

DUCT TALK

September 1, 2008 Volume 13, Issue 6

LEGISLATIVE UPDATE

The nature of the political landscape is such that it's rare for a sitting legislator to face a serious challenge. Incumbents have a much easier time raising money, have already reached out to voters and can take credit for virtually every bill they put their name on. In August, however, bucked the trend – most incumbents facing tough primaries lost their races.

Three Assembly Republicans – Assemblymen Bob Beers and John Marvel along with Assemblywoman Francis Allen all lost their respective primaries.

John Marvel was an assemblyman from Northern Nevada whose career in the legislature spanned three decades. His ailing health prevented him from waging the campaign required to overcome perennial primary challenges. He'll be replaced by former lawmaker and Washoe County Commissioner David Humke.

In Southern Nevada, Assemblyman Bob Beers – not to be confused with the Senator of the same name – saw a tough challenge from GOP insiders. He served only one term in the Assembly and some pundits credited his original election with confusion (Senator Beers was running for Governor at the time).

Francis Allen's loss came after her opponents capitalized on a series of personal problems that beset her campaign. She'll be replaced by Richard McArthur, a retired FBI agent. Assemblywoman Allen was always good to SMACNA on legislative issues, and her input will be missed.

Only Senate Majority Leader Bill Raggio bucked the trend after a waging a very tough race for his seat in Reno – narrowly defeated former Assemblywoman Sharron Angle. Raggio will be starting his last four years in the Senate after November.

There are a few races up for grabs for the November election, but we will all have to stay tuned to find out the outcome!

INSIDE THIS ISSUE

Page 2 & 3

Contracts Bulletin
All Breaches Are Not
Created equal -
Understanding
Breach and Default

Page 4

New SMOHIT Safety
Products Available
to Contractors

Smart Deal For
Contractors:
ITI's Free
Train-The-Trainer
Program

Page 5

Joint Apprenticeship
Training Center

September
Birthdays

Calendar of Events



of Southern Nevada, Inc.

www.smacnalv.com

CONTRACTS BULLETIN

A SMACNA National Publication

ALL BREACHES ARE NOT CREATED EQUAL UNDERSTANDING BREACH AND DEFAULT

No subcontractor wants to dwell on the consequences of an unfulfilled contract. However, in tough economic times, a subcontractor's performance is subject to heightened scrutiny as general contractors seek to preserve their tightening margins. Understanding the concepts of breach and default can help avoid unnecessary contractual liabilities.

In construction contracts, the distinction between a contractual "breach" and a contractual "default" is an extremely important one. In many industries, breach and default are synonymous, but the surety industry gives a special meaning to default that every bonded subcontractor should understand. Furthermore, all contracts make an important distinction between "breach" and "material breach." These terms are all important to understand because of the consequences that flow from them: (1) a breach usually entitles the non-breaching party to damages; (2) a material breach permits, but does not require, the nonbreaching party to terminate the contract and seek damages; and (3) a default is a material breach causing contract termination which may trigger the surety's performance bond.

When is a Breach Material?

To begin, it is necessary to understand the difference between a minor or technical breach of contract and a material breach of contract. A minor breach of contract is simply a violation of a provision in the contract. This includes any failure to strictly comply with the terms of the contract. For example, if a contract required a subcontractor to begin work at 8:00 AM, and the subcontractor did not begin work until 8:01 AM, that is a minor breach of contract. However, a court is not likely to award a contractor damages for such a minor breach.

Determining when a minor breach occurs is fairly simple; the hard part is determining when a breach becomes material. Whether a breach is material varies depending on the specific situation, considering such things as whether the injured party will be deprived of the benefits it reasonably expected from the contract, the extent to which the injured party can be compensated for the breach, and whether the breaching party acted in good faith. Put another way, a material breach occurs where the broken promise was so important that the contract would not have been made had lack of performance been originally known.

