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In This Issue

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Constructing in the Fifth Dimension

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Fulfilling many of the original promises of Computer Aided Design (CAD), Building Information Management (BIM) represents the latest in the continuing evolution of the electronic design and construction of building projects. In contrast to CAD, the BIM stage of the evolution will have a greater impact on the legal relations between the parties because of the depth and breadth of the information involved, and the real-time interchange of information during the design and construction process.

More than just a three-dimensional model of a facility, BIM is an infrastructure in which nearly every piece of information that an owner needs about a facility throughout its life is available electronically. It integrates various areas of information, including spatial design, scheduling, resource management, energy simulation, and code checking. The depth of design information ranges from specific doorknob specifications, to fenestration data that permits analysis of interior lighting under differing environmental conditions. As it is created, the information generated is available for use, review and contribution by the designer, owner, contractor, subcontractors, and other project participants.

The "on demand" availability, and real-time modification, of design information creates a design process that is more collaborative with the construction process, and that ▸ *PAGE 2*

From the Chairs

"What's new?" Well, lots actually. In this issue of *Construction OberView*, we discuss three new developments in very different areas of construction law. First, Jeffrey Regner addresses the rapidly developing new field of Building Information Modeling (BIM). As usual, the new technology will result in novel legal issues and problems. These include interesting questions such as who assumes design responsibility under BIM, and what happens to the warranty of design per the Spearin doctrine.

Next, Ian Friedman addresses the new Maryland law limiting retention on construction projects to five percent. Finally, Jack Morkan tackles a very recent Supreme Court case that, for the first time, addresses subcontractor liability issues under the False Claims Act. FCA suits represent the fastest growing area of federal litigation. Ready or not, these cases are coming your way.

As always, we thank our authors for their thoughtful pieces and our editor Jay Bernstein for his good work. We welcome your questions and comments.

Jack Morkan and Joe Kovars
Co-chairs, Ober|Kaler Construction Group

Constructing in the Fifth Dimension… FROM PAGE 1

presents significant new legal issues. For example, by drastically reducing the number of RFIs, and simplifying (if not automating) the creation of shop drawings, it is foreseeable that BIM may reduce disputes that result in construction claims.

While designer liability may be reduced under BIM, it is greatly complicated by the broader number of participants involved in each stage of the design. Although most BIM software packages track who enters design data at what time, the final design is not necessarily a fixed landmark against which design liability can be measured. Further, the scope and enforceability of the designer's implied warranty that the design is constructable and free of defects is unclear when subcontractors collaborate with designers to complete shop drawings, and to work through conflicts and other issues.

The uncertainties that BIM creates regarding design liability complicate, and potentially implicate, issues of insurability and coverage under a designer's E&O policy.

Copyright issues also arise under BIM when multiple designers collaborate in real time to create a single, comprehensive design product. While BIM allows more design flexibility and fast track construction, the question of who owns the collaborative design is unclear, and in flux. Some commentators support a new ownership model such as that used in the film industry, where ownership of the collaborative product is shared by the producer and the individual artists. However, current contract forms do not reflect this approach, and the design community would undoubtedly strongly resist any effort to wrest from them sole ownership of the design.

Despite the legal uncertainties, the industry is using BIM, and with good results. Reportedly, the use of BIM on the construction of the new Washington Nationals baseball stadium reduced RFIs on the structural steel by an estimated factor of ten. The General Services Administration, which provides 330 million square feet of workspace to more then 100 federal agencies, has implemented a BIM pilot program which has reduced design errors, increased efficiency, reduced project construction time, and improved facilities management.

In the short term, the cost of implementing BIM will fall primarily on designers, in the form of technology investment and education. However, BIM's benefits will be enjoyed by all project participants in the form of more efficient project delivery and facilities management. ■

New Maryland Law Limits Retention to 5%

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A major change in the amount of retention that can be held on construction projects was enacted by the Maryland legislature during its 2008 session.

Senate Bill 313 provides that if a contractor has furnished 100% security (either through surety bonds or through other mechanisms authorized by Maryland law) to guarantee the performance of the contract and to guarantee payment of suppliers of labor and materials, then the percentage of the contract that an owner can retain to guarantee performance is limited to five percent of the contract price.

The new bill also provides that a contractor's retention from a subcontractor may not exceed the percentage of retention held by the owner from the contractor, and that a subcontractor's retention of contract funds from another subcontractor may not exceed the percentage of the subcontractor's funds being retained by the contractor. In practical terms, this means that a contractor cannot retain more than five percent from a subcontractor, and that a subcontractor cannot retain more than five percent from a sub-subcontractor.

Prior to the enactment of Senate Bill 313, Maryland law imposed retention limits only upon bonded construction projects involving public contracts. Senate Bill 313 expands these restrictions to include private contracts that are entered into after September 30, 2008.

