

Bulletin

The Official Publication of the Washington Building Congress | **May/June 2010**

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May/June 2010

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.

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Chairman's Letter

Dear Members and Colleagues:



The Washington Building Congress will be offering an exciting series of programs and activities over the summer months. The highlights of the season will be the June 14 Summer Golf Outing and the late August Summer Networking organized by the Hammerheads Committee for all members. This edition of the *Bulletin* features several informative articles from WBC member law firms. Following this issue, we will be adding a monthly *Legal Corner* to continue focusing on current and emerging industry issues. Please keep in mind that all members are encouraged to submit articles and information to be published in the *Bulletin*.

The Community Services Committee took on another very rewarding Rebuilding Together project in April. With the help of numerous volunteers, in-kind contributors and financial supporters, a very worthy homeowner in Falls Church is now enjoying a dramatically improved standard of living. Please 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 Tom-bros (Vango), Vice-Chair Winona Leaman (Greenman-Pedersen), and Board liaison Steve Smithgall (Balfour Beatty Construction). Special recognition also goes to House Captain Tim Bakos (Lessard Group) for his exceptional dedication and professionalism!

The Membership Services Committee hosted the Spring Networking event in May at Cactus Cantina on Wisconsin Avenue in the District. Over 100 members and guests attended this outstanding event featuring great food in a festive atmosphere. Thank you to the Membership Services Committee, Chair Scott Mucci (Forrester Construction), Vice-Chair Brett Snyder (P&P Contractors) and Board liaison Karen Roberts (Forrester Construction) for all you do for our association and industry.

The Hammerheads and Marketing & Communication Committees collaborated on the excellent Social Media Seminar also held in May. Panelists discussed the basics of social networking and provided attendees hands on advice on how to get started in this fast growing realm of business and professional development. The seminar was held at the U.S. Green Building Council headquarters and attendees were treated to a tour of the LEED Platinum office following the program. The committees are now planning a follow up social media seminar for later this year. Thank you to the Hammerheads Committee, Chair Lisa Walker (BE&K Building Group) and Vice-Chair Mike Baruccheri (Tishman Construction Corporation), along with the Marketing & Communications Committee and Co-Chairs Louise Boulton Lear (Davis Construction) and Katie Garrett (David M. Schwarz Architects). What an outstanding collaborative effort!

The 73rd annual WBC Summer Golf Outing was held Monday, June 14 at *Lansdowne* and *Belmont* golf clubs in Northern Virginia. The WBC golf outing provides a great way to showcase your business, entertain clients and reward employees. Thank you to the 2010 Golf Outing Committee, Co-Chairs George Domurot (Clark Construction Group) and John Hardy (Capital Lighting & Supply), along with Board liaison John Barron (Foulger-Pratt Contracting), for making sure this important WBC event is a success.

I look forward to seeing you at an upcoming WBC program or event. Thank you for your active participation and ongoing support of our great association!

Best regards,

Jonathan Kurtis
WBC Chairman of the Board

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Industry Report

Promotions at DAVIS

WBC member James G. Davis Construction Corporation (DAVIS) kicked off the first quarter of 2010 with promotions and additions. The 27 promotions fall across the board within DAVIS' key market and strategy groups and include leadership changes. In the Interiors Group, Kevin Clark was promoted to director-government interiors, alongside Ben Cohen, LEED AP, now director-corporate interiors, and Brandy Masse, LEED AP, now director-law firms & professional services. TJ Sterba was promoted to senior project Manager, and is joined by Kady Hillman, Joanna Shopf, LEED AP, Karen McKinney, LEED AP, and Saul Roberts, LEED AP, who were promoted to project manager. John Bornholdt, LEED AP, was promoted to preconstruction manager-interiors.

A recent addition to the Law Firm & Professional Services Group is Project Manager David Doherty. He joins DAVIS with over seven years of critical high-end, fast track and complex interiors project experience, and has helped deliver over 1 million square feet of space. David previously held a position within ABC's Legislative Committee, and is an active community service volunteer.

In the Commercial Office & Renovation Group, Pranav Pandya has been promoted to vice president, and Paul Athanas is now director-building renovation. Both Ted Holt and Ron Juban were promoted to director-building construction and Julie Kirkwood joins them as senior project manager.



Fulya Kocak

Within DAVIS' recently formalized Integrated Construction Group, **Fulya Kocak**, LEED AP was promoted to sustainability director, and is joined within the group by Todd Povell as virtual construction manager. Fulya Kocak joined DAVIS in 2003, and has delivered over 1.5 million square feet of LEED certified space. Her graduate studies focused heavily on whole

building design and the integration of disciplines and building systems to achieve high performance buildings. She advises clients regarding the feasibility of LEED credits, and also works closely with her project teams to not only achieve the LEED certification goals, but to push for a better understanding of what the contractor can do beyond the certification process. Kocak is a member of USGBC National Capital Chapter and serves in the DCRA Green Technical Advisor Group. She holds both a Masters in Architecture and a Masters in Architectural Engineering with a concentration in Construction Management, from The Pennsylvania State University.



Dominic Argentieri

leadership, the Planning & Strategies Group provides internal and external support in developing and defining strategies for project success, and acts as a facilitator in implementing those "strategic" plans. His team looks to communicate effectively with the entire project team and seamlessly lead the collaborative efforts towards facilitating solutions. Argentieri joined DAVIS after graduating from The Pennsylvania State University with a Bachelors in Architectural Engineering, and has delivered over 2.6 million square feet of complex base building, secure, educational and headquarters space.



Jonathan Dougherty

manages corporate education, professional development, and knowledge

Within the Planning & Strategies Group, **Dominic Argentieri**, LEED AP was promoted to director-construction planning & strategies. Under Argentieri's

Jonathan U. Dougherty, PhD was recently appointed to the USGBC's Education Development & Training Committee. Since joining DAVIS in 2006, Dougherty

management initiatives within DAVIS. He also serves as an adjunct professor in the Department of Building Construction at Virginia Tech, Blacksburg, VA and is the 2010 Chairperson for AGC of DC's Young Constructors Forum. Dougherty's background in architectural engineering and corporate education, coupled with his enthusiasm for lifelong learning, are valuable assets to the Education Development & Training Committee. According to the USGBC website, "The Committee's work supports the strategic goals of USGBC to a broad and diverse audience of building industry stakeholders to support and foster a culture of lifelong learning."

Other DAVIS promotions include:

- **Chanel Levy** is now project development manager within the Project Development Group.
- **Jonathan Dougherty** was promoted to corporate knowledge center director within the corporate resources Group.
- In the Residential group, **Roy Rafter** is now director-residential construction.

Heiber Named SIGAL President



Gerard Heiber

WBC member SIGAL Construction Corporation has named **Gerard Heiber** as President overseeing all corporate operations. SIGAL Founder **Gerry Sigal** remains on

board as Chairman.

Gerard Heiber has been with SIGAL for more than 25 years starting as an assistant project manager. Throughout his tenure, Heiber has undertaken roles to spearhead key initiatives as part of SIGAL's commitment towards serving as an industry leader. Most recently and as senior vice president, Heiber had been responsible for overseeing all of SIGAL's base building projects, including the award-winning projects of Wilson Aquatic Center for

DCOPEFM and The Jefferson Hotel for Ogden Cap Properties. Other notable projects include 1331 L Street, NW (recently purchased by CoStar), One Metro Center, Kettler Capitals Iceplex, the Tower Building at Tower Oaks, Turkish Embassy, and others.

At one time, Heiber also served as COO for SIGAL Environmental, a former subsidiary of SIGAL. In this role, he focused on creating and implementing sustainable building practices into construction. Heiber also served on the committee that spearheaded the LEED® green building rating system and was part of the team that developed the original specifications now known as LEED®. Heiber has achieved and maintains his LEED® AP accreditation.

Over the years, Gerard has been tapped to lend his expertise on industry trends and standards, including speaking engagements for Green Building Alliance, USGBC, Washington Building Congress, US Energy Association, and CREW. Gerard has pursued an Engineering Administration degree with a major in Construction Management from George Washington University; a Master of Landscape Architecture with a major in Planning from the State University of New York at Syracuse; and, a Bachelor of Science from Boston University.

