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Brian Cashmere

## Federal Contract Performance Evaluation Challenges: The Federal Circuit Affirms The Right To Judicial Review

by Brian Cashmere, Partner and James D. Coleman, Associate



James D. Coleman

In recent years, the federal government has placed increased emphasis on its reporting of contractor performance and its use of past performance evaluations in the procurement process.

This increased policy and regulatory focus has made fair and objective project “report cards” a critical component of a contractor’s effort to obtain future work; a single poor rating can effectively disqualify a contractor from consideration on a competitive procurement. Not surprisingly, as a result of the increased emphasis on performance evaluations, contractors have become increasingly vigilant in their efforts to ensure that performance evaluations are fair and accurate.

Despite their increased importance, until recently, independent judicial review of an erroneous evaluation was limited. For years, contractors have had little success judicially challenging negative evaluations. The Boards of Contract Appeal have routinely rejected such challenges, stating that ordering changes to performance evaluations is outside their jurisdiction or authority. However, as was widely reported several years ago, recent decisions from the Court of Federal Claims (“COFC”), including *Todd Construction L.P. v. United States*, 85 Fed.Cl. 34 (2008), seem to have opened the courthouse doors to performance evaluation challenges. Importantly, on August 29, 2011, in *Todd Construction L.P. v. United States*, CAFC No. 2010-5166, the Court of Appeals for the Federal Circuit, affirmed the COFC decision in that case, further clarifying the jurisdictional grounds to consider performance evaluations claims.

While the Federal Circuit’s decision in *Todd Construction* provides a clear and well-intentioned affirmation of a contractor’s right to judicial review of an adverse past performance

evaluation, the decision also reveals that overcoming this initial hurdle is but the first of many potential obstacles to obtaining relief from an arbitrary, capricious or defective performance evaluation. This article provides a brief outline of the Federal Circuit’s recent and instructive decision on this issue.

### Todd Construction’s Performance And Adverse Evaluations

In 2003, Todd Construction (“Todd”) contracted with the U.S. Army Corps of Engineers (“Corps”) to perform roof repairs on two projects. These projects were completed more than a year late due to delays that Todd attributed to its subcontractors, weather and the government. Todd asserted that all delays were beyond its control. In March of 2006, the Corps issued proposed final evaluations of Todd rating its performance as “unsatisfactory.” Todd responded with a letter to the Contracting Officer (“CO”) explaining why the unsatisfactory ratings were unwarranted. Regardless, the CO issued a final, unfavorable evaluation in July 2006. Todd appealed the CO’s Decision to the Department of the Army, alleging in its letter that the government had violated required review procedures and had issued evaluations unsupported by the facts. The Army denied the agency appeal in April 2007 in a letter stating that the response was a “final decision” on the performance evaluation.

A month later, Todd filed a lawsuit at the COFC requesting judicial review of the CO’s Final Decision and seeking a declaratory judgment. Todd asserted that the Corps failed to follow internal evaluation procedures (a procedural violation) and that the final evaluations were arbitrary and capricious (a substantive violation). The government responded with a motion to dismiss for lack of jurisdiction alleging there had been no Contract Disputes Act (“CDA”) claim submitted to the Contracting Officer. The government also filed additional dispositive motions alleging a lack of standing and failure to state a claim. In a series of procedural decisions, the COFC denied the



government's motions to dismiss on jurisdictional grounds, reaffirming the COFC's jurisdiction to review challenges to performance evaluations. While this jurisdictional victory is an important ruling for government contractors, it was somewhat hollow for Todd as the COFC ultimately dismissed Todd's claims on procedural grounds. Todd appealed the dismissal of its Performance Evaluation Claim to the Federal Circuit which, as discussed below, affirmed the COFC on the three principal issues presented: (1) subject matter jurisdiction; (2) standing; and (3) sufficiency of allegations to support a claim.

### Propping The Courthouse Doors Open - The Right To Judicial Review Is Affirmed

The Federal Circuit's *Todd Construction* opinion clearly affirmed that government contractors are entitled to file stand-alone claims challenging adverse performance evaluations. In support of this decision, the Federal Circuit provided a detailed analysis of the Tucker Act and CDA language and legislative history as well as the FAR. The Federal Circuit began its jurisdictional analysis with the observation that the Tucker Act provides court jurisdiction over "any claim by or against, or dispute with, a contractor arising under [the CDA], including... non-monetary disputes on which a decision of the contracting officer has been issued." Relying on this broad language and legislative history, the Court held that the word "claim" must be interpreted broadly to include non-monetary disputes, which would include a contractor's challenge to a negative performance evaluation.

The *Todd Construction* decision also provides clarity as to why an evaluation challenge constitutes a claim. Citing Federal Circuit precedent, the Court stated that a "claim" must be "related to the Contract." Applying this general principal, the Federal Circuit rejected the government's plea for a narrow application and applied a broad and practical approach, holding that: "A contractor's claim need not be based on the contract itself (or a regulation that can be read into the contract) as long as it relates to its performance under the contract." The Court concluded its analysis by confirming the obvious – while the unsatisfactory performance evaluations may not relate to a specific contract term, a performance evaluation certainly relates to a contractor's performance under the contract. As such, performance evaluation challenges can be CDA claims.

Finally, the Court rejected the government's assertion that government contractors should not be entitled to judicially challenge adverse performance evaluations because the evaluation regulations are primarily for the benefit of the government. The Federal Circuit

clearly disagreed. Relying on and citing the government's own "policy statements," which contradicted the government's argument, the Court found that: "Performance evaluation regulations were intended to directly and significantly benefit contractors."

### Standing Requirements To Challenge Procedural Violations

Unfortunately for Todd, the Federal Circuit's affirmation of the COFC did not end there. In affirming the COFC's dismissal of Todd's Performance Evaluation Claim, the Court also agreed with the lower court that Todd did not have standing to challenge alleged procedural violations by the Corps. To establish "standing," the Federal Circuit observed that Todd's claimed "minor procedural violations" needed to be shown to have caused Todd's alleged injury. More particularly, Todd needed to show prejudice—that there was a *substantial likelihood* that the final evaluation would have been different had the procedures been properly followed. In this regard, the Federal Circuit found Todd had failed to allege facts indicating that the outcome of the performance evaluation would have been different had the purported procedural errors not occurred. Accordingly, the Court dismissed the procedural violation component of Todd's claim for lack of standing.

### Allege Facts Sufficient To Support A Substantive Claim

The Court also addressed Todd Construction's substantive allegations that the government acted arbitrarily and capriciously in issuing an inaccurate and unfair performance evaluation. While the Court held that it had jurisdiction to consider this substantive claim and that Todd clearly had standing to sue on this issue, the Court did not address the merits of these allegations. In affirming the COFC, the Federal Circuit reminded claimants that they face dismissal when "the complaint does not state a claim to relief that is plausible on its face." More directly, in its complaint, a claimant must identify facts that allow a court to draw reasonable inferences that the defendant is liable.

