages may be waived. Waiver of the right to recover liquidated damages has been found when an owner made final payment without holding liquidated damages. *Centerie Trust Co. v. Continental Ins. Co.*, 521 N.E. 2d 219 (Ill. App. Ct. 1988). However, other decisions related to federal government projects have held that issuance of a change order after the completion date does not, by itself, bar recovery of liquidated damages for delays prior to the issuance of that change order. *Norfolk Shipbuilding & Drydock Corp.*, ENG BCA No. 3225, 73-1 BCA ¶ 9950. Questions regarding such alleged waivers can be fact intensive and no simple rule can be easily discerned.

The ramifications of its holding are highly relevant to owners facing extensive delays and large numbers of scope changes on complex projects. One possible solution to the situation faced by the owner in this context is to issue post-substantial completion deadline change orders with reservation of rights language in order to clearly inform the contractor of the owner’s intent to maintain the validity of the liquidated damages portion of the contract. Another possible solution to this issue is to include strict language in the original contract requiring any waiver to the liquidated damages or substantial completion portions of the contract to only be effective when made in writing and signed by both parties. In any event, while the result set forth by the Eleventh Circuit may not necessarily apply

outside of the limited facts before the court, the *Royal Palm* decision must be considered when work continues beyond the substantial completion date in Florida.

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## Constructive Acceleration Demonstrated

**536** The ASBCA has recently sustained a claim that the government constructively accelerated a contractor's performance when it failed to grant all the additional time for performance that was due the contractor. *Robust Construction, LLC*, ASBCA No. 54056, 05-2 BCA ¶ 33019. The decision is noteworthy for its analysis of the delays and the parties' actions related to the claimed constructive acceleration. In addition, the Board sustained the contractor's claim even though all of the delay was not apparently excusable at the time of the acceleration "order".

### Background

On June 30, 1998 the U.S. Army Corps of Engineers ("Corps") entered into a fixed-price contract with Robust Constructors, LLC. The contract work consisted of constructing two temporary lodging facilities, a services building, an underground irrigation system, utilities, and landscaping at Altus Air Force Base, Oklahoma. The contract included the standard FAR contract clauses including "Changes," "Time Extensions for Unusually Severe Weather," "Disputes," "Suspension of Work" and "Differing Site Conditions." The contract required that all work be completed within 272 calendar days after the notice to proceed ("NTP") was issued. The NTP was issued on August 12, 1998 thus establishing an initial contract completion date of May 11, 1999. Excavation permits were required prior to the contractor initiating several critical contract elements.

In mid July, 1998, prior to the issuance of the notice to proceed, the contractor and the Corp's Administrative Contracting Officer ("ACO") met to discuss the required excavation permits. No written record of this meeting was prepared. However, as a result of this meeting and a verbal discussion with the ACO, a subsequent dispute arose between the contractor and the Corps regarding which party would obtain the excavation permits, and when would those be obtained. The contractor maintained that the ACO verbally told the contractor that the Corps would obtain the required excavation permits prior to issuance of the NTP. Although the Corps' ACO testified that he did not recall making that commitment, the Board found that the ACO "offered to initiate" the process for obtaining the

needed permits.

As of the NTP date, the excavation permits had not been obtained. While the contractor was able to proceed with some work, the lack of excavation permits impacted its ability to commence a number of its scheduled critical project elements. The contractor immediately notified the Corps that delays by the government in providing the excavation permits was adversely impacting the contractor's performance.

### Acceleration "Directive"

On March 19, 1999 the contractor wrote the contracting officer claiming that due to late receipts of excavation permits, a differing site condition, and unusually severe weather it was entitled to a 144 day contract time extension. This additional time would result in a project completion date of September 30, 1999 rather than the original May 11, 1999 contract completion date. While the contracting officer agreed the contractor was entitled to some additional time, the contracting officer would not agree to extend the contract completion date beyond July 25, 1999. The ASBCA found that the July 25, 1999 date was based upon the Corps' satisfying the requirements of its customer, the USAF.

