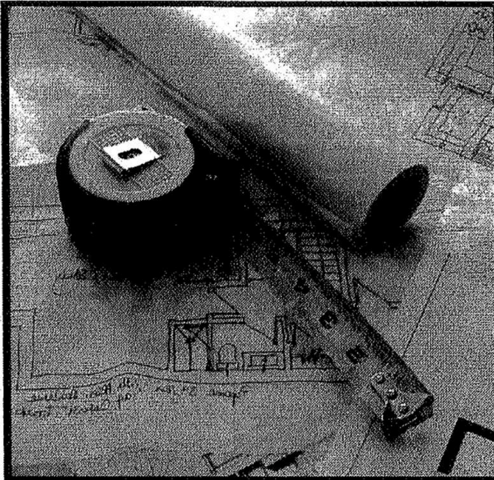

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Top Five Construction Law Developments of 2008

By Donald W. Gregory, Esq.
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The construction community is only too eager to see 2008 come to a close, even though many fear that 2009 will be at least as difficult. 2008 will be remembered for an almost unprecedented credit collapse that caused great hardship in the construction industry. As a result, we saw much more aggressive lien and collection practices and greater bid challenges as work became increasingly scarce.

Hopefully 2009 will yield a substantial economic stimulus, in the form of "shovel ready" infrastructure projects (and greater confidence), that will breathe life into the construction industry. If not, greater defaults and further erosion of profit margins and employment can be expected.

As we cross into a new year, it may be worth revisiting the top five construction law developments of 2008 in countdown order.

5. *Spearin* Doctrine in Ohio Eroded on Private Work?

Since at least 1997 when our firm prevailed on behalf of a contractor on a school project and the Spearin doc-

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trine (owner impliedly warrants the sufficiency of the plans) was first officially recognized in an Ohio appellate decision, courts have made no effort to distinguish between public and private work. However, a recent federal court decision has threatened the Spearin doctrine on private work.

The opinion stated "this Court finds no basis for extending the Spearin doctrine to include cases involving private entities and elects to not do so." *Thomas & Marker Construction Co. v. Wal-Mart Stores, Inc.*, 2008 WL 4279860 (S.D. Ohio 2008).

The troubling aspects of this decision should be obvious to anyone who understands the construction process. It is hard to imagine contractors conducting meaningful soils investigations prior to submitting a bid, particularly when the owner has already provided a soils report in the bid documents. It is also difficult to imagine how bidders can fairly price the risk of unforeseen subsurface conditions in an equitable and efficient way.

However, an interesting postscript is that the contractor overcame difficult legal rulings and recovered a jury verdict for every penny claimed under a theory that the owner had waived some of the one-sided contract language.

4. AIA Adopts Integrated Project Delivery Documents

ConsensusDOCS took the lead in 2007 by adopting the ConsensusDOCS 300 series of forms dealing with a collaborative project delivery system, often times referred to as Integrated Project Delivery (IPD), where all members of the construction team sign a single contract document and work together in the best interests of the project.

In 2008, the American Institute of Architects (AIA) followed suit and created its own IPD documents—in two different forms. The first (A295) is designed for those less familiar with IPD and is basically an owner-contractor GMP arrangement that talks about how the parties will work together at various stages of the project.

The second form (C195) creates a single-purpose LLC with the owner, architect and contractor acting as primary members. It blurs traditional lines between design and construction and all participants find themselves "in the same boat" together.

The designer and contractor have two opportunities to profit—first, if they meet project goals outlined by the group or second, if actual cost is less than the estimated target cost.

Unlike the ConsensusDOCS 300, the AIA documents are not a multi-party agreement. Nevertheless, they still require a high degree of trust and may be best suited to a sophisticated owner on a complex project with regular and trusted "partners."

3. Public Owners Win Bidding Disputes (So Far)

In a case of great interest to public entities and the contractors who bid their construction work, the Ohio Supreme Court ruled against a contractor trying to recover attorney's fees and lost profits from the municipality that rejected its bid. *See Cleveland Construction, Inc. v. City of Cincinnati*, 118 Ohio St. 3d 283, 888 N.E.2d 1068, 2008-Ohio-2337 (2008).

This bidding case was initiated by Cleveland Construction, Inc. after it was rejected for the drywall work on the Cincinnati Convention Center in favor of Valley Interiors, who unlike Cleveland Construction, satisfied the SBE requirement in the bid solicitation. Cleveland Construction argued that its federal constitutional rights were violated through the denial of the contract.

