



**Louisiana Urban League
Contractor's Resource Center**

*Empowering Communities.
Changing Lives.*

School Construction Industry Day V: Lessons Learned



This report is for general information only. All dates and estimated construction values are estimates and subject to change at any time without advance notice.

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The goal of the Contractor's Resource Center is to:

- Increase the success rate for DBE contractors in winning bid awards
- Support contractors with training, education, counseling and other resources to increase accuracy and efficiency in project bidding capabilities
- Provide capacity-building and business sustainability training to support long-term growth planning for small business contractors





The CRC houses a computer lab outfitted with widely used construction estimating software, as well as the latest electronic accounting system software.



A state-of-the-art plotter is available for large, full-color hard copies of project plans and specifications.





- Membership-based center
- Contractors utilizing the Resource Center have access to remote and virtual basic training on the project estimating software
- Other contractor-specific training workshops, including:
 - Intermediate and advanced project management
 - Back-office applications
 - Financials preparation
 - Software instruction



Contractor's Resource Center

Since 2012, the Urban League has provided:

- **60 trainings and events** on contractor-specific topics
- **195 hours** of contractor-specific trainings and events, and
- **612 attendees** participated in these trainings
 - 463 minority-owned firms attended
 - 261 women-owned firms attended



2017 CRC Training Catalog [Jan-June]

Date	Title
Wednesday, February 1	PlanSwift Training for Contractors
Friday, February 10	Bid Prep for Contractors
Friday, February 17	UDA Training for Contractors
Thursday, March 9	Contractor's Lunch & Learn: Getting Your Insurance Coverage Right
Thursday, March 16	Intermediate QuickBooks and Costing for Contractors
Tuesday, March 28	Project Management Contractor Training with CORE Construction
Thursday, April 6	Contractor's Lunch & Learn: Your 5 Step Disaster Preparedness Plan
Thursday, April 13	UDA Training for Contractors
Thursday, April 20	PlanSwift Training for Contractors
Thursday, April 27	Work-In-Progress Accounting for Contractors
Thursday, May 4	Contractor's Lunch & Learn: Disaster Planning for Contractors
Thursday, May 18	Scheduling and Gantt Chart Training for Contractors
Thursday, May 25	G702 & 03 Pay Apps and Certified Payroll Training for Contractors
Friday, June 2	PlanSwift Training for Contractors
Friday, June 9	UDA Training for Contractors
Friday, June 16	Bid Prep for Contractors



School Construction Industry Day V

Lessons Learned



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-
- Overview of upcoming OPSB/RSD contracting opportunities
 - DBE Contractor's Panel Discussion
 - Construction Law Briefing/Project Safety Requirements
 - Pay Application Submission/Change Order Overview
-

Saturday, January 28, 2017

RSD & OPSB- DBE Participation Summary



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RSD Disadvantaged Enterprise (DBE) Participation Summary

- **New & Renovations:**

DBE Contractors secured subcontracts on 23 projects as of December 31, 2016. The **DBE subcontracts** value is **\$78,613,284** of the \$362,548,187 total amount of contracts awarded.

- **Stabilization/Demolition/Mothballing:**

DBE Contractors secured subcontracts on 48 projects as of December 31, 2016. The **DBE subcontracts** value is **\$19,767,936** of the \$ 65,106,535 total amount of contracts awarded.

- **Total Amount of DBE Contracts Awarded:** **\$ 98,381,220**



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RSD Disadvantaged Enterprise (DBE) Participation Summary

- **Design-Build New:**

- DBE Contractors secured subcontracts on 3 projects as of December 31, 2016. The DBE subcontracts value is **\$ 34,525,219** of the \$109,137,557 total amount of contracts awarded.

- **CMAR-Construction Management at Risk:**

- DBE Contractors secured subcontracts on 1 project as of December 31, 2016. The DBE subcontracts value is **\$ 11,638,373** of the \$ 31,996,589 total amount of contracts awarded.

- **Total Amount of DBE Contracts Awarded:** **\$ 46,163,592**



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RSD Disadvantaged Enterprise (DBE) Participation Summary

- **Stabilization & Demolition Contracts:** \$ 65,106,535
- **New Construction & Renovation Contracts:** \$362,548,187
- **Design-Build New Construction:** \$109,137,557
- **CMAR-Construction Management at Risk:** \$ 31,996,589
- **Total Amount of Contracts:** **\$ 568,788,868**
- **Total Amount of RSD DBE Contracts:** **\$144,544,812 (25.41%)**



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RSD-DBE Participation Summary

December 2012 to December 2016

Month-Year	Projects Total \$	DBE Participation \$	DBE %	# of Projects
Dec-12	\$ 26,824,370	\$ 4,223,510.47	15.75%	7
Dec-13	\$ 177,985,997	\$ 23,644,538.23	13.28%	24
Dec-14	\$ 359,642,410	\$ 85,168,404.51	23.68%	41
Dec-15	\$ 493,281,364	\$ 118,814,092.06	24.09%	61
Dec-16	\$ 568,788,868	\$ 143,818,804.71	25.29%	75
Jan-17	\$ 568,788,868	\$ 144,549,357.14	25.41%	75

