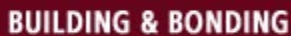




Duane Morris



BUILDING & BONDING



SPRING 2009

Building & Bonding: The Construction Group Newsletter

New Developments, New Opportunities, New Challenges . . . And a New Approach

Since our last newsletter, nearly 20 lawyers have joined the Construction Group in our New York office. We look forward to the experience these considerably talented construction practitioners bring to the table as well as the excitement surrounding the projects in which they are currently involved.

Additional developments stem from recent case decisions impacting the industry, including cases addressing pass-through claims and federal liability for overstatement of claims on public projects. A further new development arises from the utilization of overseas drywall products in projects throughout the United States that have manifested signs of defect. We would also like to highlight a much larger piece by Daniel Toomey, of our Washington, D.C. office, on energy-savings procurement contracts and their use to stimulate energy-efficient building growth. We then turn to challenges being faced by many members of the industry, securing payment for project performance.

We have decided to go electronic with future editions of this newsletter. While all of these articles will still be available for print from the website, moving forward with this electronic alternative allows us to maintain our goal of delivering efficient communications on issues and developments impacting the industry.

Robert A. Prentice
Edward B. Gentilcore

In This Issue

"The Writing Is on the Wall": Defective Drywall Claims Prompt More Legal Action by Sheila Rafferty Wiggins

Claims related to allegedly defective drywall imported from China are springing up in Florida and prompting governmental investigations. Manufacturers and distributors of drywall, as well as homebuilders and contractors that install drywall, should be aware of their potential liability as a result of the alleged property damage and health concerns.

Federal Circuit Affirms \$50 Million Civil Fraud Verdict Against Korean Construction Contractor by Daniel E. Toomey

In a much-anticipated decision underscoring the issues involved with certifying claims to the U.S. government, the U.S. Court of Appeals for the Federal Circuit affirmed a decision awarding the federal government more than \$50 million against Daewoo Engineering and Construction Co., Ltd. and forfeiting the contractor's other claims in excess of \$13 million.

Under New York Case Law, Subcontractors' Direct Claims Against Prime Contractors May Be Covered by a Pass-Through Clause by Charles Fastenberg

Although intended to facilitate the resolution of disputes, the interplay between dispute resolution clauses and pass-through clauses can have the consequence of precluding subcontractors' claims against prime contractors or construction managers without the actual merits of the claim being heard. The interaction between these two clauses should be carefully considered in any construction management, general or prime contract as well as any subcontract.

So You Want to Get Paid? Five Tips for Securing Payment for Performance by *Edward B. Gentilcore*

This article demystifies several methods businesses can employ to receive payment, such as reviewing contract provisions; utilizing mechanic's liens statutes and surety bonds; leveraging trust obligations and encouraging compensation through means that include prompt payment acts, joint check provisions and escrow accounts.

Energy Savings Performance Contracting: Will the Demand Remain High Despite Dropping Energy Prices?

by *Daniel E. Toomey*

This article, reprinted from *The Procurement Lawyer*, discusses the U.S. government's continuing need for Energy Savings Performance Contracting (ESPC), how Energy Savings Companies (ESCOs) are selected, keys to ESPC success, and potential problems and pitfalls.