

# Bulletin

The Official Publication of the Washington Building Congress | **May/June 2009**

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## Working with Uncle Sam

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# Bulletin

May/June 2009

Washington Building Congress is a nonprofit association made up of professionals from a variety of disciplines, all with an active interest or involvement in the Washington Metropolitan Area's real estate, design, and construction community. The organization was established in 1937 to represent the collective interests of its members by providing education and networking opportunities and by promoting the advancement of the building industry. For additional information about membership, joining a committee or the WBC Bulletin, call (202) 293-5922 or visit us on the web at [www.wbcnet.org](http://www.wbcnet.org).

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*Bulletin is published 10 times a year by Washington Building Congress, Inc. Individual subscriptions are available for \$139 per year. The articles in this publication are the opinions of the authors and do not necessarily represent or reflect the policies or opinions of Washington Building Congress. Copyright 2009. All rights reserved.*



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## Chairman's Letter



### Dear Members and Colleagues:

The Washington Building Congress is gearing up for the summer with a great series of programs and events. The highlights of this season will be the June 15 Golf Outing and the August 20 Summer Networking organized by the Hammerheads for the full membership. I hope everyone takes full advantage of the summer season to reenergize and enjoy themselves with family and friends.

The Community Services Committee took on a very challenging and rewarding Rebuilding Together project in April. With the help of generous volunteers, in-kind supporters and financial contributors, a very deserving family in Falls Church is now enjoying a dramatically enhanced quality of life. Please be sure to take some time to enjoy the July/August *Bulletin* where we will be focusing on all of the WBC community initiatives over the past year and individually thanking everyone involved with the Rebuilding Together project. Special thanks to the Community Services Committee and volunteers, Chair Anne Marie Tombros (Exponent), Vice-Chair Winona Leaman (Greenman-Pedersen), and Board liaison Steve Sullivan (Forrester Construction Company). This group really makes a difference in our community!

The Program and Education Committee put together another very successful panel program last month focusing on *The Economic Stimulus Package*. Speakers included Charles Matta (General Services Administration), Bill Paolillo (McGraw-Hill Construction) and Bruce Ware (US Army Corps of Engineers). Please visit the WBC website to view the electronic version of the outstanding presentations. The committee is also planning a follow-up series of seminars designed to provide a comprehensive look at economic stimulus issues. Thank you to the Program and Education Committee, Chair John Gregg (Beacon Group) and Vice-Chair Jim Coleman (Watt, Tieder, Hoffar & Fitzgerald) for planning a great series of events this year. Thanks also to Board liaisons John Barron (Foulger-Pratt Contracting) and Joe Schall (Pepco).

The WBC Hammerheads got together for another successful event in April at the Crystal City Sports Pub in Arlington. The Hammerheads group represents the association's new generation of industry leaders who are under 40 years old. Please encourage anyone in your company under 40 to get involved with the Hammerheads and attend the next event. The Hammerheads Committee is planning the August 20 Summer Networking event that will be open to all members regardless of age! Thanks to the Hammerheads Committee, Chair Scott Mucci (Forrester Construction Company) and Vice-Chair Lisa Newton (BE&K Building Group).

The 72<sup>nd</sup> annual WBC Golf Outing is scheduled for Monday, June 15 at Lansdowne and Belmont golf clubs in Virginia. Please take a moment to review the excellent sponsorship levels still available for this high profile event. The WBC golf outing provides a great way to showcase your business, entertain clients and reward employees. Thank you to the 2009 Golf Outing Committee, Co-Chairs Mike Baruccheri (Tishman Construction) and Dan Peyton (Suffolk Construction), along with Board liaison John Hardy (Capital Lighting & Supply), for helping making sure this event is once again a resounding success. Please keep in mind that the Golf Outing awards reception at Lansdowne from 2:30 to 5:00 p.m. is open to non-players as well.

I look forward to seeing you at an upcoming WBC program or event. Thank you for your support.

Best regards,

**Paul Varela**

WBC Chairman of the Board

Special Thanks to Our  
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# Industry Report

## Preferred Insurance Services, Inc. Promotions



Nancy Supples

**Nancy Supples**, CISR was promoted to senior account manager of WBC member, Preferred Insurance Services, Inc. Supples joined Preferred in 2003 and has proven to be a strong member of

the Preferred team with her knowledge and work ethic. In her new role, Supples will help lead and train the account manager's at Preferred.



Abe Myers

**Abe Myers**, CIC was promoted to vice president of Preferred Insurance Services, Inc. Myers joined Preferred in 2003 and has proven to be a valuable asset to Preferred by demonstrating hard

work, dedication and leadership skills. In his new role as vice president, he will work directly with Preferred's ownership to provide leadership and strategy for the company's future.

## Skanska Hires Joseph Tierney as Senior Project Manager

Skanska a WBC member is pleased to announce the recent hire of **Joseph Tierney** as senior project manager in the metropolitan Washington office. A graduate of Rutgers University with Bachelor of Science in Civil Engineering, Tierney brings to the Washington market more than 28 years construction experience. His expertise as a project and construction manager spans numerous aspects of biotech and pharmaceutical projects along with corporate campus construction.

In his new role, Tierney will be the senior project manager for the Adjudication Co-Location Activities Facility at Fort George G. Meade, MD, a project under the Base Realignment and Closure Act (BRAC). He was previously employed by Turner Construction where

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he served as project manager for the Army Corps of Engineers' expansion of the National Defense University in Washington, DC. His earlier portfolio of experience includes serving as project manager for Human Genome Sciences, Merrill Lynch Corporate Headquarters, Bristol-Myers Squibb, American Cyanamid Lederle and Johnson & Johnson.