Applying this procedural requirement to Todd's Complaint, the Court noted that: "Todd must plead facts which give rise to a plausible inference that the government abused its discretion in awarding the negative performance ratings." The Court then compared the factual allegations in Todd's Complaint with the disputed performance evaluation and concluded that Todd had failed to support its claim. The Court held: "All of the facts alleged by Todd could be true and yet it does not follow that any

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of the unsatisfactory ratings were an abuse of discretion or should be changed.” Accordingly, the Court held that there was not a reasonable basis for the court to infer that the government had acted arbitrarily, leading the Court to affirm the COFC’s dismissal order.

### The Potential Remedies And Relief

Given the dismissal of Todd’s claims, the Federal Circuit did not have the opportunity to address the issue of a contractor’s potential remedy should the COFC find that a CO entered an unfair, incorrect or arbitrary performance evaluation. Therefore, while the Federal Circuit’s *Todd Construction* decision clearly affirms a government contractor’s right to challenge an evaluation and is instructive about avoiding procedural problems, the decision did not clarify what a successful challenge can ultimately achieve. For now, potential challengers must look to the earlier decisions of the COFC for guidance about potential remedies. This issue was addressed directly in *Todd Construction L.P. v. United States*, 88 Fed. Cl. 235 (2009), where the COFC confirmed its lack of authority to dictate evaluation ratings, but the Court noted its: (1) authority to enter declaratory judgments; and (2) power to issue a remand order with instructions to an agency to address specific concerns. Accordingly, given the limitations and uncertainty as to the relief available, any evaluation challenge should include a request for remand to the agency with specific instructions to correct the evaluations’ deficiencies, and further, that the erroneous evaluations be removed from the various evaluation databases.

### Take-Aways

The Federal Circuit’s decision in *Todd Construction* is an important development for government contractors and is instructive in several respects. First, and foremost, the Court resolved the long-standing jurisdictional debate surrounding past performance evaluation claims. Based on the tenacity of this contractor and in light of the Federal Circuit’s opinion,

there is little dispute that a contractor is entitled to submit and prosecute a stand-alone CDA claim that challenges an adverse performance evaluation.

Second, the fact that Todd’s claim was nonetheless dismissed for various procedural or pleading deficiencies underscores the importance of posturing an evaluation claim in the most advantageous manner. The Court’s dissection of the government’s procedural motions also highlights the contractor’s need to develop and assert sufficient facts to establish not only jurisdiction but the threshold elements of the specific challenge or claim.

Lastly, despite Todd’s ultimate lack of success, the Federal Circuit’s endorsement and elaboration on the COFC’s comprehensive analyses in earlier *Todd Construction* decisions provides a road map for contractors seeking to challenge evaluations. While that map is clear, a full reading of all the *Todd Construction* cases reveals that the road is winding and care must be taken. It is fundamental that CDA claim procedures must be followed. Additionally, even if a performance evaluation claim relies on procedural defects, the defects must either be substantial—going to the heart of the process—or, if minor, must be *shown*—not just alleged—to have caused the erroneous evaluation. Moreover, while a contractor may now appeal a Contracting Officer’s Final Decision regarding a negative performance evaluation, the standard of review will be deferential to the agency. Overcoming a court’s reluctance to substitute its opinion for that of the agency coupled with the procedural lessons learned from the *Todd Construction* cases provides a strong reminder to base any performance evaluation challenge on clear, objective and specific factual allegations that, when proven, will entitle the contractor to the requested relief. Taking a specific lesson from *Todd Construction*, a successful challenge will need to set out more than broad and conclusory allegations that the CO acted arbitrarily or the mere assertion that you disagree with the final ratings. ◀



### Right On Schedule: Discussing Recommended Practice 29R-03

by Brian R. Dugdale, Associate

Forensic schedule analysis can be an important part of defending and prosecuting construction claims. With the recent issuance of the second update to AACE International Recommended Practice 29R-03 “Forensic Schedule Analysis, TCM Framework: 6.4 – Forensic Performance Assessment” (the “RP”), we take this opportunity to remind our readers of the RP’s significance in our industry and the role it could potentially play in the resolution of your disputes.

#### Background

The RP, assembled and refined by industry professionals, describes in detail nine different methods of forensic schedule analysis, as well as factors to consider in choosing the type of analysis best suited for a particular project. As stated in the Introduction to the RP: “[t]he purpose of the [RP] is to provide a unifying reference of basic technical principles and guidelines for the application of critical path method (CPM) scheduling in forensic schedule analysis.”

The RP has provoked significant disagreement in the forensic scheduling community since its original release in 2007. This disagreement exists due to a lack of consensus among forensic schedulers as to the proper application of the RP. Although the RP has now undergone two revisions—in 2009 and most recently in April 2011—and has been addressed in numerous articles and commentary by forensic schedulers, the RP’s role in construction disputes has yet to be universally defined.

This article is not intended to explain every positive and negative attribute of the RP, but instead to highlight the difficulties inherent to applying the RP, and to reinforce the notion that every project and delay dispute is different and must be examined individually when attempting to utilize the RP or any other forensic scheduling standard or guideline. The RP, although arguably one of the more comprehensive collections of forensic scheduling knowledge publicly available, should be considered for use only in conjunction with the professional judgment of qualified scheduling consultants and construction attorneys.

As the RP itself states: “[t]his RP is not intended to establish a standard of practice, nor is it intended to be a prescriptive document applied without exception ... [a]s with any other recommended practice, the RP should be used in conjunction with professional judgment and knowledge of the subject matter ...” In legal disputes, this is especially important where technical reasons for selection of a particular method must be reconciled with legal strategy.

#### Common Questions And Issues

Based on its stated purpose, the RP should make performing forensic scheduling analysis easier; however, as a review of the most recent revision to the RP makes apparent, proper understanding and application of the RP to actual construction disputes can be difficult. A number of questions are likely to arise with regard to the application of the RP to construction disputes. Is a “recommended practice” the equivalent of a “standard,” or merely a “guideline”? Is the RP binding, or even persuasive? Does citing to the RP make expert testimony stronger, and can experts effectively be cross-examined for not relying on the methods set forth in the RP? Could an expert debunk the methods described in the RP using precedential case law, and demonstrating facts that do not fit neatly within the RP’s framework? Ultimately, the question that arises is: *What do we do with the RP in construction disputes?*

The answer is not so simple due to a number of difficulties that arise in applying the RP. First, from a substantive perspective, the RP does not rank or critique the nine methods of forensic scheduling analysis in such a way that any one type of analysis is considered definitively better than any other type of analysis. Further, the RP does not offer guidance on how frequently a particular method of analysis has been accepted or rejected by courts or administrative boards. Although counsel and experts will often be familiar with the RP and the ways it can be used both offensively and defensively to support a particular argument, judges and arbitrators may not be familiar with the RP, and further, may view the RP in any number of different ways and accordingly assign it varying weight. In essence, the RP describes many different

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ways to approach forensic scheduling analysis, but leaves it to the user to determine which method works best.

