

Indiana Supreme Court Rules Some Claimants Are Too Remote to Assert Bond Claims

by Julia Blackwell Gelinis



Those who provide labor, materials or services to sub-subcontractors on INDOT projects may not make bond claims, according to a recent ruling by

the Indiana Supreme Court. In a decision that will likely influence claims on other types of government projects, the Court recently held that a performance bond issued to the general contractor on a state highway project did not extend coverage to “third-tier” claimants, i.e., businesses who do not have a direct contractual relationship with either the general contractor or a subcontractor. *Alberici Constructors, Inc. v. Ohio Farmers Insurance Co.*, 866 N.E.2d 740 (Ind. 2007).

In *Alberici*, the Indiana Department of Transportation (“INDOT”) awarded a contract to Primco, Inc. (“Primco”) to rebuild an existing bridge and to build a new bridge near Bluffton, Indiana. Primco obtained the statutorily-required performance bond through Ohio Farmers Insurance Company (“Ohio Farmers”). Primco ordered a pre-fabricated steel bridge for the project from Harmon Steel, Inc. (“Harmon”), making Harmon a “first-tier” supplier. Harmon turned to Gateway Bridge, LLC (“Gateway”) for the bridge, making Gateway a “second-tier” supplier. Finally, Gateway hired Alberici Constructors, Inc. (“Alberici”) to fabricate portions of the bridge, making Alberici a “third-tier” supplier.

Gateway failed to fully pay Alberici, prompting Alberici to bring a

claim against the performance bond issued by Ohio Farmers. Ohio Farmers denied Alberici’s claim, contending Alberici was “too removed” to bring a claim. *Id.* at 741. After Alberici sued Ohio Farmers in federal court, the federal court judge certified to the Indiana Supreme Court the question of whether a performance bond issued on a Title 8 INDOT project provides coverage to a third-tier claimant. The Indiana Supreme Court concluded that Alberici, as a third-tier claimant, was not meant to be covered by bonds required on Title 8 INDOT contracts.

In reaching its decision, the Indiana Supreme Court looked at the statute’s language, which states the bond must be “conditioned . . . upon the payment by the contractor and by all subcontractors for all labor performed or materials furnished or other services rendered in the construction of the highway.” Ind. Code § 8-23-9-9. The statute also provides: “[The bond principal] shall promptly pay all debts incurred by the principal or any subcontractor in the construction of the work, including labor, service, and materials furnished.” Ind. Code § 8-23-9-12.

However, the statute does not define who is a contractor or a subcontractor, and so the Court looked to other Indiana statutes, INDOT regulations, and federal and state case law for guidance. It concluded the term “subcontractor” is narrowly defined as one who has a direct contract with the general contractor, rather than as anyone who provides labor or material in connection with a project. Because the statute’s language provides that only

subcontractors, and those who subcontractors owe for labor or supplies, can make claims against the performance bond on an INDOT project, third-tier claimants are too remote to be covered under the bond. In reaching this conclusion, the Court rejected the approach urged by Alberici, which would have required courts to examine the work or material supplied by a particular claimant to determine whether the work or material had an “intimate, immediate, and exclusive relation to the building of the [project].” *Id.* at 745.

The Court also considered the public policy benefits of having a logical and consistent standard that limits performance bond claims to those who have contracts with either the general contractor or its subcontractors (i.e., second-tier laborers and suppliers). Without such a bright line cut-off, contractors would “face an incalculable risk of liability for claims made by distantly remote suppliers or laborers on contracts made without contractor approval.” *Id.* at 746. Contractors would not be able to submit accurate project bids. In addition, a judge would have to be called in to decide every performance bond claim if such a highly fact-intensive rule were adopted. This would add to the cost of every transaction without ensuring that the rule would be consistently applied in every case. The Court explained that third-tier laborers and suppliers can protect themselves through contract, such as requiring advance payment before delivery. Predictability helps

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Oral Argument

Ms. Gelinis’ successful oral argument before the Indiana Supreme Court in *Alberici Constructors, Inc. v. Ohio Farmers Insurance Co.* can be viewed in its entirety at the Indiana Supreme Court’s website at www.indianacourts.org. Search: Alberici.

Does Your Business Have an E-Discovery Plan?

by Dean R. Brackenridge



Construction projects frequently involve thousands of e-mails, transmittals, RFIs, drawings and letters. It has become second nature during construction projects to copy the world on communications, to prevent anyone from later questioning whether they were properly informed. This results in the same information being regenerated over and over again. Even before the building or road begins taking shape, electronic mailboxes fill, voicemail messages accumulate, and file drawers swell beyond capacity. Knowing that communications should be preserved in case disputes later arise, businesses face the difficult task of managing this electronically-stored and paper-based information.

Anyone who has experienced litigation knows the significant costs associated with producing project files and documents. Construction businesses and their attorneys have long struggled to manage project information and later produce this information to opposing litigants. Technology-driven increases in the volume of information created during construction projects have severely complicated these tasks.