	Low Bid Only
	Includes 3 Design Build Projects
	Includes 1 CMAR Project

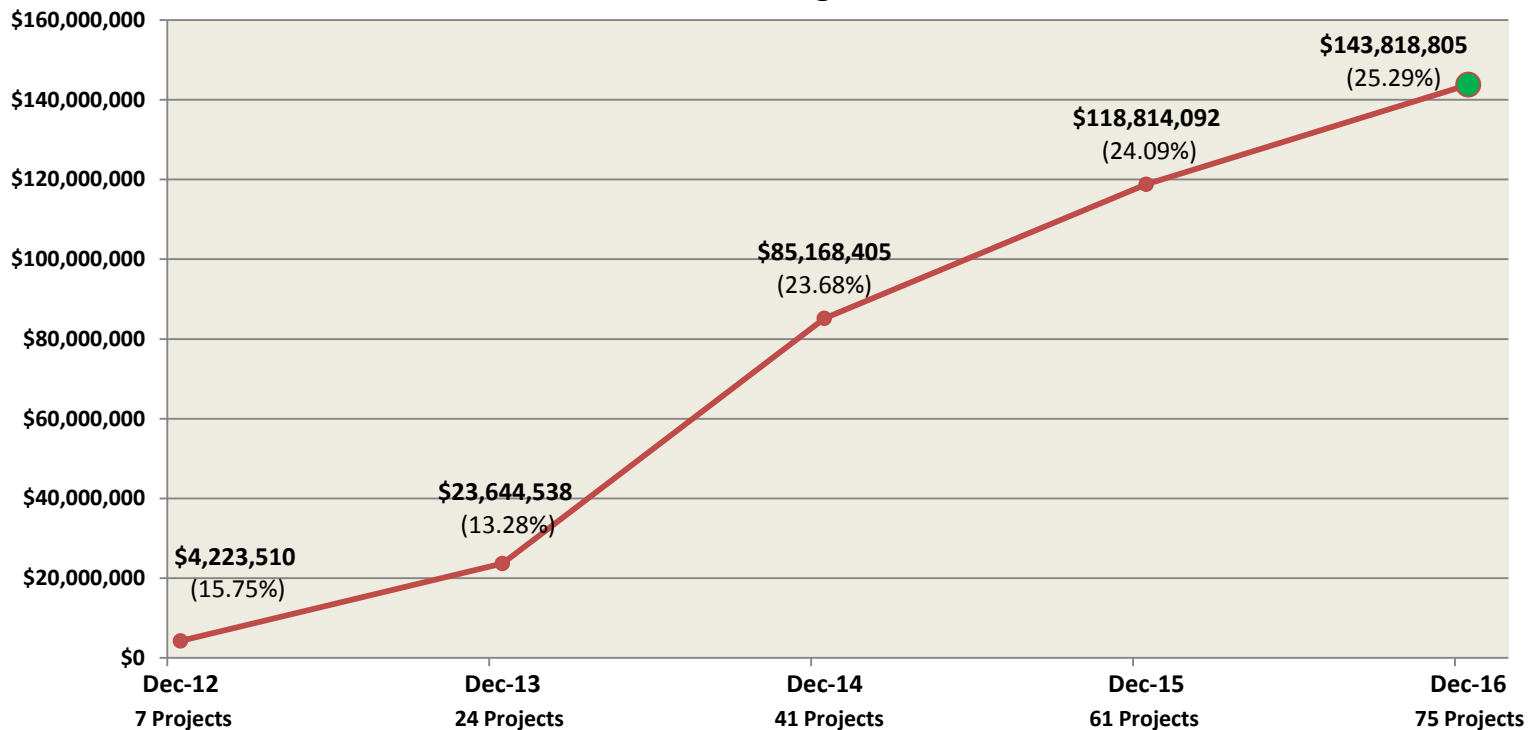


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RSD-DBE Participation Summary

December 2012 to December 2016

DBE Participation Dec 2012 to Dec 2016
Dollars and Percentage of Total Contracts



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OPSB Disadvantaged Enterprise (DBE) Participation Summary

- **New & Renovations:**

DBE Contractors secured subcontracts on 14 projects as of December 31, 2016.
The **DBE subcontracts** value is **\$54,086,557** of the \$199,371,360 total of awarded contracts.

- **Stabilization/Demolition/Mothballing:**

DBE Contractors secured subcontracts on 2 projects as of December 31, 2014.
The **DBE subcontracts** value is **\$296,520** of the \$902,999 total of awarded contracts.

- **Total Amount of Contracts:** **\$200,274,359**

- **Total Amount of OPSB DBE Contracts:** **\$ 54,383,077**



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HOW TO FIND OUT MORE ON UPCOMING PROJECTS



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Recovery School District Projects

- **State of Louisiana Procurement and Contract Network:**

- All RSD projects can be found on the State of Louisiana Procurement and Contract Network (LaPAC) website: <https://wwwcfprd.doa.louisiana.gov/OSP/LaPAC/deptbids.cfm>
- State of Louisiana Procurement and Contract Network → Bids by Department → State → Education
OR
- Type the following direct link in the address bar:
<https://wwwcfprd.doa.louisiana.gov/osp/lapac/dspBid.cfm?search=department&term=14>
- Note: LaPAC does not post the advertisement until the specified 1st advertisement date

- **All Projects will advertise in the Times-Picayune and The Advocate.** *(New Orleans/Baton Rouge Edition)*

- **Keep Track of the RSD's Construction Program through the Monthly Superintendents' Reports**

- www.rsdl.net/
- Click on Departments, New Orleans School Facilities Master Plan, Monthly Superintendents' Reports



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Orleans Parish School Board Projects

- **All OPSB projects can be found on the Orleans Parish School Board (OPSB) website:** <http://www.opsb.us/>
 - Click on “Solicitations”. Projects will be listed under “Facilities Department”
OR
 - Click on use the following direct link: <http://www.opsb.us/solicitations/>
- **All Projects will advertise in the Times-Picayune.**(New Orleans/Baton Rouge Edition)
- **Keep Track of the OPSB’s Construction Program through the Monthly Capital Construction Reports**
 - www.rebuildingnolaschools.com
 - Click on OPSB Capital Construction Report



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Requirements to Bid on RSD and OPSB Capital Projects

- **Classification 1 - Louisiana General Contractor's License**

- Exception – Demolition Specialty Allowed for Demolition Projects Only

- **Bid Security for five percent (5%) of total bid**

- Certified check drawn on a bank insured by the FDIC **OR**
- Cashier's check drawn on a bank insured by the FDIC **OR**