Perhaps it should be that way. After all, lawyers and experts are retained to analyze and present arguments in the most persuasive manner possible. On the other hand, courts and administrative boards have considered and passed judgment on the methods described in the RP, and the credibility and reliability of the various methods have been the subject of frequent commentary by forensic schedulers. Yet, the RP does not provide this type of secondary information or commentary. For example, commentators have criticized the RP's Method 3.6, "Modeled/Additive/Single Base" (commonly known as Impacted-As-Planned), which depending on the circumstances is usually regarded as being a weaker method of analysis in American courts. The RP does not include any meaningful discussion of these types of criticisms, nor does it not address how the various RP's methods have fared in practice.

As such, the RP has faced criticism for placing each of the different scheduling analysis methods on equal technical footing, without guidance as to how successfully the methods have been utilized. The RP admits that "it is impossible to recommend one method that is the 'best' method, or to rank the methods in order of preference." Although the RP has never provided guidance on the acceptability of its different methods across jurisdictions, the original release has now been revised to more fully explain what it does not offer, explaining: "[t]he RP discusses certain methods of schedule delay analysis, irrespective of whether these methods have been deemed acceptable or unacceptable by courts or government boards in various countries around the globe." Without careful consideration of this issue, parties could find themselves subject to attack based on utilization of a particular RP method in a jurisdiction where that method has been openly criticized, or just as easily, for failure to utilize a particular method in a jurisdiction where a particular method has been deemed most credible.

Another issue drawing the focus of the forensic scheduling community is the RP's use of its own "taxonomy" to classify its recommended scheduling methods, purportedly developed to "allow for the freedom of regional, cultural, and temporal differences in the use of common names for these methods." The RP's taxonomy has been criticized by some for trying to redefine common industry terms using a very formulaic approach. Given the generally unregulated use of scheduling terms and variations across the construction industry, it is not difficult to see why introducing what might be perceived as a much more regimented

process for classifying scheduling methods would cause some disagreement among forensic schedulers. For example, "Modeled/Additive/Multiple Base" is one of the methods discussed in the RP. But, also listed under this method in the RP are "common names" used in the industry for the same method, including the broadly used "windows analysis." Likewise, each of the nine methods has between four and nine "common names" associated with the RP's unique taxonomic name. Many of the RP's methods have overlapping common names. For example, five of the RP methods may be known in common terms simply as a "windows analysis." Although the RP states that "[i]t is not the intent of this document to enforce more disciplined use of the common names," established and new schedulers alike may have difficulty correlating longstanding industry practices and familiar nomenclature with the more formal taxonomy used in the RP.

### **Technical Versus Legal, Procedural And Other Considerations**

The RP offers nine detailed technical approaches to scheduling. It is very important to remember that decisions as to whether to follow the RP, and which method to choose based on its technical merit cannot stand alone, apart from relevant legal, procedural and other considerations. As the RP acknowledges, "[s]chedules are a project management tool that, in and of themselves, do not demonstrate root causation or responsibility for delays. Legal entitlement to delay damages should be distinct and apart from the forensic schedule analysis methodologies contained in this RP." The distinction between a technically sound method and legal entitlement to damages cannot be over-emphasized. Strengths and weaknesses pertaining to legal entitlement, though not addressed in detail in the RP, can weigh heavily into making a well-informed choice regarding which scheduling method should be used, and must be considered in all cases.

Procedural rules, budgetary constraints and an opposing experts' chosen method may also play a role in this decision. The RP explains generally the concept of careful selection of a method, stating in part that "the method(s) of analysis to be utilized in a given situation, and the manner in which a particular methodology might be implemented, are dependent upon the contract, the facts, applicable law, availability and quality of contemporaneous project documentation, and other circumstances particular to a given situation." The RP further devotes a section to discussing on a broad level a list of case-specific factors that must be considered in developing the appropriate forensic scheduling method, including the contractual requirements; the purpose of the analysis; the source data availability and



reliability; the size, complexity and budget and time constraints of the dispute; the expert resources available; the forum; legal and procedural requirements; and custom and usage of methods on the individual project or case. Each of these factors must be examined on a case-by-case basis.

### Conclusion

Although the desired objective of the RP may be “to reduce the degree of subjectivity involved in the current state of the art,” the RP is bound to generate further questions and debate among both proponents and opponents of its use. The content of the RP has been promoted as the best

available consensus in the industry, and yet criticized as misleading and incomplete. The scheduling community will no doubt continue to debate the applicability and merits of the RP; however, notwithstanding ongoing debate and uncertainty regarding proper application of the RP, it is important to be aware of the RP’s existence and how it may be used. Ultimately, effective handling of the RP, whether offensively or defensively, must be contingent upon thorough understanding, consideration of all circumstances and factors that could impact its applicability, and above all, consultation with counsel and forensic schedulers who can best determine whether and how the RP should be utilized or addressed in a given case. ◀

## ▶ VIRGINIA CONTRACTS ◀◀



Robert K. Cox

### Design Review Clauses In Virginia Public Contracts – Unlinking Responsibility And Risk

by Robert K. Cox, Sr. Partner and Daniel P. Broderick, Associate



Daniel P. Broderick

Are you a contractor now bidding or anticipating bidding public contract work in Virginia? If so, be aware that in October 2010 the Commonwealth of Virginia issued a significantly revised version of the General Conditions

of the Construction Contract (the “Revised General Conditions”) to be used by state agencies other than the Department of Transportation for public works contracts. Not surprisingly, the modified general conditions are without question to the benefit of the Commonwealth. One such revision will significantly impact contractors’ bidding and performance risks. Specifically, subsection (b) of the revised Article 23 (Plans and Specifications) now includes terms precluding contractors from recovering additional time or compensation due to a “conflict, error, omission, or other discrepancy in the plans or specifications” if the conflict, error, omission, or other discrepancy was “*reasonably apparent* or with *reasonable diligence* should have been

apparent to the contractor prior to submitting its bid” (emphasis added). If enforced by the courts, this revised provision shifts the risk of defects in plans and specifications from the public agency to the contractors. In fact, one could argue that the risk to contractors under the revised provision is now more akin to a design-build contract rather than a traditional design-bid-build contract.

