

WINTER/SPRING 2015

# WILLIAMS MULLEN

.....  
*Construction Industry News*

- CONSTRUCTION
- .....
- GOVERNMENT CONTRACTS
- .....
- INFRASTRUCTURE
- .....
- PUBLIC-PRIVATE PARTNERSHIPS



Williams Mullen Announces Coastal Flooding Practice.



WILLIAMSMULLEN.COM | DC | VA | NC



# WELCOME

## INSIDE

**WILLIAMS MULLEN  
ANNOUNCES COASTAL  
FLOODING PRACTICE ..... 4**

**FEDERAL GOVERNMENT  
CONTRACTS ..... 5**

When the Federal Government acts badly, but not badly enough to show bad faith - what's a contractor to do?

**NEW CHALLENGES ..... 8**

Coastal flooding and resiliency: new challenges and opportunities for the construction industry.

**GREEN CERTIFICATION ..... 10**

Obtaining green certification for existing buildings in Virginia.

**BANKRUPTCY AND  
VIRGINIA MECHANIC'S  
LIEN RIGHTS ..... 13**

The effect of bankruptcy on mechanic's lien rights in Virginia

Remember in the last issue of the Newsletter how I threatened to put my "far-away look" picture again in this issue unless I received feedback on our newsletter? Well, the readers have spoken, and the picture is not repeated.

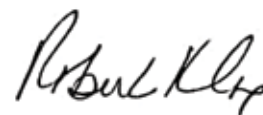
Instead, and better, in this issue we are highlighting the launch of Williams Mullen's new practice team assisting businesses and communities with the many issues of coastal flooding and resiliency. Along with the announcement of the new practice, we have included in this newsletter an article titled "Coastal Flooding and Resiliency: New Challenges and Opportunities for the Construction Industry." The author is Henry R. "Speaker" Pollard, V, who heads up our new practice team.

Also included is an article on "Obtaining Green Certification for Existing Buildings in Virginia". Rob Travers and Kelley Holland in Williams Mullen's Virginia Beach office co-authored this article on the "greening" of existing commercial buildings in the United States and the

organizations certifying "greening" of these buildings. As Rob and Kelley write, there are a significant number of commercial buildings that can be renovated to meet green standards with a return on that green investment.

Lastly, I wrote the article on when the federal government acts badly in dealing with its construction contractors, but not badly enough to warrant a claim of bad faith. This article grew out of a conversation I had at a Virginia State Bar CLE with a former Virginia State Court Trial Judge (now a mediator) on the implied duty of good faith and fair dealing in contracts, and thereafter the December 2014 decision by the federal government's Civilian Board of Contract Appeals for the contractor on the design and construction of the Veterans Administration Hospital in Aurora Colorado.

Keep your comments coming; I have archived but not deleted the photo.





On the afternoon of April 11, Williams Mullen’s Construction Practice Group sponsored the ABA Construction Law Forum’s 2014 Community Service Project – a rehabilitation and landscaping of a portion of the New Orleans City Park. Established in 1854,

City Park is one of the oldest urban parks in the country. Its 1300 acres contain gardens, walking and biking trails, tennis courts, an 18 hole golf course, and an antique carousel. The Park relies heavily upon volunteers to help maintain the Park’s beauty. Our

April 11 project included landscaping, planting, and mulching projects throughout the Park.

As the ABA’s annual Community Service Project Sponsor, Williams Mullen organized, coordinated and funded this high visibility and successful event which included more than 50 Construction attorney volunteers. We are pleased to be a part of this important project to help keep a local community park beautiful, and we are glad to support the ABA’s Community Service programs.



Williams Mullen Construction Practice Group co-sponsored and joined the District of Columbia Building Industry Association (DCBIA) for their annual Community Improvement Day – a renovation of the Dwight A. Mosley Sports Complex.

# WILLIAMS MULLEN ANNOUNCES COASTAL FLOODING PRACTICE

*Williams Mullen is proud to announce the formation of a dedicated Coastal Flooding & Resiliency practice team to assist businesses and communities with the complex issues posed by recurring flooding, higher storm surges, and threatened inundation affecting properties and infrastructure.*

Virginia and North Carolina coastal communities are experiencing flooding more frequently and more severely. The recurring nature of this flooding and accompanying higher storm surges are being driven by localized effects of sea level rise, land subsidence, and changing ocean currents. These growing threats can pose significant challenges to capital and infrastructure investment, business and governmental operations, and land use planning and construction design, triggering evolving legal and environmental risks as well.