- **Bid Bond**

- Written by a surety company licensed to do business in Louisiana and signed by the surety's agent or attorney-in-fact

AND

- Surety must be listed on the current U.S. Department of the Treasury Financial Management Service list of approved bonding companies as approved for an amount equal to or greater than the amount for which it obligates itself in the Bond

OR

- Must be a Louisiana domiciled insurance company with at least an A - rating in the latest printing of the A.M. Best's Key Rating Guide



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UPCOMING RSD NEW CONSTRUCTION PROJECT



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Edna Karr High School at JoEllen Smith (RSD) CMAR

- **Architects –**
 - Trapolin Peer – VMDO
- **Scope of Work –**
 - Construction of a New High School
- **Pre-Con Awarded**
- Core Construction
November 30, 2016
- **50% Submission Due**
December 20, 2016
- **100% Submission Due (GMP)**
March 30, 2017
- **Estimated Construction**
- \$47 Million - \$50 Million
- **Funding Source – FEMA**
- **Approximately 152,632 sf**
- **LEED Silver School - TBD**



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UPCOMING RSD REFURBISHMENT PROJECTS

Abridged Scopes of Work for Refurbishments Available on RSD Website:

www.rsdlc.net → *RSD Procurement* → *Capital Projects Procurement* →
2017 Projected Quarterly Bid Schedule



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Kitchen Group Refurbishments Banneker-Wheatley (RSD)

- **Architect**
SCNZ Architects
- **Scope of Work**
Refurbishment of existing
School Kitchens
- **1st Advertisement**
December 28, 2016
- **Construction Bid Opening**
February 1, 2017
- **Estimated Construction
Value Range**
\$ 650,000-750,000
- **Funding Source** – FEMA



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Banneker-Wheatley Schools (RSD)

Abridged Scope of Work

Scope of work includes, but is not limited to the following:

Banneker:

- Install new hand sinks at kitchen
- Install new food guard at existing serving counter
- Install new condensate exhaust hood at dishwasher
- Install new dumpster pad and enclosure with hot water connection, grease trap and drain
- Replace copper screens at 4 existing louvers
- Paint all non-conforming walls, prime and 2 finish coats
- Remove and replace ceiling tiles at the dining/serving area with new code compliant tile
- Remove existing 3" high floor curb at kitchen
- Install new quarry tile floor at kitchen
- Perform ADA upgrades at kitchen restroom
- Install new code compliant kitchen exhaust fans and ductwork



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Banneker-Wheatley Schools (RSD)

Abridged Scope of Work

Scope of work includes, but is not limited to the following:

Banneker Cont'd:

- Reconfigure existing three (3) compartment sink to hub drain
- Install new 72" air curtain
- Install new ADA compliant drinking fountain
- Repair and/or replace existing floor drains
- Install new fire protection system in kitchen, modify existing hood suppression system to meet code
- Install new exhaust fan with vent in food service restroom
- Install new light fixtures at kitchen and serving area only.
- Install new with GFCI outlets
- Repair fire alarm devices in kitchen



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Banneker-Wheatley Schools (RSD)

Abridged Scope of Work

Scope of work includes, but is not limited to the following:

Wheatley:

- Install new grease interceptor and associated drain lines at dumpster pad
- Install new scupper system to remove water from exterior stair well



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McDonogh 32-School (RSD)

- **Architect** – HMS
- **Scope of Work** – Refurbishment
- **1st Advertisement** – TBD
- **Construction Bid Opening** – TBD
- **Estimated Construction Value**
\$ 3.5 Million - \$ 4.2 Million
- **Funding Source** – FEMA



This report is for general information on
values are estimates and subject to change

McDonogh 32 School (RSD)

Abridged Scope of Work

Scope of work includes, but is not limited to the following:

- Conduct repairs to the underground storm drainage system
- Bring dumpster up to DHH code
- Clean windows, repair rusted fasteners
- Install new windows at previous locations of window A/C units
- Install new floor tile, +/- 20% of total area
- Replace roof at Building 'D'
- Repair and paint existing stucco at various locations
- Replace all steel exterior windows
- Replace damaged exterior doors, at all buildings (+/- 60% of total)
- Install new exhaust fans at each restroom
- Bldg. 'A' RTU and ductwork, replace 6 window units Bldg. 'B', repair rooftop HVAC units at Build. 'C', , install new HVAC system to replace 7 window units, RTU and ductwork at Bldg. 'D', replace 7 rooftop HVAC units
- Replace electrical panels and light fixtures throughout all Bldgs.



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Thurgood Marshall-School (RSD)

- **Architect** – Scairono Martinez
- **Scope of Work** – Refurbishment
- **1st Advertisement** – Feb. 17, 2017
- **Construction Bid Opening** –
March 22, 2017
- **Estimated Construction Value**
\$ 4.5 Million - \$ 5.0 Million
- **Funding Source** – FEMA



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Thurgood Marshall School (RSD)

Abridged Scope of Work

Scope of work includes, but is not limited to the following:

- Correct all code deficiencies
- Clean and tuck point upper areas of chimney above Boiler Room
- Clean and replace masonry at corroded lintels above windows
- Install new exterior concrete landing and ramps at front of building
- Reseal all perimeters and operable joints and repaint windows
- Install student hand wash sink near serving area
- Refurbish all exterior windows
- Install new elevator
- Install exterior basketball court with covered canopy
- Bring kitchen up to DHH code



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UPCOMING OPSB RENOVATION PROJECTS



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Benjamin Franklin Elementary School (OPSB)

- **Architect** – N-Y Associates, Inc.
- **Scope of Work** – Renovation
- **1st Advertisement** –
May 2017
- **Construction Bid Opening** –
June 2017
- **Estimated Construction Value Range** –
\$ 1.7 Million - \$2.1 Million
- **Funding Source** – FEMA