The federal courts recently amended their rules to address growing difficulties with exchanging electronically stored information during a lawsuit. A growing number of state courts, including those in Indiana, are similarly amending their rules. Under these recent federal court amendments, "electronically stored information," such as e-mails and text messages, are subject to procedural rules regarding electronic discovery.

The recent amendments place heavy emphasis on early disclosures. Within weeks after a lawsuit begins, under amended Federal Rules of Civil Procedure 26(a)(1), parties must make initial disclosures to opposing parties,

including descriptions by category and locations of their electronically stored information. In short order, a litigating business must locate and identify all of its servers, databases, intranets, and drives which contain project information, and then identify and catalogue this electronically stored information. A litigating business may later have to produce extensive amounts of electronically stored information, much of which may be highly mobile and obscure. In addition, the company's counsel will face the difficult task of reviewing this huge volume of electronically stored information to ensure that privileged communications are not disclosed.

Businesses are well advised to develop, with the assistance of counsel, an e-discovery plan in order to be prepared if litigation arises. Because the recent amendments allow little time for identifying and assembling electronically stored information after litigation is under way, these "e-discovery" rules effectively require businesses to identify, catalog, and organize electronically stored information as part of daily business activities. To hastily comply with these requirements, an unprepared business may have to spend thousands of dollars dedicating IT staff and paying outside consultants to search servers and back-up tapes to locate, retrieve and produce electronically stored information. Proactive e-discovery planning may significantly curtail such expenses and disruptions.

A vital part of any e-discovery plan is identifying personnel with responsibility for record retention and e-discovery. A business should consider identifying an in-house e-discovery IT specialist, who can develop plans for managing electronically stored information and e-discovery and also serve as a point person to communicate with counsel. A business also may want to assign this individual responsibility for instituting and managing "litigation holds," under which the business preserves all relevant materials, including electroni-

cally stored information, related to litigation. Because such preservation duties arise when litigation is likely (not just when it has begun), litigation holds must be addressed prior to litigation.

Another aspect of developing an e-discovery plan is simply familiarizing counsel with your business' electronically stored information systems. As a practical matter, IT personnel will need to educate counsel as to technical aspects of the company's servers and systems. This interaction, along with later involvement in litigation, gives IT staff a greater role in attorney relations and litigation activities than many businesses are accustomed.

Different business systems will necessitate different e-discovery protocols. As such, another critical aspect of an e-discovery plan is cataloging a business' electronic business systems, such as phone and e-mail systems, intranets, databases, and drives. This effort should proceed in tandem with developing litigation holds, so that, as a business catalogs its systems, it identifies the processes for storing and deleting electronically stored information within those systems. The business can then ensure that discoverable information is not destroyed. This cataloging will help in calculating estimates of document production costs, allowing counsel to informatively negotiate agreements as to what electronically stored information is not reasonably accessible, due to costs and obscure locations, and therefore need not be produced. By fully knowing its business systems, a business can estimate the costs and time commitments of various e-discovery components and plan and negotiate accordingly.

Businesses also must ensure that all employees comply with electronically stored information retention policies (such as maintaining e-mails they have received). Specifically, businesses should disseminate company-wide information regarding litigation holds, advising

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Indiana Modifies Size of Public Projects Subject to Bond and Retainage Requirements

by Terrence L. Brookie &
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Indiana recently amended several statutes affecting bonding and retainage requirements on state and local public works projects. These changes apply to all contracts entered into after June 30, 2007. The main thrust of these changes is to increase and standardize the size of contracts subject to statutory retainage and bond requirements on various types of state and local public projects.

Adoption of a General \$200,000 Benchmark

The bid, payment and performance bond and retainage requirements on most public projects now apply only if the project has an estimated cost of over \$200,000. There are exceptions to the new general rule, which are discussed below.

The bond and/or retainage requirements apply to contracts over \$200,000 on the following public projects:

- Most state public works projects (i.e., Title 4 projects)
 - > Bid bonds (previously entirely discretionary)
 - > Payment and performance bonds (up from \$150,000 threshold)
- Local public works projects
 - > Bid, payment and performance

- bonds (up from \$100,000 threshold)
- > Retainage
- State universities and other non-Title 4 projects (i.e., Title 5 projects)
 - > Performance bonds (up from \$100,000 threshold)
 - > Retainage (up from \$100,000 threshold)
- Design-build contracts, toll road projects, and certain highway improvements
 - > Bid, payment and/or performance bonds, depending on project type
- State highway projects
 - > Bid and performance bonds (up from \$100,000)

Discretion Given to Owner on Project Smaller than \$200,000

As with many rules, there are exceptions to the new \$200,000 benchmark. Most of the state or local contracting agencies or units can elect to, but are not required to, impose the statutorily required retainage and bond requirements if the project is estimated to cost less than \$200,000. Also, for most state public works projects (i.e., Title 4 projects) under \$200,000, a payment bond may still be required, at the discretion of the director of the public works division of the Department of Administration. The director can also elect instead to require 10 percent retainage until substantial completion.