## Centennial CEO Launches New Sustainability Challenge

Centennial Contractors Enterprises, a WBC member is celebrating Earth Day by kicking off its President's 2009 Green Challenge. The contest is designed to further Centennial's commitment to sustainability by putting the company's overall philosophy into daily practice.

Centennial's regional offices and corporate office will form teams to define and implement sustainability solutions internally and externally. The practices will be reviewed by an outside panel in early 2010 on several criteria including: ability to integrate across multiple customers; is quantifiable, potential impact on our organization; is on-going and sustainable; creative and innovative; and effort results in team building. The top three job sites will receive cash awards of \$10,000, \$5,000 and \$2,500 respectively, a portion of which must be given back to the local community.

In addition to safety, sustainability is Centennial's top initiative. Currently over 10% of its work force are LEED® Accredited Professionals and has worked on numerous sustainable construction projects around the county including the Ft. Bragg Courthouse, Lake Washington School District and Ft. Lewis. Centennial's Sustainability Mission Statement is available at <http://www.cce-inc.com/sustainability.html>

## Jennings Joins Hankins and Anderson

Hankins and Anderson, Inc. a WBC member is pleased to announce **Cole Jennings**, E.I.T., has joined the Glen Allen office mechanical department. Jennings was formerly with Qimonda.

## Hart Earns CPSM Designation

**Anne Hart**, marketing manager for Hankins and Anderson earned the designation of Certified Professional Services Marketer in March, 2009. She is among a growing number of professionals to be certified by WBC member Society for Marketing Professional Services, which advocated for, educates, and connects leaders in the design and building industry.

Certified Professional Services Marketers (CPSMs) are recognized as

having the experience and knowledge to generate profitable business in the architectural, engineering, and construction marketplace. To achieve this designation, certification candidates must meet educational and experience requirements, pass a rigorous written examination, and pledge to abide by the CPSM Code of Ethics. The process validates the individual's mastery of and ability to apply critical business development knowledge in an industry that values certification. **B**

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# Pursuing Federal Construction Projects Provides Long Term Benefits to Contractors

by *David Carrithers*

Companies looking to break in to the federal marketplace should make it a long term decision, not just a move to get by during a recession.

That's the opinion of Bill Sweetser, who spent 20 years building a business that focused exclusively on public construction, while other firms chased more glamorous private sector work. Sweetser is now retired, but the company he founded, Centennial Contractors Enterprises, Inc., has grown to become a \$250 million-a-year builder that is still busy, despite the recession.

“What drives success as a federal contractor is a long term commitment, experience and capabilities that fit contract requirements, demonstrated quality of work, reasonable and cooperative behavior, past and present performance of meeting commitments, a history of few surprises and experience helping customers,” explained Sweetser.

Sweetser cites several reasons for his claim about the long term benefits of federal contracting:

- The federal government is huge, with well over \$100 billion earmarked for construction projects each year, even before the economic stimulus bill was passed;
- It is a stable market—federal construction does not fluctuate as dramatically as the commercial market can, particularly during economic downturns;
- Federal construction offers diverse opportunities for a wide array of contractors, from huge projects like the Pentagon to small renovation and retrofit projects;
- Federal contracts are regulated by the FAR (Federal Acquisition Regulation), where requirements are spelled out in great detail;
- Awards are made based on very strict procedures that are professionally administered;
- It is fair—contracting agents look after the best interests of the federal government and those of the contractors.



*"Every day is a good day to work for the federal government," explains Bill Sweetser, retired founder of Centennial Contractors Enterprises, Inc.*

"If you've got a company that has been making a living in the private sector, you would be well served to put emphasis on federal work," urged Sweetser. He said that what drives success as a federal contractor are both tangible and intangible — a long term commitment to being a federal contractor; experience and capabilities that fit contract requirements; demonstrated quality of work; reasonable and cooperative behavior; and past and present performance of meeting commitments, a history of few surprises, and experience helping customers.

Sweetser emphasized that working for the federal government is not easy, and that there are unique considerations that federal contractors have to think about. He also stressed the need to have talented proposal writers. He also urged people interested in federal contracting to consider adding partners who can strengthen their teams. In order for partnerships to work, he said, "the most important thing you want to think about is mutual trust."

Sweetser also encouraged contractors to build relationships with contracting officers.

**To get started, Sweetser offered several immediate suggestions:**

- Talk to government procurement officers to learn about the process and specific contract opportunities;
- Go to federal procurement seminars;
- Consider teaming with someone working for the federal government;

- For subcontractors and suppliers, he suggested going to general contractors' Web sites and registering their companies and their areas of expertise;
- Find a surety because all federal work has to be bonded.

"If you are going to work for the federal government," Sweetser said, "this is a good time to start. The stimulus package is going to put pressure on contracting officers to spend money quickly."

### **American Recovery and Reinvestment Act Yields Direction for Federal Work**

The recently passed American Recovery and Reinvestment Act of 2009 provides a good starting point for companies looking to begin or ramp up their federal construction efforts. A significant portion of the plan—about \$134 billion—is earmarked for construction spending. Additionally, an estimated \$8.7 billion will be available to states for school construction by way of the American Recovery and Reinvestment Act's State Stabilization Funds. Exactly how and when the money will be spent is outlined at [www.recovery.gov](http://www.recovery.gov).