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Benjamin Franklin Elementary School (OPSB)

Abridged Scope of Work

Scope of work includes, but is not limited to the following:

- Mortar Repointing and vegetation removal
- Plaster Repair/ Replacements
- Replace Exterior Doors with Code Compliant doors and hardware
- Install Plywood Sheer walls at cloakroom walls
- Replace Damaged Lintels
- Replace and or repair roof system at stairs (*structural repairs, new scuppers and downspout*)
- Install new or repair windows as required



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Warren Easton High School (OPSB)

- **Architect-Verges Rome**
- **Scope of Work** – Refurbishment
- **1st Advertisement** –
Feb 8, 2017
- **Construction Bid Opening** –
March 15, 2017
- **Estimated Construction Value Range** –
\$ 575K - \$ 625K
- **Funding Source** – FEMA



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Warren Easton High School (OPSB)

Abridged Scope of Work

Scope of work includes, but is not limited to the following:

- Repointing existing brick masonry walls in the courtyards and over the boiler room, including removal and reinstallation of wall-mounted items. Intent is to match the previous repointing work done to the street side brick masonry walls.
- Certain repointing work included in Add Alternates.
- Removal, reinstallation, and painting of existing downspout boots.
- Replacement of damaged stucco freize at the parapet top.
- Repair of damaged cast concrete/stucco window sills, door sills, and watertable on courtyard walls.
- Coating stucco freize, window sills, door sills, and watertable on courtyard walls.



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Warren Easton High School (OPSB)

Abridged Scope of Work (Cont'd)

Scope of work includes, but is not limited to the following:

- Painting exposed wood at indicated doors and windows, to match adjacent prefinished aluminum trim.
- Sheet metal flashing work at existing parapets.
- Replacement of wall mounted light fixtures, conduit, and wiring, in Add Alternate.
- All work to existing masonry and stucco must be in compliance with Department of Interior (D.O.I.) regulations. Reference attached Mortar Analysis Report.



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UPCOMING RSD & OPSB REFURBISHMENT PROJECTS



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RSD & OPSB REFURBISHMENTS

<u>Project</u>	<u>Architect</u>	<u>Value</u>	<u>Status</u>
• Abramson Modular Demo 3	Mahlum Scairono	\$ 270,000	Bid Mar-17
• Coghill Modular Demo	Mahlum Scairono	\$ 414,000	Bid Jun-17
• Sarah T. Reed Modular Demo	Mahlum Scairono	\$ 248,000	Hold
• Banneker-Wheatley Kitchen	SCNZ	\$ 650,000	Bid Feb-17
• Benjamin Franklin Elementary	N-Y Associates	\$2,000,000	1 st Adv. May-17
• Bethune Elementary	Chenevert Architects	\$1,600,000	Bid Jan-26
• Reed-HVAC Replacement	Marrerro Couvillon	\$ 645,000	1 st Adv. Feb-17
• Village De L' Est.-HVAC	Marrerro Couvillon	\$ 230,000	1 st Adv. Feb-17
• Rosenwald HVAC Replace	Marrerro Couvillon	\$ 645,000	1 st Adv. Feb-17
• Marshall	Scairono Martinez	\$2,000,000	1 st Adv. Feb-17
• McDonogh No. 32	HMS	\$3,500,000	1 st Adv. Feb- 8
• Warren Easton	Verges Rome	\$ 600,000	TBD
• Fisher-HVAC Replacement	SCNZ Architects	\$ 450,000	TBD
• Schaumburg Roof	TBD	TBD	TBD
• Harney Gutters/Downspouts	TBD	TBD	TBD.



***Abridged Scopes of Work for Refurbishments Available on RSD Website:**

www.rsdl.net → RSD Procurement → Capital Projects Procurement →
2015 Projected Quarterly Bid Schedule

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OPSB/RSD Procurement Methods

- **Competitive Low Bid**

- In accordance with Louisiana Public Bid Law
 - All public work exceeding the contract limit as defined in this Section, including labor and materials, to be done by a public entity shall be advertised and let by contract to the lowest responsible and responsive bidder who had bid according to the bidding documents as advertised, and no such public work shall be done except as provided in this Part.
 - A responsive bidder is the apparent low bidder who submits the proper documentation within ten days of the opening of the bids.



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OPSB/RSD Procurement Methods

- **CMAR – Construction Manager At-Risk**

- In accordance with Louisiana Revised Statute Title 38 Section 2225.2.4
- Currently only for projects \$25M +
- Provides for early collaboration, cost control, risk mitigation and reduction in changes



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Change Orders

- **Change in Work**

- Preconstruction
- The contractor shall submit the following at preconstruction meeting and subcontractor shall submit no later than 14 days prior to the submission of a change order. A201 (7.1.4)
 1. Fixed job site overhead cost A201 (7.1.7)
 2. Bond premiums
 3. Insurance premiums (Construction related)
 4. Labor Burden

- **Change Orders**

- Before a Change Order is prepared, the contractor shall provide the “Cost of Work’ A201 (7.2.5)
 1. A detailed itemized list of labor, materials, and equipment... including quantities and unit costs for each labor, material, and equipment (Contractor and Sub)
 2. Cost of Work includes: A201 (7.2.2)
 3. Overhead and Profit A201 (7.2.3)
- Cost Reasonable



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Pay Applications

- **Pay Applications**

- Preconstruction
 - General contractor to submit a schedule of Value at the Preconstruction Meeting A201 (9.2)
- Construction
 - Pay Application AIA G702 A201 (9.3)
 - 10th day of the month (Suggest provide pencil copy prior)
 - Retainage 10% for over \$500,000.00
 - 45 days after the Owner has approved the Certificate of Payment
 - Required documents

- **Records**

- The Contractor shall keep full and accurate records of all cost incurred and items invoiced in connection with the work a201 (2.5) Such Records shall be open to audit....



