

### A General Contractor's Mistake of Judgment Will Not Excuse Bid Errors

by Steven J. Strawbridge &  
Matthew P. Voors



#### Introduction

We are frequently contacted by general contractors who learn that bid errors have occurred. The bid error usually relates to computational mistakes, including computer programming errors. Indiana case law has long recognized that general contractors should be afforded a reasonable opportunity to avoid certain types of bid errors, including clerical or computational mistakes. Conversely, Indiana law holds a general contractor responsible for errors in judgment, reasoning that a general contractor cannot expect to be relieved from poor judgment. A recent Indiana Court of Appeals decision examined the difference between excusable bid errors and those bid errors that will be fully chargeable to a general contractor.

#### The Recent *Mid-States* Decision

In *Mid-States General & Mechanical Contracting Corp. v. Town of Goodland*, 811 N.E.2d 425 (Ind. Ct. App. 2004), the Indiana Court of Appeals considered whether a contractor was entitled to rescind its bid and bid bond because it misinterpreted bid documents. The Goodland Town Council ("Council") requested bids for the renovation of an elementary school building into a town hall community center and daycare center. After discovering that all of the bids submitted were over budget, the Council modified its bidding process and required bidders to "break down their bid into one lump sum for the majority of the work and four smaller

optional alternate projects that could be completed if funding was available." *Id.* at 428. The Council subsequently published an Invitation to Bid, informing bidders that there were two divisions to the contract on which to bid. In addition, the Invitation to Bid required contractors to submit a bid bond of five percent of the total amount of their bids.

The bid notice provided specific instructions regarding bid submittal for the project, providing that "[b]ids shall be on a stipulated sum basis; segregated bids will not be accepted." The Council also required contractors submitting bids to complete an addendum requiring contractors to complete the work in accordance with the contract documents for the prices provided in the addendum. The addendum also directed contractors to fill in the "Stipulated-Sum Bid Price," as well as amounts for six allowance line items. Section 1.4 of the addendum provided that while the Stipulated-Sum Bid Price is broken down into its component parts, *the sum of all parts must be equal to the Stipulated-Sum Bid Price.* Section 1.1 further specified that the "stated allowances shall be included in the total lump sum bid price." *Id.* at 431 (emphasis supplied).

After reviewing the bids, the Council awarded the contract to Mid-States General & Mechanical Contracting Corporation ("Mid-States"), whose \$822,000 bid was the lowest bid. After a pre-construction meeting, Mid-States sent a letter to the project architect, notifying the architect that the total contract price, including the allowances specified in the bid notice, would be \$933,020. In response, the architect advised Mid-States that the bid documents required the Stipulated-Sum Bid Price to include the allowances,

rather than adding them to the Stipulated-Sum Bid Price.

After the parties failed to reach a resolution regarding the discrepancy, the Council awarded the contract to the second lowest bidder and filed a complaint against Mid-States and the surety that issued the bid bond for breach of contract and forfeiture of the bond. Finding a valid contract existed between the parties, the trial court granted the Council's motion for summary judgment. The trial court also held that the Council was entitled to forfeiture of the bond and damages for Mid-States' breach, and awarded damages of \$44,119--the difference between the amount of Mid-States' bid and the amount of the bid of the second lowest bidder. Mid-States subsequently appealed.

The appellate court concluded that Mid-States misinterpreted the clear language of the bid documents when preparing its bid, finding "that the bid documents were unambiguous

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#### Locke Reynolds and AGCI to Host Seminar

Locke Reynolds and AGCI present "Strategies to Address Catastrophic Price Increases: Lessons Learned from Steel Price Increases in the Construction Industry." Terry Brookie and Steve Strawbridge will discuss strategies that can be employed to lessen the impact of disastrous price increases.

This seminar will take place on February 9 from 4:00 - 5:00 p.m. at the Radisson Hotel, 31 W. Ohio Street. A cocktail reception will follow the seminar. There is no charge to attend the seminar, but you must RSVP to Ranae Stewart at 317-237-3817 or [rstewart@locke.com](mailto:rstewart@locke.com) by February 4.

