



Key Issues When Considering a Completion Project Opportunity

Introduction

In today's economic environment, contractor defaults are occurring with increased frequency. If the contractor is bonded, the owner will look to the surety to complete the project. Among other options, the surety may enter a takeover agreement with the owner and arrange for another contractor to complete the work.

When these opportunities present themselves, a contractor considering the takeover of a troubled project should carefully consider the risks and rewards before signing on to complete the project. Since a completion contractor may have a limited window of time to define the project and determine whether it wants to pursue the opportunity, and since the contractor may not get access to much of the information needed to fully define the risks, deciding to proceed with the opportunity may be based upon an educated guess. Keep in mind the following rules when evaluating these opportunities, to manage the risk and maximize the potential for a successful outcome.

The "Dos and Don'ts" When Considering a Completion Project

- Stay within your core competency. Completion projects are inherently risky. One contractor has failed in the performance of the work and a new contractor is being asked to take over a partially performed project and to complete it. Don't add an unnecessary additional risk by taking on a type of project outside of your core competency. If the project is outside of your core competency, walk away.

This advisory is published by Alston & Bird LLP to provide a summary of significant developments to our clients and friends. It is intended to be informational and does not constitute legal advice regarding any specific situation. This material may also be considered attorney advertising under court rules of certain jurisdictions.

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- Carefully review the existing contract between the initial contractor and the owner, and pay close attention to how the completion contract is structured. Even though the completion contractor will be entering a contract with the surety, the completion contract will incorporate the terms and conditions of the initial contract.
- Determine whether the initial contract is clear as to the scope of work required from the contractor, and confirm that you have been provided with the latest set of contract documents, i.e. updated drawings, specifications, bulletins, etc. Identify any disputed issues (e.g., scope disputes, etc.) that arose between the owner and the initial contractor, and identify all changes to the initial contractor's scope of work (both pending and approved).
- Determine a reasonable completion date for the work. The owner will be expecting the completion contractor to step into the shoes of the initial contractor and deliver the project as called for in the initial contract. Determine whether this is possible and, if not, negotiate changes to the initial contract's requirements.
- Determine whether completion of the work is dependent upon separate contractors or the owner's self-performance of work, or the timely furnishing of materials or equipment by the owner. It is one thing to take over a project and manage it to completion; it is quite another to condition your success on the performance of the owner's separate contractors or its self-performance. Identify long lead time items that will need to be factored into your schedule, determine who is responsible for supplying these items and determine their status.
- Evaluate the trust and reliability of the owner and the surety, and the surety's reputation for working with completion contractors to solve problems. Completion of the work will be dependent upon teamwork and a willingness of all parties to work through unanticipated issues and problems.
- Visit the site and undertake other due diligence, as time permits. Recognize that this may need to occur in phases—i.e., at the outset, when the surety is seeking proposals and again, later, if you determine to pursue the project. Due diligence should include meetings with the key project participants, such as the owner's representative, the architect of record, the lender's inspector, etc.
- Find out why the initial contractor defaulted, and try to meet with the defaulting contractor's project management team to obtain its perspective on the project. This may be difficult to accomplish if the defaulting contractor has disappeared or wants nothing further to do with the job, but most defaulting contractors will be motivated to assist because it will reduce their potential liability to the surety. Even if such a meeting is not possible, view the project from the initial contractor's perspective to understand the problems that the initial contractor faced. Just because the initial contractor was not able to perform the work, do not assume that all of the problems were "its" fault.
- Determine the quality of the owner's team that you will be working with. Were the members of the owner's team doing their jobs during the initial contractor's performance? Do you want to work with these people?
- Review key project documents such as submittals, daily reports, inspection reports, meeting minutes, logs and as-builts. This should provide you with a general sense of what happened on the job and the situation you will be facing. It may also be necessary to do this to determine what things have been processed and what things have not. This will require resources beyond what you may normally assign to a job.

