March 13, 2012

Letter from the Editor
by Jim Sienicki

In our first issue of 2012, we start off with a timely article about construction and social media from Rick Erickson and Nicole Sornsin. Rick will present the same topic at this week’s annual Associated General Contractors of America Conference. Their article discusses the importance of developing a social media plan to a) document the information used to communicate various aspects of construction projects and b) to help avoid potential legal dilemmas while posting such information.

Scott Sandberg then addresses the latest from Colorado regarding a construction defect case whereby the Colorado Court of Appeals, in a case of first impression, clarified the timing of the statute of repose for a multi-phased construction project involving a condominium HOA, the general contractor and its subcontractors.

In the third article, Josh Grabel writes about an Arizona condominium project that failed during the recession and different parties with conflicting interests and the doctrine of equitable subrogation. The article addresses the complexities involved in determining which party has priority rights.

The fourth article, by Stuart Einbinder and Jeffrey Singletary, cites a recent California court case involving a construction project that was completed late and outlines the consequences of the contractor’s failure to follow the notice and claims procedures outlined in the contract.

Marc Erpenbeck then examines four major trends in energy production and their potential impact on the construction industry. Public private partnerships may need to be developed to provide funding for these various energy-related construction projects.

In the sixth article, Brett Johnson and Sara Agne discuss the importance of companies doing business with governmental agencies documenting their interactions regarding contract performance and establishing policies for documentation and recordkeeping.

Next, Mike Yates and I discuss the importance of having a basic understanding of the rules and law governing contract interpretation. We identify seven rules of contractual interpretation in testing the reasonableness of contractual interpretations.

In the final article, Leon Mead discusses the protections offered to Nevada contractors, subcontractors and materialmen in public private partnerships under Nevada law.
We look forward to hearing from you if you have any suggestions for future editions of this newsletter. We look forward to more construction projects, continued friendships and new possibilities in 2012.

Jim Sienicki

**Construction and Social Media – Do You Have a Plan?**
by Rick Erickson and Nicole Sorns

At this year’s Arizona State Bar Convention and at the Annual Convention hosted by Associated General Contractors of America, we will be focusing our presentations on social media and its growing impact on the construction industry.

Our clients are increasingly interested in better understanding the reality of social media and its inevitable intrusion upon customary solicitation and bidding, design review, construction management and project administration and delivery. As more construction projects go paperless, moreover, clients are wondering if the electronic and digital technology behind social media is going to dominate as the means of project communication or if social media will simply be relegated to personal networking between construction professionals. Many questions have also been raised about document and data retention policies for social media, especially when claims or litigation are anticipated.

Before connecting the concept of social media to the construction industry, it is important to understand what is really meant by and included as social media. According to Merriam-Webster, 2004 was the first known use of the term “social media,” which includes all “forms of electronic communication (as websites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (as videos).” Wikipedia posts that “[s]ocial media includes web-based and mobile technologies used to turn communication into interactive dialogue.”

Keeping these definitions in mind, the most familiar social media websites are Facebook, LinkedIn, Twitter, YouTube, or popular online journals well known as blogs. In 2011, Facebook boasted more than 750 million users, making its user population comparable to the third largest country in the world, while YouTube has become the second largest Internet search engine next to Google.

The overwhelming reach of social media is obvious, but many are still reluctant to use it beyond personal and business networking and marketing. The common definitions of social media include much more than private networking, instead broadly contemplating all means of sharing electronic information and mobile technology—private, professional or otherwise. For social media in business, “”[r]eal-time’ is a new imperative,” forcing companies to reckon with information originating at the lowest level of business operations, on a moment’s notice, and with little or no ability to control the mass distribution of this information outside the company. Facebook’s founder explained this January, moreover, that he wants to transcend personal interaction to more significantly influence “our core institutions and industries” with social media.

The construction industry is certainly one of our core industries, and its leaders are already following suit by implementing comprehensive social media strategies. Among many construction blogs online today, some consultants run daily journals on any number of topics from regional trends in project funding to analyzing critical path delays. Architects and engineers are innovating social media to function as their communication platforms.

Public entities are posting bid procedures and announcements on their Facebook pages, using Twitter for design review and project updates and
linking the public to YouTube for city council meetings including discussions about change orders and project appropriations. Project managers already recognize that social media is integral to Building Information Management (BIM), which presents a collaborative and virtual model of the project.

Some major U.S. cities are using Facebook, LinkedIn, Twitter and YouTube to inform constituents about construction project opportunities, traffic delays and bid protest hearings. Public and private owners alike should appreciate social media as an effective means of communicating to avoid negative public opinion when construction inevitably interferes with daily routines and commerce. For these project owners, using social media is a sophisticated approach to public relations.

A contractor presently managing a major construction project in Arizona has followers on Twitter including many of the subcontractor representatives on the project, so he "tweets" throughout the day on topics ranging from safety issues to coordination of work. The use of social media on the project does not adversely affect productivity and is a welcome means of communicating with the overwhelming number of 20-something workers on the project. Text messaging is also how an entire generation of these workers prefers to communicate, both in their private time and while on the job. Acquiescing to their way of communicating is more practical than trying to stop or change it.

