

# CONSTRUCTION LEGAL REVIEW

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## **“Changed Circumstances” Create T&M Contract Paid By Total Cost Method**

In a recent case, “changed circumstances” were addressed for the first time in North Carolina, establishing the concept commonly known in other States as “cardinal change”, and adopting the Total Cost Method (“TCM”) to determine damages. A fire sprinkler subcontractor, with a lump sum subcontract for a new department store, realized that Owner caused radical design changes (scrapping the original design) in the course of construction would significantly increase its costs in time and materials over the agreed price. The Subcontractor notified the General Contractor, who directed the Subcontractor to perform the necessary work and to monitor costs for additional payment. The Subcontractor tracked costs on a time and materials basis, then submitted a change order request using the “total cost method” and applied the lump sum price as a credit against the total cost of labor and materials, and sought payment for the difference, but was denied. The Court ruled that the changed circumstances were an entirely new contract on a time and materials (T&M) basis, that the first contract was discharged, and that the general contractor was liable for damages under the second contract as the lump sum cost, plus T&M in excess of the lump sum price. This is unusual because TCM is routinely disfavored or disallowed entirely for calculating damages by most Courts because it captures and rewards any inefficiencies, delays, or corrective work by the Subcontractor. **For more information, contact Jonathan D. Keeler, Attorney, at [jonathankeeler@laurielaw.com](mailto:jonathankeeler@laurielaw.com) or 919.256.4455.**

## NORTH CAROLINA GC GETS OSHA VIOLATION UNDER “MULTI-EMPLOYER DOCTRINE” FOR “FAILURE TO INSPECT JOB SITE” WHEN ROOF SUBCONTRACTOR’S EMPLOYEES WERE NOT TIED OFF



In March 1999, a General Contractor was cited for violation of OSHA regulation 29 CFR 1926.20 (b)(2) “failure to conduct frequent or regular inspections of the jobsite . . . as part of an accident prevention program.” The cause for the citation arose when a Compliance Officer observed several roofing subcontractor employees working on a “steep pitch roof over six feet from the ground, without fall protection.” The General Contractor asserted that his duty for OSHA compliance did not extend to the employees of his subcontractors.

The North Carolina Court of Appeals found the General Contractor liable invoking the “multi-employer doctrine” for the first time in North Carolina. The “multi-employer doctrine” provides that “an employer who controls or creates a work site safety hazard may be liable under the Occupational Safety and Health Act even if the employees threatened by the hazard are solely employees of another employer.” The Court imposed this duty on the General Contractor for subcontractor violations which the general contractor could have reasonably been expected to detect by inspecting the job site.

The North Carolina Court of Appeals found the general contractor liable for the subcontractors non-compliance because the general contractor would have easily noticed the non-compliance with a routine site inspection. Thus, in North Carolina, the general contractor is on official notice that it has a duty to detect safety violations committed by its own employees, as well as those committed by its subcontractors. *For more information, contact James P. Laurie III, Attorney, at [jameslaurie@laurielaw.com](mailto:jameslaurie@laurielaw.com) or 919.256.4455.*





## CHILD INVOLVEMENT LEAVE ADOPTED IN NORTH CAROLINA

The North Carolina General Assembly adopted legislation granting parents and guardians of school-aged children up to four hours of unpaid leave each year to “attend or otherwise be involved at that child’s school” or “day care”. *N.C.G.S. 95-28.3*. The Leave must be taken at a “mutually agreed upon time”, *and* the employer may require a written request 48 hours in advance of the desired leave, followed by a written note from a school official verifying attendance. If Employers take “adverse employment action” against an Employee for requesting or taking leave as directed, the Employee shall have one year to bring a civil action against the Employer for specified damages. Unlike other employment causes of action available to employees, which are investigated and prosecuted on behalf of the Employee, no public agency administers the law, so suit must be brought in Court by the Employee or an Attorney. **For more information, contact Jonathan D. Keeler, Attorney, at [jonathankeeler@laurielaw.com](mailto:jonathankeeler@laurielaw.com) or 919.256.4455, or visit our website at [www.laurielaw.com](http://www.laurielaw.com).**

## COURT OKs FORMER “AT WILL” EMPLOYEES RECRUITING YOUR EMPLOYEES FOR NEW VENTURE

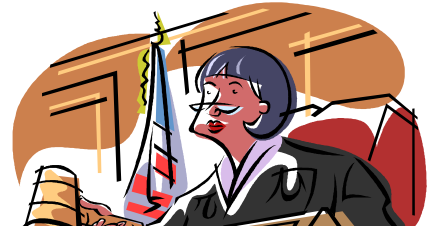
A recent case highlights the importance of written employment contracts or covenants not to compete with key employees. Two “at will” employees quit their jobs to start a new business, then recruited former coworkers. The Employer sued to stop the recruitment, but the Court refused, stating that an “at will” employment relationship does not create a “fiduciary” relationship in which employees owe a heightened duty of care and loyalty to their employer. “At-will” employees are “employed at the will of the Employer”, with no contract for employment, and cannot be prevented from quitting their jobs, opening a competing business, and recruiting previous employer’s personnel, where the Court found that all these actions were done merely “as a reasonable and bona fide attempt to develop . . . business interests”. However, these obligations can be imposed in an employment contract or non-competition agreement, and are desirable for key employees. This case appears to conflict with another recent case, where the Court found that a prearranged mass defection was actionable. **For more information, contact Andrew T. Cornelius, Attorney, at [andrewcornelius@laurielaw.com](mailto:andrewcornelius@laurielaw.com) or 919.256.4455, or visit our website at [www.laurielaw.com](http://www.laurielaw.com).**