Robinson Named VP of Human Resources at Donohoe

The Donohoe Companies, Inc., a WBC member, has named **Deirdre K. Robinson**, vice president of human resources. Robinson has been employed with Donohoe since 1992. Robinson will oversee all human resource plans and programs at The Donohoe Companies, including Donohoe Hospitality Services and its hotel portfolio, Donohoe Construction Company, Donohoe Real Estate Services, Donohoe Development Company and Complete Building Services. Robinson holds a Bachelor of Arts from Vassar College and a Masters Business Administration from George Mason University. She is certified as a Senior Professional in Human

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New Hires at SIGAL



Andrea Fitch

SIGAL Construction Corporation has hired **Andrea Fitch** as its director of business development overseeing all aspects of business development, as well as marketing and brand efforts. Fitch has been involved in the commercial real estate industry for more than 18 years. Her education and professional training as an architectural engineer eased a transition to focus on marketing and business development for architectural and construction management services with a niche on brand development and client engagement.

Prior to joining SIGAL, Fitch was president and founder of RedCarpet Creations, an award-winning firm that created unique branding solutions for its clients. During her tenure as director of marketing for a nationally recognized, multi-million dollar construction company, Fitch cofounded their award-winning marketing team and received an unprecedented 21 marketing industry awards. Fitch's commitment extends to serving her industry peers and has garnered her being named one of SMPS Washington, DC Chapter's "Golden Tuba" recipients for personal and professional achievement.

Currently, Fitch is on the Golf Outing Committee for Capital Chapter of IFMA and is soon to be seated as a committee member for DCBIA's Membership Committee. She's also a member of NAIOP. She is a National Past President of SMPS and helmed efforts alongside Executive Director Ron Worth to author its 2020 Strategic Plan. Fitch has served on the JDRF Capitol Chapter Board of Directors and its Real Estate Games Committee. She was also SMPS Foundation President

and Committee Chair of the SMPS Marketing Communications Awards Program for which SMPS was honored with an ASAE Gold Circle Award. She's been a source for The Washington Post, Yahoo!, SkyRadio, Engineering News-Record, and ZweigWhite, and has contributed to LegalTimes and SMPS Marketer.



Sarah Dreyer

Sarah Dreyer was hired as marketing/business development associate working in compliment with Director of Business Development, Andrea Fitch. Dreyer has five years of experience in the commercial real estate industry. Prior to joining SIGAL, Dreyer was director of business development and marketing manager for an international, award-winning architectural and interior design firm. She was also proposal manager for L3 Communications. Dreyer's commitment to the CRE industry includes serving on several committees and industry boards. Currently, Dreyer is Communications Chair for NAIOP MD/DC Real Estate Emerging Leaders Board. She is also serving on the following committees: CREW DC's CEO Series and JDRF Capitol Chapter's Real Estate Games. Dreyer remains active in DCBIA, ULI, GWCAR, NAIOP NoVA. At the present, Dreyer is pursuing her Master of Business Administration with George Mason University and holds a Bachelor of Arts in English from The George Washington University.

Eight Promotions at SIGAL

SIGAL Construction Corporation has elevated eight members of its construction management teams in addition to naming Senior Vice President Gerard Heiber as President overseeing all corporate operations. SIGAL Founder Gerry Sigal remains on board as Chairman.



Michael Shevitz

Michael Shevitz was promoted to vice president. Shevitz joined SIGAL in 1996 and has served as one of its senior project managers overseeing key base building projects, including the award-winning Reagan National Airport Parking Garage expansion, Kettler Capitals Iceplex, and 1331 L Street, NW. He has a Bachelor of Science in Civil Engineering from University of Maryland and a Master of Business Administration from The George Washington University.



Roy Jach

Roy Jach was promoted to senior project manager. Jach joined SIGAL in 2000 and has served as a project manager for several notable projects, including the award-winning Reagan National Airport Parking Garage expansion, the Shirlington Library and Tower Building at Tower Oaks. Jach holds a Bachelor of Science in Civil Engineering and Construction Management and has professional registration with EIT in Maryland. He is also a member of the American Society of Civil Engineers.



Dan Waldo

Dan Waldo was promoted to project manager. Joining SIGAL in 2007, Waldo served as assistant project manager on key projects, including the award-winning Savoy Elementary School for DCOPEFM and multiple tenant build-outs for Vornado/Charles E. Smith. He is currently on the team for the historic renovation of Petworth Library in the District's Ward 4. Waldo holds a Bachelor of Arts in Communications from University of Maryland.



Shawn Roberts-Malry

Shawn Roberts-Malry promoted to project assistant. Roberts-Malry joined SIGAL in 1998 as administrative assistant. Over the years, her responsibilities have elevated to serving

on project teams for the MPD conversion/build-out at Bowen Elementary School, the historic renovation of Rose Hardy Elementary School, and numerous renovations/build-outs for The George Washington University.



Mike Hickman

Mike Hickman

was promoted to senior superintendent. Hickman has more than 30 years of experience in the construction industry. Since joining SIGAL in 2001, Hickman has

overseen field operations on key projects such as the award-winning renovation/addition of Savoy Elementary School, construction of Patterson Elementary School, and construction of the Mortgage Bankers Association building at 1331 K Street, NW.



Kevin Nenno

Kevin Nenno

was promoted to senior superintendent. Nenno has been with SIGAL since 1987 and has over 23 years of experience. His notable projects include the award

winning renovation of The Jefferson Hotel, construction of the One Metro Center complex with an addition of a six-floor office building above an existing retail anchor, and construction of the Kettler Capitals Iceplex. Nenno was also involved in EPA's build out in the Ronald Reagan building as well as projects for several major law firms, including Patton Boggs LLP, Mayer Brown LLP, Paul Hastings, and Foley & Lardner LLP.

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Gordon Raines

Gordon Raines was promoted to senior superintendent. Raines has been with SIGAL for more than 24 years and has over 40 years of experience. His notable projects include the

award-winning addition/renovation of Four Seasons Hotel/Georgetown, occupied renovations and modernization of Harry S. Truman building, renovation/modernization of US GAO building, construction for NIMA, and renovation of The George Washington University's Monroe Hall.

Bryan Rey was promoted to senior superintendent. With more than 18 years of experience, 16 of which have been with SIGAL, Rey has worked on several high-profile projects, including the award-winning Reagan National Airport Parking Garage expansion, construction of Woodland Pointe, The Bowen Building modernization with historic preservation of its 1920s façade, and build-out of Morton's of Chicago in downtown Washington.

Soderman of Grunley Attains DBIA Designation

Greta M. Soderman, a senior project manager with WBC member Grunley Construction Company, Inc., has successfully completed the requirements for the nationally recognized Designated Design-Build Professional™ designation. The Design-Build Institute of America (DBIA) awarded designated status to Soderman after passing DBIA's formal examination. DBIA's designation program seeks to recognize industry professionals who demonstrate a practical level of knowledge and hands-on experience in design-build project delivery. Through the examination, DBIA establishes a uniform measure of proficiency that practitioners, owners and clients can use in selecting qualified design-build professionals.

Successful completion of the exam as well as three years substantial de-

sign-build work experience is required to earn the Designated Design-Build Professional™ designation. Additionally, candidates must meet DBIA's educational requirements, must have completed DBIA's three core courses along with 18 elective credits related directly to project delivery, and must submit three letters of reference. Those who complete these requirements earn the right to display "DBIA" after their names, identifying them to design-build end-users and the community at-large as experienced professionals in design-build project delivery. To maintain the designated status individuals agree to earn a minimum of 24 hours of continuing education credit every two years.

Councilor, Buchanan & Mitchell, P.C. Presents UPMIFA

Anthony A. Cuozzo, Jr., CPA, CGFM, senior vice president and director of not-for-profit services with WBC member Councilor, Buchanan & Mitchell, P.C. and Joseph Janela, chief operating officer of the National Association of School Psychologists, recently presented Understanding UPMIFA (the Uniform Prudent Management of Institutional Funds Act.) and Related Accounting and Disclosure Standards at the American Society of Association Executives 2010 Finance & Business Operations Symposium. Held at the L'Enfant Plaza Hotel, Washington, DC earlier this May, the program included various topics on finance, insurance, human resources, and technology.

Centennial Contractors Enterprises Receives Award

Naval Facilities Engineering Command (NAVFAC), Washington has honored NICCjv, a joint venture of WBC member Centennial Contractors Enterprises and North Island, with its Safety Excellence and Recognition of Outstanding Safety Performance Award. NICCjv is one of ten NAVFAC Washington award recipients. To select the awardees

the NAVFAC Washington safety team solicited feedback from the base commanders in the region and coupled that with their safety performance data.

Safety is the most important part of Centennial and its joint venture partners' culture. It promotes this "safety culture" through special luncheons and safety fairs for all employees and subcontractors, safety personnel, a safety Website and safety training, which is required within 30 days of hire for all staff.