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Project Safety Requirements

- **Development of Safety Plan** (reference 29 CFR 1926 OSHA Construction Industry Regulation)

- **Prevention is the only way to reduce the risk of worker injuries and death. No person should ever have to be injured, become ill, or die for a paycheck.**



- **General Duty Clause, Section 5(a)(1) OSHA Act of 1970,**

- Each Employer, "place of employment which are free from recognizable hazards that are causing or are likely to cause death or serious physical harm to his employees."
- Each Employee, "comply with occupational safety and health standards and all rules, regulations, and orders"

- **Written Safety Plan:**

- Small business w/10 or fewer employees are exempt, however a safety plan demonstrates a commitment to your employees health
- Compliant with OSHA standards and information is relevant
- 4-Prong Approach: Management Commitment/Accountability, Worker Involvement/Communication, Workplace Analysis, Training/Prevention
- Address Hazard Communication, Fall Protection Program, LOTO Procedures, Excavation, Confine Space, etc.
- Education / Training (OSHA 10hr and 30hr) and Tool Box Meeting (see handout)



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Project Safety Requirements

- **LARSD Program Site Specific Safety Action Plan** (see handout)
 - **GC responsible to provide:**
 - Site Specific Safety Action Plan (avoid cut/paste safety plans)
 - Effective, Functional Safety Plan; Pro-active Involvement; Address Employee Exposure
 - **Areas to cover include:**
 - Incident/Accident Reporting Procedures
 - Emergency Response Plan / Perimeter and Access Control
 - Personal Protective Equipment Requirements
 - Pre-Phase Meeting / Job Hazard Analysis
 - Orientation / Training / Tool Box Meetings
 - **DON'T FORGET:**
 - First-Aid Kit onsite and First Aid/AED/CPR Trained Employees
 - Federal/State Employment Poster (bi-lingual)
 - Local Medical Facility Direction / Telephone Numbers (bi-lingual)



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School Construction Industry Day V: Lessons Learned

Construction Contracting and Enforcement of Lien Rights

PRESENTED BY:

BRIAN D. GRUBB

ATTORNEY AT LAW

(504) 920-3335



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About Brian D. Grubb

Brian D. Grubb is a local attorney focused on representing owners, general contractors and subcontractors on all aspects of construction law, particularly innovative construction delivery methodologies, public procurements, contract negotiations and compliance

Brian's practice encompasses all aspects of construction law and real estate development including significant disaster recovery and governmental relations. He has been engaged to assist in the development of major multi-million dollar complex construction projects across the State of Louisiana. In such capacity he advises owners, design professionals and contractors on construction delivery methodologies, public procurements, contract drafting, negotiations and program oversight. Brian has considerable experience advising clients on compliance with complex program requirements including but not limited to the Federal Emergency Management Association, Community Development Block Grant Programs, state and federal new markets tax credits, United States Department of Agriculture Rural Development, HUD mortgage insurance programs, and state and federal Disadvantaged Business Enterprise programs.

Additionally, Brian routinely advises clients and assists with commercial transactions, insurance, leases, contracts, corporate governance, policies and procedures, technology systems and intellectual property.

Contact Brian D. Grubb at 504-920-3335.

Construction Contracting

- A successful project usually means the work was done in a good and workmanlike manner, on time and within budget (and, for contractors, has good margins).
- The purpose of this presentation is to provide you with the tools necessary to understand construction contracting so that your next project will be a success.
- We will also cover the process by which you may file and enforce liens in the event you experience problems during your project.

Formation of a Contract

A contract is a legally enforceable agreement between two or more competent persons or entities creating an obligation to do or not do something. The elements of an enforceable contract include:

Offer

- A valid offer is established by showing the following: (1) there was an intent to make an offer, (2) the terms of the offer are clear and definite, and (3) the offer was communicated to the offeree (the person receiving the offer).

Acceptance.

- Acceptance is valid when: (1) the acceptance was made before the offer lapsed/expired or was revoked by the offeror, (2) the manner in which the acceptance was made strictly complied with the terms of the offer, (3) the acceptance was communicated to the offeror (the person that originally made the offer), and (4) the form of the acceptance was clear and definite.

Mutual assent.

- The parties to a contract must have a “meeting of the minds,” which is a mutual understanding and intent as to the scope and key terms of the contract. Whether the parties had a meeting of the minds is an objective determination based on the parties’ statements, not on their subjective state of mind.

Consideration.

- Consideration is the bargained-for exchange of one thing of value for another. Consideration is often the exchange of money for goods or services.

Understanding Contract Terminology and Obligations

Terms that are commonly defined in a construction contract include the following:

- Owner
- Architect/Engineer
- Contractor
- Project
- Contract Documents
- Work
- Contract Sum
- Contract Time
- Change Order
- Date of Commencement
- Substantial Completion
- Day

It is critical to understand key provisions that are commonly found in construction contracts and how the provisions affect your rights and obligations.

- In general, the contractor is obligated to deliver the project as designed on or before the substantial completion deadline and for no more than the stipulated contract sum.
- In return, the owner is obligated to promptly pay for the construction services.

Subcontract Formation and Administration

- A successful project usually depends on a contractor's ability to balance the risk in the prime contract with those in the subcontract agreements.
- If the contractor fails to properly manage the risk, disputes between the owner, contractor and subcontractors are inevitable.
- To reduce the potential for disputes, careful attention should be given to:
 - subcontractor's bid proposals;
 - scope of work (avoid scope gaps);
 - notice requirements;
 - changes procedure;
 - timing of performance;
 - timing of payment; and
 - warranty

Flow-Down Provisions

- A flow-down provision is a contract provision incorporating the prime contract (agreement between the owner and contractor) into the Subcontract.
- The purpose of this provision is to shift the obligations the contractor owes to the owner down to the subcontractor.
- The absence of a flow-down provision can leave the contractor exposed to risk because without a flow-down, the contractor may be unable to demand of the subcontractor the performance the contractor is contractually required to undertake for the owner.
- Subcontractors are leery of these provisions because they can be assuming unknown obligations.
- To balance these concerns, a flow-down provision should provide the subcontractor with the same rights that the contractor has against the owner and it should be limited to subcontractor's scope of work – not applicable to all of the general contractor's obligations on the entire project.

