

# Querrey & Harrow

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### MECHANICS LIEN ACT AMENDED

The enactment of Public Act 095-0274 on August 17, 2007 has resulted in numerous changes to the Mechanics Lien Act. New sections have been added and existing sections have been revised resulting in a broadening of some aspects of the Act and a narrowing of others.

The amendments specifically provide that a lien can be created for the value of building materials, regardless of whether they were actually used. Moreover, the amended Act now includes “services” and “forms or form work” to the list of items for which a lien can be claimed. However, there are important exceptions. For instance, a lien for these items cannot be claimed for construction of a single-family residence or a multi-family residence of fewer than 12 units in a single building. Furthermore, if the terms of the original contract are contrary to the Act, the court will enforce the terms of the contract.

In addition, the Act was amended to provide for liens for the rental value of leased equipment for all projects. Previously, rent for leased equipment was only lienable for funds due general or prime contractors for public projects.

The Act also adds that a lien can be claimed for work performed for *any* unit of local government (and not just local entities specifically listed in the Act). A unit of local government is defined as “any entity, other than the State, organized for the purpose of conducting public business ...”

In addition, there are slight changes to how a lien may be claimed. For instance, the Act now specifically states that “[n]o person shall have a lien . . . unless” that person gives written notice to the appropriate person (clerk, secretary, or director) before payment is made to the contractor. The written notice must include “a sworn statement identifying the claimant’s contract, describing the work done by the claimant, and stating the total amount due and unpaid as of the date of the notice for the work.”

The Act now specifies that a lien becomes effective when “received or refused” by the clerk, secretary, or director. And, the Act now specifies that the 90-day period in which proceedings are to commence begins upon the other party being “serv[ed]” with notice. Perhaps more importantly, the Act now specifies that the party claiming a lien “shall

within 10 days after filing the complaint” notify the clerk, secretary, or director of the commencement of suit (as opposed to the 90 days previously allowed). Then, a claimant must commence proceedings “by complaint for accounting” within 90 days after serving notice of a lien. However, “failure to file the complaint after notice of the claim for lien shall not preclude a subsequent notice or action.”

The amended Act allows the clerk, secretary, or director to withhold pay to cover the “period for notice” of the suit while the previous version of the Act only allowed the pay to be withheld for the period of the filing of the suit.

Finally, the amended Act states that if the suit is dismissed, the lien terminates 30 days after the effective date of the order dismissing the suit unless the lien claimant takes other legal action (to reconsider, appeal, etc.) within the 30-day period. Notwithstanding such legal action, a public body can pay a lien claim in less than 30 days after dismissal.

Since the enactment is recent, the effects of the changes have yet to be seen. However, based on the amendments, it seems as though more liens will be claimed despite more specific rules and time periods to follow for such claims.

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### CONTRACTOR PROMPT PAYMENT ACT ENACTED

On August 31, 2007, Illinois Governor Rod Blagojevich signed into law the Contractor Prompt Payment Act. This Act is designed to do exactly what its name implies – ensure that a contractor or subcontractor is paid promptly for its work. The Act does this by setting forth a specific time in which contractors and subcontractors must be paid and by defining consequences for failing to pay on time. Earlier Illinois Prompt Payments Acts applied to government construction projects. The new Act applies to private construction.

Assuming that a contractor has performed in accordance with the provisions of his construction contract and the payment application has been approved, the Act gives the owner 15 calendar days after approval of the payment application in which the owner must pay his contractor. Similarly, if a subcontractor has performed in accordance with the provisions of his contract, the subcontractor is to be paid by the contractor within 15 calendar days of the contractor's receipt of payment.

Furthermore, a payment application is considered approved 25 days after the owner receives it unless the owner provides (within this 25-day period) a written statement of the amount withheld and his reasoning for withholding it. If an owner finds that a portion of the work is not in accordance with the contract, the owner can only withhold payment for the reasonable value of that portion of the work.

