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To: Deb Brenneman
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THE CONSTRUCTION LAW BULLETIN

August 2008

Group News

- Ted Adler is scheduled to be part of a panel of presenters on September 22, 2008, in Harrisburg for a Seminar by the **National Business Institute** entitled "**Construction Law: What Do You Do When. . . ?**" If you would like further information regarding this seminar, or if you wish to register, please contact us at scourchesne@reageradlerpc.com.
- Tom Williams presented a seminar entitled "**The World of Dispute Resolution**", on Thursday, August 28, 2008 at **Associated Builders and Contractors (ABC), Keystone Chapter**.
- Tom Williams is also part of a seminar series at **ABC** entitled **Business 101**, for which Tom is speaking on "**Legal and Contractual Issues**", which involves the primary and key elements of contract documents and issues that might give rise to disputes and claims under a contract.
- John Pietrzak and Rich Joyce will be part of a group of attorneys facilitating the **Contract Study Group** sponsored by the Central PA Regional Chapter of the **American Subcontractors Association**. The group will meet the first Thursday of every month at ASACP's offices in Harrisburg.
- John Pietrzak served as a panelist at a daylong presentation on "**AIA Contracts**" hosted by Lorman Education Services on June 24, 2008 in Harrisburg. The seminar was a success, and John has been asked to serve on the panel for an encore presentation on September 18, 2008 in Lancaster. Additional information on registration for this program may be obtained by contacting the firm, or emailing John directly at: JPietrzak@ReagerAdlerPC.com
- Rich Joyce was a presenter at a seminar entitled "**Employment Law Update in Pennsylvania**", in Harrisburg on August 19, 2008.

- Welcome Wayne S. Martin, PE to Reager & Adler, PC! Prior to attending law school, Wayne worked as a project engineer for Gannett Fleming, Inc. As a project engineer he was responsible for the analysis, design and inspection of bridges, transportation facilities and sanitary structures in Pennsylvania, New Jersey and Florida. In addition to his engineering background, Wayne served as a First Lieutenant in the Pennsylvania National Guard from 2000 to 2005. As a combat team executive officer, he served in Kosovo for a 12-month deployment as part of the United Nations peacekeeping operations there and also served as an infantry platoon commander in Germany for 8 months in support of Operation Enduring Freedom. While in law school, Wayne worked as a legal intern in the Department of General Services' legal office. As a legal intern, he assisted in preparing and presenting construction claims before the Board of Claims.

Recent Developments

Cumulative Impact of Many Change Orders Results in \$6 million Award to Contractor

by Ted Adler

A recent decision of the United States Court of Federal Claims makes clear that if the government issues a significant number of change orders but refuses to grant a reasonable extension of time, the government will be liable for the contractor's damages resulting from acceleration and disruption. In *Bell BCI Co. v. The United States*, 81 Fed. Cl. 617 (2008), the court awarded Bell \$6,200,672 for, among other things, the cumulative impact of change orders which affected the contractor's performance of unchanged work.

Bell was hired to build a laboratory building for the National Institutes of Health (NIH) in Bethesda, Maryland. Because NIH found itself with a "cash surplus" and, to avoid returning this cash surplus to the taxpayers, it decided to add a sixth floor to what had originally been planned as a five story building. As a result, NIH issued 200 contract modifications encompassing 730 extra work orders that delayed the completion of the project 19-1/2 months and increased the contract price \$21.4 million or 34%. Although NIH paid Bell for the changes, it refused to pay for the cumulative effect on Bell's overall performance.

The Court made a number of findings that contractors and owners need to appreciate and understand. First, the Court noted the difference between a "**delay claim**" and a "**cumulative impact**" or "**disruption claim.**" To that end, the Court wrote: "Although the two claim types often occur together in the same project, a delay claim captures the time and cost of **not being able to work** while the disruption claim captures the cost of **working less efficiently** than planned."