Flow-Down Provisions

Example: The Contract Documents consist of this Subcontract and any Exhibits attached hereto, the Prime Contract between the General Contractor and the Owner and all Modifications issued subsequent thereto. *Subcontractor agrees to be bound to the General Contractor by all of the terms of the Contract between Owner and General Contractor and by the Contract Documents and to assume toward General Contractor all of the obligations and responsibilities that General Contractor, by those instruments, assumes toward Owner.* All of the above documents are part of this Subcontract and shall be available for inspection by Subcontractor upon his request.

Revised: The Contract Documents consist of this Subcontract and any Exhibits attached hereto, the Prime Contract between the General Contractor and the Owner and all Modifications issued subsequent thereto. Subcontractor agrees to be bound to the General Contractor by all of the terms of the Contract between Owner and General Contractor and by the Contract Documents and to assume toward General Contractor all of the obligations and responsibilities that pertain to the Subcontractor's scope of work that General Contractor, by those instruments, assumes toward Owner. Subcontractor shall have the same rights, remedies and defenses against the General Contractor as the General Contractor has against the Owner. All of the above documents are part of this Subcontract and shall be available for inspection by Subcontractor upon his request.

Indemnity Provisions

- Indemnity is another risk-shifting area of contracting that is the subject of much debate.
- To “indemnify” means to provide protection against a loss or other financial burden.
- Such provisions require the indemnitor (downstream party) to hold the indemnitee (upstream party) harmless from and against liabilities arising out of the subject matter of the contract. There are three main types:
 1. **Broad Form Indemnity** – Indemnitor assumes an unqualified obligation to hold the indemnitee harmless from all liability regardless of which party was actually at fault, even if the indemnitee was solely negligent.
 2. **Intermediate Form Indemnity** – Indemnitor assumes all liabilities of the indemnitee relating to the subject matter of the contract, except for the injury or damages caused by the indemnitee’s sole negligence.
 3. **Limited Form Indemnity** – Indemnitor indemnifies the indemnitee only to the extent of indemnitor’s own fault in contributing to the loss.

Change Order Provisions

- Most construction contracts allow the owner to order changes to the work and allow the architect/engineer to order *minor* changes that do not affect schedule or cost.
- Generally, a contractor is only required to perform in accordance with its prime contract, and therefore, if the owner orders work that is different from the prime contract, the change order provision will entitle the contractor to additional money and/or time to complete.
- Changes to the prime contract could be necessitated for any number of reasons including, but not limited to,
 - (1)owner requested changes
 - (2)incomplete/deficient design documents
 - (3)concealed conditions and unknown site conditions, or
 - (4)force majeure events.
- If a reason exists justifying a change to the contract, the contractor would be entitled to change order.

Change Order Provisions

- When negotiating a change order, pay close attention to the terms of the construction contract.
- Most contracts identify who can order changes to the work and who can sign change orders.
- Further, most contracts require that the change order be in writing and signed by the parties (owner, architect and contractor) *prior* to performing the work.

Payment Provisions

- Another risk-shifting provision typically found in subcontracts that requires payment by the owner as a condition to the contractor's obligation to pay its subcontractors.

Example: Payment by the Owner to Contractor for Subcontractor's work, whether for progress payments or final payment, is a *condition precedent* to Contractor's obligation to pay Subcontractor. Subcontractor's price for the work includes the assumption of this risk.

LOUISIANA PROMPT PAYMENT (LA. REV. STAT. ANN. 9:2784)

- In Louisiana, when a contractor receives any payment from the owner for improvements to an immovable the contractor is required to **promptly** pay such monies received to each subcontractor and supplier in proportion to the percentage of work completed.
- Further, whenever a subcontractor receives payment from the contractor, the subcontractor is required to **promptly** pay such monies received to each of its sub-subcontractor and suppliers in proportion to the work completed. *La. Rev. Stat. Ann. 9:2784.A.*
- If for any reason the contractor receives less than the full payment from the owner, then the contractor is obligated to disperse only the funds received by the contractor among the subcontractors, and suppliers with each receiving a prorated portion based on the amount due on the payment. *La. Rev. Stat. Ann. 9:2784.B.*

LOUISIANA PROMPT PAYMENT (LA. REV. STAT. ANN. 9:2784)

- If a contractor or subcontractor, without reasonable cause, fails to make any payment to its subcontractors and suppliers within **14 consecutive days** after receipt of payment from the owner for improvements to an immovable, the contractor or subcontractor shall pay to the subcontractors and suppliers, in addition to the payment, a penalty in the amount of 0.50% of the amount due, per day, from the expiration of the period allowed herein for payment after the receipt of payment from the owner.
- The total penalty shall not exceed 15% of the outstanding balance due.
- Also, the contractor or subcontractor shall be liable for reasonable attorney fees for the collection of the payments due the subcontractors and suppliers.

La. Rev. Stat. Ann. 9:2784.C.

Consequential Damages Waiver

The purpose of such waivers is to eliminate uncertainty and unpredictability surrounding the award of consequential damages. Section 15.1.6 of the AIA A201-2007 General Conditions, provides the following:

“The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes:

- damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and
- damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit except anticipated profit arising directly from the Work.

