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

By Donald W. Gregory, Esq.
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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

food chain." Inequitable documents often unfairly shift the risk and encourage adversarial relationships, including excessive letter writing and "finger-pointing" early on in the project when all parties should be working together as a team to effectuate the desired result. On this project, we employed instead equitable contract documents that were protective of the District's interests, but also treated the rest of the construction team fairly. We also insisted that the contractor utilize a fair subcontract (the old AIA A401-1997) with its subcontractors. As a result, we achieved better cooperation from the construction team, and presumably received better pricing on bid day.

2. **Quick Pay.** On many public works, payment is delayed several months to the contractor, who then delays payment to the subcontractors, who are paying their employees every Friday and their suppliers every thirty (30) days. This "forced financing" of the project by the construction team often leads to adversarial relationships, poor performance, and the costs of the "forced financing" are often included in the price on bid day, which ultimately increases the overall project cost to the taxpayers. School districts that have employed "quick pay" often get better performing contractors interested in the project and better pricing on bid day. That appears to have been the experience with respect to this project as well where good contractors were low bidders and no payment problems were encountered during the course of the entire project. The District paid its prime contractors five (5) days from receipt of the approved draw by electronic transfer of funds and insisted that the prime contractor pay their subcontractors promptly as well.

3. **Line Item Release of Retainage.** Contractors and subcontractors often include the cost of "financing the project" in their bid prices, particularly when the retainage rates are higher than their profit and retainage is expected to be withheld for a significant period of time. Early finishing trades often have their retainage held for a couple of years while a large project is being finished by other trades. It does not help the owner get the punchlist done if the contractor or subcontractor who finished early has been off the site for an extended period of time and still does not have his retainage. Therefore, we included a provision that allowed for line item release of retainage so that early finishing trades could finish all of their work (including those annoying punchlist items) and get their full payment (which certainly had been earned once their work was 100% satisfactorily complete). Once again, this reduced overall project costs and encouraged earlier completion and timely resolution of punchlist items.

4. **Prevailing Wages.** As this project was being constructed in a highly-unionized area and the District had traditionally enjoyed a fine relationship with trade contractors in the area who regularly employ many of their graduates, the District elected to make this a prevailing wage project. As a result of being a prevailing wage project, union contractors actively participated in the project and experienced tradesmen were the norm, not the exception. As a result, there was greater labor cooperation and "esprit dé corps" often lacking on school projects in Ohio.

5. **No A/E or C/M Markup on Changes.** Districts are often frustrated to find their design professionals or construction managers profiting from their own mistakes. For example, if an error or omission leads to a change order, and the construction cost of the project increases, the designer frequently receives additional compensation because their fee is based on a percentage of construction costs. This perceived inequity caused us to make sure that there would be no markup on changes for the designer or the construction manager, and perhaps encouraged their close scrutiny of change orders for appropriateness.

6. **Early Site Package.** A late or wet spring has slowed progress or delayed companies of many a school construction project over the years. With this in mind, the District put out for bid an early site package, which allowed the site work to be done in dry fall conditions before winter. This ensured prompt work on the pad the following winter and spring when the balance of trade contractors began work. This "jumpstart" to the project was very helpful to the overall project schedule.

7. **Quick Finish.** As a result of the strategies employed above, the project was put in a position where it could finish early if we

had the "buy-in" and cooperation of all the trade contractors. We then secured their approval to an early completion of the project, which would allow them to end their general condition costs earlier than otherwise. For no additional compensation from the District, the contractors agreed to finish early and achieved completion of the school in time to open an entire school year early. This had great and tangible benefits to the District and its students, yet was achieved for the original budget sum.

The lessons learned from this exciting and successful project can perhaps help other school districts, and other public owners, find creative ways to "do more for less" during these difficult economic times. Employing creative and unique strategies to secure fairness and cooperation seems far preferable to simply "doing more of the same" and complaining about the inevitable frustrating results.

Ohio: Navigating the Ongoing Operations Exclusions (j)(5) and (j)(6)

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Insurance coverage for construction defects includes navigating the insuring agreement and the exclusions. An important exclusion is the ongoing operations exclusion (j)(5), which states that the insurance does not apply to property damage to: "That particular part of real property on which you [the named insured] or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the 'property damage' arises out of those operations." Equally important is exclusion (j)(6), which excludes "property damage" to "that particular part of any property that must be restored, repaired, or replaced" because "your work" was incorrectly performed on it.

The exclusions only apply to property damage to the "particular part" of the property upon which the insured or its subcontractors are performing operations. The exclusions apply to real property and apply if the damage is done at the time the operations are in progress as evidenced by the use of the present tense in the exclusion.

If the property damage occurred while operations are in progress, the "particular part" language limits the scope of the exclusion. The issue typically in dispute between construction insureds and insurers is the meaning of "particular part." This phrase is not defined in the CGL policy, so it is subject to interpretation by the courts.

Two of the key issues whether operations are in progress, *i.e.*, under construction or ongoing and how is "that particular part" defined by the courts.

Ongoing Operations

In *Fortney & Weygandt, Inc. v. American Manufacturers Mut. Ins. Co.*, 2005 WL 1566744 (N.D. Ohio July 5, 2005), the owner, Frisch's Restaurants, Inc. hired a general contractor, Fortney & Weygandt (Fortney) to build a Golden Corral Restaurant. Fortney subcontracted the concrete and foundation work of the restaurant. After completion of the foundation, Fortney oversaw the completion of the walls, roof, and interior of the building. After an inspection of the foundation, the owner learned that the foundation system was improperly designed and defectively constructed. As a result of those deficiencies, the owner had the restaurant demolished and rebuilt. It was determined that soil around the foundation of the building shifted, and the underground utility lines attached to the foundation broke and disconnected from the structure.

Because the owner failed to pay Fortney for construction of the restaurant, Fortney filed a demand for arbitration. The owner counterclaimed against Fortney and alleged: (1) in the course of construction and after installation of the foundation, the underslab plumbing lines detached and failed local inspection; (2) numerous design and construction deficiencies existed in the restaurant; (3) Fortney and its subcontractors poorly constructed the foundation system; (4) Fortney failed to exercise good construction practices and did not adhere to the plans and specifications provided by Frisch's; and (5) Fortney breached its contract with Frisch's by building a restaurant that did not comply with the plans and specifications and by failing to build the foundation system in a workmanlike manner.

Frisch's also filed a lawsuit against the architectural firm that designed the first restaurant and the architect answered the complaint and included a third party complaint against Fortney. In the third party complaint, the architect sought to pass on to Fortney the liability alleged in Frisch's complaint. The complaint repeated the allegations made in the arbitration counterclaim that con-