When a payment is not made – either to a contractor or subcontractor – within the 15 days specified, the delinquent party is liable for that amount plus interest at a rate of 10% per annum. (However, this interest will not duplicate any interest accrued from the Mechanics Lien Act.) Additionally, a contractor or subcontractor who is not paid as specified in the Act may, after providing 7 calendar days' written notice to the person failing to make payment, stop work without penalty for breach of contract.

Overall, the Contractor Prompt Payment Act shortens the time in which a contractor or subcontractor must be paid for his work and provides a statutory remedy for contractors and subcontractors working in the private sector who are not paid on time. While the effect of the Contractor Prompt Payment Act should be that contractors and subcontractors are paid for their work in a more timely fashion, it is unclear how often the Act will be utilized in court, especially since a contractor or subcontractor may still seek protection under the Mechanics Lien Act for any non-payment for his services.

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## **NEW EJCDC CONSTRUCTION DOCUMENTS ISSUED**

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The Engineers Joint Contractors Documents Committee, charged with the duties of preparing new documents and updating and modifying existing documents, has released several revisions in its 2007 edition of the Construction Series Documents. *About EJCDC*, EJCDC, Oct. 1, 2007, www.ejcdc.org. The 2007 revisions are the first major

revisions since Associated General Contractors of America (AGC) became a sponsoring member. Composed of engineering design and construction professionals, owners, contractors, professional liability experts, risk management experts, and legal counsel, the EJCDC boasts that its documents are fair and user-friendly. *Standard Contract Documents*, National Society of Professional Engineers, www.nspe.org.

Many of the 2007 revisions were made with an eye toward creating more user-friendly documents. For example, the EJCDC now offers free web access to a guide that educates on the preparation of supplementary conditions, though the EJCDC still recommends that any modifications or adjustments made to the form should be reviewed by legal counsel. *Benefits of Using EJCDC Contract Documents*, National Society of Professional Engineers, www.nspe.org. Additionally, the new series of documents offers more explanation, interpretation and instruction for document users. Also, to make use of the documents more effortless, the progress payment applications are now in spreadsheet format.

Portions on safety and site conditions have also been reworked. Under the 2007 version, the contractor's duty and responsibility to inform the owner and engineer of safety requirements is more clearly specified. Likewise, the subcontractor's responsibilities as to site safety have been made clear. The revisions note that those duties allocated by agreement to the contractor do not decrease those safety duties owed by the subcontractor. (Doc. No. C-700).

As to site conditions, the revisions call for the owner to provide the contractor with the design engineer's reports and drawings, along with all other known reports and drawings. (Doc. No. C-800). Furthermore, the EJCDC continues to support the position that bidders should not be required by owners to conduct their own subsurface tests; now, the EJCDC has included language in the instructions to support this position. (Doc. No. C-200, C-410). The revisions require the contractor to consider the owner's perception of the site conditions in conjunction with the contractor's own understanding of local site conditions.

The new documents place a greater burden on owners as to insurance. The owner, rather than the engineer, is now explicitly responsible for making crucial insurance decisions. (Doc. No. C-051). Also, included in the insurance provisions is updated insurance terminology.

An additional fair and reasonable provision provides for certifications by the bidders and contractors assuring that they are not involved in fraud, corruption, collusion or coercive practices.

Also pertinent is the change in language in Document No. C-700, allowing the contractor reasonable access to a job site to remove his or her property even where the owner

excludes the contractors after substantial completion, and the language change in Paragraph 3.05 of C-700, noting the contractor's duty to report errors or conflicts in specifications and drawings only where the contractor had actual knowledge of the inconsistency.

Minor changes were also made as to format, page numbering, headings and cross referencing. All the provisions were reviewed and very few went unchanged, as most faced at least minor format changes. Overall, the changes appear to be in effort to further clarify and maintain ease of use, without sacrificing balance and fairness. The document's face lift is likely to result in less exposure to liability for all of the contracting parties.