Social media, therefore, is already affecting the construction industry in many ways, but there has been very little discussion about legal dilemmas posed by using social media on construction projects. For example:

- Are tweets, texts and blogs all project records that owners, design professionals and contractors must preserve by law, and should this electronic media be covered under a cogent records retention policy?
- Can owners and contractors legally restrict workers from tweeting, texting or blogging about the project to avoid raising potential claims or other adverse consequences for owners, design professionals and contractors alike?

These are only a couple of the many questions that remain largely unanswered in our courts and other tribunals when it comes to social media. There is, after all, no body of law that specifically requires preservation of construction records arising from the use of social media on the project. Granted that, depending on the subject matter involved, social media may fall under a company's document retention policy or regulatory statutes, the burden of preserving social media should be governed by a standard of reasonableness. The largest companies would have a pretty strong argument that it is virtually impossible – and therefore unreasonable – to require monitoring of employees' personal smart phones, Twitter accounts, blog journals and Facebook pages to retain all information material to a construction project.

Furthermore, business leaders have been reluctant to risk being the first ones to face legal challenges because of their strict policies against social media in the workplace, even assuming that all social media can be monitored and that these policies can be realistically enforced. Some opponents have already challenged such restrictive social media policies on grounds that they impede or infringe upon constitutional rights of privacy and free speech. It remains to be seen how anyone on a construction project can control or retain social media generated by private individuals working on the project.

On the other hand, text messaging about safety issues on the project would probably be of interest to an investigator from the Occupational Safety and Health Administration. An auditor may want any electronic data associated with payment administration on the project, including social media communications about changes in the original scope of work. The Equal
Employment Opportunity Commission may find it highly material that a superintendent regularly tweeted about a worker’s poor performance before he was terminated from the project. Finally, litigation over project delays may wind up focusing on a daily blog or Facebook postings that were critical of the general contractor’s project manager for his failure to coordinate the work of the numerous subcontractors.

Social media issues like these are, indeed, becoming more prevalent in construction litigation, especially when discovery disputes arise over preservation of material records on the project.\[15\] Dealing with these social media issues requires sound legal counsel because sanctions and consequences can be severe if social media is known to be material and can reasonably be preserved but is not. When claims or litigation are anticipated, for instance, parties have an affirmative obligation to preserve material records, and dismissal or significant monetary sanctions may be appropriate in cases where spoliation of evidence deprives an opposing party of a fair evaluation of all material evidence.\[16\]

In addition, when written agreements require or necessitate the use of social media on construction projects, parties should consult their attorney and err on the side of having a plan to retain and account for material information to avoid potential legal consequences. Good records management is good project management, and good project management is good claims and litigation management. It is too risky to do nothing. Taking the time to come up with a plan can show that good faith efforts were taken to manage social media on the project.

In the meantime, the boundaries of social media are expanding rather than diminishing in their effect on the construction industry. The best approach to avoid legal dilemmas is to consider achievable objectives to keep social media in check while preserving privacy and maintaining accountability of all information material to the project. Despite the difficulties and even impossibilities with controlling social media generated on a construction project, the best plan is to put forth a reasonable and enforceable policy for everyone on the project to consider and honor. Doing so is the best way to protect the project records and prevent claims.

Notes:

\[1\] See Merriam-Webster, Social Media (Feb. 2, 2012). [back]

\[2\] See Wikipedia, Social Media (Feb. 2, 2012). [back]


\[4\] N. Clayton, Business Joins the Party—SOCIAL MEDIA: Online networking is transforming the way businesses operate but few understand its true implications, Wall St. J., May 4, 2011, at 1-2; see also M. Brown, Why the Construction Sector Should Engage with Social Media—social media can help with communication and collaboration in the construction sector and benefit sustainability initiatives, The Guardian, Feb. 16, 2012, at 1-2. [back]

\[5\] N. Clayton, supra note 4; see also J. Sheridan, To Tweet or Not to Tweet?, Architectural Record (April 2010), at 1, (last visited Feb. 16, 2012). [back]


\[7\] See, e.g., McGraw Hill Construction Community, (last accessed February 6, 2012). [back]

\[8\] See E. Joyce, Hashtag This: Social Media Risks and Rewards in Construction, Engineering News-Record (Oct. 20. 2011). [back]

On February 2, 2012, the Colorado Court of Appeals addressed issues of first impression arising under Colorado’s statute of repose for construction defect claims, which imposes an absolute deadline of six years from substantial completion of an improvement to assert defect claims against construction professionals.

In Shaw Construction v. United Builder Services, a Homeowners’ Association (HOA) sued the general contractor of a multi-phase condominium project. The general contractor then sued its subcontractors, but those claims were dismissed under the statute of repose. The contractor appealed, arguing that (1) in multi-phase projects “improvement” means the entire project; (2) the “substantial completion” triggering the statute did not occur until the project architect certified completion (after a certificate of occupancy was issued); and (3) the statute of repose was tolled by the HOA’s service of a Construction Defect Action Reform Act (CDARA) notice. The subcontractors argued that (1) the “improvement” was limited to their specific work; (2) “substantial completion” occurred when each subcontractor completed its work; and (3) a CDARA notice of claim served on other parties does not toll the statute of repose for the subcontractors.

The Court of Appeals sided with the subcontractors.

First, the court ruled that an improvement “may be a discrete component of an entire project,” meaning completing one phase of a multi-phase project may constitute completion of the “improvement” and the six-year clock may start ticking before project completion. Whether a project component constitutes an improvement depends on whether the component is...
permanent and essential to the project’s function. The court did not decide whether an improvement triggering the statute of repose can be determined on a trade-by-trade basis.