During a March 31, 1999 "partnering" meeting of the representatives of the Corps, the contractor, the Altus AFB Commander, and the Contracting Officer, the contractor was told that the contract had to be completed by July 25, 1999, as desired by the USAF. The contractor was requested to provide the Corps with a revised completion schedule showing July 25, 1999 as the final completion date. The contractor notified the Corps that it considered the Corps' communications as a directive to accelerate. The record **did not contain** a written acceleration order from the Contracting Officer.

Completing the contract by July 25, 1999 provided the contractor with 75 compensable delays in lieu of the 144 days the contractor claimed. Even though the contractor had not received a specific directive from the Corps to accelerate progress, following the March 31, 1999 meeting the contractor notified five of its subcontractors to accelerate their schedules to meet the Corps' required July 25, 1999 completion date.

Following completion of the project, the contractor submitted a claim for \$440,377.21 (\$393,521.21 for additional costs due to constructive acceleration, and for remission of \$46,846.00 in assessed liquidated damages). Subsequently, the Contracting Officer denied the claim in its entirety.

### Analysis of Constructive Acceleration

In a detailed analysis on the issue of "entitlement," the ASBCA upheld the contractor's claim that the Corps had

“constructively accelerated” its contract by requiring the contractor to complete the project by July 25, 1999. Rather than accepting the contractor’s basis for its claim of additional time, the Board made its own determination of the activities which were critical to performance of the contract as a whole based on evidence that showed the contractor’s actual operations. In doing that, the Board rejected the theoretical adjusted “as planned” schedules provided “after the fact” by expert witnesses. The Board determined that at the time of the acceleration order, the contractor was entitled to an additional 55 day time extension beyond the 75 day extension granted by the Corps. The Board concluded that the actual testimony and daily logs provided more “probative” evidence than did the theoretical bar chart impact analyses offered by the expert.

Relying upon those facts, the Board concluded that delays in the Corps’ providing the necessary excavation permits, unusually severe weather, and a differing site condition impacted the contractor’s work. Even though the Board found that the record did not contain a written order by the Contracting Officer that directed the contractor to accelerate performance, the Board nevertheless determined there was a “constructive acceleration” based upon the Corps’ requirement that the contractor complete the work by July 25, 1999 in order to satisfy the USAF desire that the facilities be completed by that date.

### Constructive Acceleration

As stated by the U.S. Court of Appeals for the Federal Circuit in *Fraser Construction Co. v United States*, 384 F.3d 1354, 1361 (Fed. Cir. 2004), a claim of “constructive acceleration” ordinarily arises when the government requires the contractor to adhere to the original performance deadline set forth in the contract even though the contract provides the contractor with periods of excusable delay that entitle the contractor to a longer performance period.

Generally each of the following elements must be proved by the contractor: (1) that the contractor encountered a delay that is excusable under the contract; (2) that the contractor made a timely and sufficient request for an extension of the contract schedule; (3) that the government denied the contractor’s request for an extension or failed to act on it within a reasonable time; (4) that the government insisted on completion of the contract within a period shorter than the period to which the contractor would be entitled by taking into account the period of excusable delay, after which the contractor notified the government that it regarded the alleged order to accelerate as a constructive change in the contract; and (5) that the contractor was required to expend extra resources to compensate for the lost time and remain on schedule.

*Appeal of Lovering-Johnson, Inc.*, ASBCA No. 53902, 05-2 BCA ¶ 33,126.

A constructive change results when a contractor performs work that differs from the contract requirements, not as a volunteer, **without a formal directive**, under the Changes provision of the contract, due either to an informal order from, or as a consequence of action or inaction by the...CO or other authorized person. (emphasis added). The Board’s decision in *Robust Construction* reflects a recent application of these basic principles and an illustration of Government conduct sufficient to prove a constructive acceleration directive.