To return to the example above, the obvious question is, "if the subcontractor promised to begin work at 8:00 AM, but 8:01 AM is not a material breach, what time is?" Like most legal questions, the answer is, "it depends." If time was not "of the essence," meaning that the time for performance was not an essential part of the bargain, it is possible that the failure to show up – even at all that day – may not amount to a material breach. This is especially true when the no-show contractor calls with assurances that it will perform its obligations the next day.

In construction contracts, time is often regarded as one of the most contentious issues between the parties. See Contracts Bulletins #54 (The Endless Project) and #85 (Liquidated Damages' Clause for Delays – Friend or Foe).

Regardless, a delay in performance constitutes a material breach when, (1) the party causes a substantial delay in performance, (2) a contract term expressly forbids such delays, and (3) the delay causes actual damages.

A material breach is usually found where the subcontractor either is unable or unwilling to cure the nonconforming workmanship. In *U.S. ex rel. Virginia Beach Mechanical Services, Inc. v. SAMCO Const. Co.*, 39 F.Supp.2d 661, 671 (E.D. Va. 1999), a subcontractor breached its contract by failing to provide and install a roof exhaust fan, an incremental heat pump, four or five plumbing fixtures, a roof curb that met contract specifications, louvers and sheet metal ducts, and some minor plumbing work. The court found that this breach only became material when the subcontractor failed to give "adequate assurances" of performance when it failed to respond to two letters from the general contractor. The general contractor had to spend almost \$6,000 to finish the work, and the contract was only for \$10,000, but the court noted that "percentages alone" should not be relied on to determine if a breach is minor or material.

The Consequences of a Material Breach

This begs the next question, what happens when there is a material breach?

A material breach entirely discharges the injured party's obligation to perform, while a minor breach only allows the injured party to recover damages or a set-off against the breaching party. Put simply, a material breach generally permits the injured party to call the deal off and terminate the contract.

Continued on page 3

ALL BREACHES ARE NOT CREATED EQUAL UNDERSTANDING BREACH AND DEFAULT

Continued from page 2

There are exceptions to the general rule which permit termination for material breach; the most important exception for construction purposes being if a contract's obligations are "divisible" or "severable." Under this exception, if the contract can be divided into separate parts, the non-breaching party must still perform its duties associated with the other parts of the contract so long as the breaching party has also performed its duties as to that other divisible portion of the contract.

For example, if a general contractor hires a subcontractor for two distinct projects, but both projects are put into one contract, it is possible that the subcontractor's material breach with regard to one project may not justify terminating the subcontractor with regard to the second project so long as the subcontractor is performing its obligations with regard to the second project.

The determination of whether a contract is divisible essentially turns on whether the parties reached their agreement with the understanding that the general contractor was exchanging all of its promises for all of the subcontractor's promises, or whether the general contractor exchanged one (or more) of its contractual promises for a specific promise from the subcontractor.

In other words, if you were to delete a promise or set of promises from the contract, would the parties have still made the bargain? In the separate project example, it is possible that the general contractor would have still contracted with the subcontractor for one project if the subcontractor was unable or unwilling to take on the second. However, if the general contractor was specifically looking for one subcontractor to do two projects, then the contract is probably not divisible and a material breach related to one contract may justify termination of the subcontractor for both projects.

In any event, there is an arguable presumption that when parties enter into a contract, each and every term and condition is in consideration of all the others. That is, the contract is presumed to not be "divisible" and can be wholly terminated if there is a material breach.

Material Breach vs. Default

You may think that a "breach" and a "default" are the same thing; and it is true that the terms "breach" and "default" are sometimes used interchangeably. However, the terms have very different meanings when it comes to construction surety contracts. See Generally Contracts Bulletins #32 (Bonding on Federal Projects – The Miller Act Provisions) and #46 (The Missing Bond).

There are usually three parties to construction surety contracts - a general contractor, a subcontractor, and a surety who guarantees the subcontractor's performance. The term "breach" refers to any violation of the contract between the general contractor and subcontractor, while a "default" is an event that triggers the surety's obligations under the contract. To constitute a default, generally there must be a (1) material breach or series of material breaches, (2) of such magnitude that the general contractor is justified in terminating the contract.