Second, the court ruled that, because the project components that encompassed the subcontractors’ work were completed more than six years before the contractor filed its lawsuit, the statute of repose barred the contractor’s claims. The court did not decide whether substantial completion occurs when a certificate of occupancy is issued or when the architect certifies completion.

Finally, the court ruled that CDARA’s notice of claim process does not toll the statute of repose unless the subcontractor is served with a notice of claim. So, the contractor could not rely on the HOA’s notice of claim to toll the statute of repose for the contractor’s claims against the subcontractors.

The Weitz Company v. Summit at Copper Square LLC
Will this Case Clarify How the Doctrine of Equitable Subrogation Applies in Arizona?
by Josh Grabel

I. In Arizona, Parties Considering Investing in Real Estate Development Projects Have to Make Investments Without Full Knowledge about One of the Key Issues—Who Has a Priority Interest in the Property if the Project Fails.

Construction development projects generally involve multiple parties who “invest” some set of resources into the construction in an effort to obtain a return. Most projects include at least three types of “investors” who all invest differently in a particular project: (1) developers and their agents; (2) a commercial lender who invests capital to finance the purchase of the property and/or the construction; and (3) contractors and material suppliers who invest labor, machinery, fixtures, materials and tools for direct compensation. And, as with any investment, the more certainty those involved in a project can have of the potential risks and rewards at the outset of the project, the better decisions they will make going forward.

Before the 2008 economic downturn, many of these decisions were easy because the appraised equity in most real estate developments in Arizona exceeded the estimated costs for the project, so nearly everyone ended up getting paid for their investment. Obviously, that is no longer the case. As real estate values declined, multiple projects were substantially underfunded and underwater, making it impossible to complete the project. Those left standing, whether a subsequent buyer of property, a lender who funded a purchase after construction, or a contractor who made improvements, were all left seeking to recover whatever they could. Since, in most cases, the “investors” had contractual relationships with the developer, who was often a single-purpose LLC or company with no assets other than the project in question, the only asset of any value was the property itself. Unfortunately, the property often did not have enough value to pay everyone back, so the question of who gets paid first often controls who gets paid for their “investment,” period.

In Arizona, lenders and contractors often have separate property interests in these projects, through a deed of trust or a mechanics’ lien, that allow the holder to foreclose on the property, extinguish all other claims on the property and take ownership. And, in a foreclosure context, one of the true keys is who has first priority as to the property, because the party with first priority will likely get control of the property because of current property values. Thus, being able to determine, before you invest, what your priority position will be if the project fails is a very important issue, as certainty makes for better risk assessment.

There is currently at least one area in Arizona law related to determining priority where making this determination is difficult. if not impossible.
because of an apparent conflict in the law. That uncertainty relates to a doctrine known as "equitable subrogation," which allows for subsequent lenders to assume the interests of earlier lenders under certain circumstances. Unfortunately, what those circumstances are, and how they are applied, may differ based upon the particular facts involved on a project. This article outlines what that issue is, highlights a current case that is on appeal in Arizona in which the issue exists and notes the arguments likely to be made by both sides related to it. Regardless of which way the Court rules, it is important to have certainty in this area of the law.

II. Arizona Law Related to Priority is Unclear

When it amended Arizona’s mechanics’ lien statutes in 2001, the Arizona legislature established what appeared to be a bright line rule for determining priority related to encumbrances on real property, at least related to such liens. A.R.S. § 33-992(A) states that mechanics’ liens have priority over "all liens, mortgages or other encumbrances upon the property attaching subsequent to the time labor was commenced or the materials were commenced to be furnished except any mortgage or deed of trust that is given as security for a loan made by a construction lender ... if the mortgage or deed of trust is recorded within 10 days." To determine priority under this statute it would appear that all that needs to be done is: (1) determine when work started or materials were delivered to a project; (2) compare that to the date any other encumbrance on the property was recorded; and (3) account for the 10-day delay afforded a construction lender to record a deed of trust. Whoever is first in time would then have priority. The issue is not that simple.

In 2004, however, Division Two of the Arizona Court of Appeals issued an opinion holding that the doctrine of equitable subrogation still controlled priority determinations in Arizona, and that doctrine substantially changes this analysis. See Lamb Excavation, Inc. v. Chase Manhattan Mortgage Corp., 208 Ariz. 478, 95 P.3d 542 (App. 2004). Under this doctrine, any lender who loaned money on a development project with "an express or implied agreement to subrogate, which is concordant with a party's having a reasonable expectation of receiving a security interest, and when an intervening lien claimant suffers no prejudice," has the same priority date as the first deed of trust up to the amount previously borrowed. The court further found that an ordinary mechanics’ lien claimant suffers no prejudice to its lien rights if a construction loan is, after construction begins, replaced with permanent financing for a project. Thus, if Lender A lends money to a developer to purchase property and fund construction, construction commences creating potential mechanics’ lien claimants, and then Lender B subsequently buys out Lender A’s loan/interest with an intent that the new loan is replacing the initial loan, Lender B has first priority under the doctrine of equitable subrogation, according to Lamb.

The question that the Lamb court did not answer was whether equitable subrogation applies when a subsequent lender provides a loan to pay a portion of an existing loan, particularly when that portion is paid specifically to pay off a construction loan on a part of the subject property. The answer to that question may, however, be coming soon.