NAVFAC used the following criteria to assess the winners:

- Zero DART incidents throughout the life of the contract.
- No significant government property damage for entire length of contract.
- No safety non-compliance notices or stop work orders.
- No findings identified during Occupational Safety and Health Administration (OSHA) compliance inspections.
- Minimum Overall Satisfactory performance evaluation, including quality.
- Cumulative Average score of 90% or better on contractor safety self-evaluation checklist where required by contract.

NICCjv performs renovation and repair projects for NAVFAC through a Job Order Contract at the Washington Navy Yard, Bethesda Naval Hospital, Patuxent NAS, MD, NSF Indian Head, MD, NSF Dahlgren, VA, Andrews AFB, USNA, and Marine Corps Base Quantico, VA.

Frost Miller Group Builds Digital Communities for Construction Clients

Facebook and Twitter users are building relationships with the Electrical Alliance, an organization that supports electricians and electrical contractors in the Washington, DC area. WBC member Frost Miller Group (twitter.com/frostmiller, facebook.com/frostmillergroup) helped the organization establish a presence online in order to connect more directly with its target audience.

The integrated marketing communications firm has launched several

social media campaigns for construction industry clients over the past year. Based on the social media network, FMG designs backgrounds and other images, populates it with content, and then provides ongoing support as needed by the client.

For the Electrical Alliance, FMG worked in phases, first redesigning several of the organization's Web sites and then adding a blog, video, and other content. Once the content was in place, it launched social media accounts on Twitter (twitter.com/DCElec_Alliance) and Facebook to share it. Social media has allowed the Alliance to connect with its audience as well as industry peers in green building, solar energy and building information modeling from around the world.

FMG uses social media as just one of many tools, integrating it into overall marketing communication plans. In addition to the Electrical Alliance, FMG has provided digital marketing services to other construction industry clients, including launching blogs and social media accounts for Centennial Contractors Enterprises and Seawright Homes.

Johnson Promoted at Frost Miller Group




Liz Johnson

Elizabeth Johnson's role has been expanded to reflect increasing role of content development in PR and marketing. Johnson has been named director of public relations and content

development at Frost Miller Group.

Johnson joined FMG in 2006 as a copywriter and in the past two years has also supported FMG's public relations department, helping to grow its client list and expand the services it offered. As director of the department, she will lead the integrated marketing communications firm's implementation of social media campaigns and continue to develop strategic public



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relations campaigns for a variety of clients.

Prior to joining FMG, Johnson worked in marketing for a trade association promoting publications, continuing education and events. FMG provides public relations, marketing strategy, branding and digital marketing services to both business-to-business and business-to-consumer clients in the association and tradeshow, construction and hospitality industries.

Tishman Construction Corporation Promotes Jeffrey Dodd



Jeffrey Dodd

Tishman Construction Corporation has promoted **Jeffrey Dodd**, senior vice president, to executive vice president and regional manager of Tishman Construction Corporation of

DC, it was announced by Daniel R. Tishman, Chairman and CEO. In his 30-plus-year career, including 25 years with WBC member Tishman, Dodd has advanced to progressively higher levels of leadership and responsibility. He joined Tishman Construction in 1984 as an assistant superintendent and worked on several high-profile projects in New York City, including the Four Seasons Hotel and the Rainbow Room renovation.

Dodd relocated to Tishman's DC office in January 1995. With this

recent promotion, he assumes responsibility for all construction, operations, administration and business development for the Mid-Atlantic region. Dodd is in charge of TCC-DC's general contracting, construction management, and other assignments in the metro DC area. He also serves as executive vice president of Tishman Technologies Corporation.

Dodd is overseeing for the U.S. General Services Administration (GSA) the construction of Phase 1 of the Department of Homeland Security's new headquarters campus on the St. Elizabeth's hospital grounds in Washington, DC; the GSA's \$1.4-billion building program for the Food & Drug Administration in White Oak, MD; and ongoing renovation and upgrade projects with the National Institutes of Health in Bethesda, MD.

Recently completed projects Dodd has overseen include the American Pharmacists Association's (APhA) new headquarters building on the National Mall. Dodd led Tishman's efforts as General Contractor throughout the pre-construction and construction phases. This \$90-million project consisted of the renovation of a 17,000 square-foot landmark structure, demolition of an existing non-historic annex, and construction of a new ten-story, 336,000 square-foot office building addition with underground parking. The project also included Tishman's interiors work for the two tenants in the building. Tishman completed one contract for the offices to be occupied by APhA and a second

Industry Report

contract of interiors for the GSA. The project won LEED® Gold certification from the USGBC in March. Other high-profile projects where Dodd served as Project Executive include St. Albans School's new Marriott Hall, One Noma Station and the Atlas Performing Arts Center

Dodd is a member of the District of Columbia Building Industry Association, the Construction Management Association of America, and 7 x 24 Exchange, as well as a former board member of the Washington Building Congress's Board of Governors. He earned his Bachelor of Science in Architecture degree from the New York Institute of Technology.

GPI / Greenman-Pedersen, Inc.'s Announces Staff Successes



Andre Nguyen

Andre Nguyen, LC of WBC member GPI / Greenman-Pedersen, Inc., recently passed the NC-QLP's Lighting Certification Examination. Nguyen is an

electrical designer whose engineering activities include design of lighting systems, power engineering and distribution and emergency power systems. Nguyen graduated from The George Washington University, School of Engineering and Applied Science with a Bachelor of Science Degree in Electrical Engineering. Nguyen is currently working on projects utilizing the Building Information Modeling tool, REVIT.



Lew Brode

Lew Brode, PE, LEED AP BD+C, Senior Vice President/Branch Manager of GPI's Rockville office, was named one of 2010 Consulting-Specifying Engineer's 40

Under 40 Winners. Lew was selected

as one of 40 most up-and-coming engineers nationwide under the age of 40. Lew leads his team emphasizing the importance of balancing responsiveness and flexibility with excellence in engineering design. In addition to promoting continuing education within his office, Lew is constantly seeking ways to share his knowledge by educating others in the industry. He teaches AIA Continuing Education and Architectural Exam Review courses and has recently presented at

NeoCon East and the NFMT National Convention.

Kinton Joins PSI

Greg Kinton, AIA, has accepted the position of facilities services department manager in WBC member PSI's Fairfax operations office. Kinton is a graduate of the University of Tennessee with a Bachelor of Architecture degree. **B**

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Industry Legal Issues

Ten Important Legal Issues for the Washington Area Building Industry

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Building Information Modeling: The Case for a Comprehensive BIM Agreement

by Jim Coleman

Jim Coleman is an attorney with Watt, Tieder, Hoffar & Fitzgerald, L.L.P. in its Tysons Corner Office. WTHF is a national construction law firm serving all aspects of the construction and real estate industry. Jim's practice focuses on construction litigation and construction contract administration. He represents owners, architects, contractors and sureties in large complex construction disputes, claims analysis and contract drafting. He is a graduate of the highly regarded Washington & Lee School of Law and holds an engineering degree from Virginia Tech. He also draws upon over a decade's experience as a project manager on public and private projects for major construction contractors in the Washington DC metro area and in Texas before becoming a construction attorney.

BIM's Promise

The emerging use of Building Information Modeling (BIM) in the both the design and construction of projects has been a hot topic in the building industry over the past several years. BIM's promise is an electronic model of the entire enterprise that is developed and used during design, further utilized and refined

through construction and continues to be both a resource and living document through the service life of the installation. The ideal BIM model would have the dimensions, location, cost, schedule information, and specifications of each building component. The federal government's General Services Administration is so taken with the technology's potential that its Public Building Service is "actively pursuing a policy" to use BIM on all major GSA projects. Comprehensive project modeling is a great leap forward in the way buildings and other installations are designed, built, and operated; however, like many new technologies it adds a few wrinkles to the legal landscape that owners, designers, and contractors should consider.

Ownership — An Unresolved Problem

An unresolved problem with BIM is the question of ownership and control of the two BIM models created for the typical BIM project. In BIM's current state of development, first the designers create a *design model* and then contractors develop a completely separate *construction model* using the design model as no more than a starting point. Creating the design model is a collaborative enterprise involving designers and consultants of various specialties. The various construction specialty contractors then collaborate to create the construction model refining and validating it against the design model. Each model is updated with changes in building requirements and as needed to resolve conflicts. The evolution of the models may continue once the building is in operation.

The consequence of their collaborative genesis is that models may be the products of perhaps dozens of separate entities,

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leading inevitably to the questions: Who owns the models, and who is liable for their errors? Existing copyright law would give each entity that contributes its original work to a model part ownership of the model. This diffuse ownership of the models is not inevitably a problem, but in construction litigation, undefined (or hard to determine) ownership of the model could be an expensive complication in the resolution of a dispute where the model plays a role.