## Preserving Your Delay Claim -- Just in Case the Project Runs Long

by Dean R. Brackenridge



Nowhere does Ben Franklin's often repeated advice to a young craftsman to "remember that time is money" ring more true than on the modern construction project.

Significant delays and adverse conditions encountered by a general contractor often lead to less profit and/or no profit on a job. If you start cobbling together documentation of a possible delay claim as the project slowly draws to a close--well after your crews were to start work elsewhere--then you have probably delayed far too long.

### Identifying Delay Claims

Have you ever been on a project where the project site was not immediately made available or sat idle while awaiting final mark-ups on drawings? Have you been in a position where your contract work was postponed because a co-prime contractor failed to complete its contract work on time? If your answer is yes, you have likely suffered damages as a result of delay. Delay damages can also arise out of belated payments, unapproved or ignored change order requests, and un contemplated changes to the plans and specifications.

In Indiana, a contractor is entitled to damages, including costs resulting from inclement winter weather, for any delay caused by the owner, in the absence of any contractual provisions which limit recovery of delay damages. *Indiana and Michigan Electric Co. v. Terre Haute Industries, Inc.*, 507 N.E.2d 588, 602 (Ind. Ct. App. 1987); *Osolo Sch. Bldgs., Inc. v. Thorlief Larson & Son of Ind., Inc.*, 473 N.E.2d 643 (Ind. Ct. App. 1978). Recovery of such delay damages generally arises from the implied condition read into all construction contracts that neither party will hinder, or interfere with, the other party's performance of its contractual obligations or increase the other party's performance costs. See *Lesh v. Tr.*

*of Purdue Univ.*, 116 N.E.2d 117, 120 (Ind. Ct. App. 1953); *Indianapolis Northern Traction Co. v. Brennan*, 87 N.E. 215 (Ind. 1909).

For example, an owner was found to have breached its obligation not to hinder a contractor when the owner failed to obtain a necessary right-of-way. *State v. Feigel*, 178 N.E. 435, 439 (Ind. 1931). Other delays for which an owner has been found liable include design changes made by the owner's architect after construction had commenced, the owner's failure to provide site utilities required by the contract, and the failure by a separate prime contractor to complete its work, which in turn delayed the contractor. *Constr. Assoc., Inc. v. Peru Cmty. Sch. Bldg. Corp.*, 393 N.E.2d 792 (Ind. Ct. App. 1979).

### Does The Contract Allow Delay Claims?

Does the contract have a "no damage for delay" clause? No damage for delay clauses limiting contractors' claims for damages arising from owner caused delays are generally enforced absent certain circumstances, such as owner interference or delays beyond the parties' reasonable contemplation.

Does the contract have specific provisions controlling claims for "extra expenses?" A contractor should carefully review the contract to determine what notification requirements may apply in the event that the contractor's progress on the job is delayed.

### How to Preserve Your Delay Claim

The first thing a contractor will need to do if it is delayed or disrupted is to provide appropriate notice pursuant to the contract terms. For example, AIA Document A201-1997 requires written notice to the architect and "the other party." Under 4.3.7.1 of AIA A201-1997, the written notice required for a claim for an increase in contract time also must include an estimate of the cost and of the probable effect of delay on the progress of the work. To the extent the contractor has received any oral directions that impact the work and give rise to some type of delay or disruption claim, the contractor

may need to immediately confirm in writing the oral directive and seek any written clarification necessary.

Second, while it is certainly possible to reconstruct delay documentation at the (later) time the final claim is prepared, the better (and often times less costly) practice is to capture evidence of the delay as the delay is unfolding. There is no substitute for contemporaneous, detailed documentation of delays in daily reports. Documents created well after the events giving rise to the delays lose credibility or may be perceived as having been created for litigation. Contemporaneous evidence of job progress can be maintained through daily log books, jobsite logs or diaries, conversation/confirmation memos, photographs, cost records, contract notices and correspondence, progress reports, job meeting minutes and payroll records. Other appropriate documentation to assemble may include documents showing increased wage rates, higher material costs, loss of efficiency, lost productivity, additional equipment rental, extended general conditions and home office overhead.