III. The Summit at Copper Square Litigation

On May 9, 2008, The Weitz Company, Inc. (Weitz) was the general contractor on a condominium project near Chase Field in downtown Phoenix known as the Summit at Copper Square (the Condos). The owner/developer of the project was Summit at Copper Square LLC (Summit), a sole-asset LLC. Summit obtained financing to purchase the property and build the Condos before any work began, meaning that the initial financing had first priority. After construction started, Summit sold various units to individual purchasers, who would buy their condo units with some sort of conventional financing (all of whom obtained some type of title insurance). Summit then
used a portion of the sales proceeds to pay off part of the initial financing.

As construction came to a close, Summit began having problems with the project and failed to pay Weitz more than $2 million. Weitz recorded a mechanics’ and materialmen’s lien (the Lien); and then Weitz timely filed a lawsuit (the Lawsuit) seeking to foreclose out any and all security and/or ownership interests in the Condos (the Lawsuit). Weitz named all of the subsequent purchasers of the condos, along with the companies that lent them the purchase money for their residences (the Defendants), and Weitz claimed its Lien rights had priority over all the Defendants’ interests. See The Weitz Co. v. Summit at Copper Square, LLC et al. Maricopa Cty. Sup. Ct. No. CV2008-028378. The Defendants (particularly the lenders) disputed Weitz’s claims and alleged their interests were equitably subrogated to the initial loan and, that as a result, they have first priority.

It is undisputed Weitz’s lien rights attached before all the interests of the Defendants were recorded. It is also undisputed that if equitable subrogation applies, the Defendants would have priority, as the original loan pre-dates any work Weitz performed. Thus, the parties filed cross-motions for summary judgment on the priority issue. The trial court found equitable estoppel did NOT apply, expressly distinguishing Lamb by noting that none of the loans at issue bought out the initial loan completely. The parties then entered into a stipulated judgment regarding the validity of the lien and the amount due, pending an appeal of the underlying finding related to equitable subrogation.

On November 2, 2011, the Defendants filed a Notice of Appeal seeking review of the Court’s decision on this issue.[1] Briefing is currently in process.

IV. Hopefully Summit at Copper Square Will Clarify the Interplay Between Equitable Subrogation and the Lien Statutes as it Applies to Certain Types of Loans.

This case has substantial import to the litigants, but the reason we are discussing it is that it highlights this priority issue that is important to a number of members of the development community. Moreover, this case appears to be well suited for determination by an appellate court, as the legal issue is very relevant to Arizona construction and development, and is well positioned for determination.

Weitz likely will argue it has first priority for three reasons. First, it will agree with the trial court and likely argue that the subsequent lenders were lending money to individual condo buyers based on those buyers’ financial status, not the developer and, thus, there was no intent to subrogate the loan interests. Second, Weitz will likely argue it would be prejudiced if equitable subrogation applies, as its lien rights would now be subject to the viability of possibly hundreds of condo owners making payments on their individual loans—a liability different than the potential liability it had with one lender and one owner when it originally agreed to do the work. Third, Weitz may seek to overturn Lamb, contending that the doctrine of equitable estoppel should not apply to mechanics’ liens in Arizona because of the public policy adopted by the Legislature when it amended A.R.S. § 33-992. Weitz will likely argue the legal maxim that “equity follows the law,” and that the statute trumps any equitable doctrines. As a result, Weitz will argue it has first priority.

The Defendants likely will respond by arguing that equitable estoppel should apply for all of the same reasons it applied in Lamb. Specifically, they likely will argue the new lenders assumed that a portion of their loans were going to pay off the original loan and that there was at least an implied intent to subrogate. They likely will also argue that, just as in Lamb, there is no prejudice to Weitz, because Weitz knew when it started working that its lien rights were subordinate to a loan and they still are. Finally, they likely will contend that equitable subrogation is now settled law in Arizona, has been for many years, and that the court should not reconsider Lamb. Thus,
Defendants will argue the Court of Appeals should reverse the trial court, find that equitable estoppel does apply here and direct that judgment be entered in their favor.

V. Regardless of the Outcome, Certainty Will Improve the Situation for All Parties by Allowing them to Take All Appropriate Steps to Protect Their Rights.

In reviewing this article, you will likely note that we have not argued that any particular position is correct, nor advocated that the Court should rule one way or the other. This was deliberate, as all we were trying to do was highlight the underlying issue for all parties and frame the issue in such a way that made it clear that both sides had a valid legal position—meaning that different courts in different cases could come to different conclusions. And this uncertainty is problematic for parties evaluating whether to get involved in particular projects, as that makes it harder to judge risk. As a result, it would be prudent for those involved in the industry to consider this issue before they “invest” in a particular project and do all they can to protect their interests. For instance, a financial institution that is providing funds to a person buying a portion of a larger residential or commercial project (and the title insurance company providing a policy) may wish to require that the developer provide certain assurances, in the form of lien waivers or other items, from a contractor related to a particular unit before the sale goes through. Similarly, the lender and the purchaser should ensure that they have adequate title insurance on a project. Contractors, on the other hand, may want to be more conscientious in requiring payment for specific units before turning them over to developers for sale, or may require the developer to agree to allocate valuations of work to units that are unencumbered.

We will continue to monitor this case and provide an update if a conclusion is reached on this important issue.