The largest single category of construction spending—\$49.3 billion—is for transportation infrastructure. Of that, \$27.5 billion will be allocated for highway and bridge construction.

One of the Act's primary goals, according to the White House, is to "Revive the renewable energy industry and provide the capital over the next three years to eventually double domestic renewable energy capacity." To that goal, \$29.8 billion will be spent on energy and technology.

\$29.5 billion will be spent on building infrastructure, a category of great interest to many commercial contractors. The funds are divided among six primary programs:

1. \$5.6 billion for GSA (General Services Administration) federal buildings and facilities
2. \$7.12 for military construction
3. \$1 billion for VA (Veterans Affairs) construction
4. \$8.04 billion for housing facilities
5. \$7.74 billion for other facilities
6. An additional \$8.7 billion will be funded through separate aspects of the bill for K-12 and higher education school construction

All of the GSA funds will be distributed for existing project backlog. The same is true of the military construction funds, with the exception of \$120 million to be distributed by DOE (Department of Energy) on a discretionary basis for energy efficiency upgrades

\$8.04 billion will be spent on new construction of housing facilities and \$7.74 billion to fund other facilities, more than half of which—\$4.53 billion—will be used to fund existing project backlogs. The remaining \$3.21 billion in funding will be distributed by agencies on a discretionary basis, for new or existing projects. This includes \$2 billion from the Department of Health and Human Services (HHS) for community health centers.

## Feature Article

Another \$21.4 billion in funds will be allocated to water and environmental infrastructure. The funds are divided among programs supporting clean water, water resources and environmental cleanup. In addition, \$4.3 billion in funds will go toward workforce development and safety. Most of that—\$4 billion—is for training and employment services.

### Getting Started in Federal Construction

Getting started working for the federal government is not easy. Like anything else in business, you have to build relationships and trust with the people who could potentially buy your services.

Federal procurement officers encourage contractors to contact them. First, however, they should take these three steps:

- Identify your product or service by federal supply classification code (FSC) or product service code (PSC) on the government's Web site (<http://fpdcapp.gsa.gov/pls/fpdsweb/PscWiz>)
- Identify your North American Industry Classification Codes—as many as apply since this is a primary way government search engines find contractors (<http://www.census.gov/eped/www/naics.html>)
- Determine SBA size standard (there is a separate size standard for each NAICS) (<http://www.sba.gov/services/contractingopportunities/sizestandardtopics/index.html>)

Most proposed DOD and federal contracting activities above \$25,000 in contract value are posted at FEDBIZOPPS ([www.fedbizopps.gov](http://www.fedbizopps.gov)). However, not all government contract opportunities are listed on FEDBIZOPPS, and projects under \$25,000 are never listed, so procurement officers encourage contractors to contact each government installation's facility manager to enquire about their projects.

Moreover, contractors should start with a narrow field of vision. Trying to go after all federal work is an impossible task for any size business, so contractors are urged to explore opportunities at one agency—the Naval Facilities Engineering Command (NAVFAC) for instance—or even to try to establish relationships with one venue, like the Bethesda Naval Hospital, where millions of federal dollars are being spent on new construction projects.

Another very early step for someone interested in federal contracting is to register on the Central Contractor Registration ([www.ccr.gov](http://www.ccr.gov)), a search engine tool for a variety of federal agencies to locate small businesses.

### The Benefits of Teaming

One effective way to jump start the process is to team with another contractor who has experience in federal construction. The only way to do this is to make an offer that is a win-win for both parties, either by providing expertise that is unique to the other party or access to markets or contracts that is not available to them.

A common way of doing this is through a joint venture or partnership between large contractors with capabilities and experience and small businesses that have access to government contracts. The government actively encourages

these partnerships, through programs like their 8(a) business development and the Mentor-Protégé program. The details of how these programs work are explained at [www.sba.gov](http://www.sba.gov). The federal government makes it quite clear, however, that the joint ventures have to provide benefits to both large and small firms, and that each has to contribute their fair share of the work.

### Contracting With the Federal Government

There are many ways to participate in federal contracting—as prime contractor, subcontractor, via set-aside programs, in joint ventures or other teaming arrangements. Regardless of how you approach the project, there are essentially two ways the federal government contracts for services—sealed bidding and competitive negotiation.

“In a sealed bidding acquisition, the agency must award to the responsible bidder who submits the lowest responsive bid (price). In contrast, competitive negotiation is a more flexible process that enables the agency to conduct discussions, evaluate offers, and award the contract using price and other factors,” according to Carl L. Vacketta of DLA Piper US LLP, of Washington.

While lowest responsive bids are typically the way contractors with less government experience get federal contracts, competitive negotiation is far more satisfactory.

“If you show you have better people and a better process you can win an RFP without the lowest price,” explained Sweetser. “The federal government believes in that,” he added.

“The Federal Acquisition Regulation (FAR) -- codified at Title 48 of the Code of Federal Regulations -- contains the uniform policies and procedures for acquisitions by all federal agencies. It implements or addresses nearly every procurement-related statute or executive policy. In doing so, the FAR reaches every stage of the acquisition process,” added Vacketta.

To learn more about federal contracting, visit [www.cce-inc.com/whitepapers.html](http://www.cce-inc.com/whitepapers.html) and download “Federal Construction as a Long Term Business Growth Strategy.” **B**



David Carrithers

David Carrithers is vice president, marketing at Centennial Contractors Enterprises, Inc., a construction services and solution contractor headquartered in Vienna Virginia.