Led by Henry R. "Speaker" Pollard, V, the firm's cross-functional team of attorneys and government relations professionals advises and assists clients by shaping strategies to manage and minimize the risks and by seeking innovative solutions and pursuing entrepreneurial opportunities that can help to overcome the challenges. Attorneys from our real estate and land use, environmental, infrastructure, lending, public finance, litigation and governmental affairs practice groups provide specific knowledge and experience where needed and constitute a team that can offer a holistic and strategic perspective.

"Virginia's and North Carolina's economies and quality of life depend greatly on healthy coastal communities, economies, military facilities and ports. But current trends show that coastal areas of Virginia and North Carolina are facing evolving risks to private and public property, infrastructure and routine and emergency transportation of people and goods," Mr. Pollard said. "These trends point to the need for good planning by public and private sectors to manage these concerns. How government and businesses respond to these concerns has now become one of the most complex challenges faced in each state, but it also presents opportunities for innovative planning and private sector roles to address these concerns."

Shipyards, marinas, ports and other shoreline-dependent industries and public facilities are vulnerable to recurrent flooding and storm surge, but any facility or operation dependent on goods and services moving through coastal communities bears these risks as well. Lending and insurance markets are also being compelled to react to property loss.



# FEDERAL GOVERNMENT CONTRACTS

*When the Federal Government acts badly, but not badly enough to show bad faith – what’s a contractor to do?*

**BY ROBERT  
K. COX**

In the prior issue of this newsletter, we included an article on the high standard of proof and the practical considerations for a federal government contractor claiming that the federal government acted in bad faith in its contract dealings. You responded with the question, suppose the government acts badly in its contract dealings with the contractor, but not to the level of bad faith – do we have a remedy? The answer is yes, you do have a remedy – that remedy being a claim against the government for failing to comply with the implied contractual obligation of good faith and fair dealing with its contractors. If established, the government’s failure to meet the implied obligation can be a material breach of contract, allowing damages for the contractor and relief from further contract performance. This principle and remedy were brought home in the recent Civilian Board of Contract Appeals’ decision in *Kiewit-Turner, A Joint Venture v. Department of Veterans Affairs*, CBCA 3450 (December 9, 2014).

## **THE PROJECT**

The project at issue in *Kiewit-Turner’s* appeal to the Board of Contract Appeals was the construction of the Veterans Administration (“VA”) medical

center campus in Aurora, Colorado. The Board of Contract Appeals’ findings of fact paint a dismal picture of the VA’s choice of project delivery method and its management of the project design team.

The VA chose a project delivery method known as an integrated design and construct contract, or IDC type contract, a method the Board characterized as similar to the “construction management at risk” or “construction management as constructor” type of project delivery method. With the IDC delivery method, the construction contractor is brought into the project early on to analyze the design and advise the project owner so that the owner can better work with the design team to control estimated construction costs or, alternatively, to procure additional funding. The VA, however, had never before used this project delivery method, and the Board found as a fact that the VA did not properly use the project delivery system from the start. Instead, the VA went into construction with an incomplete design with estimated construction costs far in excess of the available funding, repeated failures to process change orders, failures to process the design team’s joint supplemental instructions used to complete the

design, and failures to timely pay the JV contractor.

In the meantime, there had been significant red flags raised over the escalating estimated cost to construct the project. In response, after meetings among the VA, its design team, and the JV contractor, the VA issued a fateful modification to the construction contract. The modification provided that the VA and the JV contractor agreed to a project goal price at or below \$604 million. The modification further provided that the VA would ensure that its design team would produce a design that would meet the estimated construction cost of \$582 million. The Board found that at the time of the modification, the modification and, in particular, the cost sums were not based on any set of design documents, and certainly not a completed set of design documents.

Eventually, the cost estimate from the VA's design team was about \$781 million, or \$199 million over the modification's specified estimated construction cost. The JV contractor submitted a firm fixed price proposal of \$897 million with clarifications and qualifications. The VA rejected the JV contractor's proposal. Thereafter, the JV contractor advised the VA that the cost could be as high as \$1.085 billion. In response, the VA notified the JV contractor that the contractor was responsible for constructing the project for the firm fixed price established in the contract modification – \$604 million.