Not only does the revised provision attempt to erode long-standing concepts of construction law recognized since the United States Supreme Court’s landmark holding in *Spearin v. United States*, 248 U.S. 132 (1918) (later adopted by the courts of Virginia), but it also leaves contractors who bid Virginia public works with yet to be answered questions, including:

1. What types of conflicts, errors, omissions, or other discrepancies are reasonably apparent or should be apparent with reasonable diligence? Or, to what degree of analysis (e.g., reverse-engineering) are plans and specifications to be reviewed? Are the “dragnet clauses,” commonly found in electrical

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and mechanical specifications, indicative that there are “omissions” to be found (and thus “apparent”) in the electrical or mechanical specifications?

2. Are contractors who will be bidding work on public construction projects in Virginia required to be or employ Virginia licensed architects?
3. Do the Virginia Public Procurement Act and analogous court rulings render this new provision of the Revised General Conditions possibly void and unenforceable?

### Some History Behind The Implied Warranty Of Plans And Specifications - The Spearin Doctrine

In 1918, the United States Supreme Court ruled in *Spearin v. United States*, “if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications,” thereby giving rise to the “Spearin Doctrine.” Further, in language often overlooked, the Supreme Court also wrote in its *Spearin* decision that the “responsibility of the owner is not overcome by the usual clauses requiring builders to visit the site, to check the plans, and to inform themselves of the requirements of the work.”

The Supreme Court of Virginia has long recognized the “Spearin Doctrine.” For example, in *Southgate v. Sanford & Brooks Co.*, 147 Va. 554 (1927), the contractor agreed to visit the site and review the conditions on the job site and “to assume all responsibility of the same in connection with the prosecution of the work.” After the contractor constructed a bulkhead in accordance with the plans and specifications, the bulkhead failed. The owner refused to pay the contractor, claiming that it needed the funds owed to the contractor to complete the bulkhead repairs. In ruling against the owner, the Court stated that the contractor agreed only to assume responsibility for the “prosecution” of the work and to build the bulkhead as designed by the engineer.

A little more than 30 years later, the Supreme Court of Virginia began to whittle away at the “Spearin Doctrine” with its holding in *Greater Richmond Civic Recreations, Inc. v. Ewing’s Sons, Inc.*, 200 Va. 593 (1959). Citing the *Southgate* case, the Court upheld the “Spearin Doctrine” *in the absence of negligence on the contractor’s part, or any express guarantee or warranty by him as to their [plans and specifications] being sufficient or free from defects.* The italicized portion of the quote appears to have been the opening for public

agencies in Virginia to attempt to contract around the “Spearin Doctrine.” Since then, and with some success in Virginia courts, various local public agencies and school boards in Virginia, in particular, have included provisions in their contracts specifying that contractors review design plans and specifications for errors or omissions and to assume the risk of not discovering design errors and omissions. The Commonwealth has now come around to including similar terms in the new Revised General Conditions; specifying that bidders review the public owner’s design documents for design errors and omissions and to accept the risk of not discovering errors or omissions by the public owner’s architect or engineer.

### What Is Reasonably Apparent Or Should Be Apparent With Reasonable Diligence?

With its new Revised General Conditions, the Commonwealth now seeks to place the burden on bidding contractors to identify design document errors, omissions, conflicts, or other discrepancies that are *reasonably apparent* or with *reasonable diligence* should have been apparent to the bidder. The Revised General Conditions, however, do not define what is “reasonably apparent” or what constitutes “reasonable diligence” by a bidding contractor. In that regard, why would an error, omission, conflict, or other discrepancy be reasonably apparent to a contractor that has limited time to bid on a set of construction documents, but not be reasonably apparent to an architect or engineer who has had much more time to design the project and prepare those same construction documents? If the error, omission, conflict, or discrepancy is not reasonably apparent to a licensed professional architect/engineer who prepares and subjects those design documents to design review at stages in the design process, then how is that same defect reasonably apparent to a bidding contractor?

### Are Contractors Now Required To Be Licensed Architects In Virginia?

It also appears that the new design review requirement of the Revised General Conditions could be in conflict with Virginia’s statutory professional licensing requirements. By statute, Virginia requires any person engaged “in the practice of architecture or engineering which includes design, consultation, evaluation, or analysis and involves proposed or existing improvements to real property” to hold a valid architect license. Va. Code Ann. § 54.1-400. Arguably, contractors exercising “reasonable diligence” to find errors, omissions, conflicts, or other discrepancies in the design plans and specifications are evaluating and/or analyzing proposed improvements to real property as addressed in the architect license statute. Does

this mean that contractors must be licensed architects in Virginia to review the design documents for public works projects in Virginia? Or, does this mean that contractors bidding on public projects under the new Revised General Conditions must either hire a licensed architect and/or engineering firm to review the drawings, or employ a licensed staff architect and various licensed engineers to review the plans and specifications before submitting a bid? There is no answer yet to this question.

Looking at the issue from another perspective; do the activities reserved by the licensing statute for licensed architects and engineers help define the scope of a bidder's "reasonable diligence" or discovery of "reasonably apparent" defects in the plans or specifications? Presumably, given the activities reserved for licensed architects, this would leave bidding contractors with the risk of identifying only obvious or patent defects in the drawings and specifications, as contractors would not be required to "evaluate" or "analyze" the design documents, (those activities being reserved for licensed architects). Such a standard of review arguably would be similar to that imposed on contractors bidding federal construction contracts.

From the public owner's view, will the uncertainty as to the scope of the reasonable design document review result in increased contract prices as contractors account for the uncertainty by increasing their bid amount? Will there be an increase in costly disputes and litigation with contractors who encounter design defects during performance and when seeking equitable adjustment contend they conducted a reasonable review that nonetheless did not uncover the design error?

### **Does The Virginia Public Procurement Act Render The New Provision Of The Revised General Conditions Unenforceable?**

In 1991, as part of the Virginia Public Procurement Act, Virginia's General Assembly enacted §11-56.2 (now § 2.2-4335) of the Code of Virginia, which voids any provision in a public construction contract that:

...purports to waive, release, or extinguish the rights of a contractor to recover the costs for damages for unreasonable delay in performing such contract, either on his behalf or on the behalf of his subcontractor if and to the extent that such delay is caused by acts or omissions of the public body, its agents or employees and due to causes within their control...

Notably, the statute lists four exceptions to the ban on "no damages for delay" provisions in

public works contracts. Specifically, the statute does not void a provision that: (1) Allows a public body to recover delay damages caused by the acts or omissions of the contractor; (2) Requires notice of delay by the party claiming delay; (3) Provides for liquidated damages for delay; and (4) Provides for arbitration or any other procedure designed to settle contract disputes.

