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# Construction Law Spotlight

## FDOT Pursues Contractors to Address Paint Failures on Mast Arm Poles — What Are the Contractors' Options?



Paint failures on FDOT mast arm poles are now a significant industry issue. FDOT has issued demands on prime contractors throughout the state to repair or replace mast arm poles on projects accepted by FDOT as long as two years ago. The repair and replacement expenses on certain projects has approached \$1 million. Moreover, FDOT has threatened to withhold or place restrictions on Certificate of Qualification renewals for “uncooperative” prime contractors.

For projects let after September 1, 2007, FTBA and FDOT have addressed the problem through the use of bonded fabricators and a “responsible party” agreement that allows FDOT to pursue the fabricator directly.

For the maybe thousands of mast arm poles installed before 2007, FDOT has an 820 day deadline from the date of final acceptance to file suit for any defects. As a result, FDOT has implemented a program to conduct statewide inspections of its painted mast arm poles within the 820 days and to notify the prime contractor of discovered defects.

Often these notices come to the prime contractor without forewarning. And, often the notices demand quick

action in notifying subcontractors and fabricators and coordinating site investigations and negotiating a remedial action plan with FDOT.

In an attempt to avoid every instance being *ad hoc*, in April 2006 FDOT promulgated an inspection and repair procedure that it employs to determine the scope of the required repair. Any notice to the prime contractor after this date likely incorporates this FDOT protocol. The following is an outline of a suggested responses to such a notice from FDOT:

- ◆ Enter a tolling agreement with FDOT (i.e., extend the 820 day suit deadline) to allow sufficient time to inspect the mast arm poles and agree on the scope of a repair or replacement without FDOT feeling forced to file suit to preserve its claim.
- ◆ Notify relevant subcontractors and fabricators of FDOT’s allegations and require them to participate in the inspection and resolution process.
- ◆ Notify your comprehensive general liability carrier of a potentially covered claim (see discussion of *Pozzi Windows* on page 2).



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