Consequential Damages Waiver

- This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination in accordance with Article 14.
- Nothing contained in this Section 15.1.6 shall be deemed to preclude an award of liquidated damages, when applicable, in accordance with the requirements of the Contract Documents.”
- When negotiating a consequential damages waiver, one must understand what damages are waived (consequential) and which damages are not (direct).
- The distinction between direct and consequential damages is not all that clear. In order to avoid this uncertainty, one should expressly state in the contract what types of consequential damages the parties are waiving.

Liquidated Damages

- Liquidated damages provisions stipulate the amount of delay damages that may be recovered – typically payable by the contractor to the owner. The following is an example liquidated damages provision:

Time is of the essence. If the Contractor has not achieved Substantial Completion on or before the dates set forth herein, subject to adjustment as provided in the Contract Documents, then the Contractor shall pay the Owner liquidated damages at a rate of \$500 per day. The Parties agree the above liquidated damages is not a penalty, but rather, represent the Parties' estimate at the time of contract execution of the damages which the Owner will sustain for late completion. The Parties further agree that the above liquidated damages, which the Owner is entitled to, is a reasonable forecast of just compensation for the harm caused by the Contractor and the damages are incapable of accurate estimation that would be caused by Contractor's failure to achieve the Substantial Completion in accordance with the Contract.

Liquidated Damages

- To prevail on a claim for liquidated damages, two elements must be established:
 - (1) damages must be difficult to calculate, and
 - (2) it must be a reasonable forecast of just damages.
- These two elements must be present at the time of contracting.
- If a liquidated damages provision is determined to be a penalty (unenforceable), the default is to allow the owner to recover its actual delay damages, if any.

Breach of Contract and Termination

- If a contracting party commits a material breach of the contract, the non-breaching party may terminate the contract, but this decision should not be taken lightly.
- Termination of a construction contract is often synonymous with litigation.
- Termination will certainly impact the ultimate cost of the project, for both the terminating and terminated parties, and also will likely have ramifications on the parties' reputations and future business dealings.
- It is important to realize that the decisions made with regard to termination will often be analyzed and scrutinized not only at the time of termination but also later in litigation.
- Contractors and subcontractors should always attempt to negotiate cure periods as a condition precedent to termination.

Termination for Default or Cause

- “Termination for cause” provisions should be carefully drafted as they will dictate when and how a party can properly terminate the contract. The essential elements of a termination for cause provision include:
 - first to breach
 - events of default
 - notice
 - opportunity to cure
 - damages
- The benefit of terminating for cause is the remedy available to the terminating party. A party terminating for cause can expect to receive damages which place the terminating party in as good a position had the contract been fully performed by the terminated party, without regard to the terminated party’s losses.
- In termination for convenience cases on the other hand, the terminating party is forced to compensate the terminated party for work performed. A good termination clause will explicitly lay out the events of default which allow for termination.
- However, even when the termination for cause provision is well-thought out and specific, one should not rely solely on the contract language.

Termination for Default or Cause

- Common grounds for termination of a contractor by a subcontractor include:
 - contractor's failure to cooperate;
 - contractor's material interference with the work; and
 - contractor's failure to pay.
- Choosing to terminate for cause carries quite a risk.
- A wrongful termination discharges both the contractor, and its surety, from all performance obligations.
- Moreover, the owner risks liability for wrongful termination damages as well as extra-contractual damages where the wrongful termination is found to have been made in bad faith.

Termination For Convenience

- Termination for convenience effectively shields the terminating party from a claim for wrongful breach.
- Although the terminating party will have to compensate the terminated party, it may wish to bear that risk in order to forsake placing itself in a vulnerable legal position by terminating for cause.
- When a terminating party is not certain whether an event of default has occurred or if it has adequate documentation of such an event, termination for convenience might be preferable.
- Terminating for convenience would allow the terminating party to avoid a potential claim of wrongful termination.

Enforcement of Lien Rights Claims and Privileges

Louisiana Private Works Act (La. Rev. Stat. 9:4801 et. seq.)

PRIVILEGES ON IMMOVABLES

- The following persons have a **claim against the owner and the contractor** to secure payment of the following obligations arising out of the performance of work under the contract:
 - Subcontractors (for the price of their work)
 - Laborers or employees of owner for the price of work performed at the site of the immovable
 - Sellers for the price of movables sold to Owner that become component parts of the immovable
 - Lessor for the rent of the movables used at the site of the immovable and lease to the owner by contract
 - Professionals for price of services rendered in connection with work undertaken.
 - *La. Rev. Stat. Ann. 9:4802.A.*
- The claims against the owner shall be secured by a privilege on the immovable on which the work is performed. *La. Rev. Stat. Ann. 9:4802.B.* However, the **owner is relieved of the claims against him** and the privileges securing them **when the claims arise from the performance of a contract by a general contractor for whom a bond is given and maintained and when notice of the contract with the bond attached is properly and timely filed.** *La. Rev. Stat. Ann. 9:4802.C.*

Notice of a Contract

- A written notice of a contract between a general contractor and an owner shall be filed before the contractor begins work on an immovable. The notice must:
 - 1) be signed by the owner and contractor.
 - 2) contain the legal property description of the immovable upon which the work is to be performed and the name of the project.
 - 3) identify the parties and give their mailing addresses.
 - 4) state the price of the work or, if no price is fixed, describe the method by which the price is to be calculated and give an estimate of it.
 - 5) state when payment of the price is to be made.
 - 6) describe in general terms the work to be done.
- A general contractor is **not** entitled to the privilege if the price of the work stipulated, or reasonably estimated, in his contract exceeds \$25,000, unless notice of the contract is timely filed. *La. Rev. Stat. Ann. 9:4811.D.*

If a **notice of contract was properly and timely filed**, you have **30 days** after the filing of a notice of termination of the work to:

- (1) File a statement of their claims or privilege; and
- (2) Deliver to the owner a copy of the statement of claim or privilege.