Form Contracts Do Not Yet Provide the Answer

Lack of clarity of ownership and liability is not inevitable, but avoiding it requires the parties to make an agreement that clearly defines control and liability for the collaborative BIM databases. Without a clear agreement, the parties' rights and obligations will default to generalized copyright law probably combined with a form contract that is written assuming that there are conventional plans and specifications. The prominent form contract organizations have already recognized that their standard agreements did not adequately address electronic design documents. Consequently, most have published new forms and added terms regarding electronic designs, but none, so far, has adequately addressed the special challenges of BIM.

Form Contracts Can Actually Add to the Problem

BIM's unique attributes mean that some frequently seen owner-architect clauses could create peculiar consequences for an owner seeking to control and use a model for which the designer remains liable. As an example, EJCDC's standard owner-engineer agreement states that an owner can only rely upon "hard copies" of the design. Electronic versions are only "for convenience." Since a BIM model has no direct 'hard copy' analog, is the engineer of a failed model off the hook? Probably not, but that contract clause would not be of any help in resolving a liability dispute where the project model plays a prominent role.

This disclaimer of reliability of electronically provided documents is not unique to EJCDC. Architects frequently require contractors to sign an architect's disclaimer of liability when contractors request CAD files for contractors to use in the development of their shop drawings. A similar disclaimer of reliability in a BIM project would create a shaky foundation on which the contractor's team is to build its construction model.

Of all the form contracts, ConsensusDOCS is probably the most in tune with the modern reality that owners, contractors, and designers do, in fact, rely upon the accuracy of electronically transmitted information regardless of whether their form agreements reflect that reliance. ConsensusDocs allows a designation for each data file as from "accurate" to "reference only." In a similar vein, AIA's "BIM Protocol Exhibit" allows each element of the model to have a designated degree of reliability. These are compromise solutions that sidestep addressing the control and use of the model as a whole by dividing it up into its constituents. The approach is akin to marking the drawings and specifications for a

building with labels of "reliable," "somewhat reliable," and "not reliable."

These shortcomings do not mean that these forms are not useful. AIA and ConsensusDOCS are both struggling to address an emerging and evolving technology. Because of their limitations, these forms cannot be used with the fill-in-the-blanks approach that marks the use of many contracts forms. While any form contract is more effective when customized to the project, in the case of a BIM project, these contract forms are no more than jumping-off points for an agreement that fully addresses the development and use of BIM through the project's lifecycle.

A Detailed Agreement Regarding Use and Ownership of the Model is Advisable

There is a hazard in not directly addressing the question of ownership and liability for the models. Without a prior agreement, who is liable for a BIM model's flaws could be answered as "anyone" or "no one" on the team.

An apt analogy is to consider the designers and contractors as collaborating on a book. As the sections of the book become more collaborative over time, it becomes more and more difficult to separate ownership and liability each of these sections. A BIM design model is like the author/architect providing an introductory chapter followed by rough chapters that to a greater or lesser extent outline the completed work. Then the author/architect's co-authors/consultants further refine and develop each chapter. Next the entire work is given to a new team of author/contractors that writes a *separate* book (the construction model) that they intend to be true to the designers 'book.' Then every co-author in each group refines various parts of each work over time. Who then 'wrote' the completed books? Modern computer technology can identify the author of every word, every change, and every addition, but with so many collaborators, apportioning ownership and liability would be exceedingly difficult without the guidelines of a detailed prior agreement.

From an attorney's perspective, the ambiguity resulting from the lack of such a prior agreement is a recipe for protracted and complex litigation. This is not to say that BIM itself is a recipe for litigation. The technology allows and perhaps even forces a level of cooperation and coordination that can resolve many of the conflicts on a computer screen before they are set in concrete and lead to law suits. Increased cooperation and fewer conflicts can mean fewer disputes, better buildings and more profits. However, maximizing the opportunity to realize that goal would be helped by owners taking the lead and collaborating with their architects and contractors to carefully define both the BIM process and the ownership and control of the BIM models from the outset. In that way BIM's promises have a better chance of being realized and its liabilities mitigated.

Considerations for the Contractor When Dealing with an Unsophisticated Owner

by **Tamara M. McNulty, LEED AP, Esq.**



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tion contracts and assists clients in managing projects during construction from a legal perspective to help to avoid claims and disputes from the outset. Ms. McNulty is an experienced trial attorney, teaches advanced trial skills, and is listed in Chambers USA as a top construction attorney in the Washington DC metropolitan area. She is also on the Executive Committee of the WBC. Tamara can be contacted at 202 776 7859 or tmmcnulty@duanemorris.com.

As construction professionals we speak a different language from the rest of the world and we understand a unique process. We understand what it means when someone says "we need to update the CPM schedule." We know that masons are the people and masonry is the practice. We know what rebar is and what it is designed to do. Understanding this language and how construction projects are completed is *not* a universal skill. In fact, each of the examples given above come from real cases where I have had to explain these concepts to either an owner, a non-construction attorney or a judge.

In construction we are also often confronted with the situation where the parties we are dealing with simply don't speak the language and really don't know the process. This is particularly true when dealing with an owner who business is something other than construction, i.e., the unsophisticated owner. The unsophisticated owner's project is usually a one-off deal; for example, building a church, a school or the home office. There are special considerations for working on such projects.

Make sure the Owner understands his rights and obligations and the Contractor's right and obligations.

Too often the unsophisticated owner will make assumptions that the contractor is guaranteeing things that they are not. Educating your owner up front is paramount if the contractor wants a minimum of misunderstandings, problems and delays.

The contractor must make it clear that the owner understands that a contractor's job is to build from the design

documents as they exist, not to fill in missing details from the design. Owners are far more likely to balk at change order requests if they operate under this misapprehension.

The contractor is also not taking responsibility for unknown existing conditions. Thus, should the site be found to have such differing conditions, there will be a cost to the owner associated with the condition.

The need for prompt payment is another area in which education of the owner is important. Most construction contracts have a payment application process but necessity for that process is not explained. Contractors should make sure that the owner understands the impact on both the contractor and the subcontractors when payments are slow in coming, and how slow payment will impact the job itself.

Punchlist and warranty are two other areas ripe for owner misunderstanding. The owner must understand that the punchlist process must be thorough but not never-ending. Moreover, the contractor is not guaranteeing perfection of the work but rather that the work is complete to a reasonable standard. With regard to warranty, the owner must be informed that the warranties for equipment will come from the suppliers and not the contractor.

Insurance, and who is insuring what is another area for owner confusion. The contractor must educate the unsophisticated owner on the various types of insurance that the owner and the contractor each must or may provide. Additionally, the contractor must make clear that the insurance it provides does not insure against defects in the contractor's work.

Another area in which an owner may not understand its obligations is in the area of permits. It is the owner's obligation to obtain the permits and a failure to timely do so can have substantial impact on the progression of the work. The contractor must make it clear that there will be delays to the project if the owner doesn't promptly fulfill its obligation.

Process is important

The process outlined in the contract for how things are to occur is particularly important when dealing with an unsophisticated owner.

Change orders should be in writing. Unsophisticated owners may try to get change order work accomplished verbally. "We need to get this going, let's deal with the paperwork later." This is a recipe for disaster when it comes time to settle up. Keep in mind, under most contracts a contractor working without a signed written change order performs at his own risk. The handshake deal is never a good idea with an unsophisticated owner.

Schedule maintenance is also critical with an unsophisticated owner. If the owner has unrealistic expectations about completion or the contractor does not maintain updates keeping the owner apprised of the impact of changes on the schedule there can be major misunderstandings. Additionally, allowing the owner to miss its timing obligations (e.g., for owner-provided materials, RFI responses, etc.) will wreck long term havoc on the schedule.

The contract should clearly set forth who is the appropriate decision maker for the owner and the contractor. Not only should this be set out, but then both sides must adhere

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to this demarcation. All too often, unsophisticated owners have multiple persons wanting a “say” in the project. As the old saying goes, too many cooks spoil the broth. The contractor should resist the urge to be helpful and listen to all the cooks and should rather insist that the owner’s representative be the sole party with the right to give orders. Along the same vein, the contractor must resist the urge to go around the owner’s representative to those who may appear to be the higher authority (e.g., the pastor in a church project), but rather should respect the entirety of the process the parties put into place.

It does not serve the contractor and it does not facilitate a smooth relationship over time when the agreed processes are ignored.

Encourage the Owner to get professional help

As discussed above, there are many ways in which an unsophisticated owner may not be familiar with the parties

rights and responsibilities. One way to get your unsophisticated owner properly educated and properly carrying out its obligations and responsibilities is to encourage the owner to get its own professional help in the form of a construction manager, independent consultant or even a construction attorney.

