

New Law Passed by the Legislature *Designed to Help Build Better Public Projects*

by Terrence L. Brookie & Matthew P. Voors



On April 25, 2005, the Governor of Indiana signed into law Senate Enrolled Act 244, allowing the use of design-build contracts between design-builders and public agencies for certain public projects. The new law authorizes state agencies, state educational institutions, counties, cities, towns, townships and certain other bodies, to enter into design-build contracts for public works projects, and establishes procedures for solicitation and award of design-build contracts. However, it does not apply to Indiana Department of Transportation (“INDOT”) projects, nor the design, construction, altering or repairing of public highways. This new law takes effect on July 1, 2005.

Before a design-build contract can be used, a public agency must adopt a resolution authorizing the use of the design-build method for the public project. The resolution must identify the members of a technical review committee, which will qualify potential design-builders and rate/score submitted proposals. This committee must have at least three members: a representative of the public agency and at least two, but not more

than one each, of the following: an architect, professional engineer or qualified contractor. Each technical review committee member must certify the lack of any conflict of interest between the member and the design-builders responding to the request for proposals.

After approving use of a design-build contract, the public agency must publish a notice of a request for qualifications, allowing at least 30 days for potential design-builders to respond to the request for qualifications. This notice must describe the project (i.e. size and function of the facility, approximate budget and project schedule) and the selection process (i.e. process of communication with the design-builders, selection process schedule, technical review committee procedure and submission requirements).

The notice, among other things, must also set forth the general qualifications for prospective bidders--such as experience with similar projects, design-build experience, licensing, financial strength and bonding capacity, and history of contracting with businesses owned by minorities or women. Further, the notice must outline the “project specification qualifications,” which include the team’s experience with the facility or building type at issue, the team’s performance record, the proposed team’s composition and key project personnel, the team’s current capacity to manage the project and client references. Finally, the notice must also provide a description of the qualifications statement evaluation process, including an established rating system and a briefing session or formal question and answer process conducted with the offeror before the submission of a proposal.

Based on this rating system, the technical review committee rates those responding to the request for qualifications and must select at least three potential design-builders it determines to be the most qualified. These names are then submitted to the public agency by the technical review committee.

After the design-builders are selected, the agency must issue a request for proposals. The request for proposals must contain a design criteria package specifying the design criteria necessary to describe the public project and other documents and information necessary in completing the contract.

Each proposal submitted in response to the request for proposals must be submitted simultaneously in two separate packages: a price proposal and a qualitative proposal. The price proposal must contain one lump sum cost of all design, construction engineering, inspection and construction costs of the proposed project or establish a maximum cost of the design-build contract that will not be exceeded if the proposal is accepted. The qualitative proposal must include all documents, information and data requested in the request for proposals.

After receiving the proposals, the public agency must submit the qualitative proposals to the technical review committee, to review and score each of the qualitative proposals. After proper notice is given, the public agency must publicly open the sealed price proposals and calculate an overall score based on the price proposal and qualitative proposal. The public agency is not required to accept the lowest price proposal based on the information, but rather

See Design-Build on page 4

What’s Inside

Interior Damage Claim Against Façade Contractor	2
Wage Issues for the Construction Industry	3

“Siding” Against the Contractor: Indiana Supreme Court Recognizes Homeowners’ Interior Damage Claim Against Façade Installer

by Dean R. Brackenridge



The Indiana Supreme Court has held that while Indiana’s Economic Loss Doctrine prevents a homeowner from advancing a negligence claim against a façade contractor to recover the costs of a leaking façade, it does not preclude the homeowner from seeking recovery of tort damages from the façade contractor regarding “other property”—such as other parts of the home on which the façade was installed. *Gunkel v. Renovations, Inc.*, 822 N.E.2d 150 (Ind. Ct. App. 2005).