- Define the status of the work performed by the initial contractor. This will be very important if an issue develops after the completion contractor starts work regarding the quality of the existing work or its compliance with the plans and specifications. Address how latent defects with the initial contractor's work will be handled.
- In developing your proposal, assume that there will be unknowns. Even with your best efforts, it will be impossible to identify all of the "hidden" problems. The surety is going to expect you to have identified all risks that should be apparent when entering the completion contract. If you identify a risk, but are not able to quantify it at the time you are required to sign the completion contract, consider putting a contingency in your price. The surety is not going to want a contingency, so you will need to justify why you need a contingency in your proposal. Alternatively, you may wish to use "alternates" for those risk items you cannot define.
- Assign your best project management team to the project—i.e., people who are able to be proactive in the management of problems. Make sure the project is adequately staffed for the specific challenges that are presented. These projects generally require a greater level of management oversight. If management sees an issue develop, deal with it in a timely manner.
- Establish a viable completion schedule as soon as possible. Make sure that you have the resources to develop a meaningful baseline schedule for your work at the start of the project and update the schedule as the work progresses.
- Because this is a "troubled project," even with a competent contractor completing the work, it may remain a "troubled project." As a result, your project management staff must understand that project documentation will be important. Ask the question: Have we assigned the staffing that is necessary to manage and document this project?
- Define the lines of communication. You will be working for the surety, and the surety will have a takeover agreement with the owner. The surety will want to be involved in the progress of the work, so address the lines of communication, and make sure you are able to have decisions made in a timely manner. Attempt to identify the issues that the surety will want to be involved with at the front end.



- Anticipate change orders. There will likely be change orders for which the surety is responsible and traditional owner change orders. Set up your project documentation so that you are able to segregate the two. For some change orders, it may be difficult to define whether it is an owner change or a surety change; make sure that you have the proper authorization from one or the other (or both) before proceeding with a change. You don't want to subsequently get caught in the trap of each party saying that you did not have authorization to proceed with a change. If you do not know whether it is an owner change or a surety change, seek authorization from both.
- Document the status of the initial contractor's work before taking it over. Video taping the status of the initial contractor's work prior to the start of your work may be worth the expense, as this will help protect against claims that your work (as opposed to the initial contractor's work) is non-compliant.
- Project relationships are crucial, and even more so on these types of projects. There is certainly a history to the project, and that history may have involved strained communications/relationships. Your first 60 days on the project will be critical to sending the message to all involved that things have been turned around.

Conclusion

Each project presents unique challenges, and completion projects can be some of the most challenging. Make sure that you have conducted adequate due diligence to thoroughly understand the risks associated with taking on the project. Evaluate and price these risks before signing the completion contract. After the contract is signed, it is too late to determine that the risks associated with the project exceed the potential fees.



STATE CASE NOTES

Arizona

Arizona's Public Policy Does Not Prohibit Enforcement of Limitation-of-Liability Provisions in Architect or Engineer Professional Service Contracts

A real estate developer began development of a townhouse project on a property bordered on one side by a canal. The developer entered into a professional services contract with a surveyor. One of the surveyor's duties was to prepare a survey identifying boundary lines and rights-of-way. The contract included a limitation-of-liability provision that limited the liability of the surveyor for its sole negligence. The surveyor prepared a survey, but failed to accurately identify a right-of-way owned by the canal's operator. The surveyor prepared drawings and a final plat based on its erroneous survey. The city refused to issue building permits for the project when the canal's operator disputed the final plat due to the incorrect depiction of the right-of-way. The developer sued the surveyor for breach of contract and professional negligence, alleging that the surveyor negligently prepared the survey and caused the developer to incur increased costs from delays and additional engineering services.

The trial court granted partial summary judgment in favor of the surveyor, holding that the limitation-of-liability provision was enforceable. The trial court also decided that any damages due to the developer for professional negligence were capped at the amount the developer actually paid to the surveyor pursuant to the contract. On appeal, the appellate court held that Article 18, Section 5, of the state constitution required that the enforceability of the limitation-of-liability provision had to be decided by a jury and the appellate court remanded for jury resolution of the issue.

On appeal, the developer asserted that the limitation-of-liability provision violated state public policy as reflected in statutes such as A.R.S. Section 32-1159 (anti-indemnity statute), which allegedly prohibited enforcement of such provisions. However, the court stated that the statute did not declare that limitation-of-liability provisions were unenforceable. While an indemnity or hold harmless provision would have completely insulated the surveyor from liability, the limitation-of-liability provision merely limited liability. In essence, the anti-indemnity statute did not apply because the limitation-of-liability provision did not eliminate the surveyor's liability.