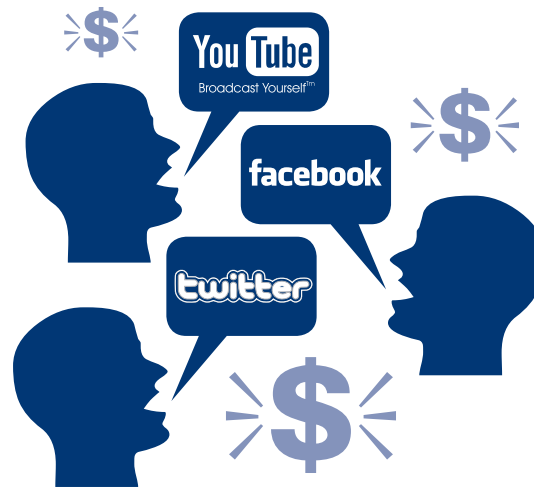
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# Social Networks That Boost Your Business

## How to Use These Applications to Make Your Company Recession-Resistant

by Daniel Burrus



Most people are familiar with the term “Web 2.0,” which refers to a second generation of web development and design that focuses on fostering social networking via the web. Innovative companies are beginning to embrace Web 2.0 as a way to enhance communication, information sharing, and collaboration, thereby allowing them to work smarter rather than harder.

The business use of Web 2.0 represents a new trend called “Business 2.0.” Aside from being the name of a defunct magazine, Business 2.0 is about using the new web-based social networking applications (many of which were originally created for personal use) in a way that fosters teamwork, customer touches, and internal and external collaboration in a low-cost seamless way.

Unfortunately, many businesses feel that Web 2.0 and social networking are for the younger generation and a waste of time when used by employees. However, once you understand the power of these applications and how to use them in your company, you’ll quickly find that they can be invaluable tools to boost your bottom line.

Following is an overview of the best Business 2.0 tools.

### Personal Tools with Business Applicability

#### Facebook

**Personal use:** Facebook enables you to connect and share with the people in your life. Users can join networks organized

by city, workplace, school, and region to connect and interact with others. People can add friends, send them messages, and update their personal profiles to notify friends about themselves.

**Business 2.0 use:** Large organizations can connect all of their employees, or members, with Facebook. Some are finding an added advantage of using an internal, secure version of Facebook. This has helped organizations to dramatically increase their internal networking and collaboration.

**Ask yourself:** Could we use Facebook, or our own internal version, to get people to collaborate at a higher level?

#### Twitter

**Personal use:** Twitter is a micro-blogging service that allows friends, family, and co-workers to communicate and stay connected through the exchange of short, quick answers using no more than 140 characters per message. Senders can restrict delivery to those in their circle of friends or co-workers. Users can receive updates via the Twitter website or other social networking sites such as Facebook. Young people use Twitter for answering the question: What are you doing?

**Business 2.0 use:** Business users could change that question to: What problem are you trying to solve? Several companies have used this as a fast way to solve problems. Hotels, airlines, and airports are using Twitter to pitch services, travel updates, and respond to travelers needs.

**Ask yourself:** Could we use Twitter to solve problems faster with our organization or our customers?

#### Wikipedia

**Personal use:** Wikipedia is a free online encyclopedia that anyone can use to find information on virtually any topic. Anyone can edit the content as well.

**Business 2.0 use:** A large manufacturing company with engineers in locations around the world increased problem solving and collaboration by creating an internal, secure version of Wikipedia for sharing information on parts and service offerings as well as repair and maintenance instructions. Retailers and suppliers could create a version of Wikipedia to foster education and training as well as enhanced information sharing.

**Ask yourself:** Could we create an internal version of Wikipedia to foster better information and knowledge sharing?

#### YouTube

**Personal use:** YouTube is a video sharing website where users can upload, view, and share video clips. YouTube displays a wide variety of user-generated video content as well as movie clips, product demonstrations, and commercials. Unregistered users can watch the videos, while registered users can upload an unlimited number of videos.

**Business 2.0 use:** Businesses are posting humorous commercial videos to generate interest in their products with great success. The more entertaining it is, the more people watch it. Business partners could create a YouTube like channel for the purpose of educating and training.

**Ask Yourself:** Could we enhance our marketing efforts as well as general communication by using YouTube?

## Guest Article

### Digg

**Personal use:** Digg is a social news web site made for people to discover and share content from anywhere on the Internet, by submitting and accessing links and stories. Voting stories thumbs up or a thumb down is the site's cornerstone function, respectively called digging and burying.

**Business 2.0 use:** Many organizations have found this to be a good way to track the most interesting advances in technology or the most useful business

news. Large organizations can create their own internal version for sharing what employees consider to be the most useful information.

**Ask yourself:** Could we use Digg, or our own internal version, to get people to share their most interesting and valuable web-based information with each other?

### Delicious

**Personal use:** Delicious is a social bookmarking web service for storing, shar-

ing, and discovering web bookmarks. It uses a non-hierarchical classification system in which users can tag each of their bookmarks with freely chosen index terms.

**Business 2.0 use:** Business users can share their most useful websites with co-workers or business partners. If a customer purchases a product, sellers could share relevant bookmarks that keep the customer coming back for more information and hopefully more products.

**Ask yourself:** Could we use Delicious to share important new web sites faster within our organization or with our customers?