The Court also discussed proving damages in connection with a disruption claim. A "reasonable basis for computation [of damages], even though the result is only

approximate" is sufficient. However, actual cost data is the best evidence. If estimates are used they "should be prepared by... individuals with adequate knowledge of the facts and circumstances", and the estimate should be accompanied by "detailed substantiating data."

Where the government issues many change orders the Court recognized the right of the contractor to recover the cost of performing the changed work plus damages for the costs associated with the "impact of multiple change orders on the unchanged work." While noting that "multiple change orders on a construction project ... can be accommodated [by careful planning]", where the government refuses to grant extensions of time and continues to issue change orders "**a chaotic project inevitably will result.**"

An interesting side light is this: according to the Court, the assessment of liquidated damages by the government against the contractor in order to "gain negotiating leverage" constitutes a breach of the government's implied duty of good faith and fair dealing.

More Recent Developments

In Case of First Impression, Pennsylvania Commonwealth Court Acknowledges "Measured Mile" as an Acceptable Method for Delay Damage Calculation

By Rich Joyce

In prior editions of the Construction Law Bulletin, we discussed the case of James Corp. v. North Allegheny School District. Here, as a last installment reviewing this case, we are scheduled to look at the Commonwealth Court's acceptance of calculation of delay damages utilizing the "measured mile" approach.

The Court acknowledged that, "this is the first opportunity for a Pennsylvania appellate court to consider [the 'measured mile' method of measuring damages]." In its analysis of the issue, the Court first noted that under Pennsylvania law, there is no requirement that damages be proved by a standard of mathematical exactness. Rather, the requirement is for the plaintiff to provide a reasonable basis for the calculation of damages suffered.

Relying on several Pennsylvania Board of Claims' cases, the Court summarized the measured mile method as comparing "the cost of completing work not subject to delay or acceleration with costs of completing work during a period of impact, the difference representing the measure of damages." The Court also noted that the Board of Claims has found the measured mile to be a preferred method of calculating damages.

The School District objected to the measured mile approach; arguing that it is no more than a total cost method for calculating damages and that a contractor's analysis was often based on erroneous assumptions regarding manpower and comparing dissimilar tasks to establish a distorted measure for damages. In reviewing the trial transcripts from this case, our Commonwealth Court relied heavily on the testimony from Contractor's expert. The Court found that the expert's testimony was credible and that the method for calculating damages was reliable. Further, the Court pointed out even the School District's expert conceded that Contractor would have experienced a certain degree of increased labor costs due to the delays. Thus, there was no uncertainty at all as to the amount of damages to the extent the

School District's expert conceded damages.

In closing on this issue, the Court stated as follows: "In sum, because the existence of damages was established, because the measured mile analysis offers a reasonable basis upon which damages can be calculated, and because the trial court found this approach persuasive, we discern no merit in School District's assertions."

As you can see, Pennsylvania appellate courts have now recognized that the measured mile may be used as a reliable way to calculate delay and acceleration damages on a construction project. Keep in mind, however, that a contractor's best evidence for delay or acceleration damages would be to have a schedule analysis, along with actual cost data for the damages incurred as a result of delays to the project. Also, keep in mind that the Court will look to what was the cause of delay, and whether the contractor claiming damages was responsible or complicit in causing any delay.

Accordingly, while you must still properly "paper" the file regarding costs, and you must still provide appropriate notice regarding any delays you have suffered on a project, the Pennsylvania Commonwealth Court's recognition of the "measured mile" approach for calculating damages should place contractors in a better position for prosecuting delay and acceleration claims.

THE CONSTRUCTION LAW BULLETIN is intended to inform and not to advise. While this periodical is based on existing law, the statements herein are general, and the status of the law is subject to change. Individual facts may alter the procedural or substantive issues involved in prosecuting or defending a claim. Should you have an issue that you believe is similar to any of those discussed here, you should contact legal counsel for a consultation.

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