While there are no hard and fast rules that clarify the "magnitude" requirement, the amount of the general contractor's damages may be a good guidepost. If the subcontractor's breach is costing the general contractor thousands or (depending on the size of the contract) even perhaps several hundred thousand dollars, then it is probably justified in terminating the contract.

Almost all surety ship contracts also require the general contractor to give notice to the surety of the subcontractor's default. This is sometimes called a "declaration of default." Given the magnitude of the surety's obligations (e.g. taking over all of the subcontractor's obligations), and the surety's inability to interfere with the subcontractor's performance prior to a default, courts generally require that the declaration of default be made in terms that are clear, direct, and unequivocal; simply writing to the surety stating that the subcontractor's work has been delayed or is otherwise deficient will not suffice. Using an explicit statement like, "I am declaring XYZ Corp. in default under the terms of the performance bond," is advisable.

Once there has been a rightful declaration of default, the surety has the option of stepping into the shoes of the subcontractor and finishing the work itself, or simply paying the general contractor's damages. It is important to note that, unless the bond provides otherwise, it is the surety that gets to make the decision. Indeed, a general contractor's actions that deprive the surety of its ability to protect itself, usually by not allowing the surety to participate in the selection of the replacement subcontractor, voids the performance bond altogether. Some courts, instead of voiding the bond, only reduce the surety's liability to the extent the surety was unable to minimize its expenses through selecting a replacement contractor. Once again, the lesson here is to communicate fully and be reasonable.

Conclusion

The distinctions between breach, material breach, and default in construction contracts are important, and every general contractor and subcontractor should understand them. Minor breaches will happen, but material breaches will normally only occur where a minor breach is neglected or there is a communication breakdown. It is only after a material breach and contract termination following default that triggers the surety's performance bond. Understanding whether a material breach or a default has occurred means the difference between a mere business "problem" and a catastrophe.

(It is important to keep in mind that this Contracts Bulletin is only a general overview of the law in this area (east coast). Because laws in individual states may vary, it is recommended that you seek legal advice.)

NEW SMOHIT SAFETY PRODUCTS AVAILABLE TO CONTRACTORS



New Sheet Metal Occupational Health Institute Trust (SMOHIT) products are now available to SMACNA members. They include the OSHA 30-Hour Course, Respirator Safety, and Hoisting and Rigging.

- The OSHA 30-Hour Course DVD provides training on industry-specific topics needed on job sites. This program is particularly useful because more facilities and job sites are requiring specific OSHA training in order to work on the site.
- The Respirator Safety Program CD provides four hours of information on the types, selection, inspection, testing and care of respirators.
- The Hoisting and Rigging Training Program (CD and Instructor's Guide) addresses safety issues related to load calculation, risk management, and types of equipment.

Through a cooperative agreement, many safety and health training aids developed by SMOHIT are available to members through SMACNA including a Safety Orientation DVD for Workers, a Safety Orientation II DVD for New Safety Managers, and Safety Sense Toolbox Talks (hard copy and CD).

Check your mail for a "hard copy" brochure providing more information on both SMACNA and SMOHIT safety and health products in a future SMACNA mailing. To order any of these SMACNA and SMOHIT safety and health products, contact Mike McCullion, director of safety and health, at (703) 995-4027 or mmccullion@smacna.org.

SMART DEAL FOR CONTRACTORS: IT'S FREE TRAIN-THE-TRAINER PROGRAM

Interested in getting in-house trainers for your business at no cost? Contractors can send one or two of their sheet metal workers to the Train-the Trainer Program, developed by the International Training Institute (ITI). Through this free program, ITI will take your sheet metal workers and teach them to become expert trainers on subjects in the sheet metal industry. The concept is to bring one or two qualified sheet metal workers from many companies to a class, train them to deliver in-house training, and send them back home to instruct others.