As discussed, there are plenty of areas where the owner will need educating. Moreover, there are plenty of ways in which the unsophisticated owner may have unrealistic expectations of the contractor and for the project. Encouraging the owner to get independent help on the project not only saves the contractor from a lot of additional work, but the mere fact that you let your owner know you are not afraid of independent scrutiny will build trust and help solidify your working relationship.

Remember this may be an unsophisticated owner and a one-off project, but this is still a reflection of your work and a potential referral source to the next project.

Project Cost Management Best Practices for Minimizing Claims, Cost Overruns and Other Project Risks

by *William M. Kerns, CCIFP®*



William M. Kerns, CCIFP®, is a director and expert witness with The Duggan Rhodes Group, a boutique construction consulting firm based in Pittsburgh, PA, with US and international clients. With more than 25 years in the construction industry, Kerns specializes in the calculation of delay and disruption related damages, construction cost accounting systems consulting, financial reporting consulting on construction projects, and expert testimony.

Many construction professionals recognize that a competent project cost tracking process and system is essential to avoiding and reducing project risk. In this time of increasingly competitive bidding and razor thin profit margins, it is even more essential that your systems help in understanding how your project dollars are being spent. Moreover, it is just as important to define a process for timely recognition of cost overruns, so that recovery can be timely requested via change order or a claim if applicable. A few items for consideration when implementing a cost tracking and monitoring process follow.

1. Your Project Cost Accounting, Project Schedule and Project Records Should Tell the Same Story.

When trying to achieve maximum recovery of a change order or claim, it is essential that the costs incurred and the entitlement to recover such costs are well substantiated. This is best established by discretely demonstrating through the schedule, project documentation and project cost system how a contractor was impacted and the costs incurred as a result of the impact. This substantiation can be more readily provided when a systematic process for discretely tracking project progress and impacts is established and followed through the project documentation, the project schedule and the project cost tracking system. When such a process is established, the time and effort needed to substantiate a claim or request for equitable adjustment is significantly reduced.

A way to ensure consistency between the project cost accounting system and the project schedule is to establish project cost codes consistent with the schedule’s work breakdown structure (WBS). In the event of an impact to a schedule activity, the schedule may be used to demonstrate the effect of the impact relative to time. Similarly, establishing a cost code / WBS correlation may assist in demonstrating the additional costs incurred as a result of the impact to a discrete scope of work or activity within the schedule.

2. Project Costs Should Be Tracked Discretely.

As discussed in item 1, project costs associated with specific scopes of work should be tracked discretely. This process can assist with the timely identification and quantification of cost overruns or damages if a particular scope of work on a project is negatively impacted. However, project cost codes should not be so detailed as to impede accurate labor coding of activities in the field; simple, straight-forward cost coding in the field is critical to ensure accurate cost tracking. For example, instead of separate cost codes for forming, reinforcing and pouring of

concrete for a sidewalk, it may be more useful to set up one cost code to track “Sidewalk Installation” in total, as a system. If “Sidewalk Installation” is being performed in different areas or phases of a project, individual cost codes for each area or phase may be established to track the cost and quantities associated with the activity in each area separately. This type of cost tracking may prove to be beneficial if a scope of work in one area is adversely impacted but not in others. The resulting comparison of the impacted work to similar scopes of work in other areas can serve as a basis of comparison for a productivity or loss of efficiency analysis.

3. Segregate Costs for Out-of-Scope Changes.

Segregating out-of-scope changes from original contract work is just as essential as discretely tracking original contract costs. This can be accomplished by setting up a separate cost code prefix for change orders. For example, a cost code prefix outside the Construction Specification Institute’s MasterFormat divisions 1-49, such as 99, can be selected to track change orders, with the remaining digits tracking individual scope changes. Using this designation, costs associated with change order request 001 may be tracked to cost code 99-001. The benefits of discretely tracking change order costs include identifying *actual* costs of changed work and establishing the basis for substantiating the costs if requested by the owner under an audit clause, or in the event of a dispute. Segregation of costs also keeps the true cost of original scope items pristine because scope and out-of-scope costs are not co-mingled, an important concept in the event that a productivity analysis is required for an in-scope item. Furthermore, a proper change order cost monitoring process will help contractors monitor unrecovered change order costs and avoid a situation where unrecovered change orders erode cash flow on a project.

4. Track Productivity and Use It as the Basis to Project Estimated Total Cost.

By tracking and reporting installed quantities along with the related discrete project costs, contractors can readily track productivity and use it to project the estimated total cost for each labor-related cost code. The benefit is that your cost report can provide you with timely early warning of potential cost overruns, or claims, while you still have the time and budget remaining on the project to address, and hopefully deal with, the issue. Also, discretely tracking quantities and costs can provide a basis for demonstrating loss of productivity if a particular scope of work or area is impacted on the project.

5. Know and Understand the Contract Requirements for Requesting Additional Costs and Submitting Claims.

When a project cost tracking mechanism is implemented, the contract requirements for requesting additional costs associated with change orders and claims should be understood and considered. Contractors should consider reviewing the contract requirements and potentially adapting their cost management procedures to insure the most effective recovery of change order costs and claims within the context of contract requirements. Negotiating more favorable contract terms can also help better match a contractor’s cost tracking procedures to the contract requirements. Additionally, in understanding the terms of the contract, it is important to note different types of changes or claim requests (e.g., force majeure, design-related, owner-caused, etc.) may call for different requirements under the contract.

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Is Your Termination for Convenience Clause Really Convenient?

by Robert J. Dietz and Lauren McLaughlin



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Lauren McLaughlin is the co-founder and managing partner of BrigliaMcLaughlin, PLLC. She has been practicing construction law exclusively for over ten years and regularly represents contractors, subcontractors, sureties and design professionals in both private and public project disputes. She has been a speaker in the past at the Construction Superconference, Structural Engineers

Association of Texas, ASCE, and other industry organizations. She co-authors the legal column every month for *Civil Engineering*, the publication put out every month by American Society of Civil Engineers. Most of her clients have involvement in or are seeking involvement in stimulus act projects.

In uncertain economic times, a termination for convenience clause serves as a valuable tool for owners and contractors to reduce hardship when continuing with a project or contract will result in a significant financial loss. Originally developed for military procurements to end contracts abruptly once a war had ended, termination for convenience provisions are now frequently used in both public and private construction contracts. Standard AIA clauses permit the owner to terminate the contract at any time for “convenience and without cause.” In addition, parties often agree to provisions converting a wrongful default termination into one for convenience, also known as a “constructive” termination for convenience.

In private contracts, owners predominately terminate for convenience when markets or project financing change during performance. However, without additional protections, the terminated contractor receives no corresponding benefit, and may face significant financial losses if the owner terminates the project suddenly or in bad faith. The committed contractor must now quickly locate new opportunities for its equipment and work forces - not a simple task during recessionary times. In order to ameliorate this risk, some contracts, including the AIA201-2007, permit the terminated party to recover reasonable overhead and profit on the work not performed at the time of termination. In these instances, the terminated party suffers no real loss other than the burden of keeping its crews occupied while seeking further work.

However, can the terminating party invoke “convenience” as a means to cancel the contract for any reason whatsoever, even if the project continues on after termination? Last August, the Maryland Court of Appeals addressed this question in *Questar Builders, Inc. v. CB Flooring, Inc.*, 410 Md. 241, 978 A.2d 651 (2009). In *Questar Builders*, a contractor had retained a flooring subcontractor to install carpet throughout an upscale apartment and townhome community in Owings Mills, Maryland. The subcontract contained a termination for convenience clause as well as a provision converting any wrongful termination for cause into one for convenience. After the subcontract was executed, the designer altered the specified carpet, and the subcontractor subsequently submitted a change order request to increase the subcontract sum. In response, the contractor sought and obtained lower pricing from another flooring subcontractor and terminated the original subcontractor, alleging that the subcontractor had submitted the change order request in bad faith. The subcontractor then filed suit to recover its expected profit.

After the trial court found that the subcontractor had not breached and awarded it \$243,000 in lost profits, the contractor appealed. On its own initiative, the Maryland Court of Appeals took the appeal to consider the question of whether a party’s right to terminate for “convenience” equated to the right to terminate for any reason whatsoever. The Court’s historical review revealed that termination for convenience clauses began during the American Civil War to aid the military in avoiding costly procurements that were rendered unnecessary by changing technologies, cessation of conflicts, or mobile forces. The federal government continued to incorporate these clauses into procurement contracts throughout World War I and World War II, and into peace-time military contracts in the 1960s. In 1967, the Federal Procurement Regulation mandated termination for convenience clauses in most government fixed-price supply and construction contracts.

