

# CONSTRUCTION NOTES

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STEVEN B. LESSER, CHAIR

## Recent Developments in Construction Law



## HOW DOES A CONTRACTOR PREQUALIFY FOR FLORIDA PUBLIC SCHOOL CONSTRUCTION?



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“Times are tough” is a phrase that is often heard nowadays. The construction industry is no exception. Contractors looking for work, and particularly those that perform public school construction in Florida, are thankful for the recent economic stimulus package. As significant funds are being made available for public school construction, students, teachers, communities, and contractors alike, hope to benefit from the foregoing.

One important step that a contractor must accomplish before working on public school construction in Florida is to become

“prequalified.” See, e.g. Florida Statute Sec. 1013.46. What is the purpose of prequalification, what does it mean, and how does it work, are matters that are addressed in this article.

A contractor seeking to bid on public school construction must comply with the Florida’s prequalification conditions. See, e.g. Section 4.1(8) of Florida’s “State Requirements for Educational Facilities.” <http://www.fldoe.org/edfacil/pdf/sref-rule.pdf>

The Florida legislature established these requirements so that school boards would be able to choose from qualified contractors to construct school board projects. The intent behind these requirements is to avoid problems during construction projects by ensuring that the contractors working on

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Becker & Poliakoff, P.A. is a diverse commercial law firm with more than one hundred and thirty attorneys practicing in offices throughout Florida, and in New York, New Jersey, Prague, Nassau, Bahamas, and affiliated offices in France and Israel. The Firm’s Construction Law Practice Group includes several attorneys throughout Florida who dedicate their practice exclusively to Construction Law, eleven of whom are Board Certified by the Florida Supreme Court in the area of construction law.

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## HOW DOES A CONTRACTOR PREQUALIFY FOR FLORIDA PUBLIC SCHOOL CONSTRUCTION? *continued*

those projects meet certain standards. In the past, contractors could just go ahead and submit bids on school board projects. The school board, in turn, was placed in the potentially untenable position of having to accept the lowest contractor's bid, even if, for example, the school board had previously defaulted that contractor on another project or had other legitimate concerns about a contractor's ability to perform the work.

Now, however, there is a prequalification process that is administered by each school district. Contractors are required to prequalify for either a one year term or for a specific project. As part of the prequalification process, the school board analyzes various criteria, including but not limited to, the contractor's license for the work, the financial capability of the contractor to complete the project and pay damages if defaulted, the (payment and performance) bonding capacity of the contractor, the contractor's experience, which would include at least two projects of similar size within the past five years; and the contractor's history of satisfactory claims resolution.

Furthermore, the contractor is required to submit to the school district a detailed, sworn application, which would include information such as a public entity crime statement and references, current financial information on the contractor, information about the contractor's principals, information about the contractor's license, information about projects completed within the past five years; certificates of insurance, and a description and explanation of all pending litigation, as well as all litigation within the past five years.

Once the contractor meets these requirements, the school district will typically issue a certificate valid for either one year or for the duration of the project. Although the project certificate will not be renewed annually, all other certificates can

be renewed on an annual basis. As part of this renewal process, the contractor should, of course, provide updated financial statements and bonding capacity information. Failure to do so within 30 days of a school district's request will result in a revocation of the contractor's certificate.

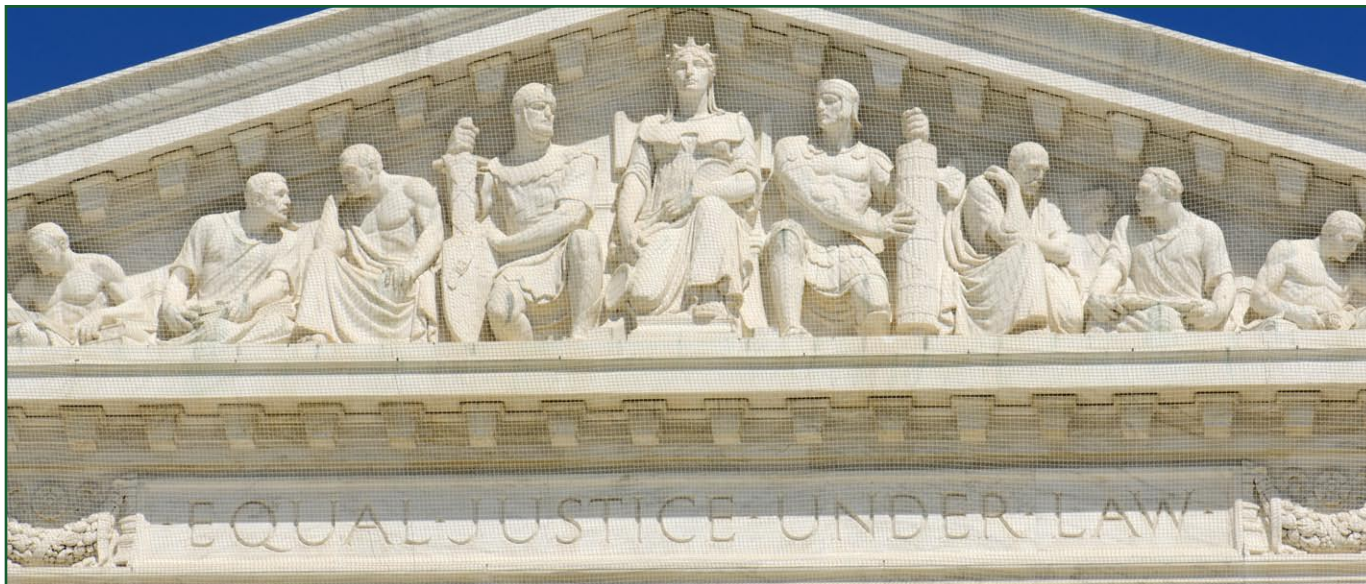
A contractor's prequalification status can also be revoked or suspended by a school district if the contractor is found to have provided inaccurate or misleading statements in its application, the contractor is declared in default, the contractor becomes bankrupt, the contractor's performance is unsatisfactory, the contractor fails to timely make payments to its subcontractors, or the contractor's license is suspended or revoked.