The JV contractor requested a Contracting Officer's ("CO") final decision as to whether the VA had breached its obligation under the contract to provide a design that could

be built for the estimated construction cost of \$582 million. The CO issued a final decision denying that the VA had breached the contract and directed

design that could be built for \$582 million? The Board ruled that the VA's failure to provide a design that could be constructed for \$582 million was a

“ Suppose the government acts badly in its contract dealings with the contractor, but not to the level of bad faith – do we have a remedy? The answer is yes, you do have a remedy. ”

the JV contractor to proceed with construction of the project at the modification price of \$604 million. The JV appealed the final decision to the Board of Contract Appeals seeking a declaratory judgment that it was relieved from further performance due to the VA's breach of contract in not complying with its duty of good faith and fair dealing with the JV contractor. The Board agreed with the JV contractor.

### **THE GOVERNMENT'S FAILURE TO COMPLY WITH ITS DUTY OF GOOD FAITH AND FAIR DEALING WITH ITS CONTRACTOR**

The Board of Contract Appeals focused on three questions in rendering its decision.

First, did the contract modification obligate the VA to provide the JV contractor a design that could be built for \$582 million? Applying contract interpretation principles, the Board ruled that the modification could not have been more clear; the VA had committed to provide a design that could be built for \$582 million.

Second, did the VA materially breach the contract by failing to provide a

material breach of contract that went to the essence of the VA's contract with the JV contractor.

In ruling the VA's breach to be material, the Board looked to the implied duty of good faith and fair dealing between the parties to a contract. The Board wrote:

"...we find that the behavior of the VA has not comported with standards of good faith and fair dealing required by law. The agency failed to provide a design that could be constructed within the ECCA because it did not control its designer, the JVT. It paid no heed to VE suggestions for cost reductions which were made by KT and Jacobs (or even those which were accepted by the agency's own medical center personnel following the "blue ocean" meeting). The agency delayed progress of construction, such as by delaying the processing of design changes and change orders, as described under factor (a) above. The agency disregarded cost estimates by KT and Jacobs, even to the point of rejecting a Jacobs estimate because it was developed under restrictions which the agency itself had imposed. The agency adopted as an independent government estimate a document



which was neither independent (it was developed by a subcontractor to the JVT, an entity which had a strong interest in the result), nor by the Government (it was by the JVT), nor an estimate (it was by admission of the chief estimator an academic exercise), and the number was so far below any previous estimate as to be of dubious accuracy. The agency did this notwithstanding the testimony of every witness who addressed the matter, including several VA witnesses, that an 'independent' estimate should not be made by a party with a vested interest in the outcome. The agency ultimately directed KT to continue its construction work for the FTP, even though the agency refused to fund that work appropriately."

We do not know what the cost of construction of this project ultimately will be. It could be nearly \$769 million (as estimated by KT in December 2013), nearly \$785 million (as estimated by Jacobs in January 2013), more than \$897 million (KT's firm fixed price proposal in March 2013), or \$1.085

billion (KT's estimate in June 2013). It could even be only \$630 million (the JVT/RLB estimate in February 2014), although that appears unlikely because this number is so much lower than all the others presented. Whether it is any of these figures, however, it will be significantly in excess of the ECCA of \$582 million. We find that beyond doubt, the VA's breach of its contract with KT was material.

Third, upon finding the VA's breach of contract to be a material breach, the Board ruled that the JV contractor had the right to discontinue performance of the contract. The Board rejected in short order the VA's argument that the JV contractor's continued performance vitiated the VA's material breach. The Board found that the JV contractor proceeded with performance to avoid a charge of default while vigorously protesting the directive to proceed and meet the modification's project price. This was sufficient for the Board to reject the VA's "continued performance" argument.

### THE TAKEAWAY

There are several significant points in the Board's decision for federal construction contractors, including:

- > A contractor need not prove the higher standard of bad faith by the government to prove a violation of the duty of good faith and fair dealing;
- > The duty of good faith and fair dealing applies to the government as well as to the contractors contracting with the government. The principle is implied in a contract and imposed on each contract party;
- > The duty of good faith and fair dealing requires each party to the contract not only to avoid actions that unreasonably cause delay or hindrance to contract performance, but also to do whatever is necessary to enable the other party to perform; and,
- > Though the duty of good faith and fair dealing is an implied contract obligation, the failure to comply is no less a breach of contract than the failure to fulfill a duty imposed by an express promise stated in the agreement.

As a final takeaway, while the contract at issue in *Kiewit-Turner* was a federal government contract, the reasoning of the federal Board of Contract Appeals could be persuasive to courts hearing state and local government contract disputes.



