ECKERT SEAMANS
ATTORNEYS AT LAW

Fall 2014

www.eckertseamans.com | info@eckertseamans.com

Construction Law

In This Issue…

Good faith and fair dealing upheld in federal construction contracts

Scott D. Cessar

In our last edition, we reported that, in *United States v. Metcalf*, the Federal Circuit Court of Appeals had agreed to review a decision of the lower court. If upheld, it would make contractor claims against the government for the breach of the duty of good faith and fair dealing very difficult by requiring the contractor to show intentional bad faith by the government, as opposed to prior precedent that the contractor need only prove that the government objectively acted unreasonably.

The policy arguments for reversal of the lower court decision in *Metcalf* were straightforward and compelling. Contractors, when bidding work, must consider the risk of government-caused delays, impacts and changes. If the very high burden of proof for the breach of the implied duty of good faith and fair dealing applied, then contractors would either be forced to increase their price or forego bidding government work. In either case, the market, the procurement process and the public would suffer.

In a far-reaching decision, the Court of Appeals reversed the lower court and set forth the standards for a claim of the breach of the duty of good faith and fair dealing. The Court held that the contractor is *not* required to show intentional bad faith by the government, such as that the government's actions were intended to specifically target a contractual benefit to the contractor in

continued on page 2

Warning to federal government prime contractors and their sureties: No notice to cure, means no right to a setoff

Audrey K. Kwak

A recent decision from the Fifth Circuit Court of Appeals, J*EMS Fabrication, Inc. v. Fidelity & Deposit Co. of Maryland* (April 2014) highlights the importance of reading, understanding and complying with contractual terms in order to ensure proper compensation (or, in this case, reimbursement).

In *JEMS Fabrication*, JEMS, a structural steel supplier on a U.S. Corps of Engineers project, filed suit pursuant to the Miller Act against Benetech (the general contractor) and Benetech's two sureties for monies JEMS claimed to be owed for work on the project.

continued on page 6

Good faith and fair dealing upheld in federal construction contracts
(continued)

order to reappropriate the benefit for the government. In addition, the contractor need not point to a specific contractual term violated by the government in order to make a claim of breach of the duty.

To the contrary, whether the government breached the duty of good faith and fair dealing may be demonstrated by showing "subterfuges" and "evasions" and a failure to adhere to the "faithfulness to an agreed common purpose and consistency with the justified expectations of the parties." The Court held that one party cannot interfere with the other party's performance and act in a manner so as "to destroy the reasonable expectations of the other party regarding the fruits of the contract."

The Court found that this subjective standard was required "because it is rarely possible to anticipate in contract language every possible act or omission by a party that undermines the bargain" because the duty of good faith and fair dealing is focused on "honoring the reasonable expectations" of the parties.

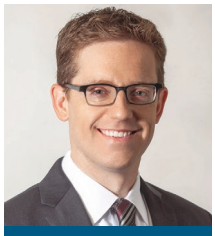
The Court did confirm, however, that the implied duty cannot be expanded to overrule bargains of the parties expressed in the written terms of the contract.

As a consequence, the Court sent back to the trial court, for further hearings, the contractor's claim for over $25 million in damages based on the government's breach of the implied duty of good faith and fair dealing.

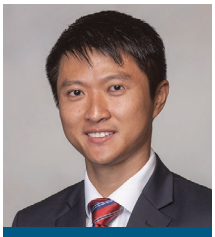
The holding in *Metcalf* is important to government contractors as it reinstates, and further explains, the basis for contractor claims, based on the breach of the duty of good faith and fair dealing, against the government for unfair or unreasonable actions that do not neatly coincide with, or constitute a breach of, express contractual terms. In doing so, contractors have regained an important line of protection and avenue for recourse from arbitrary and unreasonable government contract administration.

Scott D. Cessar can be reached at scessar@eckertseamans.com

Changes coming to the PA Mechanics' Lien Law



Timothy D. Berkebile



George Jiang

In recent years, changes have been made to the Pennsylvania Mechanics' Lien Law of 1963 that have significantly changed mechanics' lien practice in the Commonwealth, such as the extension of mechanics' lien rights to second-tier subcontractors and the provision of super-priority status to open-ended mortgages over mechanic' liens. Further significant changes are underway.

The Lien Law was recently amended: (1) to protect homeowners from subcontractor mechanics' liens in situations where the general contractor is paid in full; and (2) to clarify the extent of the super-priority status applied to an open-end mortgage.