Notes:

[1] The appeal also raised an issue with regard to res judicata that is unrelated to this article. [back]

California Court Confirms that Contractors Need to Strictly Follow Notice and Claim Procedures
by Stuart J. Einbinder and Jeffrey M. Singletary

Construction contracts usually include detailed notice and claim provisions which are often ignored by the parties. Many contractors operate under the assumption that regardless of the "fine print" in their contracts requiring timely notice of a claim, ultimately a change order or favorable court judgment can be secured so long as the contractor can prove that the owner (or non-contractor caused factors) caused a delay or additional costs. A recent California Court of Appeal decision, Greg Opinski Construction, Inc. v. City of Oakdale (2011) 199 Cal. App. 4th 1107, makes clear that contractors should strictly comply with these "fine print" provisions or risk losing the right to additional time or compensation.

In 1963, the California Supreme Court in Peter Kiewit Sons’ Co. v. Pasadena City Junior College Dist. (1963) 59 Cal. 2d 241, held that even if a public works prime contract required the contractor to notify the owner of delays – whether to make a claim, or to avoid liquidated damages – the failure to do so was not necessarily fatal. The failure to request a time extension, make a delay claim, or give notice of a delay event as required in the prime contract was excused where the delays involved were caused by the owner. However, the California legislature, just two years later in 1965, responded to the Peter Kiewit Sons’ Co. decision by amending California Civil Code section 1511 to allow parties to contractually agree to specific claims and time extension procedures.
Most recently, in Opinski, the California Court of Appeal severely limited the application of Peter Kiewit Sons’ Co. and confirmed the impact of the 1965 amendment to Civil Code Section 1511. In Opinski, a contractor entered into a contract with the City of Oakdale to construct a building. The contract required completion within a specified time frame and provided for liquidated damages for each day of delay. The contract also set forth a specific notice and change order procedure in order for the contractor to seek relief for delays. The project ultimately was completed seven months late due to circumstances beyond the contractor’s control (including owner-caused delays). The contractor, however, did not follow the notice and change order procedure set forth in the contract.

The contractor sued the City for unpaid amounts under the contract. The City filed a cross-complaint against the contractor seeking, among other things, liquidated damages for delayed performance. At trial, the contractor sought to argue that any delays were the owner’s fault and therefore, under Peter Kiewit Sons’ Co., liquidated damages were inappropriate. The trial court rejected the argument and determined not to even accept evidence of owner-caused delays based on the contractor’s failure to comply with the notice and change order requirements of the contract. The trial court also awarded the City liquidated damages. The Court of Appeal affirmed the judgment, reasoning that under the amended and current version of Civil Code Section 1511, parties to a construction contract may agree, as the contractor did in Opinski, that a contractor “intending to avoid the effect of its failure to perform by asserting that [the owner’s acts] caused the failure must be given written notice of this intention within a reasonable time.”

The decision in Opinski underscores the importance to contractors to read and strictly comply with the construction contract and its notice, change order and claims provisions.

**Contractors and Designers - Are You Ready For a Possible Clean Energy Revolution?**

by Marc A. Erpenbeck

This article simply expresses what we have observed in the construction industry relative to the energy sector and is not meant to be a politically “charged” piece, but rather a discussion of current trends and their potential impacts on the construction industry. This article assumes that the Environmental Protection Agency (EPA) continues its emphasis on the regulation of coal power plants and greenhouse gases (among many other topics). It should not be understated that this is a large assumption that may or may not occur because there is significant opposition and debate about the issue. Specifically, this year’s presidential campaign, legislative or EPA rule changes, or many pending and anticipated lawsuits to stay EPA’s actions may affect the above assumption. Many parties must plan on how to deal with the regulations and laws currently in place and those that are being proposed at all levels of government. Today, it appears there may be a construction boom in the energy sector.

If the current trends continue, we anticipate the following impacts:

1. **Existing Power Plants Will Be Impacted.** The vast majority of coal power plants (which create about half the power in the United States) will either be shut down or undergo very expensive modifications in the next one to five years. For instance, the latest Mercury and Air Toxins Standards (MATS) requirement for Utility MACT (maximum available control technology), which were finalized in December 2011, will result in between approximately five to 75 gigawatts of coal power being retired.

   The EPA has estimated the projected annual incremental private costs of the final MATS Rule to the electric power industry to be $9.6 billion in 2015 and then reducing over the next 15 years. Specifically the EPA concludes:
Furthermore, the EPA estimates that the MATS rule alone will result in approximately 46,000 short-term construction jobs nationwide to decommission or retrofit coal-fired power plants.