Mike Miller from the ITI is the lead instructor for the first program Dec. 9-10 in Las Vegas, Nev. Day one will present information on basic teaching skills and techniques for class preparation and delivery. Day two will cover the various curricula, materials and resources available from the ITI. Participants will learn how to use the instructor guide resources and assets for a particular topic.

Upon completion, participants will receive certificates for completion of the ITI On-Site Training Course. The participant's local JATC coordinator will be notified by the ITI that the participant has successfully completed the program and is eligible to perform in-house or off-site training for his contractor. Books and other resource material must be monitored and ordered by the JATC coordinator. JATC coordinators must also verify that all students are SMWIA members.

If interested, please contact Kelly at the SMACNA office - 384-1894.



JOINT APPRENTICESHIP TRAINING CENTER

The Sheet Metal Local #88 Training Center July 1st began daytime classes. First Year Apprentices will attend classes from 7:00 a.m. – 3:30 p.m., one day a week, every other week. These classes are held Monday – Thursday, with all apprentices working Fridays, this makes them available for notification of weekend work. The remainder of the apprentices and journeyman will continue to attend classes 4:30 p.m. – 8:30 p.m. Next year 1st and 2nd Year Apprentices will attend day classes and 3rd, 4th, 5th, and Journeyman will continue to be scheduled in the evening.

The Apprenticeship has continued to grow over the years and in order to continue to move forward, this change was necessary. There are a large number of benefits that will come with this change. The Training Center will be better utilized, because it will hold classes during the day and evening. The Apprentices' will be more likely to concentrate on their training by attending day classes. Currently Local #88 has 264 apprentices, with very few not currently working. When there is a chance, if laid off, that an apprentice may not immediately be dispatched, work ethic seems to improve. 1st Year Apprentices would also be available to work swing or grave shift, if needed. Local #88 Instructors are 2nd to none, and all are to be commended on the job they do, but they all have their "day time jobs" which takes their full concentration. A benefit of a full time Instructor, is this is their "day time job". Craig Von Collenberg was hired as the full time Instructor. Craig was teaching the Core Curriculum and Math, in the evening to 1st Year Apprentices. With his experience, knowledge, and familiarity with the teaching equipment, he was able to hit the ground running and done an excellent job. The Apprentices as they go through the program will continue to be exposed to a number of Specialty Instructors that are experts in their field of instruction.

The J.A.T.C. held lengthy discussions prior to making this change. It was decided that the Apprentices' wages would not be compensated for attending either day or evening classes. A new policy was also adopted by the J.A.T.C. which would allow an apprentice to obtain their AAS degree through CSN at no cost to the Apprentice. This will not only benefit the trade, but recruitment as well.

This change, as with most changes, will take sometime to become accepted, but change is inevitable if we are to continue to improve and grow. The Sheet Metal Local #88 Training Center continues to be one of the top training centers in the country. Thanks to the vision of the J.A.T.C., members of Local #88, the signatory contractors, and the staff and remember "Together We Do It Better."

Dan Rose, Training Director Local #88

NO BIRTHDAYS IN SEPTEMBER



SMACNA Duct Talk

Duct Talk is issued twelve times a year. If you have an idea for an article, please call the SMACNA of Southern Nevada office at (702) 384-1894. We want to hear from you! Deadline for submitting articles is the 25th of each month.

Executive Committee

President - **Angelo Iannucci**
Vice President - **Steve Kimmel**
Secretary/ Treasurer - **Frank Vuckovic**

SMACNA Staff

Chapter Executive - **Ken Schultz**
Asst. Chapter Executive - **Kelly Kealey**

1550 Western Ave.
Las Vegas, NV 89102
Phone: (702) 384-1894 Fax: (702) 384-2631

CALENDAR OF EVENTS

Monday - September 1, 2008
Labor Day
(Recognized Union Holiday)



Weds. - September 17, 2008
Board or Directors Meeting
11:30am
SMACNA Board Room



October 19-23, 2008
SMACNA's 65th Annual Convention
Maui, Hawaii