# NEW CHALLENGES

*Coastal flooding and resiliency: new challenges and opportunities for the construction industry.*

**BY HENRY R.  
“SPEAKER”  
POLLARD, V**

Virginia, North Carolina and other mid-Atlantic coastal communities are no strangers to severe weather and related storm surges and flooding. However, many of these communities are experiencing storm surges and tidal and routine rainfall-related flooding with greater frequency and intensity. This trend presents risks to coastal communities and, if realized, could change (quite literally) much of the landscape where the construction industry operates. However, it can also be expected to create demand – and therefore business opportunities – for innovation in construction design, techniques, and management.

What factors are driving this trend? For the mid-Atlantic area, a varied and localized mix of sea level rise, land subsidence, and changing ocean currents appear to be the contributing factors, as evidenced by decades of recorded tide gauge data, analysis of historical land elevation monitoring data, and emerging findings of ocean current behavior. For example, the Hampton Roads region has already experienced an increase in relative sea level rise of about 1.5 feet since 1930, driven as much by land subsidence as any other factor.<sup>1</sup> Other Chesapeake Bay and Mid-Atlantic coastal areas are feeling these effects as well in different ways and to varying degrees.<sup>2</sup>

This is no academic exercise – this is a problem already being experienced week in and week out for many communities, businesses and governmental and military facilities in coastal Virginia and North Carolina. Further, should this trend continue as projected, studies point to a similar rate of increase (or even more) through the 21st century, with permanent inundation and severe storm surges projected in many areas.<sup>3</sup> While they present significant challenges to capital and infrastructure planning and investment and business and governmental operations, they can also be expected to trigger additional scrutiny of legal and environmental duties and liabilities of local governments and businesses.

Further, recurrent flooding and building resiliency to such flooding are not just concerns specific to coastal communities and businesses. Anyone who relies on goods and services originating in or being shipped through or from the Tidewater region of Virginia or North Carolina’s complex coastal and low country areas, or who relies on the presence of military or port facilities in these regions, has a vested interest in how coastal flooding is addressed to build resiliency against these risks to avoid interruption of transportation of goods, customers, employees and utility services.



Various federal agencies, state governments, and many localities, as well as some businesses, are already responding to address these concerns. Lenders and insurers are already having an increasingly important role in the waterfront and low-lying residential property marketplace. Commercial, industrial and local government insurance and lending/financing markets are expected to follow suit.

As already indicated by several completed and planned projects in Hampton Roads, the construction industry and related trades will therefore need to anticipate and plan for recurrent and more severe flooding and higher storm surges, related changes in stormwater management, and potential permanent inundation. These concerns affect new construction, rehabilitation, repair and maintenance work, whether for utilities and infrastructure, industrial facilities, commercial office and retail space, or homes.

Faced with the risks of greater flooding or long-term inundation, property owners and tenants – whether developers, businesses and governmental entities – can be expected to reassess site suitability, facility development plans, and construction designs for new facilities, as well as to evaluate their willingness to protect and/or reinvest in existing

facilities. These considerations will, of course, be passed through to the construction industry through design and construction contracts as customers seek to manage and mitigate the risks. Construction industry members will also face these factors directly due to needs for increasingly complex and robust stormwater management and erosion and sediment measures, site safety procedures reflecting increasingly wetter sites, and changes in construction management and costing to account for recurrent flooding conditions such as delay in workforce and equipment mobilization due to flooded roads and job-sites.

However, as worrying as the risks of recurrent flooding and storm surge may appear, there also seem to be many opportunities for construction and related business lines. Building awareness of and resiliency to these risks so that economies and communities can thrive despite them are important responses to these risks for success in the long run. The construction industry can be an integral part of building this resiliency in many situations:

- > Existing buildings will need to be armored against increased flooding, which is already happening in new design and retrofits in many communities;

- > Increasing the elevation of structures at risk will become necessary in many cases, as evidenced by commercial space design changes and by many homeowners raising their homes using FEMA incentive funding;
- > Relocation of existing facilities may be warranted in some cases, prompting new construction and repurposing or demolition of decommissioned structures, in-ground improvements and utilities;
- > Protection of existing, and design and construction of new, critical infrastructure and facilities (such as hospitals, water supplies, sewers, wastewater and water treatment plants and their discharge outfalls, shoreline terminals, and railroads, just to name a few) will require new thinking about infrastructure design and maintenance, as well strategic budgeting and funding; and
- > Site design and construction management techniques to account for flood-prone conditions will require increasingly specialized and innovative expertise.

