

TADC Construction Law Newsletter
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The Texas Supreme will have the chance in the next year to decide some major construction law issues in three cases which currently have pending petitions for review. A summary of those cases is below:

First, in a case in which an owner was unsuccessful in defending claims against a pipeline contractor, the First Court of Appeals upheld relief to a contractor for damage from underground obstructions despite a site investigation clause in the parties' contract. See *MasTec N. Am., Inc. v. El Paso Field Servs., L.P.*, 317 S.W.3d 431 (Tex.App.—Houston [1st Dist.] 2010, pet. filed) (opinion on rehearing). Specifically, the site investigation clause was construed to emphasize the parties' expectations that the owner's bidding documents be relied upon, due to the emphasis upon examining those documents in a careful manner. *Id.* This case has drawn much interest in terms of amicus curiae briefing. At least one amicus objects to the contractor not being held to the strict letter of the contract based upon the public policy goal of upholding the freedom of contract.

A similar issue is raised, this time with additional implications in terms of public contracting, in *S. Elec. Serv., Inc. v. City of Houston*, 355 S.W.3d 319, 321 (Tex.App.—Houston 2011, pet. filed). In December 1999, the City of Houston solicited lump-sum contract bids for the construction of improvements at William P. Hobby

Airport. *S. Elec. Serv., Inc. v. City of Houston*, 355 S.W.3d 319, 321 (Tex.App.—Houston 2011, pet. filed). During the course of the bidding process, the City provided bidding documents that included information and calculations regarding the "prevailing wage rates" in the area that would be applicable to the construction work that it was soliciting. *Id.* at 322. The construction contract specifically required that the contractor use the prevailing wage rates provided as their minimum wage and that the contractor was not responsible for ascertaining whether the contract documents were in accordance with applicable laws, statutes, ordinances, codes, and regulations. *Id.* Additionally, the contract included a standard, boilerplate clause regarding site investigation. See *S. Elec. Serv., Inc.*, 355 S.W.3d at 322.

The prime contractor, the Morganti Group, Inc. (hereinafter "Morganti") was awarded the construction contract. Southern Electrical Services, Inc. (hereinafter "SES") entered into a subcontract to perform work on the project. *Id.* at 321. Both Morganti and SES were out of state contractors that relied on the prevailing wage information that the City provided to prepare and calculate their lump-sum bids in accordance with the terms of the contract.

Three years after the work started, the City directed use of a different prevailing wage information than had been provided when the bid was solicited from Morganti and SES. *Id.* at 322. Despite the fact the City wrote that it would reimburse the contractors and subcontractors for the variance, it later denied Morganti's claims for reimbursement on behalf of the subcontractors and itself. *Id.*

Morganti and SES filed the underlying lawsuit asserting claims of breach of contract and failure to comply with the Prompt Payment Act. *Id.* The trial court granted summary judgment in favor of the City and dismissed all of Morganti and SES's claims. *Id.* at 322-23. On appeal, the First Court of Appeals affirmed the trial court by holding that the site investigation clause imposed a duty on Morganti and SES to investigate and know the prevailing wage rates in the area despite the fact that the City provided them with prevailing wage information and required them to use it. *Id.* at 325-326.

In response to SES's Petition for Review, the Supreme Court ordered briefing on the merits. The American Subcontractor's Association has filed an amicus brief in support of the Petition for Review, taking the position that a site investigation clause should never be applied to prevailing wage rates.

A third case to watch is *Cajun Constructors, Inv. V. Velasco Drainage Dist.*, 2012 WL 3490405 (Tex.App.—Houston [14th Dist.] 2012, pet. filed). In 2005, the Velasco Drainage District hired Cajun to provide labor and material for the expansion of the Clute-Lake Jackson pump station located in Brazoria County, Texas ("the Project"). During the course of the construction, Cajun submitted the four claims to the project engineer, Baker Lockwood JV ("the engineer") related to various problems that delayed completion of the Project and increased the costs of Cajun.

Each of these claims, and Velasco's response to the claims, were reviewed and considered by the engineer and were subsequently denied by the engineer. Additionally, as a result of the

delays in the project, Velasco withheld \$206,000 from the agreed contract price as a penalty for the late completion of the Project. In October 2008, Cajun joined Velasco to pending litigation regarding the Project and asserted causes of action based on the denial of Cajun's four claims and the withheld \$206,000.

Velasco filed a traditional motion for summary judgment on the sole grounds that: (1) all of Cajun's contract claims were barred as a matter of law because Cajun failed to comply with the notice requirements set forth in Section 10.05 of the Standard General Conditions of the Construction Contract ("Section 10.05") and (2) Cajun's quantum meruit claims are barred by the existence of a contract. It was undisputed that Velasco received notice of all of the claims and had the opportunity to investigate and subsequently deny them on the merits of the claims rather than a technical deficiency in the notice. Accordingly, the issue presented on summary judgment was whether the notice received was sufficient to preserve Cajun's claims against Velasco. Applying a strict interpretation of the provisions, the trial court determined that the notice was insufficient and granted summary judgment.

Cajun's dismissed claims against Velasco were severed and the issue of attorneys' fees was presented to a jury. The jury awarded fees, and Cajun subsequently appealed to the Fourteenth Court of Appeals. On rehearing, the Fourteenth Court of Appeals withdrew its original opinion (which reversed and remanded the summary judgment), and affirmed the trial court. The appellate court determined that the notice requirements constituted conditions

precedent with which Cajun failed to comply by providing notice of its intent to appeal the rejection of its claims.

On Petition for Review, the Texas Supreme Court may be called upon to address whether Texas will be in the minority of jurisdictions which strictly enforce such notice provisions as conditions precedent to filing suit. In an issue of first impression in the construction law context, the intermediate court of appeals opinion appears to have ignored the case law from a majority of jurisdictions which do not follow such a strict construction of claims notice provisions.