In *Gunkel v. Renovations, Inc.*, the Gunkels contracted with Renovations, Inc. for construction of a three-story home. Six months later, the Gunkels separately hired J & N Stone, Inc. (“J&N”) to install a stone façade on the exterior of the home. Not long after installation of the stone façade, water began seeping through gaps in the façade. The Gunkels claimed that substantial moisture problems resulted from the leaking façade and caused damage to the façade and other parts of the home.

The Gunkels sued Renovations, Inc., and later added J&N as a defendant. The Gunkels attempted to cast J&N as a subcontractor, apparently content to pursue only a negligence claim—and not a breach of contract claim—against J&N. The trial court granted summary judgment in favor of J&N, finding that Indiana’s “Economic Loss Doctrine” precluded the homeowners’ entire claim against J&N. The case proceeded to the Indiana Supreme Court after the Indiana Court of Appeals affirmed the trial court decision. The Indiana Supreme Court reversed.

Under Indiana’s Economic Loss Doctrine, “[c]ontract is the sole remedy for the failure of a product or service to perform as expected.” *Id.* at 152. What the courts characterize as “[e]conomic losses” occur when there is no personal injury and no physical harm to other property.” *Id.* at 153-154. As the *Gunkel* court explained,

“[r]ather these losses are viewed as disappointed contractual or commercial expectations.” *Id.* at 154. The Economic Loss Doctrine has been applied in Indiana to claims concerning allegedly defective products, under the Products Liability Act, and concerning the sale of goods, under the Uniform Commercial Code.

The *Gunkel* court explained that under Indiana law:

damage from a defective product or service may be recoverable under a tort theory if the defect causes personal injury or damage to other property, but contract law governs damage to the product or service itself and purely economic loss arising from the failure of the product or service to perform as expected.

* * *

“The Indiana Supreme Court instead held the Economic Loss Rule ‘does not bar recovery in tort for damage that a separately acquired defective product or service causes to other portions of a larger product into which the former has been incorporated.’ *Id.*”

The theory underlying the economic loss doctrine is that the failure of a product or service to live up to expectations is best relegated to contract law and to warranty either express or implied. The buyer and seller are able to allocate these risks and price the product or service accordingly. *Id.* at 153-55.

The Indiana Supreme Court rejected the Court of Appeals’ conclusion that the “product” was the entire house on which the stone façade had been installed. The Court of Appeals had reasoned that the damage to other parts of the house caused by the alleged defect in the façade would have been treated as damage to the product itself and would not have been barred by the economic loss rule. *Id.* at 156.

The Indiana Supreme Court instead held the Economic Loss Rule “does not bar recovery in tort for damage that a separately acquired defective product or service causes to other portions of a larger product into which the former has been incorporated.” *Id.*

The Court further explained that “property acquired separately from the defective good or service is ‘other property,’ whether or not it is, or is intended to be, incorporated into the same physical object.” *Id.* at 155. The Court noted that the Gunkels dealt directly with J&N; property acquired by the Gunkels separately from the allegedly defective goods or services provided by J&N constituted other property whose damage potentially was recoverable from J&N by the Gunkels. *Id.* at 156. Such separately acquired property constitutes “other property” for purposes of the

economic loss rule, even if the defective product is to be incorporated into the same completed product for use or resale. *Id.*

In *Gunkel*, the product or service the Gunkels purchased from J&N was the façade added to the exterior of the Gunkels’ home. J&N installed the facade under a direct arrangement with the Gunkels, which was independent of the contract the Gunkels had with Renovations, Inc. Accordingly, the Indiana Supreme Court concluded that the Economic Loss Rule prevented the homeowner from recovering, in negligence, for damage to the façade itself, but left the door open for tort recovery against J&N for damage to the interior of the home, resulting from the allegedly negligent installation of the facade. *Id.* ♦

Wage Issues for the Construction Industry

by Thomas E. Deer &
Deborah K. Hepler



With increasing regularity, employers find themselves in court defending their payroll practices. There, they learn that some common pay practices actually violate Indiana's wage payment or wage assignment statutes. Because both of these statutes afford employees the opportunity to collect treble damages and attorney's fees from the employer, an incentive exists for both the employee and his or her attorney to pursue these types of claims.

