



# Construction Law Developments

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**James G. McConnell  
Attorney at Law**

**Industry Specific, Experienced, Superior Quality Service**

Website: <http://james-g-mcconnell.com/>

Blog: <http://chicagoconstructionlaw.blogspot.com/>

312-287-1343

## Arizona License Is Enough

Concrete Management Corporation a Colorado concrete subcontractor, licensed in Arizona, entered into a subcontract with Double AA Builders of California, for \$1.2 million of concrete work in the construction of a Home Depot store in Poway, California. CMC and Double AA signed the subcontract in Scottsdale, Arizona. The contract included a clause providing that Arizona law would govern interpretation of the contract.

CMC completed the Home Depot concrete work, and billed Double AA, which paid all but \$107,791.06 of CMC's invoices. When Double AA refused to pay the remaining balance, CMC sued Double AA for payment, in federal court in Arizona. Double AA claimed it had been damaged by CMC's failure to work in accordance with the project schedule, that CMC failed to properly pitch the floors, allowing water to enter the building, and that Double AA had to hire another concrete contractor to fix CMC's defective work.

Double AA filed a counterclaim seeking \$122,733.00, plus interest and attorney fees, from CMC. Double AA also filed a motion for summary judgment against CMC's claim for the balance due on the contract, contending that, since CMC performed the work in California, and California law prohibits contractors not licensed in that state from suing to collect payment for their work, CMC should recover nothing at all from Double AA.

The federal judge in Arizona recognized that California has an interest in requiring that all contractors performing work in the state be licensed, for the protection of the general public from shoddy construction. The judge also acknowledged that California laws enforce the licensing requirement by prohibiting unlicensed contractors from suing to collect the payment promised for their work.



However, the judge reasoned that there was nothing in California law which indicated that being licensed in Arizona, as CMC was during the Home Depot project, would provide insufficient protection to the citizens of California against improper construction by CMC. Since Double AA and CMC had agreed in their subcontract to abide by Arizona law, the judge ruled, CMC's license in Arizona would be enough to permit CMC's to proceed against Double AA on its claim for the balance of the contract price.

This ruling by the federal judge in Arizona leaves CMC and Double AA to fight it out at trial over the competing claim for delay damages and remedial work as an offset to CMC's claim for payment.

*Concrete Management Corp. v. Double AA Builders*, 2009 WL 32742 (D. Arizona Jan. 6, 2009).



## Two Stage Bid Analysis Survives Court Challenge

In May, 2008 the Army Corps of Engineers issued a solicitation for bids on five so called "indefinite delivery indefinite quantity" construction contracts under its "multiple award task order contract" procedure, for miscellaneous construction projects in Baghdad, Iraq. Al Andalus General Contracts Company, one of the unsuccessful bidders, challenged the procedure used by the Corps for awarding the contracts, complaining that the Al Andalus price was not included in the price reasonableness calculations used in evaluating the proposals.

The Corps received twenty seven proposals in response to the bid solicitation. Three late proposals were immediately eliminated from consideration. Seven others were excluded from final review because of their failure to comply with the terms of the solicitation. The seventeen remaining proposals, including the Al Andalus bid, were evaluated under a two step procedure, and ultimately five of the proposers, not including Al Andalus, were awarded contracts.

Al Andalus filed a post award bid protest, and when its protest was denied, appealed to the Federal Court of Claims. Al Andalus argued that the Corps of Engineers use of a two step bid review procedure, under which the complete group of proposals was evaluated for past performance, construction experience, and technical capability, and only those rated "Good" or better were included in the final price comparison process. Since Al Andalus received ratings of "Acceptable" or lower on the non-price evaluation factors, its bid was not included in the price comparison phase of bid evaluation.

Al Andalus argued that Corps of Engineers regulations required the prices of all proposers to be included in the price evaluation phase of the award process. The Court of Claims concluded that it was rational for the evaluator to limit her price evaluation to only those eight proposers who satisfied the non-price factor rating of "Good" or better, as advertised in the bid solicitation, and granted the motion of the government for judgment upholding the process described in the administrative record.

*Al Andalus General Contracts Co. v. United States*, 2009 WL 661331 (Fed. Cl. 2009).



## Owner Provided Insurance Limits Claims By Injured Workers

In a decision complicated by numerous concurring and dissenting opinions, the Supreme Court of Texas has given extraordinary protections to property owners in that state who include owner provided insurance programs for construction of their projects. Like many other states, Texas has workers compensation laws which require construction contractors to provide workers compensation insurance for the protection of tradespeople and laborers working for subcontractors, unless the subcontractor provides workers compensation insurance for its own work force.

Under the terms of these laws, when the general contractor purchases workers compensation insurance covering the employees of subcontractors, both the subcontractor and the general contractor are protected from injury lawsuits by the employees of the subcontractor when the

employee has received benefits under the workers compensation law.