Exceptions to the New General Rule

Exceptions exist to this new general \$200,000 benchmark. For example, on most state public works projects (i.e., Title 4 projects), retainage requirements still

kick in at the lower \$150,000 level. Also, for state public works projects not governed by Title 4 (i.e., Title 5 projects such as state university projects) nor administered by the Department of Administration, a payment bond will still be required no matter the size of the contract. As was the case before these new changes, on local projects less than \$250,000, an irrevocable letter of credit from an authorized Indiana lender can be submitted in lieu of a performance bond.

Additional Retainage Modifications

The retainage requirements on all state and local public works projects have also been modified by adding a new mandatory minimum percentage of retainage. In the past, a state agency could choose to withhold a maximum of 10 percent of the value of the work until 50 percent of the work is done or a maximum of 5 percent until substantial completion. These same choices and caps will remain in effect, but the agency now must withhold no less than 6 percent of the value of the work until 50 percent of the work is complete or 3 percent until substantial completion on contracts entered after June 30, 2007.

The goal of these modifications is the standardization and simplification of the retainage and bonding requirements which had differed depending upon the various types of public projects. While these changes take a step toward standardization, the revised statutory standards still fall a few steps short of uniformity. ♦

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employees of possible and existing lawsuits, as well as of the duty to preserve documents and, particularly, electronically stored information. Additionally, businesses must educate their employees with respect to their records policies, and must consistently punish any employee viola-

tions of records policies. Further, certain employees hold sufficiently important roles that they should receive personalized information as to their retention duties. To facilitate these communications, businesses should develop protocols for identification of key employees and the notification of retention and e-discovery duties.

Taking proactive steps, such as devel-

oping protocols and policies for dealing with electronically stored information and e-discovery, can help control costs and business disruptions related to e-discovery. With proper planning, businesses that actively and intelligently manage their information systems can minimize the burdens of e-discovery. ♦

Indiana's New Military Family Leave Act

by Heather L. Wilson



As of July 1, 2007, Indiana requires an employer with at least 50 employees during each working day of any 20-week period to provide up to 10 days of unpaid leave to an employee

who has an active duty military family member. See Ind. Code 22-2-13-1 *et seq.* However, the benefits of the Indiana Military Family Leave Act ("Act") are limited to the spouse, parent, grandparent or sibling of a person who is ordered to active duty. For purposes of the Act, a "parent" is not only the biological mother or father, but an adoptive mother or father, or court-appointed guardian or custodian. In addition, a "sibling" is not only a brother or sister, but also a half-brother, half-sister, or brother or sister through adoption. However, a "grandparent" must be a biological grandparent.

In order to be eligible under the Act, the employee must have been employed by the employer over the previous 12 months, and have worked at least 1,500 hours during the 12 months before the requested leave period. In addition, the soldier must be performing full-time service for longer than 89 consecutive calendar days.

An employee can take the leave of absence while the soldier is on leave from a qualifying active duty period, or during the 30 days before or after the

active duty period. The leave of absence is allowed for a maximum of ten days each year. The Act is not specific on whether leave time should be granted on a calendar year or rolling year basis, however, we recommend employers use a calendar year until the Indiana courts clarify this provision.

To be eligible for military family leave, an employee must provide written notice 30 days before the intended leave of absence. This written notice should include the active duty orders, if they are available. Active duty orders which are issued less than 30 days before the intended leave are an exception to this rule. The employer may also require the employee to utilize available vacation or personal time during the 10 day leave period. However, an employee cannot be required to utilize her medical or sick leave in the same manner. Further, the employer must allow the employee to continue his health insurance coverage at the employee's expense during the leave period.

An employee returning from leave must be restored to the same position he held before his leave, or its equivalent, with the same or equivalent seniority, pay, and benefits.

Employers with more than 50 employees should ensure compliance by taking the following steps: First, employers should confirm that it employs more than 50 people during each working day of any 20-week period, otherwise the Act does not apply.

Second, the employer should adopt a military leave policy that is consistent with the Act's requirements and publish it to its employees. Third, the employer should educate employees as to the benefits and limitations of the Act. Finally, proper recordkeeping and notification procedures should be implemented to ensure that each employee takes only the appropriate amount of leave, and that military leave is not confused with other leaves of absence.

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third-tier laborers and suppliers know in advance whether they will be able to make a claim against a project bond.

The Indiana Supreme Court's ruling is limited to Title 8 INDOT contracts. However, the Court stated that when they interpret a statute, they "presume the legislature intended to apply harmoniously Indiana Code sections with a similar purpose and subject matter." *Id.* at 743. The Court found Title 4, governing state public works projects, to have provisions similar to Title 8. Given this language, as well as the Court's goal of consistency and predictability, the *Alberici* decision may foreshadow the adoption of a bright-line delineation between second-tier and third-tier claimants on state and local government projects. ♦

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