### Conclusion

If you believe that you are entitled to a time extension under a contract with the federal government, as soon as possible submit a formal written request for time with the contracting officer. If the contracting officer denies your request and requires you to complete contract work by an earlier date or threatens retaliation (e.g., default or an adverse performance evaluation), and you “accelerate” to meet the contracting officer’s required completion date, you may have a valid constructive acceleration claim. Document the basis for your time request as well as keep a detailed record of all meetings, letters, etc., where performance time is discussed. In addition, recognize that accurate and detailed contemporaneous jobsite records may be the critical items evidence needed to demonstrate delays. More and more boards of contract appeals and courts look to those documents. These may be critical records in the event you subsequently pursue a claim for acceleration.

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## Clean Water Act – Expansive Coverage

**537** In a 2005 decision, the United States Court of Appeals for the Seventh Circuit upheld the imposition of a fine imposed by the U.S. Corps of Engineers under its wetlands regulatory authority against a contractor for a violation of the Clean Water Act. The contractor was fined for dumping dredged stumps and roots, plus sand-based fill, onto a 5.8 acre tract containing wetlands drained by a ditch that ran into a non-navigable creek, which in turn ran into a non-navigable river, which in turn runs into a navigable river. The contractor failed to obtain a permit for this disposal from the Corps of Engineers (“COE”). *United States v. Gerke Excavating, Inc.*, 412 F.3d 804, (7th Cir. 2005). The *Gerke* decision packs a powerful punch for

owners, developers, and contractors: if water from a construction site finds its way to a navigable water body, then that connection, no matter how tenuous, is sufficient to confer the Army Corps of Engineers with jurisdiction over the site for purposes of the Clean Water Act.

## Background

Under its authority to regulate waterways used to transport people and goods in interstate or foreign commerce, Congress enacted the Clean Water Act (“CWA”) several decades ago. The CWA requires that a permit be obtained from the COE for the discharge of pollutants into navigable waters. The term “navigable waters” is defined under the CWA as “the waters of the United States, including the territorial seas.” The COE has issued regulations defining the term “waters of the United States” to include “waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce,” and “tributaries” of such waters. The COE’s regulation under the CWA also extends to “wetlands adjacent to waters” of the United States. The Corps has defined the term “adjacent” as “bordering, contiguous, or neighboring,” and including “[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like”.

The Supreme Court of the United States has explained the meaning of “navigable waters” in several significant cases. In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 106 S.Ct. 455, (1985), in which the Court held that the Corps of Engineers had jurisdiction over wetlands that actually abutted on a navigable waterway. In so holding, the Court noted that the term “navigable” is of “limited import” and that Congress had intended to “regulate at least some waters that would not be deemed ‘navigable’ under the classical understanding of that term,” including wetlands “inseparably bound up with the ‘waters’ of the United States.”

## Gerke’s Actions/Liability

In *Gerke*, the Corps sued a contractor for its failure to obtain a permit for dumping dredged stumps and roots, plus sand-based fill, into wetlands on the 5.8 acre tract of land. The wetlands were drained by a ditch that ran into a non-navigable creek that ran into the non-navigable Lemonweir River, which in turn runs into the Wisconsin River, a navigable body of water. The Lemonweir River is thus a tributary of a navigable river. However, the issue in *Gerke* was whether the wetlands are “adjacent” to the Lemonweir, for purposes of the CWA. The wetlands are connected to the Wisconsin River in the sense that water

from the wetlands ultimately flows into the river, but they might be thought “adjacent” not to the river but merely to the ditch, and a ditch is not what one would ordinarily understand as “a tributary” for purposes of the CWA.

The contractor in *Gerke* did not contest that the dredged stumps and roots, and sand-based fill, were all “pollutants” under the CWA; that the dumping was a “discharge” under the CWA; or that the areas where the dumping occurred were “wetlands” under the CWA. Instead, the contractor argued that the Corps’ regulation defining “waters of the United States” to include “wetlands adjacent to waters” exceeded the authority granted the Corps under the CWA because wetlands are not “waters of the United States.”