Entergy Gulf States contracted with International Maintenance Corporation for performance of maintenance and repair work at various electricity distribution facilities Entergy owns. In return for a reduced contract price for the work, Entergy agreed to set up and pay for an Owner Provided Insurance Program which included, among other coverages, workers compensation insurance covering the IMC employees working at Entergy's facilities.

John Summers, an IMC employee, was injured while working under this contract at Entergy's Sabine Station. Summers applied for, and was paid, benefits under the workers compensation insurance which was part of the OPIP Entergy paid for. Summers then sued Entergy for negligence causing his injuries. Entergy moved for summary judgment against Summers, based on Entergy's provision of the workers compensation insurance under the OPIP and the Texas workers compensation statute.

The trial court granted summary judgment dismissing Summers' negligence claim, and the Texas Court of Appeals reversed, ruling that Entergy was not a "general contractor" providing workers compensation insurance for its subcontractors' employees. The Texas Supreme Court overturned the Court of Appeals and reinstated the order dismissing Summers' negligence claims against Entergy.

The Texas Supreme Court was convinced that the purpose of the provision in the workers compensation law protecting general contractors who pay for workers comp insurance on subcontractor employees was to provide an incentive for carrying such coverage, and that the same reasoning applies to an owner on a construction project who buys workers comp insurance covering all workers on the

project. Accordingly, the court ruled that owners purchasing OPIP insurance on their projects are immune from injury claims by workers who collect comp benefits for their injuries on those projects.

If other states follow the lead of Texas on this issue, there will be even more reasons for project owners to purchase, and require participation in, OPIP policies on all their major construction jobs.

*Entergy Gulf States v. Summers*, 2009 WL 884906 (Texas April 3, 2009).



### **Reliance Is The Key To Damages For Botched Bridge Estimate**

The City of Omaha paid Figg Bridge Engineers over \$3.7 million to design a pedestrian bridge over the Missouri River. Figg designed three variations of a pedestrian bridge and gave the City construction cost estimates ranging from \$16.8 million to \$17.7 million, depending on which variation the City put out to bid.

When the City put the project out to bid, however, there were two bids of \$44.9 million and \$50.3 million for construction of the bridge. The City's budget for the project, including Figg's design fee, was \$22.6 million, and the Figg design was scrapped, in favor of a less expensive redesign by another engineering firm. The City of Omaha sued Figg to recover the \$3.7 million in fees it had paid for Figg's design, contending that Figg

negligently estimated the cost of building its proposed design.

The city sought summary judgment against Figg, arguing that the 200% discrepancy between Figg's construction cost estimate and the bids received on the project proved Figg was negligent in preparing its estimated construction cost. The federal district judge hearing the case agreed with the City that Figg's cost estimate was negligent as a matter of law, yet refused to grant the city's motion for summary judgment and order Figg to return its entire professional design fee.

The judge reasoned that, while Figg's cost estimate was so clearly negligent, the City could not show the negligent estimate had caused any damages to the City unless the City could prove it had relied on the Figg construction cost estimate in some way which caused financial harm. Distinguishing the Figg contract for professional design services from other situations in which underestimating building costs enabled governments to recover design fees, the judge pointed out that the Figg contract did not contain any reference whatsoever to an amount of money limiting the construction cost of the design Figg was to prepare.

In the absence of a contract provision requiring Figg's design to reasonably meet a stated budget amount, the court ruled, it would be up to the City to prove in a trial how it lost money as a result of the botched estimate.

*City of Omaha v. Figg Bridge Engineers*, 2009 WL 187692 (D. Nebraska January 23, 2009).



### **Search The Title, Then Record The Lien**

Enforcing lien claims when you don't get paid in full on a project is a tricky endeavor, not to be attempted by the faint of heart. The slightest slip can cause loss of valuable rights.

McNair Builders contracted with 1629 16th Street LLC to build a five unit apartment building, with parking, in Washington, D.C. McNair went to work on the project, and finished in January, 2006. The owner refused to pay the final balance due on the construction contract, and McNair filed a notice of mechanics lien with the Recorder of Deeds, naming 1629 16th Street LLC as owner of the property, and describing it as Lots 0152, 2075 and 2077 in Square 0193.

However, in April, 2005, before the lien notice was recorded, 1620 16th Street LLC had recorded a condominium declaration on the project, and sold all but one of the units to outside purchasers. None of these outside purchasers was named in McNair's lien notice.

McNair brought suit in D.C. Superior Court, seeking to foreclose its lien and collect the balance due on the construction contract. The D. C. Superior Court judge dismissed McNair's lien claim, ruling that the lien notice was defective, because it named the wrong owner and did not include a proper legal description of the property against which the lien was recorded.