This process is not one-sided; the contractor has rights too. If a contractor is denied prequalification, it has the right to appeal such a decision. But, the contractor must be careful to comply with all procedural and timing requirements of the specific school district and other appellate requirements. Failure to do so may result in a waiver of a contractor's appellate rights. And, of course, the contractor must meet its burden to show the existence of error to warrant a reversal of the school district's denial of prequalification. See, *Enterprise Bldg. Corp. v. School Board of Pinellas County*, 445 So. 2d 686 (Fla. 2nd DCA 1984) (affirming denial of contractor's application for prequalification and observing that any failure of the school board to follow Florida's Administrative Procedure Act was harmless where contractor did not show it would not have otherwise been disqualified).

Consequently, contractors should be careful to comply with all requirements of the prequalification process so as to increase their likelihood of obtaining public school construction projects. ■

# CASES OF NOTE

*Important legal decisions that impact owners and construction professionals*



## ***Florida's Supreme Court employs the "significant issues" test in determining who is the prevailing party in a construction lien foreclosure case***

Florida's construction lien law contains a provision that the party prevailing in a construction lien action will be entitled to attorneys' fees. Fla. Stat. § 713.29 As Florida's Supreme Court ruled earlier this year in *Trytek v. Gale Industries*, 3 So. 2d 1194 (Fla. 2009) the court should determine who prevailed on the "significant issues," irrespective of the lienor having obtained a judgment on the lien. In *Trytek*, the issue to be resolved was the amount of the homeowner's setoff for damaged work. Even though the contractor ultimately got a judgment, the homeowner got almost the entire amount of its setoff and was deemed to be the prevailing party entitled to an award of attorneys' fees. So, although a lienor may recover a judgment in a lien foreclosure action,

it does not necessarily mean that the lienor will automatically be entitled to recover attorneys' fees under the "significant issues" test. Under *Trytek* the court may determine that neither party is the prevailing party for purposes of awarding attorneys' fees.

## ***Homeowners' failure to comply with Florida's construction defect statute did not bar homeowners from deducting costs of repairs from monies owed contractor***

In *Hebden v. Roy A. Kunnemann Const, Co.*, 3 So. 2d 417 (Fla. 4th DCA 2009), a homebuilder sued certain homeowners to foreclose on a construction lien. The homeowners, who withheld the last payment to the homebuilder, filed a counterclaim for construction defects. During the course of the dispute, the homeowners gave the homebuilder written notice of construction defects pursuant

## CASES OF NOTE, *continued*

to Florida Statute § 558.04. Nevertheless, they denied the homebuilder access to the property to make certain repairs. Observing that the homebuilder did not move to abate the lawsuit or to require the homeowners to provide a written rejection of its offer, the court found that the homeowners failure to allow access to the property constituted a rejection of the homebuilders offer to repair. Any failure to strictly comply with Chapter 558, Florida statutes did not bar the homeowners' claim for a setoff as to repairs made on the work.

### ***Sub-subcontractor's assignment of any claims against subcontractor to general contractor by execution of a partial waiver and release of lien through a date certain bars sub-subcontractor's damage claims against subcontractor through that date***

A general contractor hired a subcontractor, who in turn hired a sub-subcontractor, to perform certain work on a construction project. During the project, the sub-subcontractor executed a partial waiver and release of lien through a date certain, which also contained language assigning to the general contractor the sub-subcontractor's claim against the subcontractor for damages. The subcontractor ultimately sued and recovered damages against the subcontractor (and others). On appeal, however, the court found that the sub-subcontractor's assignment of its claims through a date certain to the general contractor prevented the sub-subcontractor from pursuing such claims against the subcontractor. *Spectrum Interiors Inc. v. Exterior Walls Inc.*, 2 So. 3d

1093 (Fla. 5th DCA 2009). The case was remanded to the trial court for a new trial on those damages incurred after the date that the sub-subcontractor provided the subject partial waiver and release of lien.