The wage payment statute regulates the frequency, manner, timing and amount of wage payments by employers who do business in Indiana. I.C. §§ 22-2-5-1 & 2. In 2002, the Indiana Supreme Court made clear that this statute requires the employer to pay the full amount of wages due, at the time they are due. *St. Vincent Hospital v. Steele*, 766 N.E.2d 699 (Ind. 2002). The *Steele* decision also speaks to the issue of whether this duty is modified when there is a dispute about the amount of wages due. It is not.

The wage assignment statute also offers fertile ground for employee claims against unsuspecting employers. If an employer makes an unauthorized deduction from the employee's pay, the employer is exposed to liability for treble damages, costs and attorney fees. I.C. § 22-2-6-2; *E & L Rental Equip. v. Bresland*, 782 N.E.2d 1068 (Ind. Ct. App. 2003).

In *E & L Rental Equipment*, the employer withheld money from an employee's paycheck to cover the cost of property damage he had caused. The employee, a truck driver, agreed to have a set amount deducted from his paychecks, but the agreement was not in writing. After the employee had caused even more damage to the employer's property, the employee quit his job. Adding insult to injury, he then

sued his former employer for wrongfully withholding money from his paycheck. The trial court awarded damages equal to the amount of the unpaid wages, plus costs, and the Court of Appeals affirmed.

Just like the employers in these cases, many contractors are unaware of the Indiana wage payment and wage assignment statutes. The failure to pay all wages due at the time they are due is not uncommon. An oral agreement with employees to postpone their pay longer than semi-monthly will not protect the contractor from liability. I.C. § 22-2-5-1(a). Similarly, if the amount paid is less than the total amount due, the contractor is exposed to wage payment liability.

One of the reasons a paycheck might be short is that the contractor took an "improper" deduction from it. Improper deductions from an employee's pay violate the wage assignment statute, and constitute the failure to pay the total amount of wages due. The most common types of improper wage deductions occur in the most routine circumstances. For example, deducting for loans or advances to the employee, for tools or equipment purchased by the employee, or for property lost or damaged by the employee, could be a violation. Deducting a fine or penalty is absolutely prohibited. I.C. § 22-2-8-1.

To effect a valid wage assignment, employers should observe the following steps. The wage assignment (deduction) must be:

- in writing;
- signed by the employee;
- by its terms, revocable at any time by the employee;
- agreed to in writing by the employer;
- delivered to the employer within ten days after execution; and
- made for a *proper purpose*.

The purchase of merchandise sold by the employer to the employee, at the written request of the employee, is proper. It is also proper to make a deduction for a loan to the employee that is "evidenced by a

written instrument executed by the employee." I.C. § 22-2-6-2(b)(7). An oral agreement is not enough.

At the same time, an otherwise properly documented deduction for the cost of

“An oral agreement with employees to postpone their pay longer than semi-monthly will not protect the contractor from liability.”

safety equipment purchased by the employee--such as safety shoes, safety glasses or hard hats--may still expose an employer to liability under federal law. If such equipment is required by law or deemed by the Fair Labor Standards Act ("FLSA") to be "primarily for the benefit of the employer," the deduction is unlawful if the employee will make less than minimum wage for the hours worked. 29 CFR § 3.5(k). "Tools of the trade" that are incidental to carrying on the employer's business are for the primary benefit of the employer. 29 CFR § 531.3(d).

A similar FLSA limitation applies to deductions for part of the cost of lodging. The "reasonable cost" of lodging is not part of an employee's wages unless it's provided for the primary benefit of the employee. 29 CFR § 516.27. If the employee is assigned to a location outside the normal daily commuting distance, the employee's lodging is deemed to be for the primary benefit of the employer. 29 CFR § 516.27(b). Therefore, deduction for any of the cost of lodging is unlawful if the employee will make less than minimum wage.