FEDERAL "MILLER ACT CLAIM" RULING

## SUBCONTRACTOR USES "TOTAL COST METHOD" FOR CALCULATING OWNER-CAUSED DAMAGES RECOVERED FROM GC IN A MILLER ACT CASE



A U.S. Court of Appeals recently ruled that "the total cost method can be used to calculate damages under the Miller Act, regardless of the fault of the general contractor" since "general contractors have privity of contract with the government and can thus recover delay damages directly from the government, while subcontractors cannot". The Federal Miller Act and State "Little Miller" Acts require Contractors on public projects to provide performance and payment bonds because public property cannot be liened and the Government is sovereignly immune from suit without a contract. So, the Subcontractor cannot sue the Government for Owner caused delays, but can seek "total cost" damages from the Contractor without proving the Contractor was the "cause in fact" of the damages. The Contractor can then seek recovery for these losses asserted by the Subcontractor from the Government. *For more information, contact Jonathan D. Keeler, Attorney, at [jonathankeeler@laurielaw.com](mailto:jonathankeeler@laurielaw.com) or 919.256.4455.*

## "Pass Down" Clause Kills Subcontractor Claim When It Incorporates Notice of Delay Provision

A subcontract containing a "pass down" clause incorporated the prime contract between the General Contractor and the Owner into the Subcontract. The prime contract included a "pay when paid" clause and a 21 day written notice for claims of delay clause, making these binding terms of the Subcontract Agreement. The Subcontractor claimed for delay, and sued the General Contractor, claiming that the "pay when paid" clause in the subcontract was illegal. The Court struck the "pay when paid" clause as illegal, but enforced the Delay Notice requirement because the Subcontractor failed to comply with the notice requirement and the Court denied the delay claim. Subcontractors should never execute a subcontract which "incorporates by reference" any other document unless that document is furnished and reviewed prior to execution. Unless standard form documents, such as AIA, are used, "Pass Down" clauses usually materially increase the obligations and duties of the Subcontractor beyond the terms stated in the Subcontract Agreement document. *For more information, contact James P. Laurie III, Attorney, at [jameslaurie@laurielaw.com](mailto:jameslaurie@laurielaw.com) or 919.256.4455.*

# Case Says Owner Must Hold ALL Funds For Lien On Funds

In a recent case, a subcontractor filed a claim of lien because the general contractor involved in the project failed to pay the subcontractor for the construction of a regenerative thermal oxidizer system. After filing the claim of lien, the subcontractor served a notice of lien on funds to the owner of the project, which under the lien statute, triggers the duty of the Obligor, the owner in this case, to retain funds owed to the general contractor. Under the lien statute, an obligor who makes payment to a general contractor after receiving a notice of lien on funds may be personally liable to the lien claimant. In this case, the owner retained funds in excess of the amount of the subcontractor's notice of claim of lien on funds, but the owner made two payments to the general contractor after it received the notice. The general contractor subsequently declared bankruptcy. The Court broadly interpreted the lien statute and held that "the mere retention of funds equal to or in excess of the lien amount is not sufficient to avoid personal liability." The lien attached to the funds, *and*, even though some funds were retained by the Owner, the Owner was held personally liable for making payments to the general

**“...the mere retention of funds equal to or in excess of the lien amount is not sufficient to avoid personal liability.”**

contractor after the notice of claim of lien on funds was served. Because the subcontractor could not obtain the funds from the bankrupt general contractor, it sought the funds from the owner and won. “The reason the obligor becomes personally liable by making a payment after receiving a notice of claim of lien is that the obligor is then on notice that a potential problem exists and, having control of the funds, is in a position to avoid or rectify the problem.” Based upon this new ruling, an Owner who does not retain all funds owed to the general contractor can face with personal liability which may result in double payment. *For more information, contact Andrew T. Cornelius, Attorney, at [andrewcornelius@laurielaw.com](mailto:andrewcornelius@laurielaw.com) or 919.256.4455, or visit our website at [www.laurielaw.com](http://www.laurielaw.com).*



## Proposed NC Bond Law Changes Not Voted Yet

As of press time, the Bill pending in the North Carolina legislature, which would make significant changes to the way Payment Bonds work, has not been passed. The proposed changes would affect deadlines, impose notice requirements, cut off lower tier claimants, impose statutory terms on private Payment Bonds, and make other significant changes to the requirements for making a bond claim. As always, the trade offs are a mixed bag for both General Contractors and Subcontractors, and would involve the current Notice of Contract and Notice of Subcontract procedures already in place for liens, which have always been arcane, misunderstood, and not extensively used. ***For more information, contact James P. Laurie III, Attorney, at [jameslaurie@laurielaw.com](mailto:jameslaurie@laurielaw.com) or 919.256.4455.***

## Settling Into Our New Office

Last year we completed build out of our new office in North Raleigh and moved in. We've been settling in ever since. The Office is located on Six Forks Road, just south of the Forum. Many Clients and Friends have dropped by for a visit since we moved in, and we hope you will too!