### Visual Communications

**Personal use:** Visual Communications, unlike traditional video conferencing, uses your desktop, laptop, and soon your smart phone to hold a quick, anytime, anywhere videoconference with one or more other people. Travelers who must be away from home are using their laptops in hotel rooms with broadband access and free software such as Skype and AIM to communicate with family and friends to enhance their personal connection.

**Business 2.0 use:** Businesses are discovering the power of Visual Communications to enhance the connection with their sales force, business partners, and customers.

**Ask yourself:** Could we use Visual Communications to enhance communications internally and externally?

### Purely Business 2.0 Tools

#### Wiki

A Wiki is a collaborative web page or collection of web pages designed to enable anyone to create a quick web page that allows visitors to search the Wiki's content and edit the content in real time, as well as view updates since their last visit. Wikis are often used to create collaborative Web sites and to power community websites. On a moderated Wiki, Wiki owners review comments before additions to the main body of the topic. Additional features include calendar sharing, live AV conferencing, RSS feeds, and more.



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## Guest Article

**Ask yourself:** Could we use Wikis to enhance internal and external collaboration?

### LinkedIn

LinkedIn is a business-oriented professional networking website for exchanging information, ideas, and opportunities. There are over 35 million registered users spanning 170 industries actively networking with each other. For example, large insurance companies use LinkedIn to foster networking with their independent sales representatives. HR professionals from all over the world could use LinkedIn to share best practices

**Ask Yourself:** Could we use LinkedIn to expand our organizational network for enhanced knowledge sharing?

### Cloud Computing and Software as a Service

In Cloud Computing, some or all of the storage, software, IT processes, and data center facilities you use can exist on your provider's server, which is maintained and cared for by your provider, giving you 24/7 access from any device anywhere. The cost of upgrading hardware and software, maintenance, and associated IT labor costs can be dramatically reduced or eliminated. Currently, the ideal organization would be any size company that's facing big investments in computing and communications infrastructure. For example, Amazon.com can give you an entire e-commerce back end. Software as a Service (SaaS) such as SalesForce.com has a CRM package, SciQuest has a spend management package, and Google, Microsoft and others have a suite of offerings.

**Ask yourself:** Could we use Cloud Computing & Software as a service to streamline our IT needs?

### Gain a New Competitive Advantage

By reframing the use of social networking technology, companies can increase communication, collabora-

tion, problem solving, and competitive advantage with little cost. Remember, many of these tools are free or nearly free, making them accessible to even the smallest of businesses. Therefore, the sooner you embrace Business 2.0 and put it to work for you, the faster you can penetrate new markets and win the lion's share of business. **B**

Daniel Burrus is CEO of Burrus Research and author of six books, including the highly acclaimed "Technotrends." Over the past two decades he has established a worldwide reputation for his exceptional record of accurately predicting the future of technological change and its direct impact on the business world. Dan monitors global advancements in technology driven trends to help clients better understand how technological, social and business forces are converging to create enormous, untapped opportunities. For more information, please visit: [www.burrus.com](http://www.burrus.com)



## WBC 72<sup>nd</sup> Annual Golf Outting

June 15, 2009

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## Guest Article

# Money and Time

## The Critical Issues in Construction Industry Bankruptcies

by *George J. Bachrach*

**N**o matter the financial size, type or complexity of a construction project, there are many interconnecting relationships among the owner, the general contractor, the subcontractors and suppliers. Other than the competent and correct performance of the work, the two most important issues for all of the parties are money and time, with the additional truism that time equals money. When one of the parties involved on a construction project files for bankruptcy, that disturbs the universe of the parties' relationships and may drastically affect the issues of money and time.

This article addresses the basic bankruptcy concepts and provides information for you to ask the questions necessary to protect your rights when a party involved in a construction project files for bankruptcy. While space is too limited to provide all of the possible answers to those questions, this article will assist you in recognizing the issues and knowing the questions to ask that will lead to the legal and practical answers that you need.

### Overview of Bankruptcy Law

On the date that an entity files its petition commencing its case in the bankruptcy court (the "Petition Date"), the entity becomes a "Debtor." Any person or entity that has a pre-petition claim against the Debtor (a right to payment or a right to a remedy for breach of performance arising on or before the Petition Date) is a "Creditor" of the Debtor.

If the Debtor has filed a chapter 11 reorganization bankruptcy case, it may operate its business, pay its post-petition obligations (obligations arising after the Petition Date), and file a Plan of Reorganization to address its pre-petition obligations to its Creditors. If the Debtor

has filed a chapter 7 liquidation bankruptcy case, a trustee will be appointed for the Debtor to take control of the Debtor's property, liquidate the Debtor's property, and distribute what is left of the Debtor's property (after the payment of the trustee's commissions, attorneys' fees, other administrative expenses and priority payments) to the Creditors. This article focuses on the money and time concepts in a Debtor's chapter 11 reorganization bankruptcy case.

The Bankruptcy Code addresses the concepts of money. It defines the property of the Debtor's estate, which reaches just about everything you can imagine, including the Debtor's cash on hand, its contractual rights, its rights to receive the contract funds, its inventory, materials, equipment, and books and records, among other things. The chapter 11 Debtor may use its property in its ordinary course of business, although its cash (such as the contract funds) may be controlled by the terms of a bankruptcy court order to protect those parties who claim an interest in the contract funds (secured lenders, entities with trust fund and other statutory rights, entities with subrogation rights, etc.). Essentially, the Debtor faces two money issues on a construction project: (a) how is it going to get paid; and (b) who does it have to pay. Not surprisingly, the non-debtor parties on a construction project have the same concerns and issues in their relationships with the Debtor.

