

**Deb Brenneman**

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**From:** Deb Brenneman  
**Sent:** Friday, November 14, 2008 9:38 AM  
**To:** Susan Courchesne  
**Subject:** FW: The Construction Law Bulletin November 2008

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**From:** Deb Brenneman [mailto:dbrenneman@reageradlerpc.com]  
**Sent:** Friday, November 14, 2008 9:40 AM  
**To:** Deb Brenneman  
**Subject:** The Construction Law Bulletin November 2008



## THE CONSTRUCTION LAW BULLETIN

November 2008

### *Group News*

- Tom Williams will be presenting a seminar for the National Business Institute in Harrisburg on December 10, 2008, entitled **Collection Law Tips and Strategies**. If you would like further information regarding this seminar, or if you wish to register, please contact us at [scourchesne@reageradlerpc.com](mailto:scourchesne@reageradlerpc.com)

### *Recent Developments*

#### **Boom !!! What Can A Contractor Do About the Skyrocketing Price of Steel and Asphalt ??**

**by Wayne S. Martin**

Imagine the following scenario. You are a general contractor, a few months back you were awarded a typical construction contract; nothing startling in the scope of work. A modest profit, but it will keep the workers employed during these trying economic times. When the initial invoice from the steel mill arrives, low and behold, there must be a mistake, it has too many digits. Then the phone rings, your paving subcontractor has just declared bankruptcy. To shed light on this all too frequent situation, consider the following:

- ❖ From July 07 to July 08 the producer price index for inputs to highway and street construction went up by 21%. That's four times as fast as the consumer price index.[\[1\]](#)
- ❖ Scrap index prices have increased from \$290 per ton in December of 2007 to \$555 per ton in May, 2008.[\[2\]](#)
- ❖ Asphalt prices have jumped by 40 percent in several parts of the country.[\[3\]](#)
- ❖ The cost per ton for liquid asphalt has increased 133% in the last year.[\[4\]](#)

Undoubtedly, the typical questions are racing through your mind. Is going out of business the only available option? Is there some way to modify the contract to reflect actual costs. Is there a way to get out of this contract altogether? Is the government doing anything to protect contractors from this market uncertainty? These questions will be addressed in a series of articles beginning with this one. Later articles will discuss the legal doctrines of impossibility, impracticability and frustration of purpose and the effect of contract provisions or force majeure clauses to excuse performance.

Article III, Section 26, of the Pennsylvania Constitution states, in part: "No bill shall be passed giving any extra compensation to any public officer, servant, employe, agent or contractor, after services shall have been rendered or contract made ...." It is therefore illegal and unconstitutional for the state to provide additional compensation to contractors on existing contracts due to the unanticipated increases in the price of steel and asphalt. The only solution then is to focus on future contracts.

To provide relief for steel escalation PennDOT adopted the standard special provision, "Price Adjustment for Steel Cost Fluctuations." The provision allows for a price adjustment when the ratio between the price index of steel on the date it was invoiced and the price index of steel on the date the project was let varies by more than five percent. Bidders must opt into the program at bid time.

PennDOT has also adopted an escalator clause providing for a price adjustment for fluctuations in the cost of asphalt cement. The price adjustment clause provides for both a price increase or price rebate where the ratio between the price index of the material on the placement date and the price index of the material in the proposal varies by more than ten percent. There is no opt in like the steel clause. The price adjustment provision applies automatically to projects where more than 100 tons of asphalt cement will be used. This provision also applies to counties and municipalities who receive liquid fuels tax funds since PennDOT has been given regulatory authority for the administration of the funds. Local governments can also adopt an asphalt adjustment clause for projects where the quantity is less than 100 tons. Some counties and municipalities may not be familiar with these provisions, so it is critical that contractors understand them and take advantage of them.

The Pennsylvania Procurement Code does not prohibit escalation clauses. However, the current and proposed DGS public works construction contracts do not have provisions for the escalation of any construction materials.

The next edition of the newsletter will discuss the arguments for contractors seeking to modify current contracts as a result of the market instability of construction materials.

[1] *Building Up a Crumbling Economy*, National Society of Professional Engineers, September 2008, at <http://newsmanager.commpartners.com/nspeupdt/issues/2008-09-24.html>

[2] Scott Melnick, *Suggestions on Managing Projects to Minimize the Impact of Structural Steel Price Increases*, American Institute of Steel Construction, Inc., May 2, 2008 at [www.aisc.org/template.cfm?template=/PressRelease/PressReleaseDisplay.cfm&PressReleaseID=50307](http://www.aisc.org/template.cfm?template=/PressRelease/PressReleaseDisplay.cfm&PressReleaseID=50307)

[3] *Surging Fuel, Asphalt, Steel Costs 'Clobber' Construction Budgets*, AGC Says, Construction News, The Associated General Contractors of America, July 15, 2008 at [www.agc.org/cs/news\\_media/press\\_room/press\\_release?pressrelease\\_id=198](http://www.agc.org/cs/news_media/press_room/press_release?pressrelease_id=198)

[4] Associated Pennsylvania Constructors, *Between The Lines*, August 20, 2008.

## *More Recent Developments*

### **Payment Bond Claims: Time and Tide Wait for No Man (or Woman)**

**by Wayne S. Martin**

Payment bonds are, in most instances, for the protection of subcontractors and suppliers. They are required on all public projects and when they are required on private projects may have the effect of barring any mechanics' lien claims. Payment bond claims must be filed within one (1) year after the subcontractor or supplier's cause of action accrues. A cause of action does not accrue until ninety (90) days "after the day on which such claimant performed the last of such labor or furnished the last of such materials for which he claims payments." Thus, no action can be taken on a payment bond until this 90 day waiting period has passed. The question confronting subcontractors and suppliers is this: When was the last date on which labor and materials were furnished to the project?

This question is not as easy to answer as it may seem. Is it the substantial completion date? Or is it the date of final completion? And if it's the date of final completion, how is that determined? In *Preferred Fire Protection v. Joseph Davis, Inc.*, the Pennsylvania Superior Court held that the date of "final completion" was the triggering event. However, the date the Superior Court identified as the possible date of final completion was not really the date when the subcontractor finished its work but the date on which it returned to the project to test the system prior to occupancy by a tenant. This was almost two years after *Preferred* had completed its work, and the lawsuit itself was filed almost a year after that. The Superior Court reversed the trial court (which had dismissed *Preferred's* claim as untimely) and sent the case back to the trial court for it to determine if the testing *Preferred* performed was work "essential to the terms of the contract." If it was, the lawsuit was timely; otherwise it was not.

First, what does this case mean for prime contractors and their sureties? It could mean that warranty or repair work performed by a subcontractor years after the project was completed could reinvigorate a bond claim that the prime contractor and its surety had previously ignored because it was untimely. So, what can a prime contractor do to prevent this from happening? Initially, it should examine the language of its surety bond forms to see what they say. In the *Preferred* case, the bond said that a claim must be filed within one year from the date of "final completion." Had the bond used the term "substantial completion" the outcome might have been different.

Second, what does this case mean for subcontractors and suppliers? Mainly, it means that you need to pay attention to the calendar. If you haven't been paid in

accordance with the deadlines in the contract or there are disputed change orders that are outstanding, notify both the prime contractor and the surety in writing by certified mail. If the 90 day waiting period passes and you are still owed money, notify your lawyer. However, if a subcontractor is unfortunate enough to have missed the one year deadline but fortunate enough to have been called back to perform repair or warranty work there still may be time to resurrect the bond claim.

Questions? Don't hesitate to give us a call.

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