Under the amendment, payment of the full contract price by a residential homeowner to the general contractor shall lead to the discharge of a subcontractor's mechanics' lien on the residential property. Even partial payment by the homeowner can cause the lien to be reduced to the amount of the unpaid contract price owed to the general contractor. Residential subcontractors should be especially careful regarding the risk of non-payment in light of the weakening of their mechanics' lien rights.

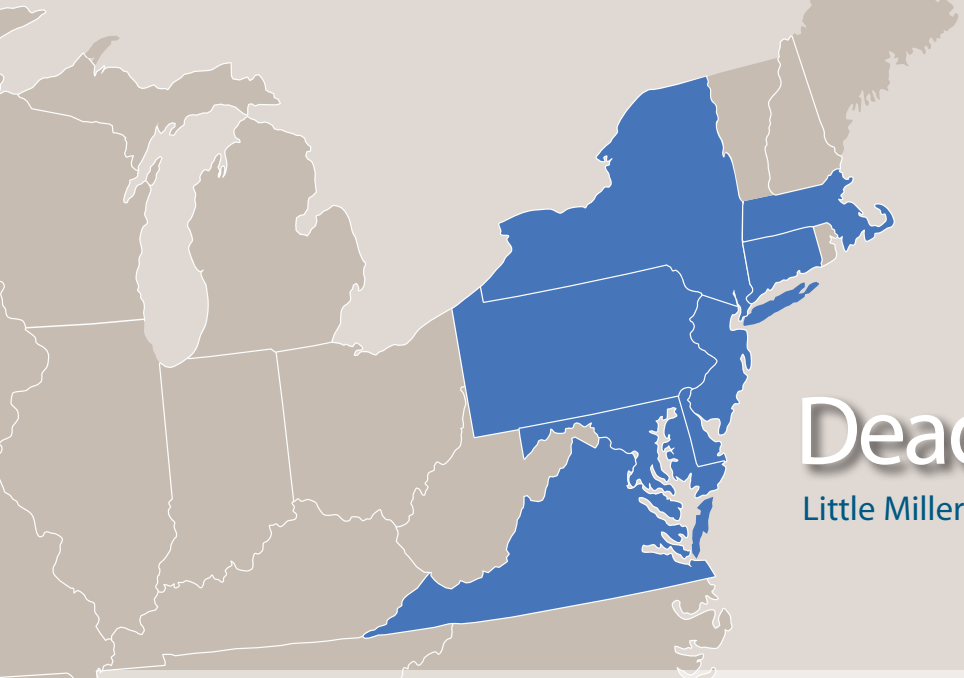
The amendment also clarifies when a mechanics' lien has priority over an open-ended mortgage. Previously, a mechanics' lien was subordinate to an open-end mortgage where the loan proceeds were used to pay the cost of completing construction. It was previously unclear what effect the use of such loan proceeds for so-called "soft" costs had on the loan's super-priority status. The amended Lien Law makes clear that an open-end mortgage has super priority over a mechanics' lien where at least sixty percent of the loan proceeds are intended to pay or are used to pay for the "costs of construction." A fairly broad definition of "costs of construction" was provided. By limiting the instances where mechanics' liens are granted priority over such loans, the amendment addresses numerous instances where lienholders have attempted to jump in front of open-end mortgages where loan proceeds had been used for "soft" costs of construction.

The above amendments apply to all mechanics' liens perfected on or after September 7, 2014, including liens relating to the construction of an improvement for which the visible commencement of work has already occurred prior to the effective date.

Perhaps more significantly, in the coming months, the law will be further amended to implement a searchable database of all construction projects costing at least $1,500,000. This database will facilitate the filing of newly-required construction notices, including owner-filed Notices of Commencement and subcontractor-filed Notices of Furnishing. These new requirements constitute a MAJOR departure from prior mechanics' lien practice in Pennsylvania, with very serious implications. For example, a subcontractor failing to properly file a Notice of Furnishing within 45 days of supplying labor or materials to a project forfeits its rights to file a mechanics' lien. It is vitally important that all parties to ongoing and upcoming construction projects (including owners, contractors, subcontractors, lenders, etc.) remain timely apprised of the status of this legislation, as it will affect mechanics' lien rights upon enactment.