## **NEW ISO ENDORSEMENT EXCLUDES COVERAGE FOR ADDITIONAL INSURED'S SOLE NEGLIGENCE**

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The Insurance Services Office, Inc. (ISO), which provides underwriting and risk management services to property-casualty insurers, filed a revision to its additional insured endorsements. The purpose of additional insured coverage is to provide liability coverage to contracting parties, such as a prime contractor and subcontractor. Such endorsements are intended to provide coverage for risks that are within the control of the insured and losses for which the named insured is primarily liable, but for which the additional insured may be held vicariously liable. However, in recent years, additional insured endorsements have become breeding grounds for coverage disputes, and courts have effectively created coverage for the additional insured which was never intended by the insurer.

The principal change made by the revision is to exclude coverage for an additional insured's sole negligence. The revision was in response to court rulings that, in the absence of specific limited language, the previous ISO additional insured endorsement included coverage for injuries and damages arising from an additional insured's sole negligence. See, e.g., *Cincinnati Ins. Co. v. Dawes Rigging & Crane Rental, Inc.*, 321 F. Supp. 2d 975 (D. Ill. 2004) (liberally construing "arising out of" language and resolving all doubts against the insurance company); *Ohio Cas. Ins. Co. v. PETSMART, Inc.*, 2003 U.S. Dist. LEXIS 22782 (D. Ill. 2003) (strictly construing the phrase "arising out of" against the insurer). "The vast majority of courts have broadly interpreted the phrase 'arising out of' to find coverage where there is any causal nexus between the named insured's work and the accident, regardless of who was actually at fault for causing the mishap." Millikan, The

Law of Unintended Consequences: Legal Issues Involving Additional Insured Endorsements, 15 U.S.F. Mar. L.J. 299, 304 (2003).

The previous endorsement covered liability "arising out of" operations performed for the additional insured by the named insured. Courts broadly construed the phrase "arising out of" so as to create coverage even for the additional insured's sole negligence. The original intent of the endorsement was to provide coverage only for the additional insured's vicarious liability arising out of the named insured's negligent acts. The new endorsement corrects this problem and provides coverage only for acts or omissions for which the named insured is either totally or partially at fault. Of course, coverage for the additional insured's sole negligence can still be obtained through another endorsement [CG 26 26] and an additional premium.

The revision is accomplished generally by replacing the phrase "arising out of" with "in connection with" and including specific language excluding coverage for the sole negligence of the additional insured: i.e., "There is no coverage for the additional insured for [injury or damage] arising out of the sole negligence of the additional insured or by those acting on behalf of the additional insured." [CG 20 07 06 04]. The goal of this language is to limit coverage to imputed liability only. In *Liberty Mut. Fire Ins. Co. v. Statewide Ins. Co.*, 352 F.3d 1098 (7th Cir. 2003), the Seventh Circuit Court of Appeals found that similar language, which limited coverage to negligence of the named insured which is imputed to the additional insured, was not illusory.

The revision applies to the ISO endorsements for (1) engineers, architects, or surveyors [CG 20 07 01 96, CG 20 31 01 96, 20 32 01 96], (2) owners, lessees or contractors [CG 20 10 10 01, CG 20 33 10 01, CG 20 37 10 01], (3) vendors [CG 20 15 11 88], (4) designated persons or organizations [CG 20 26 11 85], and (5) lessors of leased equipment [CG 20 28 11 85, CG 20 34 03 97]. The revision has been submitted to insurance regulatory bodies in all jurisdictions, except New Mexico and Oregon.