The court concluded that the limitation-of-liability provision did not violate public policy. Furthermore, the limitation-of-liability provision did not constitute an "assumption of risk" subject to Article 18, Section 5, of the state constitution. Rather than abrogating the surveyor's duty toward the developer, the limitation-of-liability provision limited the recoverable damages if that duty was breached.

1800 Ocotillo, LLC v. WLB Group, Inc., 196 P.3d 222, 2008 Ariz. LEXIS 203, 542 Ariz. Adv. Rep. 11 (Ariz. 2008).



Connecticut

Connecticut Continues to Recognize “No Damages for Delay” Clauses

In *Mafco Electrical*, an electrical subcontractor brought suit for damages against the general contractor, alleging delay claims and seeking equitable adjustment of the contract for approximately \$875,000.00. The U.S. District Court granted the contractor’s motion for summary judgment because the contract contained a “no damages for delay” clause.

The subcontractor claimed that it was harmed by the contractor’s abandonment of the construction schedule and allegedly poor supervision of the work. The subcontract provided for an extension of time in the event of delay, but also stated that the subcontractor “expressly waives and releases all claims or rights to recover lost profits, recovery of overhead, and any other indirect damages, costs or expenses in any way arising out of or related” to the subcontract, including “delay, charges, acceleration, loss of efficiency or productivity disruptions and interferences with the performance of the work.” The subcontractor did not dispute the applicability of this clause, but argued that one of several equitable exceptions should prevent its enforcement.

The court noted that Connecticut law recognizes “no damages for delay” clauses and allows that such clauses are valid except under four specific circumstances: (1) delays caused by bad faith or willful, malicious or grossly negligent conduct; (2) unanticipated delays; (3) delays so unreasonable that they constitute an intentional abandonment of the contract; and (4) delays resulting from breach of a fundamental obligation of the contract. Carefully considering the subcontractor’s factual allegations, the court held that none of the subcontractor’s claims satisfied one of these four conditions. The court was also persuaded by the subcontractor’s failure to give notice of its purported damages in a timely fashion, as required by the subcontract. Thus, the court held that the no damages for delay clause barred the subcontractor’s claims, and granted the contractor’s motion for summary judgment.

Mafco Electrical Contractors, Inc. v. Turner Construction Company, 2009 U.S. Dist. LEXIS 24499 (D. Conn. March 26, 2009)



Georgia

Four-Year Statute of Limitations Applies to Claims for Breach of Contract Where Professional Negligence Alleged

Newell Recycling, a business engaged in the purchase and processing of scrap metal, hired Jordan Jones and Goulding, Inc. (JJG), an engineering firm, to design its new automobile shredding facility. As part of its work, JJG developed a design for concrete pavement to be installed around the shredding machine to act as a work platform and to control drainage. JJG added this design to the site plans and specifications, setting out directions regarding sub-grade preparation, concrete mix and concrete thickness. All engineering work on the project was completed by September 1999. After the project was completed and the facility became operational, the concrete paving surrounding the shredder began to crack.

Newell brought a single claim for breach of contract in August 2004, noting that, by entering the contract, JJG “contracted to perform its required services with that degree of care, skill, and ability ordinarily expected of prudent design professionals and civil engineers under similar circumstances....” Newell also attached an affidavit from an engineering expert to its complaint in order to comply with O.C.G.A. § 9-11-9.1, relating to all claims for professional malpractice. Denying JJG’s motion for summary judgment, the trial court believed that the six year statute of limitations for breach of contract, found at O.C.G.A. § 9-3-24, applied, making Newell’s action timely.