1. “Relative sea level rise” accounts for lower land elevation as well as any actual rise in sea level. See [http://tidesandcurrents.noaa.gov/sltrends/sltrends\\_station.shtml?stnid=8638610](http://tidesandcurrents.noaa.gov/sltrends/sltrends_station.shtml?stnid=8638610).  
2. Other documented local sea level trend lines can be viewed at the National Oceanic and Atmospheric Administration’s website mapping Northern Atlantic tide gauge stations and sea level trends at <http://tidesandcurrents.noaa.gov/sltrends/sltrends.html> (last visited December 9, 2014).

3. See Larry P. Atkinson, Tal Ezer, and Elizabeth Smith, Sea Level Rise and Flooding Risk in Virginia, 5.2 Sea Grant L. & Policy J., 3, 12 (Winter 2013); Virginia Institute of Marine Science, Recurrent Flooding for Tidewater Virginia (January 2013), available at [http://ccrm.vims.edu/recurrent\\_flooding/Recurrent\\_Flooding\\_Study\\_web.pdf](http://ccrm.vims.edu/recurrent_flooding/Recurrent_Flooding_Study_web.pdf) (last visited December 8, 2014).



# GREEN CERTIFICATION

*Obtaining green certification for existing buildings in Virginia.*

**BY ROBERT E.  
TRAVERS IV  
& KELLEY C.  
HOLLAND**

"Revaluing building reuse is not just an environmental issue, it's an economic opportunity. One that will reduce our dependence on foreign oil and one that creates American jobs. Because renovation projects use less material, it is good for the environment, but it requires more labor, which has to be local. That's good for America."

– Elizabeth Hider, Chief Sustainability Officer at Skanska USA, Inc.

On June 19, 2014, the U.S. Energy Information Administration released its preliminary results for the 2012 Commercial Buildings Energy Consumption Survey (CBECS). According to the CBECS, the United States currently has 87 billion square feet of commercial floorspace. Only 14 percent of that commercial floorspace (12.2 billion square feet) was constructed within the past 10 years; that is, built pursuant to current green construction standards. By contrast, 50 percent of the commercial buildings in the United States were built prior to 1980.<sup>1</sup>

The U.S. Green Building Council does not view increased construction of new green buildings as a practical solution to the glut of energy inefficient commercial floorspace. In fact, the U.S. Green Building Council estimates that it takes up to 80 years to offset the environmental impact of demolishing

an old building and constructing a new, albeit more efficient, one.<sup>2</sup> In light of an average new construction replacement rate of 2 percent per year in the United States, we will maintain an incredibly large supply of low efficiency commercial floorspace for the foreseeable future.<sup>3</sup>

The tremendous supply of energy inefficient commercial space coupled with the increased public demand for green properties has led to the recognition by owners and contractors of the profit potential in "greening" existing commercial buildings.<sup>4</sup> Various studies demonstrate that green buildings have longer usable lives, command premium rental rates, enjoy higher tenant occupancy, present a lower lending risk to financial institutions and sell for approximately 20 percent more per square foot when compared to similar "non-green" properties.<sup>5</sup> Further enhancing green construction, the Federal Government and various states, including Virginia, offer incentives to owners and contractors for buildings that can be certified as green. These incentives primarily take the form of tax credits, tax exemptions and green mortgages.<sup>6</sup>

What organizations offer certification for refurbished green building in Virginia? The three most prominent organizations offering green certification are:



1. The Environmental Protection Agency and its ENERGY STAR certification program begun in 1999;
2. The U.S. Green Building Council and LEED (Leadership in Energy and Environmental Design), a multi-tiered green building certification program begun in 2000; and
3. The Green Building Institute and the Green Globes program, which was implemented in the United States in 2004.<sup>7</sup>

For the purposes of tax incentives, Virginia delegates the statutory certification of “energy efficient” commercial construction to, among others, these same three organizations.

Each utilizes a unique and competing green verification system. Until recently, green certification by the U.S. Green Building Council and the Green Building Institute focused primarily on new commercial construction; *i.e.*; the initial design, materials and methods used in the construction of a new structure. To address the certification of refurbished buildings, LEED and Green Globes each created new

verification programs that specifically address existing buildings, or “EBs.”

An EB certification focuses on the operation and maintenance of a structure. A brief summary of the EB certification options offered by LEED and Green Globes follows. The Environmental Protection Agency’s ENERGY STAR program is also addressed.

