

MEMORANDUM

TO: ASA Subcontractors Legal Defense Fund Task Force Members

FROM: Eric B. Travers, Esq.

DATE: April 11, 2021

RE: *H2K Technologies. v. WSP USA, Inc. & Fidelity & Deposit Company of Maryland*, pending in the Supreme Court of Oklahoma.

I. Dispute Background.

This case was on appeal of a trial court decision adverse to the subcontractor. In a rate move, on March 22, 2021 the appeal, on the Oklahoma Supreme Court's motion, was retained by the Oklahoma Supreme Court for disposition. The issue is:

- May an upper tier contractor waive the rights of the lower tiers to file a mechanic's lien?

1. The Facts.

A. The Parties and the Project

The dispute arose out of an oil refinery project (the "Project") in Garvin County, Oklahoma where the Wynnewood Refining Co., LLC ("Owner") entered into an Environmental Services Agreement with WSP USA, Inc. ("PRIME CONTRACTOR") to provide labor and materials to improve the Project property

PRIME CONTRACTOR, in turn, contracted with Techsas, Inc. ("Techsas" or "Contractor") to provide certain labor and materials in furtherance of the improvements. Under the terms of the "Techsas Contract," the Contractor waived its right to a mechanic's liens for unpaid Work on the Project and agreed to insert similar lien waiver provisions into any subcontracts it entered into for the Work.

Techsas then entered into a Subcontract (the "H2K Subcontract") with H2K Technologies, Inc. ("Subcontractor") to perform a portion of Techsas' Contract work.

Unfortunately, Techsas began experiencing extreme financial difficulty and ultimately entered into bankruptcy without having paid Subcontractor anything for its work on the project. On or around April 4, 2019, Subcontractor sent a letter to PRIME CONTRACTOR and others advising that Techsas had failed to pay it for its Work on the Project. Shortly thereafter, Subcontractor filed a mechanic's lien in the amount of \$120,780.00, plus interest, attorney fees and filing costs and then moved to foreclose the lien.

In accordance with Oklahoma law, the PRIME CONTRACTOR bonded the lien off, and it and its surety (Fidelity and Deposit Company of Maryland – the "Surety") substituted as Defendants in place of the Owner. The action proceeded as an action against the Surety bond.

d. The Issue/Policy Interests.

The parties then each moved for summary judgment. Subcontractor argued that it had timely preserved and perfected its mechanic's lien. Contractor and its Surety argued that Subcontractor's lien rights had been waived by Techsas in its Contract.

Subcontractor argued that (1) under Oklahoma law a "contractor and owner [cannot] privately abrogate the legal rights of the subcontractor without the knowledge or consent of the latter" *Thacher v. Int'l Supply Co.*, 1936 OK 136 at ¶ 18, 54 P.2d 376, 379, and (2) 15 OKLA. STAT. § 821.B.1 voids as against public policy, any "provision, covenant, clause or understanding in, collateral to or affecting a construction contract that disallows or alters the rights of any contractor or subcontractor to receive and enforce any and all rights under this act."

The PRIME CONTRACTOR and Surety, in contrast, contended that Subcontractor's rights were controlled by the terms of the Techsas Contract (between PRIME CONTRACTOR and Techsas), and Subcontractor was charged with constructive notice of the terms of same. Citing *Treece v. Carpenter*, 1923 OK 569, ¶ 7, 222 P. 230, 230; *Christy v. Union Oil & Gas Co.*, 1911 OK 83, ¶ 0, 114 P. 740, 740.

The trial court sided with the PRIME CONTRACTOR and Surety, and held that “because Techsas waived any right to liens and claims for unpaid balances owed for Work performed under the Techsas Contract ... [Subcontractor] cannot as a matter of settled Oklahoma law cannot obtain any greater rights than Techsas could have obtained.” The trial court thus dismissed Subcontractor’s claim, holding that it “cannot assert any right to a lien or claim for unpaid balances owed for Work performed under the Techsas Contract, including Work which First Party Subcontractor subcontracted to H2K under the H2K Subcontract. *Hudson Houston Lumber Co. v. Parks*, 1923 OK 313, ¶ 26, 215 P. 1072, 1075; *Haggard v. Sunway Oil Co.*, 1936 OK 166, ¶ 26, 54 P.2d 662, 665.

Subcontractor appealed.

The Oklahoma Supreme Court took the unusual step of retaining the matter for its own disposition.

C. Are the issues presented preserved for appeal? What is the certainty that the issues will be decided on appeal?

The issue is preserved for reconsideration here.

II. Factors and Considerations for SLDF Involvement.

A. Generally.

ASA’s Board of Directors requires the SLDF Task Force to consider the following factors, namely whether:

(a) The issue is of specific interest to construction Subcontractors and suppliers.

The issue of the lien waivers and whether subcontractors control their right to waive such rights, or can have them waived for them, is of great interest to subcontractors and suppliers.

(b) The issue is focused and clearly presented.

The issue is focused and clearly presented.

(c) There is a consensus among ASA members on the issue(s).

There should be a consensus on the issue.

- (d) ASA could have a meaningful impact in the judicial proceedings.

ASA's heft as an industry association, could help focus the Oklahoma Supreme Court on the importance of mechanic's lien rights and deleterious policy implications that could flow from a failure to reverse the trial court.

- (e) The proceeding is likely to result in setting favorable judicial precedent (or avoiding the setting of unfavorable judicial precedent) primarily in appellate level court proceedings or other reported formats.

The decision in this case will set favorable or unfavorable precedent.

- (f) The issue or forum is of high visibility from a public relations standpoint.

The issue and forum are of high visibility.

- (g) Whether a party seeking ASA's intervention has agreed to indemnify ASA for its expenses incurred should the case be settled prior to a final decision in the proceeding.

They have agreed to indemnify up to \$5,000.

B. Amicus Brief Deadline and Procedure.

Under the applicable rules, there is no deadline for an amicus Petition in support. This case is an accelerated appeal and the Oklahoma Supreme Court's order (retaining the case) does not itself change this case from accelerated to a regular appeal (in which briefs are filed), but ASA can still file an application for leave to file an amicus brief under Oklahoma Supreme Court Rule 1.12.

The application must be in the form of "a statement not to exceed five (5) pages which concisely discloses the nature and extent of the applicant's interest, states any facts or questions of law which may not be presented adequately by the litigants, and the relevancy of these facts or questions of law to the disposition of the cause." There's no clear deadline because Rule 1.12 says that the application can be filed "During the Briefing Cycle of the Appeal.

Because this case is an accelerated appeal, there is no briefing cycle but we would need to act quickly to advise the Subcontractor when someone can file on behalf of the so it could request a workable deadline for that filing the application.