The Georgia Court of Appeals disagreed. The court began by holding to a broad definition of professional malpractice claims, finding that such actions include any action that “calls into question the conduct of a professional in his area of expertise.” *Goodin v. Gwinnett Health System*, 273 Ga.App. 461, 462(2), 615 S.E.2d 129 (2005). Newell’s reference to JJG’s violation of a “standard of care” in its complaint was sufficient to create a claim for professional malpractice, even though it was presented as a breach of contract action. While O.C.G.A. § 9-3-24’s six-year statute of limitation does apply to written contracts, the court explained that the standard of care imposed on professionals is a function of law, implied in written contracts. Newell’s contract did not contain an express “standard of care” term. The court cited *Old Republic Nat’l Title Ins. Co. v. Atty. Title Servs.*, No. A090999, 2009 WL 1636567 (June 12, 2009 Ga. Ct. App.) and *Plumlee v. Davis*, 221 Ga.App. 848, 473 S.E.2d 510 (1996) for the general proposition that the four-year statute of limitations at O.C.G.A. § 9-3-25 applies to claims for breach of contract where professional services are concerned.

Jordan Jones and Goulding, Inc. v. Newell Recycling of Atlanta, Inc., No. A09A1397, 2009 WL 2151962 (July 21, 2009 Ga. Ct. App.).



Mississippi

Developer of Subdivision Has Imputed Knowledge of Property Lines of Subdivision in Equitable Dispute Regarding Encroachment

An experienced builder was mistaken about the boundary line between two neighboring lots, Lots 16 and 17, in a new residential subdivision based on four stakes placed by the developer at the perimeter of Lot 17, following a recent survey. As a result, the home he built for the Pitts family on Lot 17 encroached five feet onto the ten-foot setback required by the subdivision covenants. His error also caused the driveway appended to the home to encroach upon adjacent Lot 16. Lot 16 was then, and at the time of trial, owned by developer David M. Cox, Inc. (Cox, Inc.). When selling Lot 17 to the Pitts family, the developer's daughter acted as dual agent for the builder and family and made no disclosures regarding the encroachments. When purchasing the home, the Pitts family asked whether a survey would be necessary and the developer's daughter stated that a survey would be unnecessary because it was a platted subdivision, her father was the original owner and the property had passed directly from her father to the developer. The Pittses later built a detached garage directly at the end of the encroaching driveway.

Although David Cox (Cox), the developer of the subdivision and founder of Cox, Inc., witnessed the construction of the new garage on a daily basis, the garage was completed without any objection from him or any agent of Cox, Inc., until a new survey of Lot 16 was taken four years after construction of the garage. Upon discovering the encroachment, Cox, Inc. demanded removal of the garage. When the garage was not removed, the developer filed suit seeking to have the garage removed and the driveway repositioned. Finding Cox, Inc. to be the more responsible party and the party with superior knowledge, the chancellor ordered Cox, Inc. to convey title of the affected portion of Lot 16 to the Pittses in exchange for the highest stated market value.

The Mississippi Court of Appeals affirmed, explaining that “[i]f the owner of land with full knowledge, or with sufficient notice or means of knowledge, of his rights and of all the material facts, knowingly, though passively, looks on while another person expends money on the land under an erroneous opinion of title, it would be an injustice to permit the owner to exercise his legal rights against such other person. The owner is bound by the doctrine of equitable estoppel.” *Bright v. Michel*, 242 Miss. 738, 749, 137 So.2d 155, 159 (1962)

The Court of Appeals concluded with a number of findings favorable to purchasers of real property: “Although we recognize that it would be a safer practice for the purchasers of real property to obtain an independent survey, we find that it was reasonable for the purchaser of a new home in a new subdivision, who was being represented by the developer's daughter and an agent of the development corporation, to rely upon the assertions made to him or her. It was not unreasonable for the Pittses to trust that their new home, as well as its driveway, was properly situated on the lot. It was also not unreasonable for them to believe that the land *directly* at the end of their driveway was part of their property.”

David M. Cox, Inc. v. Pitts, No. 2008-CA-00499-COA, 2009 WL 2152278 (Miss. App. July 21, 2009).