#### **LEED EB:O&M**

The U.S. Green Building Council certification program for existing buildings is referred to as LEED EB:O&M (Existing Building: Operations & Maintenance). Much like LEED’s multi-tiered certification program for new construction, LEED EB:O&M rates an existing structure as certified, silver, gold or platinum. In order to apply for LEED EB:O&M certification, the EB and its owner must meet certain threshold requirements including: the EB must be in compliance with all applicable environmental laws; the EB must consist of at least one existing commercial structure; the owner must employ a reasonable site boundary on its application of all lands affected or disturbed by the EB; the EB must be at least 1000 square feet in size;

the EB must be operating currently at typical physical capacity and have been doing so for at least twelve continuous months; the EB owner must commit to provide whole building energy and water data; and the EB must occupy no less than 2 percent of the site area.

Assuming these minimum requirements are satisfied, the applicant must then complete a request for review and submit historical performance data, calculations, and analysis. The U.S. Green Building Council will evaluate the application to determine if certification is warranted. LEED EB:O&M certification is valid for five years, but annual recertification is encouraged.

#### **GREEN GLOBE CIEB**

Green Globes refers to its EB program as Green Globe CIEB (Continual Improvement of Existing Buildings). Green Globes CIEB rates EBs on a “Globe” scale from 1 to 4 with 4 Globes the highest possible rating. Green Globes requires the EB to be at least 400 square feet in size, have twelve consecutive months of operational and water data, and have conditioned space.

Assuming the minimum requirements are met, the next step is to complete an on-line environmental assessment. Green Globes scores the assessment on a 1,000 point scale focusing on energy, water, resources, emissions, indoor environment and environmental management. For an EB to be eligible for Green Globe certification, the online assessment must achieve a minimum score of 350 and meet threshold scores in each assessment area. The self-assessment is then verified by a third party with expertise in green building design, engineering, construction and facility operations. The third party assessor makes the final determination as to certification and rating of the EB.

### **ENERGY STAR**

The ENERGY STAR program has always focused on building performance. ENERGY STAR certifies that a qualifying building is within the top 25 percent of the most energy efficient buildings in the United States. Unlike LEED and Green Globes, ENERGY STAR does not rate EBs at various levels of certification. ENERGY STAR scores an EB on a 1-100 scale. Similar to Green Globe CIEB, the EB's preliminary ENERGY STAR score is established

through an online self-assessment protocol referred to as a Portfolio Manager, which focuses on energy consumption, water consumption and greenhouse gas emissions. A preliminary Portfolio Manager score of 75 is required to proceed with the certification process. Assuming a minimum Portfolio Manager score, ENERGY STAR requires verification of an EB's application by a licensed Professional Engineer or Registered Architect. ENERGY STAR verification is good for one year and must be recertified annually.

### **FUTURE GREEN TRENDS**

Regardless of the rating system employed, the purpose of these certification programs is to verify that a qualifying building operates with greater energy efficiency, reduced water consumption, enhanced stormwater management, and better indoor air quality than a traditional structure. While the current focus is on achieving a smaller carbon footprint, the future of green construction is sustainability. A sustainable building causes a "net-zero" impact on the environment by generating and collecting on-site as much energy and water as it consumes.

The Living Building Challenge™ gives us a glimpse of the coming sustainability movement. Launched in 2006, the Living Building Challenge™ certifies that a building "lives" off the land by using solar, wind and geothermal energy and rain for all of its operating needs. Currently only 4 projects in the world have achieved full certification under the Living Building Challenge. The Chesapeake Bay Foundation's Brock Environmental Center in Virginia Beach is the first, and to date only, registered Living Building Challenge™ project in Virginia. The Brock Environmental Center boasts an indefinite life expectancy, designed to operate through loss of power and withstand a 500 year storm event.