McNair appealed to the District of Columbia Court of Appeals, which affirmed dismissal of the lien claims. The Court of Appeals correctly observed that a proper title search made at the time the lien was filed would have disclosed the changes in ownership and legal description, and McNair could easily have included the correct information in its lien notice.

Although McNair continued to pursue its contract claim in court, the ruling dismissing its lien claim permitted the owner to sell the remaining unit for \$2.3 million and "take the money and run," forcing McNair to chase the owner later on if it recovered on its contract lawsuit, rather than showing up at the closing with a valid lien, and it's hand out waiting for a check in payment, in return for a lien release.

**Moral:** If you want to effectively use the collection leverage afforded by mechanics lien laws, get the assistance of experienced legal counsel before the lien documents are prepared and filed.

*McNair Builders v. 1629 16th Street LLC*, 2009 WL 855894 (App.D.C. April 2, 2009).



## Being In Jail Is No Excuse

Steven Gebhart owned and operated Abbottstown Pole Building, a pole barn construction company in Pennsylvania. He entered into contracts with a number of Pennsylvania residents to put up pole barns on their properties. As a result of unrelated activities, Gebhart was arrested and jailed from June 22, 2004 through July 30, 2005.

For a period of time during his early incarceration, Gebhart continued to be in contact with Abbottstown Pole employees, who performed some work on some of the projects under contract. Abbottstown's customers, however, became impatient with the pace of progress on their jobs, and began demanding their money back from Abbottstown.

When Gebhart neither arranged for completion of the work, nor returned customer deposits, a number of Abbottstown's customers preferred criminal charges of theft by deception against him. Upon his release from jail, Gebhart filed a lawsuit against two police officers, seeking money damages for their actions in swearing out arrest warrants against him for theft by deception. Gebhart argued that his failure to complete the projects of Abbottstown or return the deposits was a result of his being jail, that breach of contract is a civil matter, and that the police officers should not have had him arrested for theft by deception.

The United States District Court for the Middle District of Pennsylvania disagreed, and dismissed Gebhart's lawsuits for false arrest and malicious prosecution against the police officers. The court reasoned that Gebhart could have arranged for return of the deposit money to Abbottstown's customers, even if his incarceration prevented completion of the projects. While the judge's decision may have been influenced in part by Gebhart's earlier convictions on theft by deception charges brought by other customers, the moral of this lawsuit is that being in jail is no excuse for taking care of business.

*Gebhart v. Vaughn*, 2009 WL 25246 (M.D.Pa. January 5, 2009).

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Website: <http://james-g-mcconnell.com/>

Blog: <http://chicagoconstructionlaw.blogspot.com/>

Mr. McConnell has over 35 years of experience working with clients in the construction industry, both on the jobsite and in the courtroom. He has tried many civil jury cases in state and federal courts in Illinois, and he has been specially admitted as trial counsel in courts in seven other jurisdictions. He has handled numerous appeals, in the Illinois Appellate Court, the Illinois Supreme Court, United States Court of Appeals for the Seventh Circuit, and the United States Supreme Court.

During his career as a trial lawyer, Mr. McConnell has represented clients in hundreds of cases involving complex construction claims, and other international commercial, financial and insurance issues, including the British Overseas Trade Board, J. C. Decaux, the Consul General of Mexico, the Public Building Commission of Chicago, Blue Cross/Blue Shield, Exelon Corporation, Bethlehem Steel, American Bridge Company, United States Steel, Youngstown Sheet & Tube, and Zenith Radio. He has handled litigation concerning such familiar construction projects as Chicago's Millennium Park, the John Hancock building, and the Sears Tower. He has served as an attorney and as an arbitrator in international construction and insurance claims.

Mr. McConnell is a national and international author and lecturer on public, private and international construction contracting. Most recently, he has been involved in construction negotiations and disputes concerning Millennium Park's mixed public and private funded construction, Kennedy King Community College, Blue Cross Blue Shield's Vertical Completion, homeland security improvements at the Port of Chicago, the Mexican Consulate in Chicago, the Illinois International Port District, Chicago's Central Police Headquarters, Harborside International Golf Center, Soldier Field, the Midwest Center for Green Technology, the Chicago Center for Children's Advocacy, Bronzeville Military Academy, and Chicago's Deep Tunnel storm runoff and flood control project.



**James G. McConnell**

He has also handled litigation involving redevelopment of the former Glenview Naval Air Station property, the South Campus development of the University of Illinois at Chicago Circle, and the historic landmark Carson, Pirie, Scott & Company flagship store at State and Madison streets in Chicago.

Mr. McConnell welcomes your E-mail or call setting up an initial free consultation to determine whether he can effectively help you with your problem, dispute or situation.

312-287-1343

[james.mcconnell@james-g-mcconnell.com](mailto:james.mcconnell@james-g-mcconnell.com)

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