The Ohio Supreme Court adopted the City of Cincinnati's arguments that Cleveland Construction had no constitutionality-protected interest in the drywall contract because the City always had the ability to reject any bid if "not in the best interests of the City." As a result, Cleveland Construction had no right to recover damages or fees of any kind. This Ohio Supreme Court case reinforces the broad discretion given public authorities in determining who are the "lowest and best" or "lowest, responsive and responsible" bidders on their construction projects.

Meanwhile, Franklin County was successful in defending its bid disqualifications of contractors on the Huntington Ballpark project who had multiple prevailing wage violations. However, the Ohio Supreme Court recently accepted the Painting Company case (sponsored by ABC) for review, so further change on this front may occur in 2009.

2. Prevailing Wage Expanded

Governor Strickland and the Ohio Department of Commerce announced changes to Ohio's prevailing wage law, which became effective October 15. The new guidelines provide that when a public entity provides funding—no matter how limited—prevailing wages are triggered for the entire project, even it is it largely privately-financed. The guidelines also provide that if

public funds are used to support infrastructure improvements on private land within six months of privately-funded construction, the entire project is subject to prevailing wage. Loans, grants and bonds are considered "public funds" for triggering prevailing wage, but tax abatements are not.

1. Contractors Score Victory with Broad Interpretation of "Delay"

The Ohio Supreme Court case of *Dugan & Meyers*, with its strict insistence on notice, greatly worried contractors who believed that they were being forced to give almost daily written notices of their project impacts and delays or risk the loss of otherwise viable claims. Meanwhile, owners confidently believed that they finally had a shield against claims for delay costs at the conclusion of their projects. Yet we cautioned clients that the *Dugan & Meyers* case might have little long-term precedential value as it was decided under a contract signed before the Fairness in Construction Contracting Act (R.C. 4113.62) was enacted, which (in relevant part) provides:

> Any provision of a construction contract ... that waives or precludes liability for delay ... when the cause of the delay is a proximate result of the owner's act or failure to act, or that waives any other remedy for a construction contract when the cause of the delay is a proximate result of the owner's act or failure to act, is void and unenforceable as against public policy.

A case decided by the Franklin County Court of Appeals has broadly defined "delay" within the meaning of the statute to include acceleration or other impact claims. *Cleveland Construction, Inc. v. Ohio Public Employees Retirement System*, 2008 WL 885841, 2008-Ohio-1630 (Ohio App. 10 Dist. 2008). Perhaps even more importantly, the court ruled that the statute eliminated the need for a time extension request as required by the contract. This case means that contractors will need to worry less about giving formal written notices of delay throughout the course of the project, and that owners have lost the means to defend otherwise valid delays or impact claims on procedural grounds, such as lack of timely notice or the failure to timely request a time extension.

There is no question that this decision will encourage contractors to assert claims, even long after the original delay occurrence, when the cause of the delay is arguably the owner's "actions or inactions." The pendulum has swung from owner to contractor with respect to delay claims in Ohio—at least for now.

How an Owner, Contractors and Subcontractors Can Work Together to Build a Large School Early and Under Budget

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School administrators have often been frustrated by cost overruns and delays on much needed capital improvement projects in recent years. Yet many of those same administrators and their counsel continue to employ the same techniques and methodologies that have failed in the past. Our firm had the opportunity to serve as counsel on what was probably the largest individual school project in Ohio history, the Penta Career Center in Northwest Ohio, and to employ unique strategies designed to avoid the "same old problems." We were aided by an experienced and savvy superintendent and his committed staff and were not encumbered by many state regulations, as the District had the good fortune to be able to build the project from their own funds.

Rather than pit the project players against one another in an adversarial fashion, the district wanted to work cooperatively with all members of the construction team in the best interests of the project.

As a result of these creative strategies, and the hard work of all concerned, this $90 million new construction project was completed without any claims or disputes well within budget and an entire school year early. Such a successful end result warrants discussion of the strategies utilized to effectuate this unusual and satisfying result:

1. **Equitable Documents.** Traditionally, owners have employed one-sided contract documents that are bid upon by prime contractors who impose even more one-sided subcontracts on their subcontractors, and so forth, all the way down the "construction