New Hampshire

***Nullum Tempus* Doctrine Preserves State’s Claims Unless Statutes Expressly Provide Waiver**

Lake Winnepesaukee Resort, LLC (LWR) sought to construct a golf course in New Durham, New Hampshire. It retained Peerless Golf, Inc. (Peerless) in May 2001 as general contractor. Early in the construction of the course, the New Hampshire Department of Environmental Services (DES) learned of certain environmental problems, investigated and ultimately issued an order in August 2001 requiring LWR to mitigate environmental damage and to cease disturbing soil. DES subsequently lifted the order and issued permits allowing construction to be completed. The state then petitioned the superior court in August 2006 for civil monetary penalties for alleged violations of RSA chapter 482-A (2001 & Supp.2008) (entitled “Fill and Dredge in Wetlands”) and RSA chapter 485-A (2001 & Supp.2008) (entitled “Water Pollution and Waste Disposal”). The underlying conduct complained of occurred no later than 2002.

Peerless raised a statute of limitations defense based on the general three-year statute of limitations for personal actions at RSA 508:4 (1997) and moved to dismiss. In ruling upon the motion to dismiss, the trial court first recognized *nullum tempus*, the notion that the state is immune from RSA 508:4 as an operative doctrine in New Hampshire. It noted that neither RSA chapter 482-A nor RSA chapter 485-A specifically limits the time for bringing actions to recover civil penalties. It further reasoned that the general three-year statute of limitations upon “personal actions,” RSA 508:4, did not apply because the state’s action against Peerless was penal. Accordingly, it ruled that “the presumption that time does not run against the State applies.”

On interlocutory appeal, the Supreme Court of New Hampshire affirmed that *nullum tempus* continues to apply in New Hampshire despite limitation of the doctrine in other states, such as South Carolina, Colorado and New Jersey. Following a review of RSA 508:4, the court did not conclusively resolve whether the statute was relevant to the state’s claims, but considered this irrelevant as RSA 508:4 does not expressly waive *nullum tempus*. The Supreme Court stated, “We follow the doctrine that unless a statute of limitations expressly waives *nullum tempus* by making a limitations period specifically applicable to the State, the sovereign remains immune from general statutes of limitations.” Consequently, the state was free to pursue its claims for civil monetary penalties.

State v. Lake Winnepesaukee Resort, LLC, No. 2008-724, 2009 WL 1676885 (N.H. June 17, 2009).



FEDERAL

Bad Faith Attack on Surety's Decision to Make Payment Precluded by Indemnitors' Agreement to Pay

In *Fid. & Guar. Ins. Co. v. Star Equip. Corp.*, Appellant Star Equipment Corporation (“Star”) contracted to replace water mains in the town of Seekonk, Massachusetts (“Seekonk”). Appellee Fidelity and Guaranty Insurance Company (“Fidelity”) executed a performance bond as surety on behalf of Star for the water main work. The principals of Star executed a general agreement for indemnity promising to reimburse Fidelity for any losses. Eventually, Seekonk declared Star to be in default under the construction contract. Consequently, Fidelity filed a declaratory judgment to determine the rights under the bond, and the parties agreed to submit the case to mediation. At the close of the mediation, the parties entered into a settlement memorandum of understanding, to which Star and its principals were parties.

Following execution of the settlement memorandum of understanding, Fidelity paid Seekonk pursuant to the terms of the memorandum, but Star’s principals claimed that the settlement was contingent upon the resolution of a separate dispute they had with Fidelity, and that the payment made by Fidelity was in bad faith. Fidelity and Seekonk then filed a joint motion to enforce the settlement agreement, and the court entered a judgment in their favor. Star and its principals filed an appeal contesting, *inter alia*, the enforcement of the settlement agreement. The First Circuit upheld the lower court’s decision, finding that the settlement agreement to which the principals had assented in writing was enforceable and that the principals could not claim that Fidelity acted in bad faith by fulfilling its obligations. Thus, where an indemnitor agrees to a payment by an indemnitee, the indemnitor cannot later argue the payment to have been made in bad faith by the indemnitee.

Fidelity and Guaranty Insurance Company v. Star Equipment Corporation, 541 F.3d 1 (2008).

No-Damages-for-Delay Clause Unenforceable in Pass-Through Claim Against the Government

In *Harper/Nielson-Dillingham Builders, Inc. v. U.S.*, a general contractor entered into a prime contract to perform various work for the Air Force. The general contractor then entered into a subcontract that contained a “no damages for delay” clause. When the subcontractor was delayed in completing its work, the general contractor brought suit on behalf of its subcontractor to recover excess costs incurred due to delays by the government. The government then filed a motion for partial summary judgment on the ground that the general contractor could not pass through its subcontractor’s delay claims to the government under the *Severin* doctrine.