2. **New, Cleaner Power Plants Will Be Required to Pick Up the Power Losses From Coal Power and the Continuing Increased Need For Energy.** We anticipate those will come in three forms:

   a. **Natural Gas.** Natural gas plants are popping up consistently and are often now co-located with renewable energy. The primary driving forces for natural gas are that it is cleaner than coal and, historically, has a lower cost. A recent technological development in obtaining more natural gas out of the ground with hydraulic fracturing (another potential EPA issue) is a large factor in creating the increased supply of affordable natural gas. Now, there is much more supply of natural gas than demand.

   b. **Renewable Energy.** Renewable energy is still a hot topic being fueled via subsidies at the state and federal levels. Both federal and state governments are pushing for the development of renewable energy on public lands (which we will discuss in a future article). Some industry insiders deem it as expensive and inconsistent power (at least for solar and wind, unless and until power storage is found and smart grid technology improves). Yet, it’s green and green is en vogue such that many states are requiring renewable energy portfolios that require something like 15-20 percent of all power to come from renewable sources by 2020 (it varies state to state, but we call that the current average). Hydropower is a possibility as well, but it has been very difficult to get new hydropower facilities approved in the U.S. and environmental battles would likely ensue. Bio-Fuels also have a place at the table.

   c. **Nuclear Plants.** In February 2012, the Nuclear Regulatory Commission (NRC) issued permits for the first nuclear power plant since 1978: a $14 billion project in Georgia. In the next few months, it is widely anticipated that the NRC will approve two similar nuclear reactors in South Carolina. Others are on the books as well and have been pending for years if not decades. Within days of the permit approval of the nuclear power plant in Georgia, environmental and anti-nuclear groups filed a lawsuit to stop the construction. We anticipate numerous legal battles on these permits that will likely delay construction. The most significant unresolved issue is where the nuclear waste (spent fuel rods) will be stored permanently. The ramifications of last year’s
nuclear fallout in Japan after a devastating earthquake and tsunami should not be underestimated. Desert lands in Utah or Nevada (primarily Nevada at Yucca Mountain) have been the most widely proposed location for permanent nuclear waste storage in the United States. Therefore, even if no new nuclear plants are built in the Southwestern United States, we still anticipate that the Southwest could be involved in the construction of very large permanent waste storage facilities. See e.g., Nuclear Energy and Radioactive Waste, A Hot Choice for Utah.

3. Modifications in Other Sources of Greenhouse Gases or “Air Toxins.” Additionally, the EPA has proposed rules that will require major modifications to more than just power plants. Specifically, experts anticipate that the EPA will initially focus on boiler/incinerator/manufacturing plants that create significant amounts (typically considered 100 tons per year) of greenhouse gases, mercury or other “air toxins.” Legislation and enforcement in these areas may have a significant impact in the manufacturing and mining industries throughout the country. For instance, the EPA estimated that 10,000 businesses nationwide now have to report greenhouse gas emissions. See e.g., our previous legal alert on greenhouse gas reporting.

4. Energy Efficiency. Increased and varied energy production is one part of the equation, but the other part is to use less energy. In some circles, this reduction in energy usage is called a “negawatt” hour. There will be continued movement in energy efficiency, green building, energy storage, net metering and smart grid development (to name a few). In recent years, there has been a consistent push for energy efficiency in fields dominated by subcontractors (examples include the Energy Star program that focuses on energy efficient windows, doors, HVAC, appliances and insulation) and energy audits sponsored by utility companies. There is also a strong push and series of legislative efforts focusing on more fuel-efficient cars and transportation. Yet, it is very possible that energy efficiency is not the solution, because of the increased use of technology and electricity generally. In other words, the increased demand for more megawatts will exceed the negawatt gains. A good example is plug-in cars. If that becomes as popular as anticipated, then more energy from power plants will be required to power plug-in cars rather than fuel at the gas pump. In addition, depending on the success of the plug-in technology, it could put a strain on an already over-stressed power grid and may alter prime-time usage of power. Renewable energy sources such as solar power plants may not be such a great solution for high power demands to charge vehicles overnight. Energy efficiency is part of the focus, but not enough on its own.

In addition, the funding for these large types of infrastructure and renewable energy projects is uncertain. The federal government’s deficit is at all-time high. There have been some public failures and increased public scrutiny in the funding of renewable energy projects such as Solyndra. State and local economies are still struggling with decreased budgets and large deficits. It seems unlikely the construction of all the projects detailed above will be funded with solely public funds and it is probably economically infeasible for solely private funding as well. Thus, we anticipate that there will be an increasing likelihood for funding through public private partnerships (P3). A detailed discussion of P3 and financing of these projects is beyond the scope of this article, but we have discussed it in numerous other forums. See e.g., Infrastructure Development and Related Project Finance Players.
The days of companies in any industry, especially the construction industry, relying on government contracts to sustain operations during the remainder of the after effects of the Great Recession are likely over. In fact, due to existing and future budgetary cuts, it is expected that government agencies will terminate existing contracts in an effort to save money. In some cases, termination will be for the government's convenience. In others, especially those where disputes about performance have plagued a project, termination for default may occur—especially if the contracting officer is under pressure to eliminate the costs associated with termination for convenience. Further, bid protests over fewer government contract opportunities will become the norm. Although proper recordkeeping is required under any government contract, to properly prepare for a termination, claim or other dispute, it is essential that companies doing business with the government document interactions regarding contract performance.

Companies that do not document erroneously rely on any number of excuses. Many believe they have a "special" relationship with contracting officers (or their representatives) and believe there is no need to document because the government agent will always support the company. Other companies simply do not want to appear to offend the government representative by documenting interactions. Others are fearful about documenting events that may raise performance issues down the line.