### ***Court finds mechanic's lien not fraudulent, despite including non-lienable items such as overhead and profit***

A contractor sued a homeowner to foreclose on a construction lien, which improperly included items such as overhead and profit. The homeowner claimed the lien was fraudulent, relying upon Fla. Stat. § 713.31(2)(a) (2007), which defined a fraudulent lien as one where "the lienor has willfully exaggerated the amount for which such lien is claimed or in which the lienor has willfully included a claim for work not performed upon or materials not furnished...." The homeowner didn't testify at trial. The court found that the homeowner had breached the parties' contract. In rejecting the homeowner's fraudulent lien claim and affirming the trial court's ruling, the appellate court observed that the parties had a valid contract, the contractor had furnished materials over a period of years to build the subject home, the contractor had spent more than the amount of the lien and there was a legitimate dispute over certain items. Moreover, in distinguishing other fraudulent lien cases, the appellate court observed that the trial court found the contractor's testimony credible and found that the evidence did not show the existence of fraud. *Politano v. GPA Const. Group*, 9 So. 3d 15 (Fla. 3rd DCA 2008) ■

***Cases of Note was prepared by Kenn Goff, Esq., Board Certified in Construction Law. Please contact [kgoff@becker-poliakoff.com](mailto:kgoff@becker-poliakoff.com).***

# NEWS & NOTES

## BECKER & POLIAKOFF ATTORNEYS RECEIVED SEVERAL HONORS:

**Perry Adair, Esq., Kenn Goff, Esq., and Aaron Pruss, Esq.** have been granted board certification in construction law by the Florida Bar. The firm now has eleven (11) Florida Bar board certified construction lawyers.

**Steven Lesser, Esq., Lee Weintraub, Esq., and Herbert Brock, Esq.** received Florida “Super Lawyer” ranking, which is awarded to only 5 % of the attorneys in Florida.

**Steven Lesser, Esq., and Lee Weintraub, Esq.,** were chosen by their peers to be members of *Florida Trend's* Legal Elite for 2009 in the field of construction law; an honor given to less than 2% of practicing Florida Bar members.

**Steven Lesser Esq.** has received the prestigious Tier 1 ranking in the 2009 edition of *Chambers USA: America's Leading Lawyers for Business*, in construction law. **Lee Weintraub, Esq.,** and the firm's Construction Law practice also received a Tier 2 ranking in the 2009 edition of *Chambers USA: America's Leading Lawyers for Business*.

## IN ADDITION:

**Perry Adair, Esq. and Belinda Bacon, Esq.** successfully represented a condominium association and defeated a supplier's attempt to foreclose its claim of lien for almost \$650,000.00. After 6 days of trial in Volusia County, Florida, these attorneys convinced the court that the doors provided by the supplier for the condominium did not meet the project specifications, which required hurricane impact resistant sliding glass doors. Not only was the supplier's claim of lien discharged and cancelled of record; the court also ruled that the condominium association is entitled to recover its attorneys' fees and costs.

The Firm's Hurricane Recovery Team including **Herb Brock, Sanjay Kurian, and Bill Strop** presented webinars: “What Your Insurance Carrier Doesn't Want You to Know: Preparing and Presenting an Insurance Claim for Maximum Recovery”; “Don't Let This Happen to You: Avoiding Pitfalls in Construction Contracts”; “Hurricane Season 2009: Are You Ready to Weather the Storm?”

**William Cea, Esq.** authored, “Procurement, Avoiding Common Bidding Mistakes,” and **William Strop, Esq.** authored, “Tips for working with your Surety,” which were published in *El Proyecto* (magazine of the Latin Builders Association).

**Neil Levinson, Esq.** spoke at a Community Association Management Professionals meeting on the topics of construction contracts, insurance and lien law.

**Sanjay Kurian, Esq.** was a panel speaker at the Suncoast chapter of the Community Association Institute on the topic of legal issues in concrete restoration projects. Mr. Kurian also spoke at the Collier County Community Association's Officers Forum on the issue of construction-related casualty damage.

**Belinda Bacon, Esq.** presented a seminar to the Miami Chapter of the American Institute of Architects about Three Building Envelope Construction Methods for Increased Windstorm Resistance.

**Steve Lesser, Esq. and Michelle Ammendola, Esq.** co-authored, “How Owners can avoid Litigation on Construction Projects,” which was published by the American Bar Association.

**Kenn Goff, Esq.** authored an article on products-completed operations coverage, which was published in the firm's Community Update newsletter.

**Steve Lesser, Esq.** has been elected to the prestigious *Governing Committee of ABA Forum on the Construction Industry*, which is the largest organization of construction lawyers in the United States and abroad. In addition, Mr. Lesser has been appointed to the *Florida Bar Construction Law Certification Committee*, which approves standards for board certification. ■

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Becker & Poliakoff's Construction Law Practice Group is well-known for its knowledge of the construction industry and its experience protecting the interests of its clients. Our construction attorneys represent clients in both transactions and disputes ranging from single and multi family dwellings to large commercial buildings, planned unit developments, retail, industrial and governmental projects.

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\* Available for consultation by appointment.