ECKERT SEAMANS

Fall 2010
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Construction Law

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Read before you sign: preventing the inadvertent waiver of claims

Contractors should be wary of casually signing form documents provided by project owners in order to receive payment – they may be simultaneously signing away their rights to bring future claims. The February 2010 decision by a federal court applying Texas law is the latest in a line of recent decisions that emphasizes the importance of reading every document carefully before signing the dotted line.

In *Addicks Services Inc. v. GGP-Bridgeland LP*, 596 F.3d 286 (5th Cir. 2010), the contract between the contractor (Addicks) and developer provided that Addicks would be paid by monthly progress payments. To be paid, Addicks was required to submit a written application for progress payments, accompanied by an executed lien waiver that released any outstanding claims for payment of extra work performed before the date of each interim waiver, by way of this broad release language: "[Contractor] specifically waives, quit claims, and releases any claim for damages due to delay, hindrance, interference, acceleration, inefficiencies or extra work or any other claim of any kind."

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Payment Bond pitfalls

Subcontractors and sub-subcontractors on projects where there is a Payment Bond — required on government funded projects because Payment Bonds are legally compelled under the Federal Miller Act and many state law equivalent Little Miller Acts — enjoy an enhanced level of protection against not being paid by the insolvent general contractor or by the general contractor attempting to balance its books or increase its profit level by leveraging the contractor to take a discount on its final pay application. If not paid, subcontractors and sub-subcontractors have recourse to make a claim against the surety which issued the Payment Bond to collect unpaid contract amounts.

Care must be taken, however, by subcontractors and sub-subcontractors in making the claim to be sure to comply fully and completely with the notice terms set forth in the Payment Bond. For

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Eckert Seamans' Construction Practice Group named as a Tier 1 Practice by *Best Lawyers in America* and *U.S. News and World Report*. *See Construction Practice Group News* on page 8 for details.

Read before you sign: preventing the inadvertent waiver of future claims (continued)

Applying Texas law, the Fifth Circuit Court of Appeals affirmed the decision of the lower court, which had enforced the broad release and dismissed Addick's claims for damages for extra work and delay costs, agreeing with the developer that the waivers were unambiguous and enforceable. In enforcing the release, the court noted especially that the interim waivers provided space for Addicks to list claims it was not releasing and that Addicks had failed to list any such claims in that space.

Although decided under Texas law, this decision is consistent with the increasing number of jurisdictions – including Pennsylvania – that take the position that broad releases of future claims are fully enforceable. For example, in *Kenneth Hantman, Inc. v. Whiting-Turner Contracting Co.*, 2008 WL 4072591 (E.D. Pa. 2008), a case decided under Pennsylvania law, the court barred a fencing subcontractor's breach of contract claim due to the subcontractor's execution of interim waivers and a final release. There, just like the contractor in *Addicks*, the subcontractor had signed partial lien waivers throughout the course of the project – each of which provided a blank space in which to note any "claims or any circumstances that could give rise to any future claims against Construction Manager [or] Owner."

The subcontractor not only failed to note any such claims, but it had also executed a final release and accepted final payment. The language of the releases in both the interim waivers and final release was clear and unequivocal – the interim waivers released the owner from "all claims ... in any manner arising out of work ... through the period covered by the current invoice and all previous invoices"; and the final release released the owner "from all causes of action ... from the beginning of the world to the date of this Release, in any manner relating to or arising in connection with the above referenced contractor project" – and the subcontractor's claims fell squarely within the scope of these releases. Accordingly, the court did not hesitate to enforce the waivers and bar the subcontractor's claims.

The underlying message these decisions send is both clear and commonsense: read and understand what you are signing before you sign it, and if necessary, consult with your attorney. Be cautious before executing lien waivers over the course of a project, as hastily executing such waivers might result in forgoing the right to pursue otherwise legitimate claims for extra work or consequential damages. And if required to execute a lien waiver releasing claims for extra work performed up to the point of execution, identify actual – or potential – claims and note the same on the waiver. As both the *Addicks* and *Kenneth Hantman* decisions illustrate, the failure to do so – especially when given the option – can be fatal to those claims down the road.