## **INSURER HAS NO DUTY TO DEFEND CONTRACTOR IN BREACH OF CONTRACT SUIT**

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Determining the extent of insurance coverage in a typical commercial general liability policy for a contractor when sued for breach of a construction contract was addressed in the federal court case of *Lyerla v. AMCO Insurance Co.*, 2007 U.S. Dist. LEXIS 56300 (S.D. ILL, August 2, 2007). In the *AMCO* case, two property owners, Riddlemoser and

## COURT FINDS INSURER OWED ADDITIONAL INSURED NO DUTY TO DEFEND

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McNulty, filed a suit against their general contractor, Lyle Lyerla, d/b/a Wildewood Construction, alleging breach of their construction contract. The lawsuit involved allegations of faulty construction, failure to build pursuant to the plans, failure to complete punchlist items, and failure to correct defects. Lyerla carried a commercial general liability policy with AMCO insurance. At the outset of the litigation, AMCO denied a duty to defend the suit or indemnify Lyerla under the terms of the insurance policy. Eventually, Lyerla settled with Riddlemoser and McNulty for \$53,000.

After the settlement, Lyerla filed a lawsuit against AMCO for breach of contract and for various violations of provisions of the Illinois Insurance Code for failure to defend Lyerla or indemnify him in the suit with Riddlemoser and McNulty. The court first noted that Illinois courts typically view allegations of breach of contract as falling outside of general liability policies. This ruling is made because there is no “occurrence” to trigger coverage under the standard language of insurance policies. Furthermore, the court determined that when interpreting insurance policy coverage courts usually find that an occurrence means an accident (including continuous or repeated exposure to substantially the same general harmful conditions). As a result, commercial general liability policies are:

intended to protect the insured from liability for injury or damage to the person or property of others; they are not intended to pay the costs associated with repairing or replacing the insured’s defective work and products, which are purely economic losses.

The court then determined that liability policies are not intended to provide protection against the insured’s own faulty workmanship or product, which are normal risks associated with the conduct of the insured’s business. This reasoning was proper because the court held that if the insurance policy did cover general losses or lack of performance disputes the purpose of the insurance policy would be lost. The rationale frequently articulated is that liability insurance should not become a warranty or be converted into a performance bond. Therefore, since the issue in the underlying case revolved around traditional contract dispute issues, the insurance policy did not cover and AMCO did not have a duty to defend or indemnify the contractor for the losses sustained for his own non-performance or failure to complete the project in a workmanlike condition.

On September 6, 2007, the First District Appellate Court decided the case of *Pekin Insurance Company v. Beu*, 2007 Ill. App. LEXIS 981 (Ill. App. Ct. 2007). In doing so, they reaffirmed the case of *Village of Hoffman Estates v. Cincinnati Insurance Company*, 283 Ill. App. 3d 1011, 670 N.E.2d 874 (1st Dist. 1996), which held that an insurance company does not have a duty to defend an additional insured for allegations of personal negligence. The appellate court took this opportunity to confirm that unambiguous insurance policies will be protected and strongly upheld.

When one secures a liability insurance policy, it very well may be the insurance carrier’s “duty to defend” which is the reason for doing so. Knowing that this coverage and protection exists gives the insured the peace of mind to sleep easier at night. But situations do arise in which the protection is denied and insurers claim that they have no duty to defend under the particular circumstances. In order for this to occur, the allegations made against the insured must fall outside the parameters set by the language of the insurance policy itself.

One unique situation in which this can happen is when an additional insured is named on the insurance policy. It is regular practice for that particular policy to specify in which situations that additional insured will be covered. In the 1996 case of *Village of Hoffman Estates v. Cincinnati Insurance Company*, the Village of Hoffman Estates was added onto an insurance policy as an additional insured and the policy provided that the Village would be covered “only with respect to liability incurred solely as a result of some act or omission of the NAMED INSURED.” (Emphasis in original) 283 Ill. App. 3d at 875. The court affirmed that the Cincinnati Insurance Company did not have a duty to defend because the underlying complaint alleged liability against the Village itself. *Id.* at 876.