The Bankruptcy Code also addresses the concepts of time. In a nutshell, the automatic stay, which arises as of the Petition Date, prevents a Creditor from doing what it really wants to do against the Debtor and the Debtor's property. This includes any collection efforts, the creation and enforcement of lien rights (UCC, judgment, mechanics' lien, etc.), the termination of contract rights, and the use of set-off rights. A Creditor must obtain relief from the automatic stay in the bankruptcy court, whether by modification or termination of the automatic stay, in order to take such actions against the Debtor and the Debtor's property.

Furthermore, the Debtor (with bankruptcy court approval, either by motion or under a confirmed Plan of Reorganization) is the only party authorized to

assume, assume and assign, or reject any of its contracts. If the Debtor assumes a contract, it must cure any defaults and provide adequate assurance of its future performance under the contract. The bankruptcy filing may allow the Debtor to extend the time to make its decision for a period of months, if not longer. This means that only the Debtor may decide whether it wants to continue to perform under its general or prime contract, its subcontract or its purchase order; and a Creditor in the construction industry chain of relationships may not unilaterally terminate such a contract without a bankruptcy court order.

In addition to addressing the issues of time and money, the bankruptcy filing provides Creditors with the ability to obtain information from the Debtor. The Debtor must file schedules of its property (real and personal), liabilities to its Creditors (secured, unsecured and priority) and existing contracts, and a statement of its financial affairs. There is a meeting between the Debtor and its Creditors where questions may be asked of the Debtor, and the Debtor's deposition may be taken. However, that does not prevent a Creditor or its counsel from picking up the telephone and obtaining useful information directly from the Debtor and its counsel, who are usually cooperative at the beginning of the Debtor's bankruptcy case in order to try to work with the Creditors that the Debtor needs for its future success.

This article addresses the issues of a Debtor's bankruptcy case starting with the perspective of a Supplier Debtor, then a Subcontractor Debtor, then a General Contractor Debtor and, finally, an Owner Debtor.

### The Supplier Debtor

Whether the Supplier Debtor is a supplier to a subcontractor or to a general contractor, it wants to get paid for its continuing performance of its purchase order or agreement to supply services, material, etc. The issue of whom a Supplier Debtor has to pay is irrelevant, except for the fact that a Supplier Debtor's inability to pay may result in delay to the construction project due to its inability to supply, as the Supplier Debtor's sources are not part of a normal construction industry financial chain of relationships.



However, what is critical to a Creditor is the ability of the Supplier Debtor to deliver on time what the Creditor has ordered. Shelf or in-stock items may be one thing. However, specially manufactured items require lead times and may be identifiable to a specific construction project. A Creditor may have to go to bankruptcy court to obtain delivery of the specially manufactured items from the Supplier Debtor, assuming they have been created, and be prepared to pay for them immediately even if the Creditor has not received payment from the next higher tier. At this point, the Supplier Debtor or its lender may want the money and not the specially manufactured items that can't be resold, and they may, therefore, cooperate. The bigger problem may be that the purchase order has been executed for the specially manufactured items, the items have not yet been manufactured, and there are issues about whether the Supplier Debtor can perform in the future to supply the items. The questions to be answered are whether the Creditor can have the purchase order rejected in time to obtain the items elsewhere and/or whether the Supplier Debtor can provide sufficient adequate assurance that it can perform in the future and provide the items.

### The Subcontractor Debtor

The Subcontractor Debtor bankruptcy case gets materially more complicated because the Subcontractor Debtor has relations both above it (the general contractor) and below it (sub-subcontractors and suppliers). The Subcontractor Debtor is very concerned about whether and how it will be paid by the general contractor because the general contractor may allege defenses to payment, including contract, common law (set-off) and statutory defenses to payment as a result of the Subcontractor Debtor's alleged failure to perform and/or pay its own subcontractors and suppliers. The Subcontractor Debtor's ability to perform may be dependent upon its ability to get paid promptly, its ability to assert its contractual and statutory (trust fund, prompt payment, etc.) rights against the general contractor, and, if relevant, its mechanics' lien rights against the owner.

On the other side of the equation, the Subcontractor Debtor's sub-subcontractors and suppliers are having the same concerns about receiving payment from the Subcontractor Debtor and may or may not have the obligation to perform as a result of nonpayment.

The final Subcontractor Debtor money issue concerns its ability to continue operating by paying its overhead and other general and administrative expenses. Generally, a bankruptcy court will understand the need for those non-project

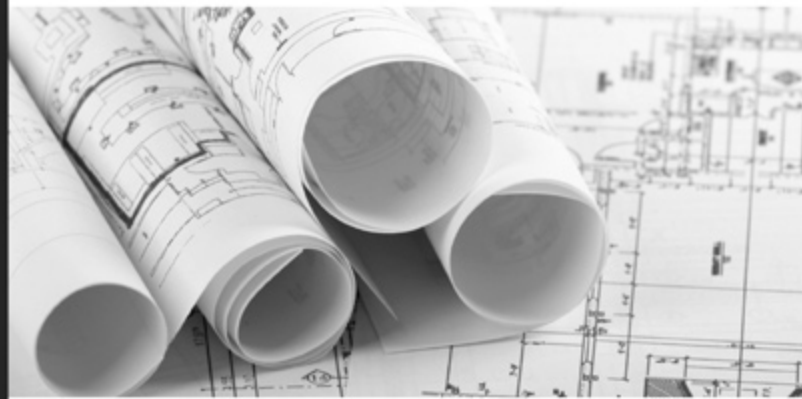
related payments, but the Subcontractor Debtor's lender will want control over the timing of the payment and the amount of those expenditures.