Audrey K. Kwak
Construction Group

The life of a Performance Bond – perhaps longer than you think

On most construction projects, the contractor will be required to provide a one year warranty on labor and materials running from substantial completion. On projects requiring a Performance Bond, the owner may call on the surety to perform the warranty in the event the contractor will not or does not due to insolvency or other reason.

Many construction contracts will also require the contractor to provide an extended warranty for certain divisions of the work, such as for roofing or for mechanical equipment, for upwards of ten years. The issue then arises as to whether the surety remains responsible, under the Performance Bond, to perform the extended warranty in the event that the contractor is unable or unwilling to do so.

This was the question in a recent Wisconsin case, *Milwaukee Board of School Directors* (owner) *v. Atlantic Mutual* (surety) and others on a project where the surety's principal, Specialty Assurance, Inc. (SAI) had agreed to install a roof for the Owner and had provided both a standard one year labor and material warranty and also an extended five year warranty on the roof. In year four, owner discovered defects with the roof and brought suit against the Surety, under the Performance Bond, to correct the defects, but not against the roofing contractor, SAI, which was apparently no longer in business.

The owner's position was that the surety remained liable on the Performance Bond. The surety contended that its obligations had "long ago" expired and that it had only bonded the one year warranty on labor and materials.

The court found in favor of the owner focusing on the coextensive relationship of the underlying construction contract and the Performance Bond and the surety's obligation to perform all of the contractor's obligations under the contract, including during the five year extended warranty period. Most critical to the court's ruling was the fact that the Performance Bond did not provide for a statute of limitations on the bringing of claims against the surety under the Performance Bond. Such a term is common in most Performance Bonds and usually provides that suits against the surety must be brought within two years of substantial completion of the work.

The legal rationale of this case contains lessons for owners and sureties alike. For owners, the lesson is that, if you want Performance Bond protection for the life of the extended warranty, provide for this in the contract documents and require the contractor to provide a Performance Bond that covers the period of extended warranties. For sureties, understand that, if you accept a Performance Bond form set forth in the contract documents and which does not contain a statute of limitations, then you may be liable for the full period of any extended warranties required under the contract.

Scott D. Cessar
Construction Group

Payment Bond pitfalls
(continued)

example, the commonly used American Institute of Architects ("AIA") A 312 Payment Bond sets forth, in Article 4, a detailed notice process to be followed and, importantly, provides that, if the process is not followed, then "[t]he surety shall have no obligations to Claimants under this Bond…."

The notice process under the AIA A 312 for subcontractors is, predictably, less complicated than for lower tier subcontractors. Subcontractors need only notify the surety and the owner of a claim. However, for lower tier subcontractors, they must give notice to the surety and owner within 90 days after having last performed work. Much like lien law notice requirements, this period of time is intended to permit the owner to investigate and to hold contract monies owed to the general contractor to cover the amounts claimed by the sub-subcontractor, thus, protecting the surety. Sub-subcontractors must then wait 30 more days and then, if not paid, send a second written notice to the surety and to the owner.

These notice requirements must be strictly followed or otherwise the Payment Bond claim will be subject to denial for failure to do so. If, notwithstanding compliance with the terms of the Payment Bond, the subcontractor or sub-subcontractor is still not paid by the surety, it is not enough that the Payment Bond claim was perfected through this notice process, as suit must be brought against the surety and also the general contractor, if still solvent.

Here is where subcontractors and sub-subcontractors will sometimes get into trouble. They will read the article of the Payment Bond that states that they must bring suit on the bond within a set period of time, say two years. This period of time is known as the "limitation of actions." The subcontractor or sub-subcontractor will then delay on bringing suit until the two years has almost expired. The trouble occurs, however, when the state where the project is located has a "statute of limitations" which provides that a suit on a bond must be brought in a different period which may be shorter than the limitation of actions, say one year.