While the court acknowledged that the filling of wetlands on a 5.8 acre tract would not have a measurable effect on the navigability of the Wisconsin River for the purpose of commerce, the court also recognized that “[t]he sum of many small interferences with commerce can be large, and so to protect commerce Congress must be able to regulate an entire class of acts if the class affects commerce, even if no individual act as a perceptible effect.” The court found nothing in the Constitution prohibiting Congress from regulating *any* wetlands that are connected to navigable waters. Accordingly, the court affirmed the imposition of a fine on the contractor, holding that regardless of “[w]hether the wetlands are 100 miles from a navigable waterway or 6 feet, if water from the wetlands enters a stream that flows into the navigable waterway, the wetlands are ‘waters of the United States’” within the meaning of the CWA.

## Practical Application

Under *Gerke*, a contractor who dumps pollutants into any body of water that ultimately enters a navigable waterway must receive a permit from the COE authorizing the activity. Judging from the cases prior to *Gerke*, we can expect more cases and regulations post *Gerke* further defining and expanding the COE’s jurisdiction over all bodies of water in this country. Accordingly, it is of the utmost importance that owners, developers, and contractors understand the COE’s regulations and keep abreast of recent changes affecting them. Given the COE’s ever-expanding jurisdiction, the risk of non-compliance is high, and the punishment is severe: failure to comply with the CWA can result in hefty fines (up to \$25,000 per day of the violation), commencement of a civil action, and even criminal penalties in some cases. 33 U.S.C. § 1319.

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## UPCOMING SEMINARS

**AIA Contracts, Analysis and Interpretation of AIA Standard Contract Forms**, July 14, 2006, Lorman Education Services, Atlanta, GA. *S. Gregory Joy.*

**The Development and Presentation of Lost Productivity Claims**, July 19-20, 2006, IQPC (Legal IQ Division), Boston, MA. *Eric L. Nelson.*

**Practical Construction Law for Florida Contractors**, August 3-4, 2006, Georgia Branch - Associated General Contractors of America. Atlanta, GA. *Philip E. Beck, S. Gregory Joy, Thomas J. Kelleher, Jr., Joseph C. Staak and Brian A. Wolf.*

**Practical Construction Law for Florida Contractors**, August 10-11, 2006, Alabama Chapter, Associated Builders & Contractors, Birmingham, AL. *Philip E. Beck, S. Gregory Joy, Thomas J. Kelleher, Jr., Joseph C. Staak and Brian A. Wolf.*

**Legal Issues for Professional Engineers**, August 10, 2006, Half-Moon Seminars, Charlotte, NC. *Harry R. Bivens.*

**Master Institute in Construction Law**, August 15-17, 2006, Federal Publications, Washington, D.C.

*James F. Butler, III.*

**Practical Construction Law for Florida Contractors**, August 22-23, 2006, Associated Builders & Contractors, Ft. Lauderdale, FL. *Philip E. Beck, S. Gregory Joy, Thomas J. Kelleher, Jr., Joseph C. Staak and Brian A. Wolf.*

**Practical Construction Law for Florida Contractors**, August 24-25, 2006, Tampa, FL. *Philip E. Beck, S. Gregory Joy, Thomas J. Kelleher, Jr., Joseph C. Staak and Brian A. Wolf.*

**Construction Claims: New Law**, September 19, 2006, Lorman Education Services, Charlotte, NC. *Harry R. Bivens.*

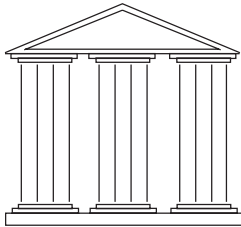
**EPC and Design-Build Contracting**, September 26-27, 2006, Federal Publications, Miami, FL. *James F. Butler, III.*

**For information on Continuing Education Courses for Florida Licensed Contractors scheduled for August 3-4, August 10-11, August 22-23 and August 24-25, please contact Thomas J. Kelleher at 404/582-8016 or [tjkelleher@smithcurrie.com](mailto:tjkelleher@smithcurrie.com).**

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