To date, the Supreme Court of Virginia has not specifically addressed whether the statutory ban would render provisions such as the new design review clause, waiving the contractor's rights to recover delay damages for errors, omissions or other discrepancies in plans or specifications, to be void as against public policy. However, two recent decisions by the Supreme Court of Virginia might indicate that the new provision could be subject to judicial challenge and possibly found to violate the statutory ban on "no damages for delay" clauses in Commonwealth public works contracts.

In *Blake Constr. Co. v. Upper Occoquan Sewage Authority*, 266 Va. 564 (2003), the Supreme Court of Virginia held that the statutory ban on "no damages for delay" clauses identifies the permitted exceptions and that statute "means what it says: '[a]ny provision . . . that purports to waive, release, or extinguish the rights of a contractor . . . shall be void.'" The Court has subsequently acknowledged that its ruling held that any provision in a public contract that purported to limit or restrict a contractor's right to recover delay damages was void as against public policy unless it was specifically enumerated as an exception under §2.2-4335 (B) or other statutory enactment. The significance is in the Court's reference to "statutory enactment," and not an expansion to contractual terms. Given this statement of the law by the Supreme Court of Virginia, does the new provision of the Revised General Conditions run afoul of the statutory ban on "no damages for delay" clauses when none of the four statutory exceptions can be read as an exception for errors or omissions in design documents resulting in delay damages?

Perhaps the answer lies in *Martin Bros. Contractors, Inc. v. Virginia Military Institute*, 277 Va. 586 (2009), a case in which the Virginia Military Institute argued the amount of delay damages payable to Martin Bros. Contractors, Inc. for added work and delay was limited to the fixed markup for overhead in the Changes clause of the prior version of the Commonwealth's General Conditions. The Supreme Court of Virginia ruled the fixed markup on overhead was an agreed or "liquidated" sum to cover additional expense the contractor may incur for administration and profit for extra work required by the public

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owner's change orders, but it was not an agreed formula for the calculation of delay damages. Citing to its prior decision in *Blake*, the Court found that the clause was a bar to the contractor's damages for delay and consequently void and unenforceable under the statute. The Supreme Court of Virginia may soon have the opportunity to consider whether the new provision of the Revised General Conditions is likewise void and unenforceable.

### Conclusion

With its new Revised General Conditions, the Commonwealth wants the bidding contractor to be, in essence, a "backstop" for the construction documents presented for purposes of securing a fixed price bid and ultimately a fixed contract price. The bidding contractor, however, was not part of the design process, was not compensated for design services, certainly had no control over the design entities or persons

preparing the construction documents, and importantly under Virginia law has no direct recourse against the design firm for errors and omissions in the design documents. This unlinking of responsibility and risk in the design process could lead to higher bids as contractors protect themselves, and certainly increased litigation over exactly where does the line lie when deciding what design error or omission was "reasonably apparent or with reasonable diligence should have been apparent to the contractor prior to submitting its bid."

If the Commonwealth insists on a "backstop" for its plans and specifications, then perhaps the answer is to include a bid item in the Commonwealth's bid documents for a bidder's price to perform a constructability review of the construction documents and limit the risk shifting to patent errors and omissions in the public owner's design documents. ◀

## » CM ISSUES ◀



### Learning To Manage Construction Management Expectations And Liabilities

by Yanna J. Li, Associate

In today's economy, owners are under increasing pressure to deliver high quality, cost efficient projects – and quickly. But with contractors, subcontractors, designers, materials suppliers, and a slew of other things to consider, owners often need help managing a project's many moving parts. As such, project owners are increasingly looking to construction managers (sometimes called "CMs") to help keep costs down, expedite project delivery, and minimize conflicts between the construction and design teams. The two most common construction management arrangements are the "agency-CM" and the "CM-at-risk." Because each type is accompanied by very different and important legal and contractual risks, it would be prudent for owners, contractors, and any other interested parties to be aware of those differences at the time of contracting.

#### "Agency-CM"

An "agency-CM," is a construction manager that assumes no financial risk in connection with construction. In that regard, it is not directly at risk for delays, cost overruns, the quality of

construction, or design deficiencies. The agency-CM acts solely as the owner's agent and is generally considered to have a fiduciary relationship with the owner. In essence, it stands in the shoes of the owner in supervising and coordinating all aspects of the construction process from project design to project completion. Accordingly, the agency-CM is expected to act in the owner's best interests at every stage of the project. This is an extremely important characteristic of the agency-CM which can be used to protect or minimize it from liability.

For example, in *L. K. Comstock & Co., Inc. v. The Morse/IBM Joint Venture*, the court decided that a no-damage-for-delay clause in a contract between an owner and its contractor also ran in favor of the CM, even though the latter was not a party to the contractor agreement. *L. K. Comstock & Co., Inc. v. The Morse/IBM Joint Venture*, 153 Ill.App.3d 475 (Ct. App. 1987). In that case, an owner hired defendant to act as the CM for its project. *Id.* at 476. Pursuant to the construction management agreement ("CMA"), the CM was charged with, among other things,

coordinating the management of all contractors and procedures of construction, assisting the owner to assert its rights and perform its responsibilities in connection with the project, and supervising and controlling various phases of the project. *Id.* at 479. The project owner also contracted with plaintiff to perform electrical work on the project. There was no contract between plaintiff and the CM. *Id.* The contract between the owner and plaintiff contained a no damage-for-delay provision that prohibited plaintiff from making any claims for delay damages against the owner. *Id.* at 477. In another provision of the contract, it was expressly stated that the CM was a representative of the owner and had the power to act on the owner's behalf. *Id.* at 478-479. Because the no-damages-for-delay provision made no references to the CM, plaintiff argued that the provision did not bar it from making delay claims against the defendant CM. *Id.* at 477. The court examined the circumstances surrounding the agreement and the language of the contract before holding that the contract between the owner and plaintiff was likewise intended to protect the CM from suit. *Id.* at 479. It reasoned that because the CM was given so much significant responsibility, it was evident that the owner was relying on the CM to operate and manage the construction of the project. *Id.* As such, it was logical to conclude that the no-damages-for-delay provision was intended to protect not only the owner, but the CM as well, to ensure that the latter would and could use its best judgment in favor of the owner's interests. *Id.* at 481.