"These notice requirements must be strictly followed or otherwise the Payment Bond claim will be subject to denial for failure to do so."

This was the problem that befell a mechanical subcontractor in a case recently decided in Philadelphia County, Pennsylvania arising out of the construction of student housing on a university campus. The Payment Bond provided that suits must be brought on the bond against the surety within two years. Before the two year limitation of actions had run, but more than one year after the subcontractor was entitled to payment — the accrual date of a claim under the terms of the Payment Bond — the subcontractor brought suit against the surety for the general contractor for its unpaid contract balance.

The problem for the subcontractor was that Pennsylvania has a one-year statute of limitations for suits brought on bonds. The court, thus, was faced with the issue of whether the one-year Pennsylvania statute of limitations or the Payment Bond's two-year limitation of actions governed the expiration of the period in which to file suit against the surety. The court, in an arguably surprising decision, held that the one-year statute of limitations trumped the surety's agreement in the Payment Bond for a two-year limitation of actions. As such, the court ruled in favor of the surety and denied the subcontractor's claim to recover contract monies owed to it by the general contractor.

The lesson from this case, *Gory Mechanical Contracting, Inc. v. Travelers Casualty and Surety*, is clear: check state law on the statute of limitations and, if it sets forth a shorter period than the limitation of actions contained in the Payment Bond, follow the statute and file suit against the surety within the shorter period. Conversely, if the limitation of actions period is shorter than the statute of limitations, follow the limitation of actions period. If there is any question, do not risk it and always file suit within the shortest period of time provided by either.

Another point of advice to consider: while checking the state's law on the statute of limitations, also check to determine if the state allows bad faith claims against sureties for non-payment. If it does, and if the facts warrant it, add a claim of bad faith against the surety for failure to pay the claim. Such a bad faith claim often allows for recovery of attorney fees and for enhanced damages.

Scott D. Cessar
Construction Group

Advice for federal construction projects: Take the time to provide notice of differing site conditions

In the "stay on schedule" world of commercial construction, contractors are sometimes faced with Catch-22s when problems arise on the project. Unexpected difficulties may lead to delays, but taking the time to fully document those problems – and seeking appropriate change orders or other relief – only adds work and more time. This is especially true of excavation or other subsurface work, where other parties are often waiting for that contractor to complete its task so the rest of the project can continue. A contractor may feel pressure to just "get it done" and let time-consuming paperwork take a back seat, with the hope of resolving the issue at the close of construction.

> *"Under the Federal Acquisition Regulations (FAR) that apply to all Federal construction projects, a differing site condition is a subsurface or latent physical condition that materially differs from that expected at the beginning of construction."*

In the case of Federal construction projects, when a contractor is faced with a differing site condition, it is imperative that the contractor take the time to document the conditions encountered and provide prompt written notice of any potential claims. Under the Federal Acquisition Regulations (FAR) that apply to all Federal construction projects, a differing site condition is a subsurface or latent physical condition that materially differs from that expected at the beginning of construction. Classic examples of differing site conditions include the discovery of unknown utility lines or unusual rock formations.

Differing site conditions can take one of two forms: a "Type I" site condition is a latent condition that is materially different from those specified in the contract. For example, the contract may specify that the soil in the excavation area has certain moisture-retention properties, but once digging begins, a different type of soil is encountered. A "Type II" site condition, on the other hand, is an unusual condition that materially differs from what would "ordinarily" be encountered at the site, but which is inherent to the work provided by the contract. In a Type II situation, the contract may not even address the conditions that are found.

In either situation, it is essential for a contractor to notify the government contracting agent in charge of the project when a potential differing site condition is discovered. Under FAR section 52.236-2, a contractor must "promptly" give written notice of any differing site conditions "before the conditions are disturbed." The failure to provide such written notice may result in a waiver of the contractor's ability to recover an equitable adjustment if the differing condition leads to more expensive work. The rationale underpinning this rule is one of protecting the government. If a contractor proceeds with work that disturbs the site, without giving the government notice of a potential problem, evidence related to the differing site condition may be irreparably altered. The government may be unable to investigate the site conditions for itself, and moreover, may lose the ability to mitigate costs by ordering a less expensive method to address the problem.

