

Tampa Construction Contracts Must Address Labor Shortages

By **Gary Schaaf** (October 29, 2018, 12:12 PM EDT)

If you're a fan of real estate development, now is a great time to be living, working and playing in Tampa.

Between the skyline-altering Water Street Tampa project, and two other multi-billion dollar projects underway at Tampa International Airport and Port Tampa Bay, construction cranes dominate the city's horizon.

But, in keeping with the law of unintended consequences, the current construction boom, together with the effects of two consecutive years of major hurricanes hitting Florida, the recent crackdown on immigration, flight by skilled workers from the construction industry during the economic downturn, retirement of many skilled workers and a lack of sufficient incentive for younger workers to enter a field which requires hard, physical work, particularly out in the Florida sun, have conspired to present Tampa with a serious construction labor shortage.

In such an environment, owners and contractors need to ensure that their written contracts address the possible effects of debilitating labor shortages upon the rights of the parties, and upon the health of their projects.

One issue which owners and contractors would do well to address is whether a labor shortage will comprise a force majeure, which may excuse the contractor's failure to meet certain timing or cost obligations.

A force majeure is typically defined to include unexpected circumstances which affect a party's ability to perform under a contract, including hurricanes, fires, earthquakes, floods, other similar "acts of God," strikes and other labor stoppages, wars and even acts of terrorism.

However, since a question remains as to whether a court will find that a particular labor shortage, in and of itself, and absent being directly caused by some other recognized force majeure, such as a hurricane or a strike, will itself constitute a force majeure, it is incumbent upon the parties to ensure that their contract addresses the issue, and to fully understand the effect that various contract provisions, intended to resolve the problem, may have on their respective rights.

As we see in the decision of the Eleventh Circuit Court of Appeals in *S&B/BIBB Hines PB3 Joint Venture*



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v. Progress Energy Florida Inc.,[1] courts will look exclusively to the contract terms, wherever possible, to resolve such issues, and will not insert terms which are inconsistent with the parties' intent, which intent will typically be derived, not from testimony or evidence of external factors, but solely from the plain wording of the contract. S&B held that a court will not insert a contract term unless the "parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties." [2]

To this point, the federal court in S&B held that, under Florida law, a "contract should be considered as a whole in determining the intention of the parties to the instrument," [3] and we "give effect to the plain language of contracts when that language is clear and unambiguous." [4]

S&B involved a contract for construction of two electric generating plants in Polk County, Florida. The project was negatively impacted by the effect of several hurricanes which crisscrossed Polk County and other parts of Florida that year, causing a shortage of labor and materials.

While the plaintiff contractor, S&B, sought \$40 million in damages for additional costs incurred as a result of those labor and materials shortages, to assure timely completion of the construction, the court held that, under the plain terms of the contract, which provided for a fixed price with no right to additional compensation for added costs, S&B was entitled to receive no such costs. Ironically, the court further held that the shortages could have justified an extension of time for S&B to complete its obligations under the terms of the contract.

This case demonstrates the importance of fully understanding the rights provided in a construction contract, since, had S&B known its rights and the effect of the contract provision, it would have likely opted not to incur \$40 million in additional costs to meet its timeliness obligations, since the costs were not recoverable under the contract, but its failure to timely complete construction may, in fact, have been excused as a force majeure. Specifically, the court found that "a 'no damage for delay' clause gives a contractor the specific right to seek an extension of its time for performance in the event of a delay in consideration for the agreement not to seek damages for such delay." [5]

The court further found that S&B's exclusive remedy, under the circumstances presented, was an extension of time, and that if additional costs were to be sought, such a contract term should have been negotiated and included in the contract. Of course, many contractors lack sufficient economic leverage to negotiate such provisions with their contracting owners, or sufficient experience to know precisely what terms may be necessary.

Owners, on the other hand, should seek to include language in their contracts which (1) clearly reflects that the parties have considered the contractor's obligation to address its labor force needs, and (2) defines the specific circumstances under which a labor shortage may provide the contractor with a claim for extension of time or for additional costs.

The following is an example of such owner-friendly contract language:

The Contractor has represented to the Owner that Contractor has secured the manpower necessary to successfully complete the Work of this Contract in the timeframes required therein. As such, Contractor's representation that it has secured the requisite number of qualified workmen necessary for the timely and successful completion of the Work has been a material inducement to the Owner entering into this Contract. In keeping with the foregoing, Contractor has agreed to waive any right to seek relief and/or assert a claim based in whole or in part to a lack of available manpower and/or

a lack of available skilled workers. Moreover, Contractor waives any right to assert a force majeure event, based in whole or in part on a lack of available and qualified manpower; however, manpower shortages resulting from the acts of the Owner or its agents, or acts of God, are not applicable to the foregoing.

Within ten (10) days of the execution of this Contract, Contractor shall provide Owner with a written representation of the number of workers it plans to have on-site, broken down by their respective skill levels, during the various stages of the Work (hereinafter "Manpower Projections"). Contractor shall update its Manpower Projections on a monthly basis, and shall report therein a comparison of projected versus actual manpower it has working on the Project. The Contractor's monthly manpower updates shall be submitted with its Applications for Payment, and shall be a strict condition precedent to Owner's obligation to make payment to the Contractor. Failure to comply with the manpower representations noted in the Manpower Projections shall be a material breach of the Contract.

The above language makes clear that the obligation to provide a work force which is sufficient to properly and timely complete the construction shall fall squarely upon the contractor, not only at the beginning of the project, but periodically throughout the progress of the work. This or similar language, particularly in the current economic climate in which the possibility of labor shortages should be well known to all contracting parties, would effectively remove any claim a contractor could raise based upon a labor shortage as justifying a force majeure-type exception to full compliance.

While the above language provides a bit of wiggle room for the contractor by providing potential relief for manpower shortages resulting from "acts of God," it is a safe bet, particularly when we consider the S&B decision, that a court would find that a labor shortage arising from general, well-known economic conditions, and not an unexpected event, such as a hurricane, flood or fire, would fall within that category.

Ultimately, it is incumbent upon both the owner and the contractors involved in any construction project (1) to recognize and address the potential effects of a debilitating labor shortage upon their ability to complete the project in a timely and economically feasible manner, and (2) to fully understand the specific ramifications of the contractual provisions employed to address those contingencies.

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[1] 365 Fed.Appx. 202 (11th Cir. 2010).

[2] Citing §204, Restatement of Contracts (1981).

[3] Citing City of Homestead v. Johnson, 760 So.2d 80, 84 (Fla. 2000).

[4] Citing Equity Lifestyle Props., Inc. v. Fla. Mowing & Landscape Serv., Inc., 556 F.3d 1232, 1242 (11th Cir. 2009).

[5] Citing Marriott Corp. v. Dasta Const. Co., 26 F.3d 1057, 1066-67 (11th Cir. 1994).