Timothy D. Berkebile can be reached at tberkebile@eckertseamans.com

George Jiang can be reached at gjiang@eckertseamans.com



Deadline Reminders

Little Miller Act deadlines in selected jurisdictions

Federal:

Notice Requirement

Direct relationship with Contractor: None.

"Sub-sub" Contractor: Within 90 days after work, no recovery for sub-sub-subs.

Statute of Limitations: 1 year

Cite: 40 U.S.C. 3133(b).

Connecticut:

Notice Requirement

Direct relationship with Contractor: After 60 days, within 180 days of furnishing labor.

"Sub-sub" Contractor: After 60 days of providing, within 180 days after supplied or due. Bond company must reject in 90 days.

Statute of Limitations: After 90 days if a direct Contractor, before 1 year.

Cite: Conn. Gen. Stat. § 49-41, § 49-42 (2006).

Delaware:

Notice Requirement

Direct relationship with Contractor: None, consult bond.

"Sub-sub" Contractor: None, consult bond.

Statute of Limitations: Must be brought in 1 to 3 years depending on the bond.

Cite: 29 Del.C 6927 (f).

Maryland:

Notice Requirement

Direct relationship with Contractor: None.

"Sub-sub" Contractor: Within 90 days of last performing work.

Statute of Limitations: After 90 days after labor performed, within 1 year work is accepted.

Cite: MD State Finance and Procurement Code, §§ 17-108.

Massachusetts:

Notice Requirement

Direct relationship with Contractor: None.

"Sub-sub" Contractor: Within 65 days after services.

Statute of Limitations: 1 year.

Cite: M.G.L. 149, § 29.

New Jersey:

Notice Requirement

Direct relationship with Contractor: 1 year from date last performed.

"Sub-sub" Contractor: Before performing work or limited to "benefits available." 20 days after first performance of work if a municipality.

Statute of Limitations: 90 days after notice is given to the surety, but no later than 1 year from the date provided. In the case of a municipality, 60 days since prime completed or work accepted.

Cite: N.J.S.A. 2A:44-143; N.J.S.A 2A:44-125; N.J.S.A. 2A:44-132.

New York:

Notice Requirement

Direct relationship with Contractor: After 90 days.

"Sub-Sub" Contractor: Sub-Subs must give Notice within 120 days of last furnishing services unless face of bond specifies differently. **Note:** Monies can be liened from Contractor as well 30 days from completion/acceptance.

Statute of Limitations: 1 year from acceptance of project for a bond claim. 1 year from subcontractor's final payment date for a lien.

Cite: N.Y. STF. LAW § 137 (3).

Pennsylvania:

(Most Public Entities Except Commonwealth Purchasing Agencies)

Notice Requirement

Direct relationship with Contractor: None.

"Sub-sub" Contractor: None.

Statute of Limitations: After 90 days from work performed, before 1 year elapses.

Cite: PA. Public Works Contractors Bond of 1967, 8 P.S. 191 et seq.; 62 Pa, C.S.A. 101 et seq.

Virginia:

Notice Requirement

Direct relationship with Contractor: After 90 days after performed services.

"Sub-sub" Contractor: Within 90 days after last performed services.

Statute of Limitations: 1 year, unless Department of Transportation (5 years).

Cite: VA Code Ann 2.2-4340, 2.2-4341.

David M. McGlone

David M. McGlone can be reached at dmcglone@eckertseamans.com

New Jersey's statute of repose imposes a hard 10-year cap on construction claims, but only for defective and "unsafe" work


Vincent J. Paluzzi


Edgar Alden Dunham, IV

Many in the construction industry are aware of statutes of limitation, which set deadlines for asserting claims. In New Jersey, the deadline for construction claims is generally six years, unless personal injuries are involved. The time runs from the date the cause of action "accrues," which, in construction, generally means when the defective work was performed or completed. The purpose is to cut off stale claims. The deadlines are not absolute, however. Under the "Discovery Rule," courts may find that a claim did not accrue until the plaintiff "discovered," or should have discovered, the basis for the claim; often resulting in claims being brought after the deadlines would have otherwise occurred.

Recognizing that the Discovery Rule made reasonable risk management for the industry difficult, New Jersey's Statute of Repose (the Statute) imposes a "hard" 10-year cap on certain construction claims, regardless of when problems were, or should have been, discovered.