Although not defined by the FAR, various decisions have held that "prompt" notice, however, depends on the circumstances. Courts have noted that differing site conditions do not spring forth fully formed, and that a contractor should be given a reasonable opportunity to work at the site before it must provide notice. *Dawco Constr., Inc. v. United States*, 18 Ct. Cl. 682 (1989). Additionally, other decisions have acknowledged that the notice requirement is not hyper-technical, and that an otherwise legitimate claim will not be denied if the government was aware of the operative facts giving rise to the claim. *Appeal of Parker Excavating, Inc.*, 06-ABCA 33217.

Further, if a contractor fails to place the government on notice of the differing site condition, all is not lost. Because the notice requirement is meant to protect the government, if there is no harm to the government stemming from a lack of notice, a contractor may still maintain his claim. Cases such as *Ace Constructors, Inc. v. United States*, 70 Fed. Cl. 253 (2006) have acknowledged that unless the government can demonstrate that it was prejudiced by the lack of notice, through destruction of evidence or otherwise, a contractor may still recover for a differing site conditions claim. Indeed, where the government would not have changed anything if it had received notice, the contractor may still recover. *Appeal of Pat Wagner DBA A-Plumbing Co.*, 85-ABCA 18103.

While a contractor may be able to assert that the government was not prejudiced by a lack of notice, the better practice is to avoid that situation entirely. Disputes over whether the notice was "prompt" or whether there was truly prejudice to the government may result in unnecessary litigation costs after the project has ended. Even when faced with a demand to complete work as quickly as possible, a contractor should take the time to promptly provide full written notice of a differing site condition. By doing so, a contractor ensures that its ability to recover any increased costs is protected, which may help to avoid an even more time consuming and expensive dispute with the government after the project has ended.

Matthew J. Whipple
Construction Group

Bid shopping: The push-back against the traditional rule

When it comes to bidding construction projects, general contractors have traditionally held all the cards. Once the owner issues the project specifications, a general contractor will take subcontract bids from multiple parties to drive down the project costs through increased competition. A subcontractor who submits the lowest bid may be pleased to hear that the general contractor has been awarded the project – until the general contractor "shops the bid" by coming back and asking for an even lower price. Any reduction in the subcontractor's price at this point is pure profit for the general. Traditionally the subcontractor had very little recourse because, legally, the subcontractor is obligated to honor his bid, even though the general contractor does not have the same obligation to the subcontractor. More recently, however, courts, legislatures, and owners have begun to push back against the practice of bid shopping and have helped to equalize the balance of power between owners and subcontractors.

Particularly in the current economic downturn, many subcontractors or suppliers are willing to drastically reduce their bids if it means they secure the contract, keep their crews busy and cover overhead costs. In addition to being able to take advantage of this "race to the bottom," general contractors have a recognized superior bargaining position under the law. Under the principles of promissory estoppel and detrimental reliance, most courts recognize that the general contractor's reliance on the subcontractor's bid makes it "firm" or irrevocable. In other words, a general contractor may compel a subcontractor or supplier to honor their bid once the general contractor has reasonably relied on that sub-bid to develop and submit its winning bid.

For example, in the leading case of *Drennan v. Star Paving Co.*, the court in California held that the subcontractor had to honor its bid even where the subcontractor had made a mistake in computing its original bid. The court reasoned that the subcontractor not only expected the general contractor to rely on its bid, but hoped it would in making his final bid to the owner. This reliance, along with the potential "detriment" that the general contractor would face in additional costs in finding another subcontractor, has led almost all courts to hold a subcontractor's bid to be irrevocable in this situation.

Unfortunately for the subcontractor, however, promissory estoppel does not apply in reverse. Unless the general contractor has made a "return promise" to the subcontractor or supplier that their bid will be chosen, there is no legal obligation for a contractor who used a subcontractor's bid in its successful bid to the owner to award the subcontract to that subcontractor.