But, documentation protects all parties in the contract: the government, the prime contractor and the subcontractors. Often, the importance of documentation becomes blindingly clear in its absence—e.g., if there is a dispute about a procurement and a company has not sufficiently papered the record. In federal contracting, when a dispute occurs, the government agency is responsible for creating an "administrative record" upon which it made its decisions related to the contract (e.g., selection of awardee, performance evaluations, claims, contract modifications, termination, etc.). The rules of the dispute reviewing body (e.g., Court of Federal Claims, Government Accountability Officer, Civilian Board of Contract Appeals, etc.) dictate what records the governmental agency must include in the administrative record to substantiate its decisions. The contractor, however, has the right to request that the administrative record be supplemented. But, if documentation to support the contractor's position does not exist, then there is obviously nothing with which to supplement the record. The judicial review will only include documentation from the government agency to support its decision. This is obviously not good for the contractor.

Companies should consider establishing policies for documentation and recordkeeping. Such policies should not only encompass government-required recordkeeping, but also take into account court rules concerning what documentation would be included in an administrative record. Companies should then consider requiring that subcontractors comply with the company's recordkeeping and documentation policies. Organization and accountability to the recordkeeping requirements is key. A senior project manager should be responsible for ensuring compliance with recordkeeping requirements and document retention. Regular audits should be performed to ensure compliance.

There are a multitude of other issues that construction companies must consider when preparing for potential disputes, protests and claims with agencies related to government projects. Such issues should be addressed from an organizational standpoint and well before a bid is submitted. Where appropriate, knowledgeable legal counsel, experienced with the bid protest process and with creating an administrative record, can assist contractors with these issues and help them obtain a competitive advantage in federal
government contracting.

**Contract Interpretation: How Courts Resolve Ambiguities in Contract Documents**
by Jim Sienicki and Mike Yates

Many construction disputes arise out of terms set forth in the contract. Unfortunately, many construction contracts were never reviewed by a construction attorney and are not models of clarity. Because many disputes are won or lost depending on the interpretation of the contract terms, it is imperative that those in the construction industry have in their skill set at least a basic knowledge of the rules and law governing contract interpretation.

One key issue in any contractual dispute is whether the court will allow the parties to introduce extrinsic evidence regarding how the subject contract should be interpreted. This evidence could include testimony from witnesses about what they thought the contract meant, e-mails or other correspondence discussing contractual terms, or evidence of how the parties conducted themselves under a separate contract containing similar provisions.

While the law varies from jurisdiction to jurisdiction, generally two competing philosophies exist with respect to when extrinsic evidence may be admitted to explain or interpret the contract. The "four corners" philosophy (also known as the "plain language" approach) typically requires a court or trier of fact to discover an ambiguity before allowing the introduction of extrinsic or parol evidence to supplement or explain contractual terms. On the other hand, the "intent of the parties" philosophy (also often referred to as the "Corbin" approach) typically allows the introduction of extrinsic and/or parol evidence regardless of whether the underlying contract is determined to be ambiguous. The "four corners" method has been, and continues to be, the most widely accepted method of contract interpretation in the United States. On the other hand, the "intent of the parties" approach, along with numerous variations, appears to have gained momentum and has been adopted in several states, including Arizona and California.

For example, Arizona has adopted a modified Corbin standard requiring a court to (1) consider the proffered interpretation of the contract; (2) determine if the contractual language is "reasonably susceptible" to the proffered interpretation; and, if so, (3) admit the extrinsic and/or parol evidence for further consideration. This rule appears to adopt a sort of "sliding scale" test with respect to how courts are to evaluate evidence and interpretations. A highly improbable interpretation will require very convincing evidence in order for a court to permit the admission of extrinsic evidence. On the other hand, a much less strict standard will apply to evidence supporting reasonable (or likely) interpretations of contractual language. It also follows that contract terms that can reasonably be interpreted in more than one way (or "ambiguous" terms) will usually lead to more plausible alternatives for interpretation, likely lessening the burden in convincing a court to allow extrinsic evidence. A good construction attorney will evaluate what his or her client’s intent was and then marshal the available evidence to prove that intent. This may be the difference between winning and losing the case, and/or may provide the attorney additional leverage during settlement discussions or mediation proceedings.

In addition, courts and tribunals utilize various well-known rules of contractual interpretation in testing the reasonableness of proffered contractual interpretations. A list of these rules and a brief description of these rules of contract interpretation are set forth below.

**A. The "Whole Agreement" Rule:** Simply put, the "whole agreement" or "harmonize" rule expresses the preference that the interpretation of the contract that renders all portions of the contract valid and enforceable, or in harmony, as opposed to rendering any portion of the
In the majority of cases, the invocation of the “whole agreement” rule benefits owners over contractors because the rule typically operates to place upon contractors the obligation to perform work when any part or portion of the contract can be construed to require the work.

B. Specific Versus General Contract Terms: This well-known and often used rule holds that specific terms and exact terms are given greater weight than general contract language.

C. Ordinary and Normal Meanings of Contract Language: Pursuant to this rule, contractual language is to be given its normal and ordinary usage unless circumstances exist to consider alternative meanings.

D. Technical Meaning Governs Over Ordinary Meaning: While contractual language is to be given its normal and ordinary meaning, some words have both an ordinary and technical meaning. This rule holds that courts interpreting contracts that contain words that have both ordinary and technical meanings should utilize the technical meaning unless evidence suggests that the parties intended otherwise.

E. Expressio Unius Est Exclusio Alterius: This rule, translated as “inclusion of one is exclusion of the others,” typically applies when lists of items or services are included in construction contracts. When disputes arise regarding scopes of work or materials to be provided, this rule can be invoked to demonstrate that the specific inclusion of lists of work and/or materials that are included in the scope of work demonstrates that the parties did not intend for work or materials that were not listed to be included in the scope of work.