The Statute does not always apply, however. Counterintuitively, it only applies if the condition resulting from the work is not only defective, but also "unsafe." For example, if application of the Discovery Rule would extend the statute of limitations past the Statute's 10-year cap, and the defect in question is unsafe, the claim is barred. But if the defective condition is not unsafe, the Statute does not apply and the claim is not barred. The reasoning behind the "unsafe" requirement is not clear; however, the wording was adopted from similar statutes in other jurisdictions.

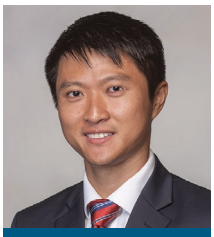
A famous example in New Jersey concerned a surveying error that incorrectly located a building on a lot. When the error was discovered more than 10 years later, a claim was asserted and the Statute was invoked as a bar to the claim. The New Jersey Supreme Court held that despite the expense and "inconvenience" caused by the defect, there was no resulting unsafe condition, so the claim was not barred. Had the error caused personal injury, the resulting unsafe condition would have let the surveyor off the hook.

Thus, the Statute rewards those whose work is both defective and unsafe by providing the additional protection of a hard 10-year cap on claims, but it does not provide the same protection for those whose work is merely defective.

Vincent J. Paluzzi can be reached at vpaluzzi@eckertseamans.com

Edgar Alden Dunham, IV can be reached at edunham@eckertseamans.com

AAA UPDATE


George Jiang

The American Arbitration Association (AAA) has issued a new set of Supplementary Rules for Fixed Time and Cost Construction Arbitration. These Supplementary Rules, which took effect on June 15, 2014, were designed to address concerns that construction-related arbitration has become particularly expensive, time-consuming and unpredictable. As the title suggests, the new rules are optional and supplement the pre-existing Construction Arbitration Rules & Mediation Procedures.

If invoked, the Supplementary Rules work to limit the scope of an arbitration proceeding. The new rules include a cap on total fees, stipulate that the proceedings will involve only one arbitrator, require a meet and confer conference during which parties are expected to agree on procedural and administrative issues, institute limitations on the duration of the arbitration and hearing days, limit an arbitrator's time and compensation, restrict the filing of post-hearing briefs except upon approval of the arbitrator or upon agreement of the parties, and feature other cost-saving measures. Even the arbitration award itself is limited to three pages and must be issued within 20 days from the close of the hearings.

Not all cases benefit from the Supplementary Rules. Simple cases with discrete issues and limited discovery will likely see the most cost savings. Moreover, the new rules only apply to arbitrations between two parties, with only limited exceptions where a surety is involved. In order to take advantage of the Supplementary Rules, parties to a contract only need to state the intent to arbitrate under the Supplementary Rules. Even existing parties to a dispute may jointly file an agreement to proceed with the Supplementary Rules. Attorneys with Eckert Seamans' Construction Law group can provide counsel on whether a matter would benefit from the use of the Supplemental Rules.

George Jiang can be reached at gjiang@eckertseamans.com

Contract Corner

Christopher R. Opalinski

Timothy D. Berkebile

Risk allocation should be at the center of every construction contract negotiation. Conscientious owners, contractors, subcontractors, and design professionals should attempt to limit their own legal exposure by shifting duties, obligations, and liabilities to other parties in the contracting chain, as leverage allows. The use of a "Flow-Down" clause is one important method of achieving this goal. On its face, a flow-down clause pushes risks and obligations, and shares rights and remedies, assumed under a separate contract down the contract chain to another contracting party. For instance, an owner may require a contractor to pass down certain obligations to its subcontractors. Section 5.3 of the AIA A201 does this by requiring the contractor to include language in its subcontracts by which subcontractors agree to assume toward the contractor all the obligations and responsibilities that the contractor assumes toward the owner with respect to the subcontractor's work, but in addition it provides the subcontractor with the benefit of all rights, remedies, and redress against the contractor that the contractor has against the owner. Similarly, Article 2 of the AIA A401 mutually binds the contractor and subcontractor to the terms of the contractor's agreement with the owner to the extent such terms apply to the subcontractor's work.

Strategic use of flow-down clauses can provide benefits to contracting parties in a number of ways. Owners obtain assurance that subcontractors are on the same page as the contractor, at least contractually. Contractors may use such a provision to limit the subcontractor's right to progress payments or delay damages or increase the subcontractor's financial obligations per the terms of the prime contract. In the same way, if the clause is reciprocal, subcontractors may gain the benefit of various rights and remedies in the prime contract.