It is also important for a contractor asserting delay damages to review the time-sensitive overhead costs found in general conditions, which are those overhead costs which can be directly attributable to a particular job. These extended general conditions are to be distinguished from main office overhead, which are those costs not directly attributable to a particular job but are necessary to run a business. BRAMBLE & CALLAHAN, *CONSTRUCTION DELAY CLAIMS* (John Wiley & Sons, Inc., 2d Ed. 1992).

### Conclusion

Many delay claims fail because of lack of contemporaneous, accurate records and because of failure to comply with notice provisions. While you cannot avoid all delays on construction projects, their effect can be minimized by careful contract preparation, detailed documentation and advance planning in the form of risk allocation. ♦

## Indiana's Wage Statutes -- Answers to Common Questions

by Heather L. Wilson



Indiana employers are facing increasing litigation with -- and liability to -- employees over incorrect wage payments. Many of these cases arise out of the delayed payment of wages or improper wage deductions. The Indiana Wage Payment and the Indiana Wage Claims statutes govern both the frequency and amount that employers must pay their employees. Violations of these statutes can result in an employer owing up to three times the amount of the wages due plus attorney's fees. On many occasions, by the time an employer realizes there is a violation, it is too late.

The following are issues that employers face in their daily management of their workforce:

### **How often do I have to pay my employees?**

Generally, the Indiana Wage Payment Statute requires that employers pay employees semi-monthly or bi-weekly, if requested by the employee. In the absence of an employee request, the employer and the employee may agree to a method of payment other than that provided by the statute.

### **Can I pay my employees two weeks in arrears?**

Probably not. The Indiana Wage Payment Statute requires employers to pay all wages earned within 10 days of the end of the pay period. While there is authority that employers and employees can agree to a time of payment other than as provided by statute, recent case law suggests that this might not be the case. The safest option is to pay your employees no more than ten days in arrears.

### **If I terminate an employee or if an employee quits, when do I have to pay them?**

All wages should be paid by the next regularly scheduled payday. Unlike other states, Indiana employers are not required to pay employees all compensation due on the day of termination.

### **If I terminate an employee for stealing, do I have to pay them their unused but earned vacation pay, commissions or bonuses?**

It depends. If an employer has a policy or contract that provides that vacation pay, commissions or bonuses will not be paid upon termination, an employer can withhold these benefits. However, if no policy exists or the employer cannot prove that the employee was aware of the policy, then an employer is required to pay the full amount owed by the next regularly scheduled payday. If proper foresight is exercised, the employer can be the master of his own destiny on these issues.

### **Can I deduct a loan to an employee from their final paycheck?**

Potentially yes. Indiana law refers to a "deduction" as an "assignment." According to the Indiana Wage Assignment Statute, an employee can assign his wages for an amount of a loan that is supported by a written instrument executed by the employee. The assignment must be: 1) in writing; 2) signed by the employee personally; 3) revocable at any time by the employee upon written notice to the employer; 4) agreed to in writing by the employer; and 5) delivered to the employer within 10 days of its execution. In making deductions, employers should keep in mind that a deduction cannot result in an employee making less than minimum wage.

### **Can I deduct any amount from an employee's paycheck as long as the employee agrees to it in writing?**

No. Indiana's Wage Assignment Statute only permits 13 allowable "assignments." Those include, but are not limited to, premiums on a policy of insurance obtained for the employee by the employer, pledges or contributions of the employee to a charitable or nonprofit organization, dues to become owing by the employee to a labor organization of which the employee is a member, amounts of a loan made to the employee by the employer and evidenced by a written instrument executed by the employee, and premiums on poli-

cies of insurance and annuities purchased by the employee on the employee's life.

### **Can an employee agree to waive his/her wages to repay a debt to the company?**

No. The Indiana Wage Statute provides that an employee must make at least minimum wage. The safest course of action is to simply have the employee sign an assignment of their wages.

### **Can I deduct a negative paid time off (PTO) balance from an employee's paycheck as long as they consent to it in writing?**

No. As already stated, there are only 13 allowable assignments to which an employee can consent.

### **Can I withhold an employee's paycheck if they fail to return company property?**

No. Employers are required to pay all wages due by the next regularly scheduled pay. If an employee withholds company property, an employer has the option of pursuing a claim for conversion in court.