Senate Bill 313 law only applies to contracts valued in excess of $250,000, and does not apply to contracts or subcontracts for projects funded wholly or in part by the Maryland Department of Housing and Community Development; to a contract for construction and sale of a single family residential building; to a transaction ▸ PAGE 4

Save-the-Date

Raymond Daniel Burke *will speak at "Green or Sustainable Construction in Maryland," a Lorman Education Services program slated for October 29 in Baltimore. Ray will address design issues and alternatives to LEED®. Visit lorman.com for more information.*

A False Claims Act Blockbuster May Be Opening in a Court Near You

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Movie studios release their film blockbusters during the summer season. But if recent activity is any indicator, the newest legal blockbuster may be a False Claims Act suit opening for trial in a court near you.

The False Claims Act (FCA) was enacted by Congress nearly 150 years ago in response to unscrupulous Civil War defense contractors who were selling inferior quality goods to the Union Army. The Act exposes a government contractor to civil liability for, among other things, knowingly presenting to the government a false claim for payment, or for knowingly making or using a false record or statement to get a false claim paid or approved by the government. The FCA also permits private causes of action, which enable persons with insider knowledge of false claims to file suit on behalf of the government and to receive a portion of any damages recovered.

Historically, the typical targets of FCA suits have been federal defense contractors. In the 1990s, the focus of FCA litigation shifted to healthcare companies. Indeed, by 2006, an FCA case against one healthcare company was reportedly settled for nearly a billion dollars, and four cases involving hospital and pharmaceutical companies were settled for sums that reportedly exceeded $500 million each. Recent media reports suggest that the focus of FCA suits may again be shifting to federal defense contractors. In June 2008, the Justice Department initiated an FCA suit against Honeywell in connection with the company's manufacture and sale of ballistic material used in bullet-proof vests.

In a developing trend, both courts and creative litigants have looked to broaden the scope of FCA liability to include construction contractors and subcontractors. A harbinger of this trend was the 2005 federal court decision in *United States ex rel. Bettis v. Odebrecht Contractors of California, Inc.*, in which a scheduler retained by the government to monitor progress on a dam project claimed that the contractor violated the FCA "by submitting an intentionally low bid… with the intention of seeking adjustments to the price after winning the contract." Although this argument was rejected for lack of evidence, the court left unresolved the issue of whether submission of an intentionally undervalued bid might, under the right set of circumstances, constitute actionable fraud under the FCA.

Also in 2005, the federal court in *United States v. Sequel Contractors, Inc.* held that the FCA applies to invoices furnished by a contractor to a local government on a federally-funded project, even absent evidence that the contractor itself presented a false claim to the federal government or knew that the allegedly false claims would be presented to the federal government.

On June 9, 2008, the Supreme Court addressed the applicability of the FCA in *Allison Engine Co. v. United States.* In that case, former employees of a subcontractor hired to build destroyers for the Navy filed suit under the FCA, claiming that defective products had been wrongly certified in payment submissions. In a unanimous opinion, the Court held that subcontractor liability under the FCA depends on intent. A false statement submitted to a prime contractor with the intent that it will be used to get the government to pay the subcontractor's claim is actionable. However, when the submission of a false statement to a prime contractor is not intended to serve as a condition of payment by the federal government, "the direct link between the false statement and the Government's decision to pay or approve a false claim is too attenuated to establish liability."

While most of the media coverage of *Allison Engine* has focused on the requirement that an FCA defendant intend for the false statement to be used by the government to pay or approve a claim, as important is the Court's expansion of the FCA to apply to subcontractors and other indirect recipients of federal funds. The Court's decision makes it clear that it is not just contractors who directly contract with the government that may find themselves defending against FCA claims; any entity involved with a federal project or federally funded project is subject to the FCA.

In a parallel trend, nearly two dozen states have enacted state False Claims Act statutes, meaning that entities involved in state or state-funded projects may face liability wholly apart from the federal FCA. Indeed, in June 2008, the Los Angeles Department of Water and Power filed suit under California's False Claims Act accusing the construction and engineering firm CH2M Hill of overbilling, and asserting a claim for treble damages potentially amounting to hundreds of millions of dollars.

According to the American Bar Association, FCA suits represent the fastest growing area of federal litigation. The effect of these suits will increasingly be seen and felt in construction contract litigation, with governmental ▸ PAGE 4

New Marylnd Law… FROM PAGE 2

under the Consumer Protection Act; or to a home improvement contract by a contractor licensed under the Maryland Home Improvement Act.

The five percent rule is subject to one important exception. The new law states that an owner, contractor, or subcontractor may retain an amount in excess of five percent if the owner, contractor, or subcontractor reasonably determines that the performance of the contractor or subcontractor under the contract provides reasonable grounds for withholding an additional amount.

The law does not provide any guidance as to what constitutes reasonable grounds for withholding more than five percent as retention. Presumably, such grounds would vary depending upon the facts of the case and the governing contractual provisions. As one example, an owner might be justified in withholding more than five percent if the contractor failed to complete work by the contract completion date, resulting in the assessment of liquidated damages that exceeded the five percent retention. ■

False Claims Act FROM PAGE 3

entities and whistleblowers alike trying to make a federal (or state) case for everything from a low-ball bid by a purported change order artist, to a supplier's alleged wrongful certification of compliance with contract specifications. And sooner than anyone in the industry might think, a blockbuster FCA construction suit may open in a court near you. ■

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