This issue was revisited in *Pekin Insurance Company v. Beu*. The appellate court again interpreted the issue of the duty to defend in the case of an additional insured. In this case, Roger Beu was named as an additional insured on the liability insurance policy issued to Castle Builders. The policy stated that Beu would be covered “only with respect to liability incurred solely as a result of some act or omission of the named insured and not for ... independent negligence or statutory violation.” *Id.* at 2. Following an injury on the construction site, a complaint alleging negligence on behalf of Beu and others was filed. Pekin Insurance denied that it had a duty to defend Beu and a declaratory judgment was sought.

The appellate court found that the holding from *Village of Hoffman Estates* was controlling on this matter. In determining whether or not coverage is in line, “the terms of the policy will be liberally construed in favor of the insured, and all doubts and ambiguities will be resolved in favor of coverage.” *Id.* at 6. In this case, no ambiguity existed and the policy was given its “plain and ordinary” meaning. *Id.* The underlying complaint made allegations of Beu’s own negligence and therefore did not fall within the strict language of the policy.

In summation, unless there is a dispute as to whether the policy terms are ambiguous, the language of the policy strictly governs. Although there still may be peace of mind as an additional insured, the risk exists that personal allegations of negligence will negate the security felt .

## **EXPERT TESTIMONY USED TO DETERMINE QUALITY OF WORKMANSHIP**

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In the recent case of *Meyers v. Woods*, 374 Ill. App. 3d 440, 871 N.E.2d 160 (3rd Dist. 2007), the appellate court affirmed the trial court’s ruling that a homeowners’ expert witnesses could testify that an in-floor heating system contractor had breached the implied warranty to perform in a reasonably workmanlike manner. There, the contractor had failed to add antifreeze to the system, causing it to malfunction during cold weather.

Established Illinois Law holds that:

A person who contends to perform construction work impliedly warrants to do the work in a reasonably workmanlike manner, and that failure to do so results in a breach of contract. When a contractor represents to someone that he is skilled at performing a particular task and installs the system himself, he warrants that the work done by him will be done in a reasonably workman like manner.

*See, Zielinski v. Miller* 277 Ill. App. 3d 735, 740 (1995); *Dean v. Rutherford*, 49 Ill. App. 3d 768, 771 (1977).

In this case, plaintiff, Helen Meyers, filed suit against the defendant, Ed Woods, in 2002 alleging that he breached his warranty to install an in-floor heating system in a workmanlike manner which ultimately damaged the heating system. Woods, a 27-year veteran of the heating and plumbing industry, was contacted by Brad Folkers in 1998 to install in-floor heating in a building that Folkers was

working on in Galt, Illinois. At trial, it was determined that Folkers was “merely a conduit to facilitate the agreement between Meyers and Woods” because Woods bid directly to Meyers and was paid directly by Meyers. Ultimately, Woods installed the in-floor heating system in an outdoor shed used for storage by Meyers. The ground was then covered with concrete which encased the heating system and pipes.

Upon the completion of installation, the heating system was working properly. It was not until December, 1999 that Woods was informed of the heating system failure. Woods testified that antifreeze was not requested by the plaintiff and that the system can run without it. Woods claimed that, at the time of installation, nobody told him that the building would be empty all winter. Woods attempted repairs, but it was discovered that the heating system was inoperable and in a state of complete disrepair.

At trial, Meyers made use of three expert witnesses. One testified, “in a building situated like [Meyers], an ‘out building,’ he would have always put antifreeze in the system. The contractor should always tell the customer up-front about the antifreeze option and tell them about the freezing possibilities.” He also stated that he may not have done the job if antifreeze was specifically prohibited. The second and third experts agreed with him.