1. U.S. Energy Information Administration, Commercial Buildings Energy Consumption Survey 2012 (June 19, 2014), available at <http://www.eia.gov/consumption/commercial/reports/2012/preliminary/index.cfm>
2. Preservation Green Lab, National Trust for Historic Preservation, The Greenest Building: Quantifying the Environmental Value of Building Reuse (2011), available at [http://www.preservationnation.org/information-center/sustainable-communities/green-lab/lca/The\\_Greenest\\_Building\\_lowres.pdf](http://www.preservationnation.org/information-center/sustainable-communities/green-lab/lca/The_Greenest_Building_lowres.pdf)
3. U.S. Energy Information Administration, Commercial Buildings Energy Consumption Survey 2012 (June 19, 2014), available at <http://www.eia.gov/consumption/commercial/reports/2012/preliminary/index.cfm>
4. Unless indicated to the contrary, a "commercial building" generally refers to any structure "greater than 1,000 square feet that devotes more than half of its floorspace to activity that is neither residential, manufacturing, industrial, nor agricultural" as defined by the U.S. Energy Information Administration.
5. Norm Miller, Jay Spivey, Andy Florance, Does Green Payoff? (July 12, 2008), available at <https://www.energystar.gov/sites/default/files/buildings/tools/DoesGreenPayOff.pdf>
6. U.S. Department of Energy, DSIRE Database of State Incentives for Renewables & Efficiency (October 6, 2014), available at <http://www.dsireusa.org/incentives/index.cfm>; Eric Gies, Forbes, Green Building Financing Offers More Profits, Fewer Risks (June 14, 2011) available at <http://www.forbes.com/sites/ericagies/2011/06/14/green-building-financing-offers-more-profits-fewer-risks>;
7. Virginia Code § 58.1-3221.2.



# BANKRUPTCY AND VIRGINIA MECHANIC'S LIEN RIGHTS

**BY W. ALEXANDER  
BURNETT &  
ANDREW O.  
MATHEWS**

*The effect of bankruptcy on mechanic's lien rights in Virginia.*

Mechanic's liens are created by statute and are strictly construed by Virginia courts.<sup>1</sup> As such, Courts often rule that liens are invalid because of technical deficiencies and inaccuracies in the lien form.<sup>2</sup> Lien claimants have a number of statutory deadlines and requirements that they must strictly meet in order to have an enforceable lien. For example, lien claimants must record their lien memorandum "not later than 90 days from the last day of the month in which they last perform labor or furnish materials, and in no event later than 90 days from the time such building, structure, or railroad is completed, or the work thereon otherwise terminated."<sup>3</sup> In addition, no lien memorandum can include amounts for labor or materials furnished more than 150 days prior to the last day on which the claimant last performed work or provided materials preceding the filing of such memorandum.<sup>4</sup> After recording the lien, lien claimants must file suit to enforce the lien within "six months from the time when the memorandum of lien was recorded or after sixty days from the time the building, structure or railroad was completed or the

work thereon otherwise terminated, whichever time shall last occur."<sup>5</sup>

The filing of bankruptcy by an owner, general contractor, or subcontractor can have a material effect on some of these deadlines and on the rights, remedies, and deadlines of potential mechanic's lien claimants. This article outlines the potential impact of a bankruptcy filing on different parties' mechanic's lien rights and remedies.

## **THE AUTOMATIC STAY**

When a bankruptcy petition is filed, the automatic stay under 11 U.S.C. § 362 (the "Automatic Stay") goes into effect and stays "any act to create, perfect, or enforce any lien against property of the estate."<sup>6</sup> Creditors who willfully violate the Automatic Stay can face stiff penalties and expensive fines and sanctions from the court. In Virginia, the recording of the mechanic's lien memorandum does not violate the Automatic Stay; however, the Automatic Stay precludes lien claimants from filing a suit to enforce a mechanic's lien.<sup>7</sup> Importantly, 11 U.S.C. § 108(c) tolls the six month statute of limitations on

a suit to enforce a mechanic's lien until thirty (30) days after the Automatic Stay is terminated.<sup>8</sup>

### **WHO IS IMPACTED BY THE BANKRUPTCY?**

The potential impact of the bankruptcy filing, and consequently the Automatic Stay, can differ depending on which party (owner, general contractor, subcontractor, or lien claimant) is in bankruptcy. The courts can grant relief from the Automatic Stay, pursuant to 11 U.S.C. § 362, (1) for cause, including the lack of adequate protection of an interest in property of such party in interest; and (2) if the debtor does not have any equity in the property, and the property is not necessary to an effective reorganization.<sup>9</sup>

How the court will apply these factors depends on which party is the debtor. Typically, when the general contractor or subcontractor files for bankruptcy, the general contractor or subcontractor has no ownership interest in the real property, and therefore no equity in the real property, and the real property would not be necessary to an effective reorganization. Likewise, if the general contractor or subcontractor does not have any interest in the real property, it is less likely to be willing or able to provide adequate protection of the creditor's interest. As a result, the court is more likely to grant relief from the Automatic Stay.

Where the property owner files for bankruptcy, however, the court will have to consider whether the owner has equity in the property, and whether the property is necessary to

the bankruptcy. If there is equity or if the owner is willing to make adequate protection payments to protect the equity cushion, the court is more likely to deny relief from the Automatic Stay.