The agency status of the CM in *Kenny v. George A. Fuller Co.* was also used to protect or minimize the CM from liability. *Kenny v. George A. Fuller Co.*, 450 N.Y.S.2d 551 (1982). In *Kenny*, defendant was contracted by an owner to be the CM for a building project. *Id.* at 553. The owner also entered into separate agreements with the project's contractors, one of whom was the plaintiff's employer. In the contractor agreements, the CM was designated as the owner's "representative" for the performance of the contracts. *Id.* Each of the agreements also contained a "save harmless" clause that required the contractor to indemnify the owner and its agents. *Id.* at 557. Specifically, the contractor agreements provided that the contractor would assume the "entire responsibility and liability for any and all damage to all persons arising out of, or occurring in connection with the work provided for in this contract" and to "indemnify and save harmless the owner, its agents, servants and employees, from and against any and all loss that the owner, its agents, servants and employees, may sustain as the result of any such claim." (emphasis added) Plaintiff sued the CM after he was injured on the construction site. The CM then filed a third-party action against plaintiff's employer and some of the other

contractors for indemnification. After the CM was found liable to the plaintiff, the trial court held that the plaintiff's employer was required to indemnify the CM for the same amount it owed to plaintiff. On appeal, the court held that the plain and simple language used in the contract between plaintiff's employer and the owner, as well as the surrounding facts and circumstances, led it to conclude that the indemnification provision required plaintiff's employer to indemnify the CM, as agent of the owner, for all damages incurred as a result of the contractor's work. Because the parties were sophisticated business entities who had entered into an arm's length transaction, the Court concluded that the strong, unequivocal hold-harmless provision left little doubt that plaintiff's employer was to be held responsible for any and all claims made against the CM as the owner's representative in the performance of the contractor agreement. *Id.*

#### "CM-At-Risk"

The "CM-at-risk" is a CM that usually assists owners with constructability issues, budgeting, coordination, and scheduling. A CM-at-risk typically serves as the owner's consultant during the design phase of the project, but becomes more like a general contractor when it provides the owner with a lump sum or guaranteed maximum price to construct the work. CMs-at-risk are similar to general contractors in that they bear ultimate responsibility for cost overruns, quality problems, and schedule deficiencies. As such, a CM-at-risk should be careful and precise about how its responsibilities and liabilities are described in the CMA. The case of *Holder Constr. Group, LLC* aptly demonstrates just how important it is for a CM-at-risk to understand the terms of the CMA.

In *Holder Constr. Group, LLC v. Georgia Tech Facilities, Inc.*, plaintiff CM entered into a construction-manager-at-risk contract with defendant owner to work on a fast-track project. *Holder Constr. Group, LLC v. Georgia Tech Facilities, Inc.*, 282 Ga. App. 796, 796-797 (Ct. App. 2006). Under the contract, the CM agreed to construct the project for a guaranteed maximum price. *Id.* at 797. The contract also included a "Force Majeure" clause which addressed time extensions due to the late delivery of materials. *Id.* at 798. The "Force Majeure" provision stated that the CM would be excused for its inability to perform or its delayed performance, and that time extensions would be granted if the late delivery of material(s) was caused by the events listed. The provision further stated that if the late delivery of material(s) was caused by something other than the reasons provided, such late delivery would not constitute reason for extending the final

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completion date. After construction began, the CM experienced difficulties due to an increase in the cost of steel and the late delivery of steel materials. The late delivery of the steel was not the result of any of the causes stated in the “Force Majeure” clause. *Id.* The CM asked the owner for a 67-day time extension, but the owner refused to grant the request. The CM then commenced a declaratory action against the owner, contending that it was entitled to an upward adjustment of over \$1 million dollars in the contract price, an extension of at least 63-days, and \$3.1 million dollars in acceleration costs. *Id.* at 797-798.

In deciding against the CM, the court analyzed the “Force Majeure” clause of the construction management contract and concluded that under the contract, the CM bore the risk of the late delivery of the steel because it was not due to any of the reasons set forth in the “Force Majeure” clause. *Id.* at 798. The court further ruled that the contract held the CM responsible for the failure of its steel suppliers to perform and could not use such failure as an excuse for a time extension or its inability to perform in accordance with the contract. *Id.* The Court agreed with the trial court that the intent of the parties was to enter into a contract whose purpose was to complete the project in a timely fashion within the limit of available funds. *Id.* at 797, 799. Both parties were sophisticated business entities that had entered into a contract that assigned the risk of loss for delays and escalated costs to the CM. As a result, the CM was not entitled to a time extension or additional funds. *Id.*

#### **Minimize CM Risks By Spelling Everything Out In The Construction Management Contract**

Based on the above case examples, it seems clear that one of the best ways for a CM to minimize its risks is to mitigate the potential for liability in the first place. CMs should take care to negotiate and review their contracts to ensure that they provide adequate protection and/or fairly allocate risks to the contracting parties. If the CM is expected to bear the brunt of the legal risks and responsibilities, then the CM should at least make sure that the CMA provides adequate compensation to cover for the potential losses associated with such risks. Indeed, courts often look to the CMA to define the scope of the CM’s duties and to resolve disputes concerning the CM. See *Farabaugh v. Pennsylvania Turnpike Commission & Trumbull Corp.*, 590 Pa. 46, 52 (2006) (acknowledging

that a construction manager’s duty is defined by the intent of the contracting parties as reflected by their contractual designation of responsibilities); *Collins v. J.A. House, Inc.*, 705 N.E.2d 568, 575 (Ind. App. Ct. 1999) (examining the contract as a whole to determine whether the construction manager owed a duty of care to the third-party plaintiff and the extent of the duty owed); *Wenzel v. Boyles Galvanizing Co.*, 920 F.2d 778, 781 (11th Cir. 1991) (interpreting the contract and finding that the construction manager had a duty to provide for the safety of the employees working at the site).

Given that courts place such a heavy emphasis on the CMA, the CM should consider many things before entering into a construction management contract with an owner. The level of the owner’s representation and involvement, project funding, applicable laws and regulations, adequacy of the design, responsibility for permits and licenses, the manner in which differing site conditions are to be addressed, site access, expected quality levels of construction, value engineering, the criticality of schedule, how delays are to be handled, safety obligations, and the likelihood of hazardous materials at the jobsite are just a few things that the CM should probably contemplate. The CM should have a clear understanding of the owner’s expectations and the allocation of risks. If the contract seems one-sided and contains unreasonable owner expectations, the CM should either avoid the project entirely or try to offset the risks with a greater fee. The CM may also try to protect itself by negotiating limitation of liability and/or indemnification clauses into the contract. This way, a ceiling will be placed on the CM’s amount of liability.