The defendant challenged that the trial court abused its discretion when it allowed the plaintiff’s experts to testify. Generally, expert testimony will not be limited to just scientific or technical areas, but may also include areas of specialized knowledge. Typically, all that is required of the expert testimony is that it be of assistance to the trier of fact. *See, Chem-Pac, Inc. v. Simborg*, 145 Ill. App. 3d 520, 524-25 (1986)

The expert witnesses testified regarding the issue as to whether Woods performed the contract in a reasonably workmanlike manner as should and would a generally proficient contractor engaged in similar work and performing under similar circumstances. Each of the witnesses testified to extensive training and experience with installing, repairing, and the designing of in-floor heating systems. The trial court found that the testimony of these men would better help it to understand the evidence and make a decision on whether the workmanlike standard had been met. The appellate court unwaveringly agreed and could not say that the trial court abused its discretion by qualifying the witnesses as experts and allowing them to testify. The appellate court agreed with the trial court and found, based on all the evidence, that Woods did not do his job in a workmanlike manner because he failed to include antifreeze during the installation of the system.

## **CONTRACTOR NOT LIABLE FOR HIGHWAY CRASH**

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To succeed in an action for negligence, a plaintiff must prove facts that establish the existence of a duty, a breach of the duty, and an injury to the plaintiff that was proximately caused by the breach of the duty. Recently addressing the threshold question of duty, the appellate court in the case of *Shank v. H.C. Fields and Champaign Asphalt Company*, 373 Ill. App. 3d. 290, 869 N.E.2d 261 (4th Dist., 2007), affirmed the trial court's granting of summary judgment in favor of the defendant asphalt company on the basis that no legal duty to the injured third party plaintiff arose by virtue of specifications contained in its contract with the Illinois Department of Transportation.

On May 25, 2001, the Friday before Memorial Day, Champaign Asphalt Company was performing road construction on Interstate Highway 74 near exit 192 in Champaign County, Illinois pursuant to its contract with IDOT. Due to the construction, Champaign Asphalt had closed down one of the two traffic lanes, and had posted several signs warning traffic as much as 3 miles back to merge from two lanes into one lane. Its contract with IDOT incorporated IDOT's standard specifications, one of which was that all lanes of traffic should be open on any legal holiday period, including the Friday before Memorial Day, beginning at 3:00 p.m.

At approximately 3:35 p.m. on May 25, 2001, a semi-truck carrying a 40,000-pound load traveling at 57 mph drove into a row of cars that were stopped or slowed on the highway due to the lane closure, seriously injuring the plaintiff. The reason for the delay in timely opening all lanes was that the Athey loader, conveyor-type equipment being used to remove debris from the highway, unexpectedly broke down.

Plaintiff filed suit alleging in his complaint that by the terms of its contract with IDOT, Champaign Asphalt had a duty to have all lanes open by 3:00 p.m., but failed in its duty, resulting in the plaintiff's injury. Whether a duty of care exists is a question of law that must be resolved by the court. The court explained that breach on the part of the contracting parties does not normally impose a legal duty of care to third parties, let alone constitute evidence of negligence. Thus, where the law does not impose a duty of care to third parties, one will not generally be created by a contract between independent parties. Rather, it is the law that, in the end, must say what is legally required.

While acknowledging that highway authorities generally have a legal duty to act reasonably in preventing harm to the public, the court noted that there is a difference between

allowing unguarded open holes, trenches or barricades on or adjacent to a highway and closing a lane to traffic after posting proper warnings. An unguarded open hole is a danger even to careful drivers, but a properly marked lane closing is only a danger when encountered by a completely inattentive driver, which was the case here. A completely inattentive driver is a threat at any time and under any road conditions.

The court found that Champaign Asphalt complied with that general duty by posting all of the required warning signs. With respect to the plaintiff's allegations of breach of duty, the court held that Champaign Asphalt's contract with IDOT requiring the opening of lanes during holiday traffic did not impose any further legal duty of care on Champaign Asphalt, including any duty to prevent the truck driver's independent intervening act of negligence.

## **RECOVERY DENIED UNDER CONSTRUCTION BOND**

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In *Solai & Cameron, Inc. v. Plainfield Community Consolidated School District No. 202*, 374 Ill. App. 3d 825 (3d. Dist. 2007), a school district planned to build several schools. The district hired a general contractor for the project. In turn, the general contractor hired an electrical subcontractor for several of the schools.