A mechanic's lien should not be affected by the lien claimant filing for bankruptcy. The automatic stay does not prohibit a lien claimant from continuing to prosecute the claim; however, any money obtained would become part of the bankruptcy estate.

### **WHAT SHOULD LIEN CLAIMANTS DO WHEN A COMPANY UPSTREAM FILES BANKRUPTCY?**

Although each situation is different, below are some general guidelines to follow in order to best protect your clients' lien rights:

1. Protect your clients' lien rights. If you suspect an owner, general contractor or subcontractor (i.e., someone upstream from your client) may file bankruptcy, a mechanic's lien is your client's best, and possibly only, way of getting paid everything that is owed to your client. The following are some important tips on protecting your clients' lien rights.
2. Pay close attention to the 90 day and 150 day deadlines by which you must have filed your mechanic's lien. The automatic stay does not affect these deadlines. Advise your clients to develop a consistent system to flag and handle delinquent accounts before they reach these important deadlines.

3. If a contractor, subcontractor, or owner on a project your client is working on filed for bankruptcy, determine your client's rights as quickly as possible. In addition to mechanic's lien rights, your client may have reclamation or other remedies that carry a very short deadline.
4. When recording a mechanic's lien, notice is very important and there are numerous different kinds of notices that need to be given before, during, and after a lien is recorded, depending on the type of project and where your client falls in the chain of contract. On residential projects, for example, if a mechanic's lien agent is listed on the building permit, your client needs to give notice to that lien agent at the start of the project. You should ensure that your client has proper procedures in place and that proper notice is given.
5. Keep in mind, however, that once the bankruptcy court enters an Order granting relief from the automatic stay or once the bankruptcy case is dismissed or the stay otherwise terminated, a lien claimant's statute of limitations to file the suit recommences. The lien claimant will have the longer of (1) whatever time is left on the original six month statute of limitation; or (2) 30 days from the Order granting relief from the Stay.<sup>10</sup>



### **WHAT SHOULD OWNERS DO WHEN A COMPANY DOWNSTREAM FILES BANKRUPTCY?**

1. Quickly determine the payment status and how many subcontractors and suppliers have not been paid. Owners need to determine who has mechanic's lien rights, claims directly against the owner, or other claims besides general unsecured claims. Owners should determine how to get any mechanic's liens or other payment issues resolved. The automatic stay and the bankruptcy filing in general will often alter the rights and remedies of owners, and owners want to make sure they don't end up paying twice.
2. Quickly get a handle on any open or unfinished projects with the bankrupt entity. Protect your client by taking steps to ensure that the project continues and that the work is protected.
3. Items 2 and 3 will help owners determine whether they have claims against the general contractor that can be offset.
4. Urge the general contractor, through contractual remedies or otherwise, to bond off or settle all liens if possible.

### **CONCLUSION**

Each case is unique and should be handled on a case-by-case basis. It is important to develop a case-specific strategy and ensure that you take the proper steps after a bankruptcy is filed to avoid violating the Automatic Stay or having to pay twice.

1. *Carolina Builders Corp. v. Cenit Equity Co.*, 257 Va. 405, 411, 512 S.E.2d 550, 552 (1999).
2. *Id.* ("[U]nless [a mechanic's lien] is perfected within the proper time and in the proper manner, as outlined by the statute, it is lost.")
3. Va. Code Ann. § 43-4.
4. *Id.*
5. Va. Code Ann. § 43-17.
6. 11 USC § 362(a)(4).

7. *In re Concrete Structures, Inc.*, 261 B.R. 627, 637 (E.D. Va. 2001); *In re Bain*, 64 B.R. 581, 583 (W.D. Va. 1986); *In re Richardson*, 123 B.R. 736, 738 (Bankr. W.D. Va. 1991).
8. *In re Concrete Structures, Inc.*, 261 B.R. at 642.
9. 11 U.S.C. § 362.
10. *In re Concrete Structures, Inc.*, 261 B.R. at 645-46.

# WILLIAMS MULLEN

Construction Industry News

8300 Greensboro Drive  
Suite 1100  
Tysons Corner, VA 22102  
Telephone: 703.760.5200  
williamsmullen.com

“ Williams Mullen  
Construction Litigation  
is ranked First-Tier  
Nationally in the 2015  
Edition of *U.S. News -  
Best Lawyers'* 'Best  
Law Firms!' ”



WILLIAMS  
MULLEN  
findingyes®