Obtaining the intended benefits of a flow-down provision requires that the contracting parties fully appreciate the way in which all of the "flowed-down" language and the parties' contract are intended to interact. It is virtually certain that a lazily constructed flow-down provision will have unintended consequences for the parties. Therefore, it is vital that all contracting parties have a firm grasp of what is required by the terms which flow down and whether or not any potential conflicts or ambiguities are created between the two agreements. In that regard, it is crucial that the parties carefully define what terms are included or excluded from the scope of the flow-down clause. Payment terms, for instance, are often the subject of such exclusions. To the extent that the contract may contradict with flow down language, the contract should carefully set forth - either specifically with regard to certain provisions or more generally in an order of precedence clause - which language governs. This is particularly the case with damage limitations, "pay-when-paid" clauses and disputes provisions. It is important to understand that certain clauses that make sense as between the owner and contractor may not make sense further down the contract chain depending on the circumstances. The party to whom the additional obligations and responsibilities flow down to should make every effort to further flow such obligations and responsibilities down to lower tiered subcontractors or suppliers.

Flow-Down clauses can be a valuable risk-management tool, but effective use of this tool requires understanding and careful application.

Christopher R. Opalinski can be reached at copalinski@eckertseamans.com

Timothy D. Berkebile can be reached at tberkebile@eckertseamans.com

Relief for home builders: Pa. Supreme Court limits liability for latent defects in *Conway v. The Cutler Group, Inc.*

Katherine L. Pomerleau

Until recently, residential builders in Pennsylvania were potentially on the hook for implied warranty claims brought not only by the buyer of the new home, but also by subsequent purchasers of the home, regardless of the fact that the builder had no contract with the subsequent homeowners. In *Conway v. The Cutler Group, Inc.*, however, the Pennsylvania Supreme Court decided that the implied warranty of habitability does not extend to subsequent purchasers of a new home, and requires a contractual relationship between the original purchaser and the homebuilder.

Since 1972, Pennsylvania courts have implied a warranty of habitability in the context of new home sales, meaning that a warranty that the home is fit for habitation and free from latent construction defects is implied in each builder's contract to construct a new home. The question that had divided trial courts, and that was ultimately decided in *Conway*, was whether this implied warranty extended to subsequent purchasers of that home.

In *Conway*, The Cutler Group, Inc. sold a new house to Davey and Holly Fields in 2003. Three years later, the Fields sold the house to Michael and Deborah Conway. In 2008, the Conways discovered water infiltration around some of the windows of the home, determined that the infiltration was caused by several construction defects, and filed a suit against The Cutler Group in 2011 for breach of the implied warranty of habitability. The trial court dismissed the Conways' claim because there was no contract between The Cutler Group and the Conways, and therefore no implied warranty of habitability. Citing public policy reasons, the appellate court reversed the trial court, and decided that the implied warranty should extend to subsequent homeowners. This ruling

continued on page 6

Relief for home builders: Pa. Supreme Court limits liability for latent defects in *Conway v. The Cutler Group, Inc.*

(continued)

opened homebuilders up to breach of warranty lawsuits for latent defects discovered by countless homeowners, with only the 12-year statute of repose cutting off the builder's liability.

The Supreme Court reversed the ruling of the appellate court in August, however, choosing not to extend the implied warranty of habitability to subsequent purchasers of a newly constructed home, and holding that an action for a breach of the implied warranty of habitability requires the existence of a contract between the purchaser and the builder.

It is important to note that this issue may not be completely resolved. The Supreme Court explicitly placed the ultimate decision regarding the issue of whether to extend the implied warranty to subsequent homebuyers into the hands of the legislature, stating that the issue is one involving public policy, which is properly left to the General Assembly. Since the Court based its ruling on its limited authority to decide public policy issues and essentially handed the issue off to the legislature, it is important to continue to monitor this issue.

Katherine L. Pomerleau can be reached at kpomerleau@eckertseamans.com

Warning to federal government prime contractors and their sureties: No notice to cure, means no right to a setoff

(continued)

The project itself involved the renovation and redevelopment of pumping stations at various sites located along the Mississippi River. The Corps hired Benetech as general contractor, and Benetech hired JEMS to supply structural steel and a $54,000 custom building. In all, the subcontract, which included shop drawings and on-site labor, was valued at $2.38 million. During construction, however, Benetech ultimately supplied the on-site labor. In addition, according to Benetech, JEMS did not provide certain materials required by the subcontract, and Benetech had therefore been forced to procure materials from other suppliers at a cost of roughly $400,000. In all, Benetech paid JEMS nearly $1 million, and claimed JEMS was due no more.