During contract negotiations, the general contractor requested that the subcontractor obtain a performance bond for the benefit of the district. The subcontractor obtained the performance bond from Hartford Fire Insurance Company ("Hartford").

Several sections of the bond addressed the possibility of a default by the subcontractor. Section 3 of the bond required the general contractor to provide notice of a default and then wait 20 days prior to terminating the subcontractor. Section 3 also required the general contractor to pay the balance of the subcontract to Hartford if the general contractor terminated the subcontractor. After Section 3 was satisfied, Section 4 of the bond allowed Hartford to perform the obligations of the subcontractor, find a replacement subcontractor, or allow the general contractor to find a replacement subcontractor.

The subcontractor began performance on the project as required under the contract. The general contractor, however, soon took issue with the quality of the subcontractor's work on two of the schools—one middle school and one high school.

## COURT INTERPRETS EXCAVATION TO INCLUDE CONCRETE CUTTING

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On May 21, 2002, the general contractor hired another electrical contractor to perform the subcontractor's duties for the middle school. On June 7, 2002, the general contractor terminated the subcontractor for the middle school and sent notice of the termination to Hartford.

Additionally, the general contractor terminated the subcontractor on the high school portion of the project on June 15, 2002. The general contractor, however, failed to send Hartford notice of this termination until June 24, 2002. On June 21, 2002, the general contractor retained the new contractor to finish work on the high school.

The general contractor subsequently requested payment from the school district for the original subcontractor's portions of the contract. The general contractor then requested Hartford's performance on the bonds. Hartford refused to perform on the bonds and litigation commenced. The trial court found that the general contractor had failed to comply with the terms of the bond. The general contractor appealed the court's decision.

The appellate court affirmed the lower court decision for both the middle school and the high school. With respect to the middle school, the court noted that the general contractor had hired the new subcontractor prior to terminating the original subcontractor. This was clearly in violation of the bond which specifically required termination prior to replacement. Additionally, the court found the general contractor had violated the terms of the bond by failing to pay Hartford the balance of the subcontract.

The court also determined that the general contractor had breached the terms of the bond as to the high school. Contrary to the middle school portion of the project, the general contractor terminated the subcontractor prior to hiring the new electrical contractor for the high school. The general contractor, however, failed to give Hartford notice of the termination before hiring the new subcontractor. Failing to notify Hartford prior to hiring the new subcontractor effectively stripped Hartford of its right to perform or find a replacement subcontractor as provided under Section 4 of the bond. The court declared the bond nullified based upon the actions of the general contractor.

The general contractor argued the subcontract trumped the language contained in the bond, relying upon the fact that the bond incorporated the subcontract by reference. The court pointed out, however, that the bond predated the subcontract. Consequently, when the bond was signed, it incorporated a document that did not yet exist. The court found this improper, and therefore, refused to consider the subcontract.

In *Quality Saw v. Illinois Commerce Commission*, 374 Ill. App. 3d 776, 871 N.E.2d 260 (2d Dist. 2007), Quality Saw and Seal, Inc., a concrete cutting company sought review of the Illinois Commerce Commission's finding that it had violated the Illinois Underground Utility Facilities Damage Prevention. 200 Ill. Comp. Stat. 50/4(d). Chicagoland Paving Contractors, Inc., hired Quality Saw to perform full-depth saw cutting of concrete pavement and curbs for various removal applications on a street in Highland Park. On August 10, 2004, Quality Saw struck and damaged a 3/4-inch-thick underground natural gas transmission facility that was owned and operated by North Shore Gas Company.