La. Rev. Stat. Ann. 9:4822.A.

Note, general contractors have **60** days after the filing of the notice of termination or substantial completion of the work to file a claim. *La. Rev. Stat. Ann. 9:4822.B.*

If a **notice of contract was not filed**, you must file a claim **60** days after:

- (1) The filing of a notice of termination of the work; or
- (2) The substantial completion or abandonment of the work, if a notice of termination is not filed.

La. Rev. Stat. Ann. 9:4822.C.

What's included in the claim?

A statement of a claim or privilege must:

- (1) be in writing.
- (2) be signed by the person asserting the same or his representative.
- (3) reasonably identify the immovable with respect to which the work was performed or movables or services were supplied or rendered and the owner thereof.
- (4) set forth the amount and nature of the obligation giving rise to the claim or privilege and reasonably itemize the elements comprising it including the person for whom or to whom the contract was performed, material supplied, or services rendered. *Note - you are not required to attach copies of unpaid invoices unless the statement of claim or privilege specifically states that the invoices are attached.*

Where Do I File?

- Statements of claims or privileges must be filed for registry with the recorder of mortgages of the parish in which the work is to be performed. *La. Rev. Stat. Ann. 9:4831.A*
- Each filing made with the recorder of mortgages pursuant to this Part which contains a reference to immovable property shall contain a description of the property sufficient to clearly and permanently identify the property.
- A description which includes the lot and/or square and/or subdivision or township and range shall meet the requirement of this Subsection.
- Naming the street or mailing address without more is not sufficient.

La. Rev. Stat. Ann. 9:4831.C.

Enforcement of Claims and Privileges and Concurus Proceedings

After the delays for filing claims has expired, the owner or any other interested party may convoke a concursus proceeding wherein all persons who have filed claims against the owner, or their privileges on the immovable, establish the validity and rank of their claims and privileges. *La. Rev. Stat. Ann. 9:4841.A.*

The owner may deposit into the registry of the court the amounts owed by him to the contractor. *La. Rev. Stat. Ann. 9:4841.B.*

The owner may by rule order the other parties to show cause why a judgment should not be entered discharging and cancelling their claims and privileges or discharging the owner from further responsibility to them. The rule shall be tried and appealed separately and is limited to the following:

- (1) whether the proper amounts have been deposited by the owner into the registry of the court.
- (2) whether the asserted claims or privileges have been properly preserved.
- (3) whether a notice of the contract and a bond for the work were properly and timely filed.
- (4) whether the bond complies with the legal requirements.

La. Rev. Stat. Ann. 9:4841.C.

If the court determines that the owner has properly deposited all sums owed by him to the contractor; has complied by properly and timely filing notice of a contract and bond; that the bond complies with the legal requirements, or if it finds that any of the claims or privileges have not been preserved, it shall render a judgment directing the claims or privileges to be cancelled and declaring the owner discharged from further liability for such claims or limiting the claims and privileges to the amounts as may be owed by the owner or granting other relief that may be proper. *La. Rev. Stat. Ann. 9:4841.D.*

Public Work (La. Rev. Stat. Ann. 38:2212, et. seq.)

REQUIREMENTS FOR A WRITTEN CONTRACT AND BOND

- Public works contracts of \$5,000 or more must be in writing and signed by the parties. *La. Rev. Stat. Ann. 38:2241.A.(1)*
- For public works contracts of \$25,000 or more, contractors are required to provide a bond for not less than 50% of the contract sum.
- The bond and contract must be recorded in the parish where the work is to be done not later than **thirty** days after the work has begun. *La. Rev. Stat. Ann. 38:2241.A.(2)*
- The requirements for written contract and bond cannot be waived by contract.

Who is a Claimant?

"Claimant" means any person to whom money is due under a contract with the owner or a contractor or subcontractor:

- doing work, labor, or furnishing materials or supplies for the construction, alteration, or repair of any public works project or for transporting and delivering such materials or supplies to the site by a for-hire carrier, or for furnishing oil, gas, electricity, or other materials or supplies for use in machines used in the construction, alteration, or repair of any public works,
- includes lessors of movable property used at the site
- includes registered or certified surveyors or engineers or consulting engineers, or licensed architects, or their professional subconsultants employed by the owner or by the contractor or subcontractor in connection with the project.

La. Rev. Stat. Ann. 38:2242.A.

When to File?

You have **45** days after the recordation of acceptance of the work by Owner or of notice of default of the contractor or subcontractor, to file a sworn statement of the amount due with the Owner and record it in the office of the recorder of mortgages for the parish in which the work is done. *La. Rev. Stat. Ann. 38:2242.B.*

Petitions and Preferential Payment of Claimants

- If at the expiration of the **45** days any filed and recorded claims are unpaid, the Owner shall file a petition in the proper court of the parish where the work was done, citing all claimants and the contractor, subcontractor, and surety on the bond and asserting whatever claims it has against any of them, and shall require the claimants to assert their claims. If the Owner fails to file the proceeding any claimant may do so. *La. Rev. Stat. Ann. 38:2243.A*
- All the claims shall be tried in concursus and the claims of the claimants shall be paid in preference to the claims of the public entity. *La. Rev. Stat. Ann. 38:2243.B*

Q&A

IMPORTANT NOTE: The information contained in this presentation is designed to assist the layman and/or attorney in understanding rights and responsibilities of contractors, subcontractors, and suppliers under construction contracts. It should not be used by anyone not attending the lecture during which it was distributed.

This information can be best utilized as an initial reference point when reviewing construction contracts. It is neither intended as a substitute for sound legal advice, nor is it intended to address every legal issue in the complex area of construction contracts. Rather, it is intended to provide you with a basic framework of information regarding construction contracts, and some of the issues and provisions likely to appear in your contracts. Competent legal counsel should be sought for specific questions relating to specific facts and how the law applies.