#### **Conclusion**

In construction management, the construction management agreement is arguably the greatest tool for minimizing liability. Courts use it as a threshold for determining the scope of a CM’s duties and liabilities. As a result, it is imperative that owners and CMs take the time to ensure that (1) their contract clearly outlines the expectations and duties of each party; (2) the allocation of risks is clear; and (3) the contract accurately and completely reflects the CM and the owner’s business deal. Although it may be impossible to eliminate all risks, following these guidelines will afford the contracting parties much greater protection than they would otherwise have. ◀



# SB 392: California Contractors May Now Take Limited Liability Form; Right?

by Brent N. Mackay, Associate

California recently passed Senate Bill 392 (“SB 392”), which for the first time allows contractors to take the form of a limited liability company (“LLC”). Although the LLC form has certain benefits which may make it an appealing choice for contractors and others, the effect of SB 392’s “fine print” may render the LLC option illusory.

### Pre-SB 392 And The Allure Of The LLC Form

SB 392’s significance is in the potential benefits available through the LLC form. For instance, LLC members generally enjoy limited personal liability for acts and obligations of the LLC. Although corporations also enjoy this feature, LLCs are only taxed at the individual member level (sometimes referred to as “pass through taxation”) whereas corporations are taxed at both corporate and individual shareholder levels (sometimes referred to as “double taxation”). In addition, LLCs are generally viewed as easier to manage, control, and dissolve than other entity types, including corporations. Although the LLC form has its disadvantages and may not be the best entity type for every situation, its utility and popularity are well-established.

Notwithstanding the allure of the LLC form, prior to the passage of SB 392, the California Contractors State License Board (“CSLB”) would not issue a contractor’s license to a LLC. Consequently, contractors typically formed as either corporations, partnerships, or sole proprietorships.

### SB 392 And Contractor LLC Requirements

With the passage of SB 392, California was brought into line with most other states by allowing LLCs to hold a contractor’s license and generally treating LLCs the same as corporations for this purpose. LLCs, similar to corporations, can qualify for a contractor’s license by examination through a “qualifying individual” appearing as a responsible managing officer, a responsible managing employee, or a responsible managing manager or member, on behalf of the company. (Bus. & Prof. Code § 7065(c)(4).) Also similar to corporations, LLC members or responsible

managers are required to be listed as a member of the personnel of record. (Bus. & Prof. Code § 7065(b)(1).)

SB 392 does, however, treat LLCs differently than corporations in significant ways, including in the areas of bonding and insurance.

#### • Surety Bond Requirement

In addition to the \$12,500 contractor’s bond required of all licensees, contractor LLCs must also obtain a surety bond in the amount of \$100,000 from a California-admitted surety. (Bus. & Prof. Code § 7071.6.5.(a).) The bond is “intended to serve as an additional safeguard for workers employed by or contracted to work for a [LLC],” and is for the benefit of employees damaged by the company’s failure to pay wages, interest on wages, fringe benefits, as well as union benefits if applicable. (Bus. & Prof. Code § 7071.6.5.(c)-(d).)

#### • Liability Insurance Requirement

Contractor LLCs are also required to maintain liability insurance for damages “arising out of claims based upon acts, errors, or omissions arising out of the contracting services it provides.” (Bus. & Prof. Code § 7071.19(a).) The total aggregate limit of coverage for LLCs with five or less persons listed on the licensee’s “personnel of record” filed with the CSLB is \$1,000,000. LLCs with more than five such persons must obtain an additional \$100,000 of coverage for each additional person up to a maximum of \$5,000,000. (Bus. & Prof. Code § 7071.19(b)(1)-(2).) In addition, the insurance policies may be on a “claims-made or occurrence basis.” (Bus. & Prof. Code § 7071.19(c).) Even after dissolution or “winding up” of the LLC, liability insurance in the amount required during operation must be maintained, such as through an extended endorsement, for an additional three years “if reasonably available from the insurer.” (Bus. & Prof. Code § 7071.19(e).)

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## Weighing Advantages And Disadvantages Under SB 392

As previously discussed, the LLC form may be desirable under certain circumstances, including as it relates to limiting personal liability, taxation, management/control, and dissolution. SB 392's requirements, however, may undermine the very advantages a contractor would hope to realize by selecting the LLC form.

Contractors angling to increase profit margins through LLC tax benefits may find those margins eroded by SB 392's increased bonding and insurance costs. Smaller, unestablished contractors may find the bonding and insurance requirements altogether cost prohibitive. In addition, requiring contractors to extend liability insurance coverage for three years beyond dissolution in order to avoid significant personal exposure undermines the efficient "winding up" of the business and protection from personal liability for the LLC's obligations that the LLC form generally offers.

Moreover, nothing in SB 392 lessens a contractor LLC's obligation to maintain its license and good standing with the Secretary of State at the risk of substantial personal liability. Failure of a contractor to do so will result in suspension of its contractor's license after 30

days written notice from the registrar. Upon suspension, each person from the LLC listed in the records of the registrar as associated with the license will be personally liable up to \$1,000,000 each for damages resulting to third parties during the suspended period in connection with the LLC's performance. (Bus. & Prof. Code § 7076.2(b).)

## Conclusion

Whether a contractor should elect to form a LLC (or any other entity form) will depend on numerous factors, and accounting and tax professionals should be consulted to address each specific situation. In any event, SB 392's increased bonding and insurance costs, restrictions on dissolution, and the potential for significant personal exposure should be weighed against the anticipated benefits of forming a LLC.

Although SB 392 allows California contractors to form as LLCs, this entity choice may in practice continue to be out of reach for smaller contractors, given the sizeable bonding, insurance and other requirements of SB 392. Larger, established contractors, in contrast, are more likely to be able to absorb the additional costs and realize the benefits of the LLC selection. ◀

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## » FIRM NEWS ◀

### Kathleen O. Barnes is Elected To The American College Of Construction Lawyers

**Kathleen O. Barnes**, Senior Partner, was elected to the American College of Construction Lawyers ("ACCL"). The ACCL includes the top one-percent of construction lawyers in the United States. Fellowship is offered by invitation

to those lawyers and judges who after careful review, are found to encompass the highest standards of ethical conduct and professionalism in the practice of construction law and alternative dispute resolution. ◀

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## Super Lawyers

*Southern California Super Lawyers* recognized **Michael G. Long**, **Robert C. Niesley** and **Gregory J. Dukellis** for the practice area of Construction Litigation. In addition, **Robert C. Niesley** was recognized for the practice area of Construction/Surety and **Gregory J. Dukellis** was recognized for the practice area of Banking. *Northern California Super Lawyers* recognized **Bennett J. Lee** and **Ben Patrick** for the practice area of Construction Litigation. **Bennett J. Lee** was also recognized for the practice areas of

Construction/Surety and Government Contracts. *Washington Super Lawyers* recognized **Christopher A. Wright** for the practice areas of Construction Litigation and General Litigation. **R. Miles Stanislaw** was recognized for the practice areas of Construction Litigation, Business Litigation and Construction/Surety. **Diane C. Utz** was selected to *Washington Super Lawyers* as a 2011 Washington Rising Star. *Nevada Super Lawyers* recognized **Jared M. Sechrist** as a 2011 Nevada Rising Star. ◀

## WTHF Welcomes New Associates

WTHF welcomes three new associates in the McLean, Virginia and Irvine, California offices.