JEMS filed suit against Benetech and its sureties, and the inevitable disputes arose as to whether JEMS was entitled to the monies it sought, whether offsets were available for shoddy or defective performance, or whether some other contractual defense existed that would reduce or even eliminate liability.

Benetech and its sureties argued that they were entitled to a setoff against any amounts due under the subcontract because Benetech had purchased materials that JEMS should have supplied. The trial court rejected this argument, noting that the subcontract required Benetech to give JEMS notice of any deficiencies and an opportunity to cure before incurring costs on its own. Benetech had failed to give such notice to JEMS, which eliminated its ability to seek reimbursement for the $400,000 spent in materials.

Ultimately, the court entered judgment in JEMS' favor and against Benetech and its sureties, awarding JEMS nearly $500,000.

The sureties appealed this decision (Benetech did not participate in the appeal), arguing that the notice and opportunity to cure required by the subcontract should not apply, and/or was not binding on them, as they were not party to the subcontract itself.

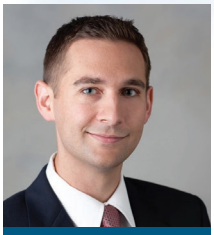
The appellate court rejected these arguments, noting that "while a Miller Act surety is not a party to a contract between a subcontractor and a contractor," the sureties "nonetheless stand[] in the shoes of the contractor and [are] bound by [their] dealings for these purposes." Therefore, the sureties, like Benetech, were "bound by the terms of the Contract, including its 'notice and cure' provisions."

This case underscores, yet again, how critical it is to be aware of, to understand—and most importantly, to follow—any contractually agreed-upon procedures to ensure that monies spent in the rush to complete a project are properly compensable after the fact. Equally significant, this decision is a reminder to sureties that their rights are only as good as those of the contractors they guarantee. In the words of the JEMS court, even though sureties are not a party to a subcontract, they "nonetheless stand[] in the shoes of the contractor and [are] bound by its dealings."

Audrey Kwak can be reached at akwak@eckertseamans.com

The F.A.R. Side

Timing is key to claims on federal construction projects



Matthew J. Whipple

For construction projects, timing is everything. Each activity must be precisely timed and logically sequenced so the project proceeds in a unified, orderly manner. The greatest mess results when too many workers are trying to do too many tasks without any clear plan.

The federal claims process is no different—a contractor has the greatest success when timing is understood and properly managed. If a contractor has a dispute on a federal project and submits a formal "claim," a clock starts for the contracting officer's response, typically 60 days. If the response approves the claim, it is good news for the contractor. If the claim is denied, however, that timer then re-sets. Now, it ticks for the contractor, who must appeal the decision to the appropriate contracting agency (within 90 days) or the Court of Claims (within one year), or else the claim may be lost.

A potential problem arises when the timing for the claims process does not marry with the timing for the remainder of the project. Even if the project is ongoing, the appeals clock continues to run, which puts a contractor in an awkward position of prosecuting an appeal while simultaneously proceeding with the project. In some situations, additional damages may accrue from the same claim. In others, additional problems may arise on the project, leading to entirely new claims. On a particularly long project, that first claim may be on its way to trial just when the contractor is quantifying a second, third or even fourth impact. Any attempt by the contractor to comprehensively address all the issues may be complicated by the fact that, once in litigation, a separate government official from the project's contracting officer may be in charge of the claim in litigation, and he or she may have very different views about the project.

When presented with this dual-track situation, a contractor may face hard choices. Certain principles of law, such as the "enlarged claim doctrine," may allow a contractor to later add damages to his original claim. In many situations, however, new damages cannot be added because they stem from a separate claim. A good rule of thumb is that if the government could logically grant relief on Item A while denying relief on Item B, these are separate claims. With the separate claim comes the need for an entirely new submission from the contractor and a new decision from the contracting officer, which may again take 60 days or more.

Further, if the contractor proceeds to trial on only some of its claims, it may be barred from presenting these later claims under principles of *res judicata*. This is particularly true where the contractor knew about the additional claims and had within its power the ability to ensure that the additional claims were certified and presented, but did not timely act to do so. Prosecuting one claim too early may leave the contractor at risk to lose later claims.