The money issues, and the potential delays that may ensue, will affect the Subcontractor Debtor's time issues related to its performance. While the automatic stay will prevent Creditors from either collecting their pre-petition obligations or terminating the subcontracts, that fact does not mean that the Creditors will move quickly to assist a struggling

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## Guest Article

Subcontractor Debtor. Furthermore, while the Subcontractor Debtor has “control” over the assumption, assignment, or rejection of its subcontract with the general contractor (and, if the subcontract is assumed, the obligation to cure defaults and provide adequate assurance of future performance), that may not prevent, rightfully or wrongfully, the general contractor from attempting to exercise its rights under the subcontract (such as supplementing the Subcontractor Debtor’s work forces and/or purchasing materials and deleting the costs, and profit, from the subcontract price). Notwithstanding the Subcontractor Debtor’s bankruptcy, the construction project itself will continue to move forward with the general contractor and its other subcontractors; and the Subcontractor Debtor may find its money and its ability to perform evaporate very quickly.

### The General Contractor Debtor

Because of the general contractor’s relationships with those above it (the owner) and those below it (subcontractors and suppliers), the General Contractor Debtor model is very similar to the Subcontractor Debtor model. The General Contractor Debtor is concerned about whether and how it is going to get paid, the owner’s alleged defenses to payment (contract, statutory and set-off), and who it has to pay, including payments for its overhead and general and administrative expenses. Furthermore, the automatic stay will prevent the collection of the Creditor’s pre-petition debts and the termination of the general contract, subcontracts and purchase orders; and the General Contractor Debtor has some control over the assumption, assignment or rejection of its contracts (assuming that it can cure all defaults and provide adequate assurance of future performance).

The real difference between the General Contractor Debtor and the Subcontractor Debtor bankruptcy cases, however, is that the entire construction project is affected by a General Contractor Debtor bankruptcy case, but only as to the Subcontractor Debtor’s specific work when a subcontractor becomes a Debtor. The owner is unable to easily get rid of the General Contractor Debtor because of the Bankruptcy Code protections, and the subcontractors and suppliers may be

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concerned that the owner's payments to a performing General Contractor Debtor may not reach their level.

### The Owner Debtor

An Owner Debtor bankruptcy also raises money and time issues. With respect to the money issues, a private Owner Debtor must be concerned about how it will obtain the funding to complete the construction project as its lender may consider the Owner Debtor in default under the lending agreements. There are ramifications to everyone in the event that the Owner Debtor is not able to completely fund the construction project and pay the general contractor for its performance of the work. If the Owner Debtor wants to proceed with the construction contract, it may have to assume the construction contract and pay the general contractor (and, indirectly, its subcontractors and suppliers) for both the pre-petition and post-petition obligations. In order for an Owner Debtor to assume a construction contract, it must cure any defaults in payment to the general contractor and must provide the general contractor with adequate assurance of future performance (payment to the general contractor for the work performed in the future). The general contractor may seek to establish a mechanics' lien against the Owner Debtor's property, but this right is extremely complicated when the Owner Debtor files a bankruptcy case. Obviously, the money issues will affect the time issues and delay the construction project going forward.

### The Surety Bonds Factor

When a surety's performance and payment bonds are in effect for the construction project, whether the project is a private project or a public project and whether the surety's performance bonds are for the general contractor principal or the subcontractor principal, the payment bond will be available to pay the claims of the principal's relevant subcontractors and suppliers. The surety's performance bond, however, may have certain conditions precedent, such as a default and/or termination of the general contractor or subcontractor; and these events may not occur as a result of the automatic stay and/or the ability and desire of the general contrac-

tor or the subcontractor to assume the relevant contract. The surety's obligation to perform under the performance bond may not be triggered if the performance bond conditions are not met, and they may be delayed because of the Debtor's rights under the Bankruptcy Code.

### Preferences - Giving the Money Back

A Creditor that has received a payment from the Debtor within 90 days prior to the filing of the Debtor's bankruptcy case may face a claim by the Debtor or its trustee for receiving a preferential payment. Therefore, a general contractor's payment to its subcontractors and suppliers or a subcontractor's payment to its sub-subcontractors and suppliers, or even an owner's payment to the general contractor, may all be preferential and subject to repayment by the receiving party to the respective Debtor's estate. While there are various defenses to a preference action (payments in the ordinary course of business, new value and new consideration provided after the payment and/or contemporaneous exchange for new value), preference litigation is risky, factually detailed, time consuming and expensive. Do not ignore a letter demanding the return of the Debtor's property as a result of an alleged preference, and defend any complaint that is brought using the applicable Bankruptcy Code defenses, if they are available.

### Should Your Company File for Bankruptcy?

While all of the discussion above is from the vantage point of one entity dealing with a separate entity that becomes a Debtor, everyone in the construction industry chain may face the prospect of filing its own bankruptcy case if the circumstances seem to warrant such action. The first question is "what are your goals" in filing a petition and becoming a Debtor? That question is immediately followed by the question of whether your goals can be accomplished outside of a bankruptcy case rather than inside a bankruptcy case.