This does not mean that general contractors may automatically assume the bids that they receive are irrevocable. Courts recognizing the advantage general contractors have under the law have carved out exceptions to the promissory estoppel rule. All of these exceptions are based on situations where the reliance of the general contractor on the bid was not reasonable.

For example, a general contractor may typically compel a subcontractor to honor its bid where there has been a mistake as to price, but where the pricing mistake is obvious (e.g., a 50% bid disparity) courts have held that the general contractor should have known that the bid was erroneous and therefore had no right to rely on it. Similarly, where a subcontractor's bid terms are materially different than the specifications, courts have held that the bid can actually be considered a counteroffer (not an offer) and the contractor will be unable to hold the subcontractor to his bid.

This was part of the rationale for a recent case in the Third Circuit Court of Appeals. In *Fletcher-Harlee Corp. v. Pote Concrete Contractors*, the court held that the subcontractor's bid was a counteroffer because it had stipulated that its price quotation was for "informational purposes only," that it did not constitute a firm offer, and that it should not be relied on. The subcontractor's bid further stated that it did not agree to be held liable for any of the items it submitted. The court concluded that the contractor had alleged nothing that would make its reliance on the subcontractor's submission anything but unreasonable. Therefore, the court refused to award damages to the contractor for the cost difference in contracting for the next highest bid.

The general contractor's own actions also can prevent the application of promissory estoppel. Courts in several states have held that the doctrine of promissory estoppel does not apply to bidding disputes if the general contractor has engaged in "bid shopping" after being awarded the main contract and before accepting a subcontract.

Recently, an Ohio court held that a general contractor that bid shops thereby releases subcontractors from a mistaken bid or inequitable subcontract language. In *Complete General Construction Co. v. Kard Welding, Inc.*, the general contractor delayed acceptance of the subcontractor's bid for over 30 days in order to negotiate with other subcontractors. The court found the contractor's delay in accepting the subcontractor's bid and its negotiations with other subcontractors negated the contractor's reliance on the original bid and prevented the application of promissory estoppel.

The majority of states still apply promissory estoppel principles, but contractors and subcontractors alike should be aware of the trend toward equalizing the parties' bargaining positions during bidding through, among other things, either judicially made exceptions, bid listing statutes that require a general contractor to supply a list of the subcontractors that it intends to use for subcontract work, and bid depositories created by subcontractor trade associations to collect bids before the general contractor opens bidding.

Subcontractors need to keep in mind that they are in control of their bids and they can choose to condition acceptance on its confidentiality, its prompt acceptance, or simply place a time limit on how long the bid is irrevocable.

On the other hand, contractors should be aware of the emerging exceptions to the promissory estoppel rule and should take the initiative to review bids for possible errors or reservations.

Malgorzata (Gosia) Kosturek
Construction Group

Massachusetts enacts Prompt Payment Act governing private construction contracts

On August 10, 2010, Massachusetts enacted "An Act Promoting Fairness in Private Construction Contracts" at General Laws Chapter 149, §29E, to address payment issues arising under written construction contracts signed after the effective date. The statute applies to contractors at all tiers for any project where the original contract price of the owner's contract for the project is $3 million or more. Projects designed for the construction of one to four dwelling units are excluded from the statute.

The new law makes void and unenforceable conditional "paid when paid" or "paid if paid" contract provisions, except in certain limited circumstances. In general, any construction contract covered by the statute must provide for progress payments, and must include a provision requiring that an application for a progress payment must be rejected or approved in writing within 15 days of submittal at the first tier, and extended by seven days at each subsequent tier of contract. Payment must be made within 45 days after approval. An application for payment that is neither approved nor rejected shall be deemed approved unless rejected before the date of the next progress payment.

In addition, all written requests for change orders to increase the original contract price must be approved or rejected in writing within 30 days at the first tier, plus an additional seven days for successive lower tiers. Any increase change order not rejected or approved in writing before the next progress payment date shall be deemed approved and paid as part of the next application for payment. Any rejection of an increase change order request must be in writing with an explanation in good faith.