The Illinois Underground Utility Facilities Damage Prevention Act provides that every person who engages in non-emergency excavation or demolition provide notice not less than 48 hours, but no more than 14 calendar days in advance, of the start of the excavation or demolition to the owners or operators of the underground utility through the state-wide one-call notice system. 220 Ill.Comp.Stat. 50/4(d). The statute also states that "every person who, while engaging in excavation or demolition, willfully fails to comply with the Act by failing to provide the notice to the owners or operators of the underground facilities or CATS facility near the excavation or demolition area...shall be subject to a penalty of up to \$5,000 for each separate offense and shall be liable for the damage caused to the owners or operators of the facility." 220 ILCS 50/11(a).

In accordance with Section 4(d) of the Act, Chicagoland notified North Shore of the planned project which in turn marked the location of its facilities at the address. Quality Saw, however, made no attempt to provide notice of its plan to cut the pavement, a required act because working under another excavator's line-marking request was not permitted. As a result, on June 29, 2005, the Illinois Commerce Commission (the Commission), initiated proceedings under Article X of the Public Utilities Act, 220 ILCS 5/10-101 *et seq.*, to determine whether, in striking the gas line, Quality Saw or one of its employees violated section 4(d) of the Act.

In the proceeding, Quality Saw argued that it was not in violation because (1) concrete pavement is not "earth, rock, or other material" and (2) saw cutting is not "excavation" within the meaning of Section 2.3 of the Act. The Commission ultimately determined that Quality Saw's cutting amounted to excavation under the Act and imposed a \$450 penalty based on a finding that Quality Saw willfully failed to comply with the notice requirement of section 4(d).

Quality Saw filed for appellate review. The appellate court reasoned that the legislature was focused on the location of material and the way the material might be altered, not on the type of material. It therefore ruled that Section 2.3 of the Act was not ambiguous and moreover, it agreed with the commission that the legislature defined the term excavation extremely broadly to include the type of saw cutting of pavement that caused the damage to the North Shore gas line.

*Quality Saw* provides clarity to a once ambiguous regulation regarding the removal and disturbance of ground material. Contractors should err on the side of caution when beginning any procedure that may fall within the definition of excavation as interpreted by the appellate court.

## CONSTRUCTION NOTES

In November, 2007, the American Institute of Architects issued several revised contract forms, including the new A201 and new architect owner agreements. Although the AIA had initially indicated that three alternatives for dispute resolution would be provided arbitration, litigation or “other” and litigation would be the default provision, if no resolution is made. However, the documents as issued state that arbitration is the default provision.

ConsensusDocs, standard form construction contracts, have been issued by a group composed of representatives of twenty-three industry associations. The standard form contracts were written primarily by owner and contractor organizations. Approximately seventy standard forms will be issued.

Among those organizations which had a hand in drafting the documents the Associated General Contractors of America, the American Subcontractors Associations, and the Surety & Fidelity Association of America. Once the consensus documents are issued, the organizations which participated in drafting them will no longer publish their own documents.

The American Institute of Architects declined to participate in the effort. The program is administered by a not-for-profit organization called Consensus.

The Illinois Governor has signed legislation which places a freeze on building code standards during construction. SB1508; P.A. 95-0512. According to the Home Builders Association of Illinois, which promoted the legislation, local building inspectors were changing codes for construction after building permits had been issued and even after construction had been completed. In some cases, building inspectors required builders to retrofit brand new homes which had been started under an existing code which had been amended during construction.

Congress has created a new Civilian Board of Contract Appeals. The new board replaces the boards of contract

appeals for the General Services Administration and the Department of Agriculture, Energy, Housing and Urban Development, Interior, Labor, Transportation, and Veteran’s Affairs. The separate boards of contract appeals for the armed services, NASA, postal service, the postal rate commission and TVA continue in existence.

In a recent case, the Illinois Appellate Court refused to enforce an arbitration provision in a consumer contract because the provision was not conspicuous. The court noted that the arbitration provision was placed in the contract in eight point type where it was unlikely to be noticed. *Bess v. DirecTV, Inc.*, 2007 Ill. App. LEXIS 757 (Ill. App. Ct. 2007).

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