The construction industry is very complex and requires a great deal of expertise in understanding the critical nature and importance of money, time and keeping a construction project moving, even during difficult times. The auto-

matic stay that assists many other debtors to obtain the time and "breathing space" necessary to reorganize their business operations may just suffocate a Debtor active in the construction industry. The number of General Contractor Debtor and Subcontractor Debtor successful bankruptcy cases is minimal because general contractors and subcontractors work on such small profit margins that one or more major blips in their construction work program, payments received, payments made and the respective delays that may occur may cause serious damage to their potential for survival. Owner Debtor bankruptcies have a better chance of success, but only if the lender (or a substitute lender) is willing to stick around (or get involved) to obtain a completed project that can be sold to someone else rather than being stuck with an unfinished project.

### Summary

While construction industry bankruptcy cases raise many issues and questions, the legal and practical answers are not out of reach. They take some time, patience and guidance to get to in order to resolve the problems. Every party on a construction project should understand and assert its rights when another party on the construction project files for bankruptcy. **B**



George Bachrach


George J. Bachrach is a partner in the Baltimore office of Whiteford, Taylor & Preston, LLP, a law firm with offices throughout the Mid-Atlantic Region. He has represented construction and surety companies for 35 years in difficult times and circumstances, including many related bankruptcy proceedings. Mr. Bachrach is a former Chair of the ABA/TIPS Fidelity and Surety Law Committee (2001 to 2002). He is a frequent author, editor and speaker on construction and surety issues. A list of his publications and presentations may be found at <http://www.wtplaw.com/attorney.cfm?id=109>.

## Member Projects

By August 2009, Arlington County will welcome a new addition to its increasingly sustainable community. **The Donohoe Companies, Inc.** will introduce the **Residence Inn by Marriott Arlington Courthouse**, located at 1401 North Adams Street at the west end of Courthouse Plaza. Through design, location, construction, and property management, The Donohoe Companies is incorporating numerous green elements and innovative technologies into the project. Adjacent to the Courthouse Metro, the public plaza will include outdoor seating, a sculpted fountain, and water efficient landscaping which captures 100% storm water on-site to reuse for irrigation. Donohoe Construction is using low-emitting building materials and recycling all potentially recyclable construction waste. The all-suite hotel will feature low-flow plumbing fixtures which will result in an approximately 500,000 gallon reduction in water usage, Green Label carpeting, energy efficient lighting and appliances, programmable occupancy sensor thermostats, and a 6,000 square-foot vegetated green roof. Once complete, Donohoe Hospitality Services management will support a recycling program for both guests and employees, use environmentally sound products for everyday operation, and will employ a linen reuse program to further reduce water usage in the hotel. The transit oriented development will also encourage alternative transportation while offering bike racks, changing rooms, and an information kiosk.

Residence Inn Arlington Courthouse is a leader in environmental design and will meet the requirements for LEED certification under Arlington County's environmental planning program.

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# WBC Calendar & Advertising Information

## Events Calendar

### June

- **June 10**, 6:00 – 8:00 a.m.  
Community Service–Miriam’s Kitchen
- **June 15**, 8:00 a.m. – 5:00 p.m.  
Summer Golf Outing, Landsdowne and Belmont Golf Clubs
- **June 24**, 4:00 – 6:00 p.m.  
Board of Directors Meeting

### July/August

- **July 8**, 6:00 – 8:00 a.m.  
Community Service–Miriam’s Kitchen
- **July 9**, 4:00 – 6:00 p.m.  
Board of Directors Meeting (WBC office)
- **August 12**, 6:00 – 8:00 a.m.  
Community Service–Miriam’s Kitchen
- **August 20**, 5:30 – 7:30 p.m.  
Summer Networking

### September

- **September 9**, 6:00 – 8:00 a.m.  
Community Service–Miriam’s Kitchen
- **September 16**, 4:00 – 8:00 p.m.  
Board of Directors Meeting and Dinner

## 2009 Editorial Calendar

The **Bulletin** covers issues of importance to the building industry, news about WBC members and information about upcoming events. The topics listed below will be covered as feature articles in upcoming issues of the **Bulletin**. Persons interested in contributing information or advertising should contact WBC before the third week of the month preceding the issue. To place an ad, submit material or for more information call **(202) 293-5922**.

**January**  
Green Roofs

**February**  
Government Sales

**March**  
Economic Stimulus

**April**  
53rd Annual  
Craftsmanship Awards

**May/June**  
Federal Contracting  
and Marketing

**July/August**  
Community Services

**September**  
Client Relationship Building

**October**  
Current State of Green  
Building

**November**  
B.I.M. and Design-Build

**December/January**  
TBD

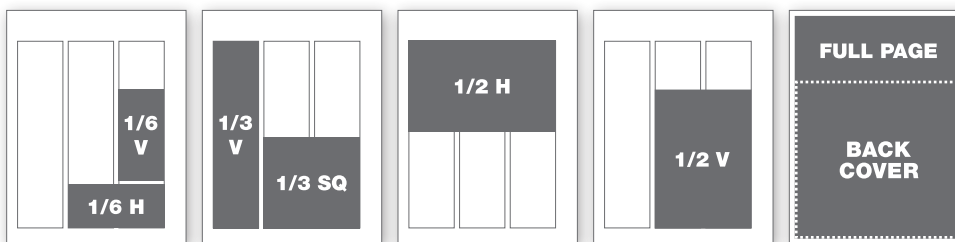
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