The *Severin* doctrine provides that a general contractor may not bring claims against the government for damages for which the general contractor would not itself be liable. Under California law, “no damages for delay” clauses are enforceable, and the subcontractor’s delay claims could not have been brought against the general contractor. Consequently, the general contractor was immunized for damages due to delay and the government properly invoked *Severin* to insulate itself from liability.

Harper/Nielson-Dillingham, Builders, Inc. v. U.S., 81 Fed. Cl. 667 (2008).

New E-Verify Requirements for Federal Contractors to Become Effective on September 8, 2009

The new E-Verify requirements set forth at FAR 52.222-54, obligating certain federal contractors to verify the immigration status of new hires and employees performing work on affected federal contracts, is set to become effective on September 8, 2009. Existing IDIQ contracts and new federal contracts meeting the description at FAR 22.1803 will begin incorporating the requirements after the effective date. The E-Verify requirements include a broad flowdown provision to subcontractors and suppliers performing under affected contracts. The new requirements, initiated by the Bush administration, had been delayed several times, due primarily to a lawsuit filed by the U.S. Chamber of Commerce in the United States District Court for the Southern District of Maryland, Case No. AW-08-3444. On August 26, 2009, Judge Alexander Williams, Jr., granted the government's motion for summary judgment, validating the authority underpinning the new requirements. Affected contractors should begin to immediately familiarize themselves with the E-Verify program, and review their standard subcontract and supplier forms to incorporate the new E-Verify requirements.

Tracking Use of Recovery Funds

Recovery.gov has recently provided two maps useful to entities interested in how funds from the American Recovery and Reinvestment Act of 2009 (ARRA) are being used, especially potential recipients. With the majority of ARRA funds yet to be spent, the following interactive maps are useful in documenting what types of contracts, loans and grants will be available as heavy spending gets underway over the next year:

1. <http://www.recovery.gov/?q=content/investments-state> - This map tracks three dollar amounts: 1) what federal agencies have announced they are giving to a particular state; 2) what the agencies currently have made available for projects; and 3) the amount the agencies have paid out to a particular state.
2. <http://www.recovery.gov/?q=content/investment-award> - This map tracks companies that have received ARRA funds, including general information about the project, the amount of money allocated for the project, and its location.



ANNOUNCEMENTS

Andy Howard delivered a presentation with **Maureen Gorsen** on federal stimulus contracting opportunities at the Santa Barbara Contractors' Association on August 25, 2009. He will also make a presentation on managing conflicting regulations in the construction industry at the ABA Construction Forum meeting in Philadelphia, Pennsylvania, on October 15 – 16, 2009.

Jeff Belkin, leader of Alston & Bird's Government Contract Practice Group, has been named by the Ethisphere Institute as one of its 2009 Attorneys Who Matter, representing the "best and brightest" in the field of corporate compliance from across the United States. The award recognizes "leading legal professionals that have excelled in and made a significant contribution to the corporate compliance space." Mr. Belkin was selected for his work in the field of government contracts, one of only five to receive the honor in this specialty. According to the institute, the following criteria were used in determining the list of winning attorneys: recognized expertise, peer/client endorsements, high-profile litigation, number of cases won, high-profile clients, public service, legal community engagement, academic involvement and other awards and recognitions. The full list of awardees may be found at <http://ethisphere.com/attorneys-who-matter/>.

Jeff Belkin will be speaking to all Phase I awardees of National Science Foundation Small Business Innovative Research Grants on September 22-23 in Crystal City, Virginia. Jeff will be speaking on negotiation strategies to the grant recipients, who are mandated by law to attend this conference, and will be accompanied by representatives of national research laboratories, research institutions, government agencies and the private sector on a wide range of topics related to the SBIR program, including business development, partnering, compliance and commercialization.



If you would like to receive future *Construction Law Reviews* electronically, please forward your contact information including e-mail address to construction.advisory@alston.com. Be sure to put “**subscribe**” in the subject line.

If you have any questions, please contact your Alston & Bird attorney or any member of the Construction and Government Contracts Group.

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