The Court recognized that private construction projects may face a similar need to halt operations when economic winds change and financing or markets dwindle. However, complex construction contracts are still bound by one of the most basic tenants of contract law: contracts must contain binding promises by both parties in order to avoid being illusory and, therefore, unenforceable. The Court found that, to avoid such a result in government contracts, the U.S. Court of Claims created two “tests” to limit the govern-

ment's ability to terminate for any reason whatsoever. Upon examination, the Court noted that either "test" granted the government substantial discretion in terminating for convenience. The Court found that a terminating party in a private contract should not enjoy the government's almost unlimited authority to terminate: "for political reasons, the federal government stands in a position entirely incomparable to that of a private person." Additionally, where a contract grants one party unilateral discretion to take an action, Maryland law implies a contractual obligation to exercise that discretion in good faith.

Therefore, the Court held that although the ability to terminate for convenience provides an effective risk-allocation tool, the terminating party cannot prevent the other party from receiving the fruits of the contract by attempting to leverage a better deal. The Court remanded the matter to the trial court to determine whether the terminating contractor had acted in good faith. By way of guidance, the Court noted that if the contractor terminated the contract in order to obtain a better deal, failed to take steps to ensure that its contractual relation-

ship with the subcontractor remained convenient, or terminated in order to avoid its contractual obligations, the trial court should find that the general contractor acted in bad faith.

In rendering its decision, the Court was attempting to strike a balance between the need for broad termination rights on large, long-term projects and the need for protecting a contractor's expectation that it has a binding, enforceable agreement. While not addressing the rights of parties to negotiate provisions converting a wrongful default termination into one for convenience, the Court implicitly rejected the viability of such provisions, as any party that wrongfully terminates will likely be found to have acted without good faith and will be liable for lost profits. In addition, the Court gives little guidance as to what constitutes terminating in "good faith," leaving the door open to interpretation as to what steps must be taken to ensure that a termination won't be subject to legal challenge. However, what *Questar Builders* does make certain is that while a termination for convenience can be employed as a shield to prevent financial disaster, a party that wields it as a sword does so at its own risk.

Organizational Conflicts of Interest: They're Not Just the Government's Problem

by Dennis C. Ehlers



Dennis Ehlers is a founding member of Asmar, Schor & McKenna, PLLC, and part of the firm's Government Contracts Practice Group, representing government contractors and commercial construction contractors in bid protests, disputes, claims, mediations, arbitrations, and litigation before state and Federal boards of contract appeals, AAA arbitration

panels, and various courts, as well as before the Government Accountability Office and Small Business Administration. Mr. Ehlers is also a retired Air Force Reserve contracts attorney (JAG). He received his J.D. degree (cum laude) from the University of Georgia ("UGA") School of Law, an M.B.A. degree from UGA's graduate business school, the Terry College of Business, and a B.A. degree (cum laude) in Biology from Southern College.

B L Harbert-Brasfield & Gorrie, JV, B-402229 (Comp. Gen. February 16, 2010) ("Harbert-Gorrie"), a recent Government Accountability Office ("GAO") bid protest case in which Asmar, Schor & McKenna, PLLC represented the successful protester, highlights the importance of, and the

continuing interest in, organizational conflicts of interest and provides valuable lessons to contractors performing or considering performing Government contracts.

An organizational conflict of interest ("OCI") arises when, "because of other activities or relationships with other persons, a person [or private entity/contractor] is unable or potentially unable to render impartial assistance or advice to the Government, or the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage." FAR 2.101 (emphasis added).¹ The objective is to prevent conflicting contractor roles that might bias its judgment or give it an unfair competitive advantage, thereby diminishing trust in the integrity and impartiality of the federal procurement system, a key element of the United States's system compared to those of other countries.

In *Harbert-Gorrie*, the design firm (AECOM Technology Corp.) assisted the U.S. Army Corps of Engineers in developing plans for a new state-of-the-art hospital at Fort Benning, Georgia by preparing the design concept and drafting the solicitation. Unbeknownst to the Corps, AECOM was also negotiating to acquire the design firm Ellerbe Becket ("EB"), which was a member of the eventual awardee's (Turner Construction Co., Inc.) team. In other words, had the Corps not found out about the AECOM-EB relationship, AECOM (which actually acquired EB) would have been allowed to evaluate and choose as the winning contractor the Turner team, which included EB. The Corps eventually learned of the conflict when the leader of the AECOM design team assisting the Corps finally told the Contracting Officer – a full year after he knew of the AECOM-EB discussions – that AECOM was in merger

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discussions with a subcontractor to one of the offerors. He refused, however, to identify EB as the subcontractor.

Had the Contracting Officer (“CO”) fully investigated the possibility of an OCI at the earliest planning stages (such as when it hired a design consultant, knowing that the winning contractor would also have a design consultant on its team) and throughout the procurement (especially when the offerors’ design consultant subcontractors were identified), and then taken immediate steps to mitigate the OCI(s), Turner might have retained the approximately \$340 million contract. Instead, the CO did essentially nothing except talk to the disclosing AECOM employee and accept his assurances that he was the only AECOM employee involved in the procurement with knowledge of the potential merger. A scant four weeks after award to Turner, AECOM announced its acquisition of Turner’s design partner EB.

Not surprisingly, our client and the other finalist in the competition promptly protested the award at the GAO. Turner’s position was, simply put, “no harm no foul”: there was no evidence of any favoritism towards EB, thus no prejudice to the disappointed offerors. The GAO disagreed, noting that even a potential OCI creating an appearance of impropriety is sufficient under the law for finding an impermissible OCI and that discussions that might lead to a merger or acquisition are enough to support a finding of an OCI. The GAO sustained both protests and recommended that Turner be eliminated from the competition and that the agency make a new award determination consistent with the solicitation. The GAO also awarded both protesters their costs of pursuing the protests, including attorneys’ fees. The Corps followed the GAO recommendation and terminated Turner’s contract. Turner has appealed the Corps’ actions. However, unless it prevails on appeal, Turner and its partners have lost a large contract and a significant investment of time and money.

Because of the Government’s increasing reliance on contractors to assist in developing and writing solicitations, specifications, and plans, and even evaluating the proposals submitted in response thereto, OCIs are arising more and more frequently. If not timely discovered and/or mitigated, an OCI can derail an entire procurement, as shown above. Early detection and mitigation are the keys to avoid losing a huge investment of time and effort by the Government, as well as contractors, that results when a contract cannot proceed as awarded.

In this competitive economic environment, Government work often seems attractive, and you may find yourselves pursuing such work as part of a teaming arrangement. The lessons for WBC contractors is that all parties to mergers, acquisitions, teaming and similar agreements – and not just the Government – have to be sensitive to possible OCIs and identify them as early as possible. Had Turner disclosed the OCI a year earlier when it first became interested in EB, and had the CO actually performed her duties under the Federal Acquisition Regulations, Turner (and its subcontractors) might still have this contract. You need to be aware of the potential for OCIs as a result of your company’s past, present, and even future relationships or those of other members of your team and bring them to the attention of the Government as soon as possible so they can be mitigated and you can stay in the race.

1. These organizational conflicts are to be distinguished from personal conflicts of interest, such as when an individual who is a member of a private contractor proposal evaluation team personally owns stock or sits on the board of an entity whose proposal he/she is evaluating.

Quarterly Reporting Requirements for Federal Stimulus Projects

by Jeffrey M. Hummel



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In February 2009, President Obama signed into law the American Recovery and Reinvestment Act of 2009 (“ARRA”). ARRA authorized \$787 billion in tax cuts, expenses, benefits, and other government spending to accomplish its three main goals: (1) create and save jobs, (2) spur economic activity and invest in long-term economic growth, and (3) heighten the levels of accountability and transparency in government spending. The construction industry was intended to be a significant beneficiary of the ARRA funds, as approximately \$143 billion of the total amount authorized was allocated for infrastructure and public building investments.

Numerous ARRA-funded construction projects have been awarded over the last 15 months, with many more in the pipeline. Given the continued lack private development projects in most areas of the county, government-funded construction projects have become much more important, and in some cases essential, to the ongoing success of many construction industry businesses. While ARRA was intended to provide much needed business opportunities to the construction marketplace, it also imposes various additional requirements upon contractors who perform work on ARRA-funded contracts. Quarterly reporting by contractors is among the most significant of these requirements.