Managing the claims process, therefore, is no different from managing the project. On-site, the excavator has to be coordinated with the mason and the mason with the electrician. So, too, must a contractor's claims be coordinated, so one claim does not outpace the others. If you are encountering difficulties on a federal project and are considering a claim, our attorneys can assist in "project managing" those activities to achieve a timely, successful result.

Matthew J. Whipple can be contacted at mwhipple@eckertseamans.com

Construction Law Group NEWS

Eckert Seamans' Construction Practice Group was selected for inclusion in the 2014 edition of *Chambers USA: America's Leading Lawyers for Business* for Pennsylvania. In addition, **Chris Opalinski** and **Scott Cessar** were selected individually for inclusion in *Chambers*. Excerpts follow below.

Christopher R. Opalinski—Client states: "He can frame issues in a way that everyone can understand and will always produce a cogent and rational argument."

Scott D. Cessar—Clients highlight his "knowledge, responsiveness and attention to detail."

The publication's rankings are based upon the recommendations of more than 10,000 clients and lawyers throughout the United States. *Chambers USA* researchers conduct thousands of interviews to obtain opinions about the lawyers and law firms the interviewees have dealt with over the past year. The leading law firms and attorneys are then compiled and ranked based on the comments in the interviews.

Scott Cessar, Chris Opalinski and **Neil O'Brien** were selected for inclusion in the 2015 edition of *The Best Lawyers in America*® for Construction Law. Scott was also named the Best Lawyers 2015 Litigation—Construction "Lawyer of the Year" in Pittsburgh.

Best Lawyers® compiles its lists of outstanding attorneys by conducting exhaustive peer-review surveys in which thousands of leading lawyers confidentially evaluate their professional peers. Inclusion in *The Best Lawyers in America* 2015 is determined by more than 5.5 million detailed evaluations of lawyers by other lawyers. The lawyers being honored as "Lawyers of the Year" have received particularly high ratings in surveys by earning a high level of respect among their peers for their abilities, professionalism and integrity.

George Jiang recently joined Eckert Seamans as an associate in the Construction and Litigation practice groups. George, who is fluent in Chinese, focuses his practice on commercial litigation and construction matters. Before joining private practice, he served as a judicial law clerk for the Hon. Nora Barry Fischer of the U.S. District Court for the Western District of Pennsylvania and for the Hon. Brian L. Owsley of the U.S. District Court for the Southern District of Texas. He received his J.D. from the University of Notre Dame Law School and his undergraduate degree in political science, *magna cum laude*, from Vanderbilt University.

After six years of litigation, arbitration and a trip to the Appellate Division of the Superior Court of New Jersey, **Ed Dunham** won substantial victories for a general contractor and an HVAC contractor against a New Jersey board of education, including actual payment of the combined judgment. The case arose out of the reconstruction and rehabilitation of a high school. The two contractors brought claims of amounts due on their prime base contracts, constructive change orders, and schedule impact claims, including both delay and efficiency claims. Despite a "no-damage-for-delay" clause in the contracts, the schedule impact claims prevailed. The contractors used the "Measured Mile" approach to calculating the efficiency claims. With interest, the combined judgment was in excess of $3 million dollars.

Vince Paluzzi recently achieved a very favorable settlement of $6.5 million of delay claims asserted against a long-standing public authority client by its former project management firm (PMF). The claims arose out of eight different projects located throughout New Jersey, having a combined construction cost in excess of $150 million. Although the projects were plagued by delays attributed to design errors and omissions, Vince was able to negotiate a settlement of all claims for $2.85 million, or approximately 44 cents on the dollar. The claims were aggressively defended based, inter alia, on contractual provisions limiting damages for delays caused or contributed to by the PMF, and the PMF's inadequate performance of its obligations to review design documents for "constructability," consistency and completeness.

ECKERT SEAMANS
ATTORNEYS AT LAW
eckertseamans.com

Pittsburgh, PA 412.566.6000
Newark, NJ 973.855.4700
Trenton, NJ 609.392.2100
Boston, MA 617.342.6800
Philadelphia, PA 215.851.8400
Troy, MI 248.526.0571
Charleston, WV 304.720.5533
Providence, RI 401.272.1108
Washington, DC 202.659.6600
Harrisburg, PA 717.237.6000
Richmond, VA 804.788.7740
White Plains, NY 914.949.2909
Hartford, CT 860.249.7148
Southpointe, PA 724.873.2870
Wilmington, DE 302.574.7400