F. Course of Dealing: If the disputing parties have acted a certain way in interpreting similar language in the past, this “course of dealing” may be used to demonstrate that the parties intended to treat the disputed language in the same way.

G. Construing Ambiguities Against the Drafter: Finally, many jurisdictions hold that contract ambiguities are construed against the drafter of the document, especially if the application of other rules of construction fails to resolve the issue.

These rules, as well as rules regarding the admission of extrinsic evidence, vary by jurisdiction, so please consult with your local construction attorney to confirm that these rules apply in your particular jurisdiction.

**Contractor Payment Protections in Public Private Partnerships Under Nevada Law**

by Leon F. Mead II

On February 23, 2012, the Snell & Wilmer Infrastructure Development and Project Finance Industry Group hosted “Moving Nevada Forward,” its first annual forum on Nevada public private partnerships. The event was well attended by many public officials and high-level development industry professionals. In the course of the seminar, questions arose about the protections afforded to contractors, subcontractors and materialmen in public private partnerships (P3s).

P3s are cooperative agreements between public bodies and private developers to design, finance, construct, operate and maintain facilities for public use. The types of financing for these projects can be as varied as creative minds can consider, but will be backed by some public obligation ensuring the initial investment and a reasonable rate of return to the private developer in exchange for undertaking the risks inherent in property development, operation and maintenance. The public body, relieved of its risk of liability for construction claims, impacts, cost overruns, change orders, design errors and the like, pays for the facility through long-term
lease agreements or concessions, with ownership of the facility usually turned over to the public body at the end of the financing agreement. So the P3 project is not quite a public work, and it’s not quite a private work of improvement. Therefore, the applicability of private work mechanics’ liens and/or public work payment bonds simply may not be available absent mandating legislation or negotiated obligations in P3 agreements.

Nevada is relatively new to P3s. While some municipalities have entered into P3 agreements for certain structures or other public facilities (such as the new City of Las Vegas City Hall project), there have been few roads or transportation facilities attempted because of public protection concerns among our political leaders. In fact, the first enabling statutes for these P3s were enacted only in 2011, and can be found in NRS 338.161, et seq, for “transportation facilities” which expressly excludes toll road construction, and the Boulder City Bypass Toll Road Demonstration Project Act (BCBTRDPA), found as Chapter 478, Statutes of Nevada 2011. Unfortunately, none of these legislative acts expressly provide payment protections for contractors, subcontractors or materialmen.

NRS 338.161 through 338.168, inclusive, allowing a public body to contract with a private person to “develop, construct, improve, maintain or operate, or any combination thereof” a transportation facility is devoid of any procedural mandates for payment protections whatsoever. Rather, the public body is mandated to review and consider the developer’s proposal for risks inherent in the project development as well as the use of money for the facility’s development, operations and maintenance before entering into any such agreement. This type of enabling statute will rely on the negotiators for the public body or market conditions to require payment protections.

Selection of a developer for the Boulder City Bypass ambiguously mandates that such a developer “award contracts using competitive bidding in accordance with the provisions of chapter 338 of NRS and solely for the purposes of those provisions regarding competitive bidding, the demonstration project shall be deemed to be a public work...” BCBTRDPA, Section 47(1)(a), emphasis added. While NRS 338 competitive bidding requirements require proof that a prime contractor be financially able to perform the contract (NRS 338.1375(3)(b)(1)) or provide the required bonding (NRS 338.1377(2)), the mandating statute to provide payment and performance bond is found in NRS 339.025, not in NRS 338.1375 through 338.148 which call out the procedures for competitive bidding. Thus, most likely as a result of the last minute passage of the BCBTRDPA, there is apparently no explicit mandate that payment bonds be provided for construction of the Boulder City Bypass. Whether there is an implied one is up to interpretation and may be the subject of a future court case.

So, if there is no mandated payment bond, could the P3 project be subject to the mechanics’ lien provisions of NRS 108.221 through 108.246, inclusive? The question is answered by the definition of the term “owner” under these statutes. To this end, owner is defined as including:

This State or a political subdivision of this State, including, without limitation, an incorporated city or town, that owns the property or an improvement to the property if the property or improvement is used for a private or nongovernmental use or purpose; or

A person ... who leases the property or an improvement to the property to this State or a political subdivision of this State, including, without limitation, an incorporated city or town, if the property or improvement is privately owned.

NRS 108.22148(1)(f) & (g), emphasis added. Stated another way, property is subject to a mechanics’ lien if it is (a) government owned but leased to a private party, or (b) privately owned but leased to the government. A P3
project could meet these criteria if the deal is structured as a lease transaction, however, for the Boulder City Bypass at least the project must remain available for public use (Section 34(3)(b)) and be owned by the Regional Transportation Commission of Southern Nevada (Section 34(3)(d)). The provisions of NRS 338.161 through 338.168 are silent on ownership and public use, although public use is clearly contemplated by NRS 338.164 and leasing options would probably be allowed under NRS 338.167.

P3 projects, then, may pose some payment risk for contractors and suppliers unless the P3 agreements mandate that the private developer provide for such relief or are structured purely as a private ownership with lease-back provisions. Contractors and suppliers should carefully review and consider insisting on contract provision requiring payment bonds or having the underlying financing transaction or project analyzed by competent counsel before signing on to perform the work.