### **Can I make deductions from an employee's future paychecks if I mistakenly overpay them?**

Yes, with some limitations. An employer may deduct the lesser of: 1) 25% of the employee's disposable earnings for that week; or 2) the amount that the employee's disposable earnings for that week exceeds 30 times the federal minimum hourly wage at the time the earnings are payable. However, if an overpayment equals 10 times the employee's gross wages and is the result of a misplaced decimal point, the entire overpayment may be immediately deducted. In either event, the employer must give the employee 2 weeks notice prior to deducting for the overpayment. ♦

### *About the Author*

Heather L. Wilson concentrates her practice in labor and employment law. She assists employers in preparing and instituting preventative policies, and frequently speaks to employers on ADA, FMLA, harassment and discrimination issues.

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and required Mid-States to include the allowances in the Stipulated-Sum Bid Price.” Further, the “bid documents specifically provided that the ‘allowances shall be included in the total lump sum bid price’ and that ‘a Schedule of Allowances showing amounts included in the Contract Sum, [was] included at the end of this Section.’” (emphasis added). The court concluded that the allowances “were clearly to be included in the ‘total lump sum bid price’ or ‘contract sum.’” *Id.* at 432.

Mid-States unsuccessfully argued that the court should base its decision on Indiana’s landmark bid rescission case, *Bd. of Sch. Comm’rs v. Bender*, 72 N.E. 154 (Ind. Ct. App. 1904). When contacted by clients who have made a bid error, we frequently argue that the 100-year old *Bender* decision supports the contractor’s position that an excusable bid error has occurred. In *Bender*, the school board advertised for bids for a school building addition. Bender obtained the specifications for the work and was informed that his bid had to be submitted by 4:00 p.m. on February 25, 1902. Two subcontractors did not provide Bender with their estimates until

3:30 p.m. that day, and in hastily finalizing his bid, Bender made a miscalculation. Bender bid \$11,337 to perform the work; he would have bid \$15,750 if he had made an accurate calculation. Bender’s bid was the lowest, and the school board accepted that bid. The next day, Bender realized his miscalculation and informed the school board that he could not enter into a contract for his bid amount.

The Indiana Court of Appeals held that Bender’s error appeared to be an excusable, computational mistake. It is far easier for a court to excuse a contractor from a bid error if it can be established that computational errors of the type addressed in the *Bender* decision have occurred.

In the *Mid-States* decision, the court did not apply *Bender*. Mid-States did not argue that it miscalculated in preparing its bid—making the reasoning behind *Bender* inapplicable. Mid-States instead argued the bid documents were ambiguous—an argument summarily rejected by the appellate court.

One favorable aspect of the *Mid-States* decision was that the court surveyed decisions from other jurisdictions which recognize that bid error relief was appropriate under certain circumstances.

The *Mid-States* court noted that other states recognize the general rule that bid errors which result from clear cut clerical or arithmetic errors are excusable mistakes. Conversely, the court noted that mistakes of judgment do not qualify for relief. Generally, misinterpretation of an unambiguous contract is considered a mistake of judgment.

**Conclusion**

It is apparent that long-standing Indiana case authority which has existed for over 100 years will continue to benefit general contractors who can establish that bid errors resulted from excusable mistakes, such as clerical or arithmetic errors. In our experience, the majority of bid errors allow arguments that bids should be rescinded because of excusable mistakes. Although the *Bender* decision is now 100 years old, we have successfully argued that it applies to current issues, such as computer programming errors. Conversely, Indiana law will not support a contractor’s rescission of its bid where the contractor has made “mistakes of judgment.” As in *Mid-States*, a contractor’s misinterpretation of unambiguous contractual provisions will be treated as a mistake of judgment. ♦

**Construction & Real Estate Group Adds New Attorney**



Locke Reynolds welcomes Angie L. Ordway to its Construction & Real Estate Group.

Her practice includes construction & real estate and business services.

Ms. Ordway received her B.A., *cum laude*, from Columbia University, New York, N.Y., in 1999, and her J.D., *cum laude*, from the New York University School of Law, New York, N.Y., in 2004, where she served as Associate Editor of the *New York University Law Review*.

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