For projects awarded by federal agencies, prime recipients of ARRA funds are required to complete quarterly reports identifying, among other things, (a) the total amount of ARRA funds received from that federal agency, (b) the amount of ARRA funds received that were expended or obligated to projects or activities, (c) a detailed list of all projects for which ARRA funds were expended or obligated, and (d) an estimate of the number of jobs created and retained by the project. Prime contractors are also required to provide similar information for all subcontracts over \$25,000.

In addition to project-specific information, certain contractors may also be required to provide information about executive compensation. ARRA requires that quarterly reports are required to include names and total compensation of each of the five most highly compensated officers for the calendar year in which the contract is awarded, *but only if* in the preceding fiscal year the contractor received

- 80 percent or more of its annual gross revenues from federal contracts (and subcontracts), loans, grants (and subgrants) and cooperative agreements;
- \$25,000,000 or more in annual gross revenues from Federal contracts (and subcontracts), loans, grants (and subgrants) and cooperative agreements; and
- the public does not have access to information about the compensation of the senior executives through periodic reports filed under the Securities Exchange Act of 1934 or the Internal Revenue Code.

The quarterly reports are required to be submitted through a specially created website – www.federalreporting.gov. Prime contractors are required to register through the website prior to submitting their first report. Federalreporting.gov provides detailed information regarding reporting requirements and provides answers to many frequently asked questions. It also provides examples of how to calculate and prepare required information, such as the number of jobs created by the particular project.

The first quarterly reports under ARRA were submitted in October 2009. In general, reporting information is required to be provided in terms of days after the end of a calendar quarter (e.g., day 10 is the 10th day following the end of the calendar quarter):

- Day 1-10 – Contractors prepare their report for submission and submit it before day 10.
- Day 11-21 – Contractor reports may be publicly posted. Contractors may make corrections by the end of day 21.
- Day 22-29 – Federal Agencies review and, if necessary, comment upon the contractor’s report. Agencies are instructed to submit comments by day 26 to permit the contractor to make any corrections by day 29. The system does not require contractors to make corrections, or otherwise require agency approval of the report.
- Day 30 – The report will be finalized on day 30 regardless of whether any corrections are made. However, in order to increase the accuracy of the data submitted, beginning in January 2010, contractors will be permitted to correct mistakes on a continual basis each quarter.

Contractors should consult the federalreporting.gov website regularly, as the above dates may be extended with respect to any particular quarter.

Compliance with the ARRA reporting requirements appears to be a priority for the current administration. On April 6, 2010, President Obama issued a memorandum “Combating Noncompliance with Recovery Act Reporting Requirements,” directing Federal agencies to use all means necessary to identify, and take appropriate action against, prime recipients who fail to comply with the reporting requirements. Contractors should also make every effort to comply with the reporting requirements because failure to do so may result in the exercise of “appropriate contractual remedies,” including withholding of payments and potentially termination, suspension and debarment.

Feature Article

Erroneous Unsat: A Contractor's Recourse

by **Laura Bourgeois**



Laura Bourgeois is a trial attorney with Howrey LLP's Construction and Government Contracts practice in the D.C. office. She has experience in both private construction disputes and government contracts. Prior to becoming an attorney, Ms. Bourgeois worked as a designer in a local architecture firm gaining experience on a variety of projects. She can be reached at BourgeoisL@

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Historically, when a government contractor received an “unsatisfactory” performance rating (“Unsat”) that was issued without observing the proper procedures or was substantively erroneous, the contractor’s only immediate recourse was to ask the agency to reconsider. Otherwise, the contractor had to wait to seek judicial review through a bid protest on a subsequent procurement – in essence forcing the contractor to wait for the Unsat to potentially deprive it of more work. For obvious reasons, this presents a major dilemma for contractors. This article examines a recent judicial movement in which the U.S. Court of Federal Claims opened the door for contractors to seek immediate review of erroneous Unsats.

Under the Contract Disputes Act (“CDA”) if a contractor wishes to pursue a claim against the Federal Government, arising out of a contract, the contractor can turn to one of two places: an agency’s Board of Contract Appeals (“BCA”) or the U.S. Court of Federal Claims (“CoFC”). However, it does not follow that both of these judicial bodies are willing to take up a contractor’s appeal of an erroneous Unsat.

Boards of Contract Appeals

BCAs have continually refused to hear contractor challenges to performance evaluations. In 1991, the ASBCA determined that a contractor could not appeal a performance evaluation directly to the Board because it was not a “claim” within the meaning of the CDA. *Konoike Construction Co.*, ASBCA No. 40910, 91-3 BCA ¶ 24170 (1991). In *Konoike*, the contractor failed to follow procedure by first seeking a final decision of the contracting officer. Nevertheless, many BCAs have declined to hear challenges to performance evaluations based on reading *Konoike* to broadly hold that requesting a change to a contractor performance evaluation is not a “claim.” The BCAs simply will not provide contractors an outlet for review of erroneous Unsats.

Court of Federal Claims

The CoFC, on the other hand, has taken a different view. The CoFC emphasized the importance of providing contractors

with a judicial forum to challenge the fairness and accuracy of performance evaluations especially “given the increasing importance of performance reviews and prejudice to contractors from erroneous ratings.” Despite its limited jurisdiction under the Tucker Act (28 U.S.C. 1491), and in part because the BCAs refused to take up the issue, the CoFC recently decided to provide contractors with a much needed forum to challenge erroneous Unsats. *Todd Construction, L.P. v. United States*, No. 07-324 (Fed. Cl. filed May 25, 2007); *BLR Group of America, Inc. v. United States*, No. 07-579 (Fed. Cl. filed August 1, 2007).

Todd Construction filed a lawsuit in the CoFC alleging that the U.S. Army Corps of Engineers (“Corps”), without observing the proper procedures, issued a substantively erroneous Unsat. Todd asked the court to issue a judicial determination that the Corps’ Unsat was unlawful and to order the Corps to remove it from CCASS. The Government claimed the CoFC did not have jurisdiction to hear the case.

Before getting to the merits of Todd’s assertions, the CoFC needed to determine whether it had jurisdiction to hear Todd’s case. *Todd Construction, L.P. v. United States*, 85 Fed. Cl. 34 (2008). Jurisdiction was only viable if Todd could show that it had properly asserted a Contract Disputes Act “claim,” which the court said had four requirements: (1) a decision of the contracting officer; (2) on a written demand; (3) made as a matter of right; (4) requesting relief arising under or relating to the contract. The CoFC held that generally a contractor appealing an Unsat would meet the third and fourth elements. The court also held that Todd submitted a written demand and obtained a decision of the contracting officer. Accordingly, the CoFC determined it had jurisdiction to hear the case.

Almost eight months later, after receiving supplemental briefing from the parties, the CoFC issued a second opinion dealing with the kinds of relief it was authorized to grant an aggrieved contractor. *Todd Construction, L.P. v. United States*, 88 Fed. Cl. 235 (2009). The CoFC held that it could issue a declaratory judgment and that it could remand the case to the agency. In reality, a declaration of rights (without more) will do little to resolve the dispute and will not put the contractor in any better position. The CoFC recognized this quandary, and took their relief-power a step further.

Under the Tucker Act, the CoFC has the authority to remand cases to agencies with “proper and just” directions. The CoFC refused to adopt the Government’s request for a narrow reading of “proper and just directions” that would amount to nothing more than telling the agency to follow the regulations. Instead, the CoFC held that “[i]n the event that the Court finds procedural deficiencies or an erroneous evaluation, the Court should use its power to issue a declaratory judgment to assist the agency, on remand, to address the identified concerns.”

Since the *Todd Construction* case is ongoing, it is unclear how far the CoFC will be willing to take a declaratory judgment when it finds an agency issued an erroneous or inaccurate Unsat. However, one thing is clear: the CoFC has greatly expanded the

ability of contractors to challenge Unsats that are inaccurate, erroneous, or were issued without following the proper procedure.

Lessons Learned

So far, *Todd Construction* teaches us two important lessons. First, while the CoFC is willing to provide a forum for reviewing erroneous Unsats, a contractor cannot take the Unsat straight to the CoFC. A contractor must first submit a written demand and receive a decision of the contracting officer, amounting to a “claim.”

Second, in reviewing whether an Unsat is substantively erroneous, the CoFC will give great deference to the decision of the agency, but will look very hard at whether the agency followed the proper procedures in arriving at the Unsat. Contractors should be familiar with both the FAR and the individual agency’s procedures related to issuance of performance evaluations. Equally as important, the contractor should keep diligent written records of instances in which the contracting officer or the agency did not follow the proper procedures.