Peter F. Carr, II
Litigation Group

A survey of all federal and state prompt payment statutes may be found on the Eckert Seamans website at www.eckertseamans.com
Select the link to the Fifty State Survey of Prompt Payment Acts for Construction Contracts from the Construction Practice Group page.

The tension between the venue selection provisions of state Prompt Payment Acts and the Federal Arbitration Act

The Prompt Payment Acts of many states — which govern payment terms between owners and general contractors and general contractors and subcontractors on private construction projects — often contain statutory provisions which require that arbitration or litigation of construction disputes arising from projects constructed in that state must be filed and heard only in that state. These statutory provisions will also often provide that this requirement is notwithstanding a contract provision that the dispute should be heard at a location outside of the state where the project was built. Such contract provisions, known as venue selection provisions, are commonly found in subcontracts and require the subcontractor to bring suit or file an arbitration only in the city where the general contractor's home office is located, which may well be in a different state from where the project is located.

The Federal Arbitration Act (FAA), however, governs arbitration of disputes involving interstate commerce. The FAA evidences a strong Federal policy in favor of arbitrating disputes so long as there is some nexus of the underlying dispute with interstate commerce. This gives rise to a tension between the FAA and the statutory venue overriding provisions of the Prompt Payment Acts of many states when a subcontract requires arbitration of disputes in a location outside of the state where the project was built. The question then arises as to which statute governs. Does the Prompt Payment Act of the state of the locale of the project govern or does the policy presumption in favor of arbitration set forth in Federal law, codified in the FAA, take precedence over the provisions of the state Prompt Payment Act?

A series of recent decisions by both Federal courts and state courts concerning disputes arising in Louisiana, Rhode Island and California and, in the last few months, Illinois, have answered this question. Those decisions — involving efforts to enforce or to avoid arbitration clauses calling for arbitration in foreign states — have uniformly held that the Federal law, the FAA, trumps the state Prompt Payment Act (or other similar state statute) requiring that disputes be heard in the state of the project, so long as the project involves interstate commerce.

Stated simply, these decisions stand for the proposition that, so long as a construction project has a sufficient nexus to interstate commerce, a provision in a construction contract requiring resolution of disputes by arbitration outside of the state where the project was constructed will be enforced — notwithstanding the venue provisions of a state Prompt Payment Act — and the arbitration must be held in the location as provided in the construction contract.

This gives rise to the issue of whether or not the construction project involves interstate commerce. In the most recent case on this issue, arising from Illinois, *R.A. Bright Construction, Inc. v. Weis Builders, Inc.*, the fact that there was some $77,000 worth of materials brought from out of state which were used on the job and the general contractor was a multistate corporation with offices in four states, compelled the Illinois court to find that the agreement between the general contractor and subcontractor was a contract that sufficiently involved interstate commerce as contemplated under the FAA. The burden, thus, to show that a project involves interstate commerce is not a heavy one.

These decisions, thus, enforce contractual provisions requiring arbitrations in states different than the site of the project, notwithstanding a venue provision in a state Prompt Payment Act, so long as interstate commerce is implicated.

However and importantly, if the venue selection clause in the contract only provides for litigation in a foreign state, and not arbitration, then the FAA has no effect and the dispute may be likely to be appropriately filed only in the state where the project was located pursuant to the venue clause of the Prompt Payment Act of the state.

Scott D. Cessar
Construction Group

Independent contractor/worker misclassification for the construction industry

On October 13, 2010, Pennsylvania enacted into law House Bill 400, also known as the Construction Workplace Misclassification Act (the "Act"), which provides for fines and jail time for construction industry employers who knowingly misclassify employees as independent contractors.