**Nathaniel G. Sizemore** joins the McLean, Virginia office. Nathaniel's practice will focus on construction litigation, government contracts and suretyship. Nathaniel received his J.D. from Vanderbilt University Law School, Nashville, Tennessee in 2011 and his B.A. from Furman University, Greenville, South Carolina in 2008. Nathaniel is a member of the Virginia Bar.

**Nina Z. Javan** joins the Irvine, California office. Nina's practice will focus on construction

litigation, suretyship, and insolvency. Nina received her J.D. from Pepperdine University School of Law, Malibu, California in 2010 and her B.A. from Scripps College, Claremont, California in 2006. Nina is a member of the California Bar.

**Matthew P. Snowdon** joins the Irvine, California office. Matthew's practice will focus on construction litigation and suretyship. Matthew received his J.D. from Loyola Law School, Los Angeles, California in 2006 and his B.B.A. from the University of Iowa, Iowa City, Iowa in 2000. Matthew is a member of the California Bar. ◀

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## WTHF Community Involvement

### ▶▶ District Of Columbia Building Industry Association Nineteenth Annual Community Improvement Day

WTHF team members **Brian R. Dugdale**, **Hanna Lee Blake**, **Heather Stangle** and **Brian E. Maxted** battled the inclement elements on Saturday, October 1, 2011, to participate in the District of Columbia Building Industry Association's ("DCBIA") nineteenth annual Community Improvement Day. For thirteen years, WTHF has been an active sponsor and participant in this annual construction industry community service day. Team WTHF devoted

their efforts toward the improvement of the Marvin Gaye Recreation Center in Washington D.C.'s Ward 7.

### ▶▶ Lee National Denim Day

WTHF regularly participates in the Lee National Denim Day for the Susan G. Komen Breast Cancer Foundation. October 7, 2011 marked the sixteenth anniversary of Lee National Denim Day. **Jeannie Blood** and **Charlotte DeFrancis** coordinated the donation drive. \$1,070.00 was raised from the McLean, Virginia, Irvine, California and Las Vegas, Nevada offices. ◀

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## Author! Author!

The article, "The Contractor's Dilemma In An Owner Bankruptcy" by **Kristen A. Roe Worley**,

appeared in the September 2011 edition of *Construction Briefings*. ◀

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## Upcoming And Recent Programs

**Keith C. Phillips** will moderate a panel session at the Inter-Pacific Bar Association Annual Conference in New Delhi, India, entitled "Dispute Resolution in Mega Construction Contracts," March 1-3, 2012.

**Kevin J. McKeon** recently presented, "The Construction Contracts Program: Understanding and Negotiating the Critical Clauses in the Industry Form Documents," at the ABA Forum on the Construction Industry Regional Program in Pittsburgh, Pennsylvania, November 3, 2011.

**John B. Tieder, Jr.** and **Edward J. Parrott** were presenters at the 2011 National Conference for the Construction Users Roundtable ("CURT"), November 7-9, 2011, in Chandler, Arizona.

**John B. Tieder, Jr.**'s presentation was "Rewards and Risks of Investing in the Former Eastern Bloc – Are These Countries the Next China and India?" and **Edward J. Parrott**'s presentation was "Important and Potentially Surprising Issues for the Construction Professional in the Former Soviet Bloc."

**John B. Tieder, Jr.** recently presented "The Top Ten (Or More) Recent Developments in U.S. Construction Law of Which Every Contractor Working in the U.S. Should be Aware" at the Annual Conference of the European Society of Construction Law, Frankfurt am Main, Germany, November 10-11, 2011. ◀

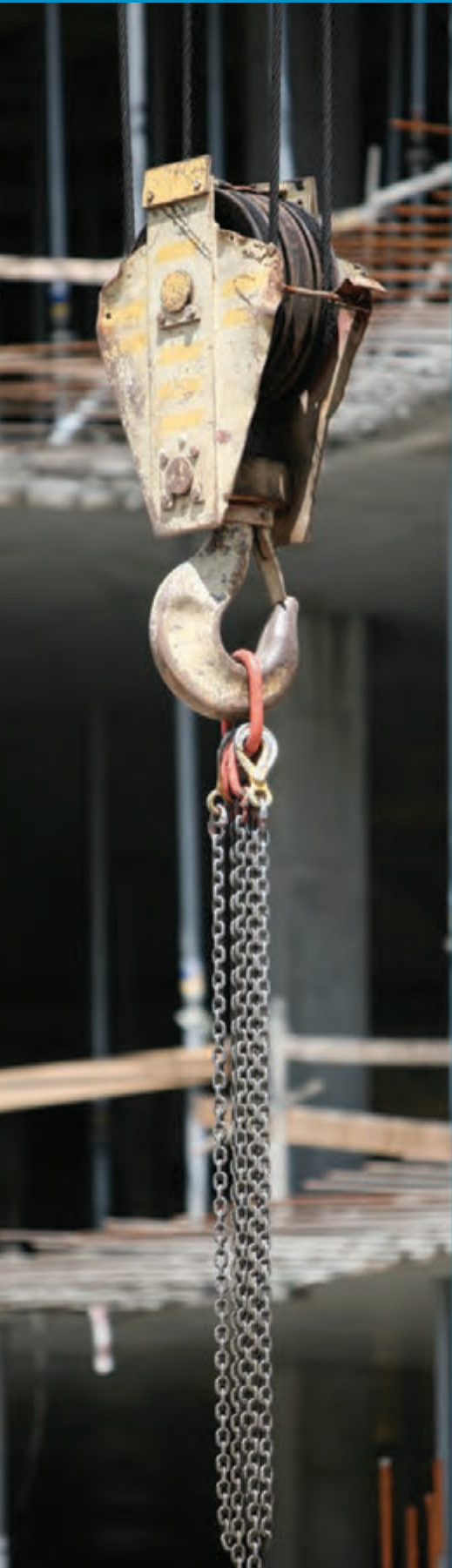




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The Watt, Tieder, Hoffar & Fitzgerald newsletter is published quarterly and is designed to provide information on general legal issues that are of interest to our friends and clients. For specific questions and concerns, the advice of legal counsel should be obtained. Any opinions expressed herein are solely those of the individual author.

Special Thanks to Editors, **Robert K. Cox** and **Robert G. Barbour**.

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