For the same reason, a contractor working on a public project may not take credit toward the common or prevailing wage for the cost of providing lodging. Doing so would subject the contractor to liability for unpaid wages, as well as possible liability under the prevailing wage laws. ♦

Locke Reynolds Partner Named BAGI Associate of the Year

Thomas F. Bedsole has been named Associate of the Year by the Builders Association of Greater Indianapolis (BAGI). Mr. Bedsole received the award to acknowledge his service to the organization. He currently serves as Treasurer of the Board of Directors of BAGI and is the former chair of the Governmental Affairs Committee.

The Builders Association of Greater Indianapolis exists so that members of the residential construction industry and related businesses can conduct their business efficiently and ethically to provide the community with reliable, safe and affordable residential construction accomplished by professionals in the industry.

Mr. Bedsole is a partner practicing in business litigation, construction, real estate and tort litigation. He devotes his practice to business and real estate related matters. Mr. Bedsole has significant expertise advising and counseling local and national residential home builders regarding the real estate, construction and business issues that affect them. ♦

Temporary Relief for Highway Contractors

The Indiana General Assembly has provided temporary relief to the always harsh, and sometimes costly, ramifications of the “no damage for delay” provision currently contained in INDOT’s Standard Specifications. INDOT’s Standard Specifications, which are generally incorporated by reference into all INDOT contracts, provide that “[n]o additional compensation will be allowed for delays, inconvenience or damage sustained by the contractor due to interference from the said utility appurtenances or the operations of moving them.” (See Standard Specifications, § 105.06). INDOT’s “no damage for delay” provision was upheld in *Indiana Department of Transportation v. Shelly & Sands*, 756 N.E.2d 1063 (Ind. Ct. App. 2001).

Newly enacted Indiana Code § 8-23-9-58 now prevents INDOT from including in any contract entered into after June 30, 2005, a provision prohibiting a contractor from receiving (or restricting the contractor from receiving) reasonable compensation or expenses directly related to unforeseen conditions encountered during the project as a result of utility relocation that differs materially from any utility relocation specified in the contract documents.

However, the relief provided by Indiana Code § 8-23-9-58 is only temporary. This new section, by its own terms, expires on January 1, 2007, leaving open the question of whether INDOT will once again be able to include “no damage for delay” provisions to bar claims for additional costs relating to unforeseen utility relocations in contracts entered into after January 1, 2007. ♦

Design-Build continued from page 1

must select the proposal that provides the public agency with the lowest adjusted price and provides the best value to the taxpayer.

A design-build contract, under the new law, may be conditional upon subsequent refinements in scope and price and allows a public agency to make changes in the scope of the project without invalidating the design-build contract. Further, the new law allows the award of the maximum cost established in the proposal to be adjusted by a negotiated agreement between the public agency and the design-builder to reflect modifications in the proposed design-build project. ♦

Locke Reynolds Construction & Real Estate Group

Thomas F. Bedsole
tbedsole@locke.com

Rex E. Bennett
rbennett@locke.com

Jeffrey M. Boldt
jboldt@locke.com

Dean R. Brackenridge**
dbrackenridge@locke.com

Terrence L. Brookie*
tbrookie@locke.com

James Dimos
jdimos@locke.com

Carrie G. Doehrmann
cdoehrmann@locke.com

Steven R. Eichholtz
seichholtz@locke.com

Julia Blackwell Gelinias
jgelinas@locke.com

Raymond Good
rgood@locke.com

J. Matt Harnish
mharnish@locke.com

David M. Haskett
dhaskett@locke.com

Daniel P. King
dking@locke.com

John K. McDavid
jmcdavid@locke.com

Angie L. Ordway
aordway@locke.com

Hugh E. Reynolds, Jr.
hreynolds@locke.com

April R. Schilling
aschilling@locke.com

Steven J. Strawbridge
sstrawbridge@locke.com

Matthew P. Voors
mvoors@locke.com

*Chair, Construction & Real Estate Group

**Newsletter Editor

To speak with an attorney, please call 317-237-3800