The Act is aimed at deterring contractors from trying to avoid the payment of Pennsylvania workers' compensation premiums and Pennsylvania unemployment insurance contributions by misclassifying workers as independent contractors as opposed to employees. The Act identifies six criteria that a worker in the residential or commercial construction industry has to meet in order to be classified as an independent contractor. When making worker classification decisions, you must take into consideration the following six factors:

1. The worker must have performed a similar service for someone else in the past or hold himself out to others as available to perform the service;

2. The worker must realize a profit or suffer a loss under the financial arrangement he has negotiated for providing his service;

3. The worker must have the tools and equipment essential for the job;

4. The worker performs the services through a business in which the worker has a proprietary interest;

5. The worker maintains a business location that is separate from the location of the person for whom the services are being performed; and

6. The worker must maintain at least $50,000 in liability insurance.

Intentional violations are misdemeanors under the Act, while a negligent violation is a summary offense punishable by a fine of up to $1,000. The Act also provides for administrative penalties of up to $1,000 for the first offense and $2,500 for subsequent violations. The Act becomes effective on February 10, 2011 which is 120 days after enactment of the Act.

Michael J. Herzog
Tax Group

Eckert Seamans' Spring 2010 Construction Law Report *contains a comprehensive article on this growing trend. The article may be found at www.eckertseamans.com. Select Publications, Newsletters, and then the link to the Spring 2010 issue.*

Federal rules amended to protect expert and attorney communications

The U.S. Supreme Court has approved amendments to Federal Rule of Civil Procedure 26 that extend the work product protections of Rule 26(b)(3)(A) and (B) to communications between attorneys and experts. Beginning December 1, 2010, drafts of expert reports, regardless of form, and communications between experts and attorneys will both be protected.

However, the amendments would continue to allow discovery of communications between a lawyer and a testifying expert about: (1) the compensation for the expert's study or testimony; (2) the facts or data provided by the lawyer that the expert considered in forming opinions; or (3) the assumptions provided by the lawyer that the expert relied upon to form an opinion. These changes were approved by the U.S. Supreme Court to encourage a freer exchange of written communications between attorneys and experts and to reduce the costly efforts that are sometimes made to avoid creating any discoverable expert draft reports.

In another change, the amendments will require, for witnesses who do not provide a written report under Rule 26(a)(2)(B), to provide a summary disclosure of the facts and opinions about which they are expected to testify. This change would apply to witnesses who are not specially retained or employed to provide expert testimony, including party employees who do not regularly give expert testimony.

Malgorzata (Gosia) Kosturek
Construction Group

But the rules remain the same in many states

Although the Federal Rules of Civil Procedure have been amended to protect the disclosure of communications between experts and attorneys in cases filed in federal court, attorneys and experts alike still need to be cautious about communications between them in cases filed in state courts. Many state courts follow the federal rules; however, until those states amend those rules to adopt the new Federal rule, communications between experts and attorneys still remain subject to discovery in cases filed in state courts.

Other states have their own rules of civil procedure which do not track the Federal rules. In those states, some rules of civil procedure protect communications between experts and attorneys, and some do not.

For example, in Pennsylvania, a state appellate court, in *Barrick v. Holy Spirit Hospital,* recently found that, in a case of first impression, the Pennsylvania Rules of Civil Procedure do not protect communications between experts and attorneys.

The court held that "if an expert witness is being called to advance a party's case-in-chief, the expert's opinion and testimony may be impacted by correspondence and communications with the party's counsel; therefore, the attorney's work product doctrine must yield to discovery of those communications." As such, the court ordered that all written communications between the expert and counsel be turned over to opposing counsel.

When engaging an expert, therefore, consideration must be given at the outset as to the Rules of Civil Procedure of the forum to determine whether the communications between the expert and the attorney will be protected or become subject to disclosure.

Timothy D. Berkebile
Construction Group

Turning square corners in government contracting

In deciding a case nearly a century ago, Justice Oliver Wendell Holmes, one of the most well known justices of the U.S. Supreme Court, wrote that "[m]en must turn square corners when they deal with the Government."

The recent Pennsylvania case of *Boro Construction, Inc. v. Ridley School District* demonstrates the perils of not turning square corners in public construction contracting.

