

# PUBLICATION

---

## Potentially Good News for Contractors Seeking Final Payment on Public Construction Projects

Authors: Mark Mercante, Mark W. Frilot

April 25, 2018

**The Louisiana Fourth Circuit's recent decision in *Woodrow Wilson Constr. LLC v. Orleans Parish School Board* marks a potential victory for general contractors seeking final payment on public construction projects. However, it is important to note that this decision remains subject to rehearing and/or review by the Louisiana Supreme Court, and therefore, could be revised or reversed.**

The case involved a dispute over final payment of retainage between general contractor Woodrow Wilson Construction, LLC (WWC) and owner of the Orleans Parish School Board (OPSB) in connection with a project for the construction of a new school. Upon substantial completion of the project, WWC submitted its application for final retainage payment. OPSB refused to issue final payment, claiming that it was entitled to withhold payment under the contract as a means to collect liquidated damages of \$5,000/day for a 517-day delay in project completion it alleged to be the fault of WWC.

WWC filed a petition for a writ of mandamus pursuant to [La. R.S. 38:2191](#) seeking to compel the final retainage payment from OPSB. The trial court refused to grant the writ because it found that OPSB's liquidated damages claim created a question as to whether final payment was due and payable under the terms of the contract. The appellate court, however, reversed the trial court, finding instead that WWC was entitled to its final retainage payment despite the existence of OPSB's not yet proven liquidated damages claim.

In reaching this conclusion, the appellate court reviewed the prompt payment and mandamus provisions of La. R.S. 38:2191, which provides in its entirety:

- A. All public entities shall promptly pay all obligations arising under public contracts when the obligations become due and payable under the contract. All progressive stage payments and final payments shall be paid when they respectively become due and payable under the contract.
- B. Any public entity failing to make any progressive stage payment within 45 days following receipt of a certified request for payment by the public entity without reasonable cause shall be liable for reasonable attorney fees. Any public entity failing to make any final payments after formal final acceptance and within 45 days following receipt of a clear lien certificate by the public entity shall be liable for reasonable attorney fees.
- C. The provisions of this Section shall not be subject to waiver by contract.
- D. Any public entity failing to make any progressive stage payments arbitrarily or without reasonable cause, or any final payment when due as provided in this Section, shall be subject to mandamus to compel the payment of the sums due under the contract up to the amount of the appropriation made for the award and execution of the contract, including any authorized change orders.

The court then went on to examine the payment terms of the contract and found that the retainage payment was "due and payable under the contract" as contemplated in La. R.S. 38:2191 because WWC had complied with all contractual requirements and conditions for final payment. According to the court, once final payment

became due under the contract, pursuant to La. R.S. 38:2191(C), no provision of the contract could serve to waive WWC's right to receive final payment, including those relative to liquidated damages.

The court explained that OPSB's separate liquidated damages claim, liability for which was heavily contested and yet to be adjudicated, had to be tried separately in an ordinary proceeding. Because resolution of the liquidated damages claim through a protracted ordinary proceeding would delay determination of whether to issue a writ of mandamus and would be contrary to the intended purpose of La. R.S. 38:2191 (ensuring prompt payment under public contracts when they become due and payable), OPSB's separate claim against WWC was secondary to WWC's right to prompt payment of its retainage.

Thus, the court held that OPSB had a ministerial duty to issue final payment and had no discretion to withhold based on its separate claim against WWC. The court also held that, because payment was not made to WWC within 45 days of formal acceptance of the work and receipt of the clear lien and privilege certificate, attorney fees were also due to WWC for bringing its mandamus action.