Boro Construction, Inc. ("Boro Construction") had contracted with the Ridley School District (the "School District") for the general construction and electrical construction on a new high school building outside of Philadelphia, PA. At the end of the project, disputes arose over Boro Construction's entitlement to final payment on both contracts, as well as various other extra costs. Unfortunately, Boro Construction neglected to submit the final payment applications requesting final payment, which was required by the terms of both contracts.

Both the trial court and the Commonwealth Court ruled that Boro Construction's failure to submit the final payment applications barred recovery of the final payments. The Pennsylvania Commonwealth Court reasoned as follows: "[I]f the contractor fails to submit a final application for payment, then the public entity, such as [the School District], cannot evaluate the payment requested. If the public entity is not given the opportunity to request the charges, there may be reckless disbursement of public funds. Therefore, strict adherence is necessary for dealing with municipal and/or quasi-municipal contracts." The Commonwealth Court also found that School District could not waive the requirement of a final payment application.

In the end, Boro Construction was barred from recovering almost $60,000 in final payments, even though its entitlement to the final payments was apparently otherwise undisputed. This extremely harsh result could have been avoided by simply submitting the final payment applications and is a warning to all contractors to take heed as they "must turn square corners when they deal with the Government."

The lesson is this: even if you are in a dispute, read and follow the literal terms of the contract as to claims, final payment and the like, not only in public contracting, but also in private contracting.

Jacob C. McCrea
Construction Group

Construction Practice Group News

Eckert Seamans' Construction Practice Group Named as a Tier 1 Practice by *U.S. News* and *World Report*

Eckert Seamans was widely recognized in the 2010 Best Law Firms rankings, the inaugural report released by *U.S. News* Media Group and Best Lawyers. The Construction Group was ranked as a Tier 1 firm for Construction Law. The rankings include an analysis of over 8,000 law firms in 81 practice areas and are presented in tiers, both nationally and by metropolitan area. The special report was published in the October 2010 issue of *U.S. News & World Report* magazine.

Client Wins

The client team of **Chris Opalinski, Tim Grieco** and **Audrey Kwak**, with assistance from **Matt Whipple** and **Deb Pope** in Pittsburgh, received a $3 million jury verdict on behalf of firm clients, a demolition and dismantling contractor and its subsidiary, a dismantling equipment manufacturer, on their claims for trade secret misappropriation in the Northern District of Ohio.

In January 2008, Martik Brothers, Inc., filed an action against a lender on a construction project, in the United States District Court for the Western District of Pennsylvania asserting several causes of action in separate counts, including that lender made either fraudulent or negligent misrepresentations to Martik arising out of a construction project located in Slippery Rock, Pennsylvania. The case was tried to a jury in Federal Court in Pittsburgh. The jury found the defendant–lender, liable to the plaintiff–Martik, on its claim of negligent misrepresentation and returned a verdict in Martik's favor in the amount of $2.4 million. Martik was represented by **Phillip Binotto, Jana Grimm** and **Marcia DePaula** of the Southpointe office.

Arbitration

Scott Cessar has recently served as an arbitrator in a number of construction related disputes. Both Scott and **Chris Opalinski** have served on the Panel of Construction Arbitrators of the American Arbitration Association for over a decade.

Joining the Firm

Eckert Seamans welcomes **Malgorzata "Gosia" Kosturek** to the Firm's Construction Law Practice Group. Gosia was a summer associate with the firm for the past two summers and will focus her practice in the areas of construction law and commercial litigation. While in law school, she won the ABA-BNA Award for Excellence in the Study of Labor and Employment Law, and was also the recipient of the CALI Excellence for the Future Awards for Employee Benefits; Property; Bankruptcy; Employment Discrimination; and Advanced Legal Writing: Writing in Law Practice. Gosia earned her J.D., *summa cum laude*, from Duquesne University School of Law where she was the Associate Recent Decision Editor for *Law Review* and a B.A., *magna cum laude*, from the University of Pittsburgh. Gosia is fluent in Polish.

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