Attempting to Meet LEED Standards: The Legal Ramifications

by **Reginald M. Jones**



Reginald M. Jones is a partner in the Washington, DC office of the national construction and federal government contracts law firm of Smith, Currie & Hancock LLP.

Leadership in Energy and Environmental Design (LEED) certified projects are at an all time high and increasing every year as a result of local, state, and federal incentives or requirements for sustainable “green” commercial development and a national trend towards reducing the nation’s carbon footprint. Owners are increasingly requiring contractors and designers to contractually agree that a particular project will obtain a pre-determined LEED rating at the conclusion of construction. Despite the ever increasing number of LEED projects, the law has not caught up with the green building trend and there is little legislative, regulatory or judicial guidance available. The lack of relevant guidance means that owners, designers and contractors must allocate the risks associated with the potential failure to meet specified or desired LEED ratings contractually on the front end of the project. If the parties do not protect themselves contractually, they run the risk of being unable to obtain acceptable remedies through the courts.

The LEED rating system was created by the U.S. Green Building Council (USGBC; not a U.S. Government agency) in 1998 to establish independent industry standards for green building meant to encourage the adoption of sustainable green building and development practices by owners, designers, and contractors. Certification is a voluntary process that is available for nine types of construction projects: new construction, existing building rehabilitation, com-

mercial interiors, retail, schools, cores and shells, homes, healthcare, and neighborhood development. The Green Building Certification Institute (GBCI) oversees all facets of project certification via its online database starting with initial registration and carrying forward through final application and certification. To be considered a LEED certified project, it must comply with a series of minimum green building requirements as well as earn a certain number of LEED credits during design and construction. A minimum of 40 credits are required to be LEED certified, 50 credits are required for a LEED Silver rating, 60 credits are required for a LEED Gold rating, and 80 credits are required for a LEED Platinum rating. In general, LEED credits are earned by implementing green design and construction techniques that increase building energy efficiency, water conservation, and construction material reuse.

The benefits of LEED project certification include tax rebates for owners and contractors, lower building operating costs, and expedited building permit review. One such example of a LEED benefit is the Maryland Energy Administration Program’s tax credit of up to eight percent of the total cost of a building that meets the LEED Silver requirements, provided the building is located in a designated LEED priority area and is at least 20,000 square feet in size. Various Maryland counties, such as Baltimore County and Howard County, also offer LEED incentives through property tax credits for residential and commercial construction depending on the LEED rating achieved. A new commercial building constructed in Baltimore County can earn an 80% property tax credit for five consecutive years after achieving a LEED Platinum rating. The Baltimore City tax credit is in addition to the eight percent tax credit from the Maryland Energy Administration Program.

Virginia provides similar LEED benefits by authorizing local jurisdictions to assess property taxes on energy efficient buildings at a reduced rate as long as the buildings exceed the energy standards of the Virginia Uniform Statewide Building Code by 30% and achieve a LEED rating. Various Virginia counties, such as Arlington County, grant bonus building densities and heights to LEED certified projects.

The District of Columbia’s Green Building Act of 2006 implements an expedited permit review process for green

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building projects. At least twelve other states have LEED benefit programs similar to the incentive programs created by Maryland, Virginia and the District of Columbia.¹

These incentives have made it desirable for owners to request, and even contractually require LEED certifications for their projects. However, contractual requirements mandating that a building project achieve a specific LEED certification have raised a number of questions that have yet to be resolved by the courts, such as what the legal ramifications of a failed or delayed attempt to achieve LEED ratings and whether an owner can hold a contractor or architect responsible for lost tax credits or for increased energy costs over the life of the building. To further complicate matters, neither contractors, nor architects have complete control or influence over all types of LEED credits. For example, LEED credit might be obtained for using specific building materials so long as they are manufactured within a 50-mile radius. Unfortunately, the current statutory and common law provides few answers to those questions. This legal uncertainty puts the burden of allocating the risk of LEED certification contingencies squarely on the parties to the contract. Ultimately, neither the owner, designer, or builders have control over USGBC or GBCI.

Including a statement in the specifications that the project is designed to achieve a specified LEED certification does not allocate the risk with any reasonable certainty. We know this based on the first known LEED related lawsuit, *Southern Builders v. Shaw Development*, which was filed in the Maryland Circuit Court for Somerset County in 2008. That case involved a large condominium project. The owner and the contractor entered into an AIA A101-1997 standard contract that did not address green building requirements or LEED certifications. However, the Project Manual indicated that the project was designed to comply with a LEED Silver certification, and the project was accepted into the Maryland Energy Administration Program. The project included a number of green features intended to obtain enough credits for a LEED Silver certification, which would have ensured that the developer received the eight percent tax credit under Maryland law.

When the project failed to achieve the desired rating, it was removed from the Maryland Energy Administration Program, and the developer lost its tax credit. The developer sued the contractor seeking \$635,000 in damages for breach of contract and negligence for allegedly failing to construct a building that met the LEED Silver requirements and for failing to obtain a certificate of occupancy within the time required under Maryland's green tax credit program. The case settled before the court was able to render a decision. However, the lesson for owners, designers and contractors is that they must clearly allocate the responsibility (and hence the risk) for securing the required LEED certification and the date by which that certification must be obtained.

Due to the absence of any significant legislative or judicial guidance regarding LEED matters, the best safeguard against potential disputes and litigation is to address in plain language in the contract documents which party is responsible for (1) registering the project with the USGBC, (2) which LEED credits must be sought, (3) compiling the supporting documents to obtain LEED credits, (4) applying for LEED certification with the GBCI, (5) working with the local, state or federal authorities to ensure the requirements of the applicable incentive programs are met, and (6) if necessary, appealing an unsuccessful request for LEED certification. Further, the owner, designer and contractor should also define how delays could affect the LEED certification process and which party is responsible if that schedule is not met. Parties who fail to implement these preliminary LEED contractual safeguards do so at their own peril. Legal review of the risks of green building on the front end of a project will save substantial time, effort, and money on the back-end of a project.

1. In contrast, the U.S. General Services Administration now requires all new federal construction projects and substantial renovations to achieve LEED Silver certification.

The Stimulus Act— One Year Later

by **Mark Berry**

Mark R. Berry, Esq. is a partner in the Washington, DC office of the law firm of Peckar & Abramson. His practice is devoted to advising and representing contractors and construction managers in virtually all phases of construction in the public and private sector. Mr. Berry is past Legal Chair of the Construction Management Association of America and co-author of the annual Thompson-West treatise *Virginia Practice: Construction Law*. Mark can be reached at mberry@pecklaw.com

The \$135 billion in construction spending authorized in the American Recovery and Reinvestment Act of 2009 is hitting the streets (literally) and is giving the industry a well-needed jolt of construction spending. Signed into law February 17, 2009, the “Stimulus Act” has, in one short year, caused a significant increase in infrastructure and other public works spending. For example, at the one year anniversary of the act, over 93 percent of the \$35 billion allocated for highway infrastructure and public transportation had been obligated, and includes over 11,000 highway projects. Other agencies have experienced varying levels of success in obligating and spending the money on construction activities. Despite the high level of allocation, some difficulties have arisen in actually spending the allocated funds, from reasons ranging from the scarcity of federal program managers to oversee the spending, to the inability of fiscally strained states to meet their required level of funding. Despite these challenges, the Act appears on track to achieve the goal of spending 70% of the Stimulus funding by March of 2011.

The simultaneous injection of public construction spending combined with the precipitous drop in private construction has caused traditional private sector contractors to pursue public work, many for the first time. For experienced and inexperienced public contractors the Stimulus Act brings unique requirements ranging from expanded rights for whistleblowers to detailed reporting requirements designed to track how effective the Stimulus Act has been in keeping and generating jobs. Recent regulations and Memoranda from the Office of Management and Budget have clarified how these new requirements will be handled in practice.

Rules for Contracts with the United States

Contracts with the United States as a party are generally governed by a lengthy and detailed set of regulations called the Federal Acquisition Regulations (“FAR”). The FAR govern every aspect of the process of contracting for the Federal Government, from the initial decisions as to what needs to be procured and how, through the bidding and negotiation process, through contract formation and performance and even post performance. The FAR specifies contract clauses for every imaginable situation. Effective March 31, 2009,

the Government issued interim regulations implementing new FAR contract clauses to be included in all contracts with the Federal Government that include funds from the Stimulus Act.

The new FAR clauses impose the following obligations on the contractor (which flow down to its subcontractors):

- The Contractor must post notice of employees’ Whistleblower protection rights and remedies
- Prior to the end of each calendar quarter, the contractor must report the following information, using an online reporting tool available at www.FederalReporting.gov.
- Basic information about the project, including the stage of completion and the amount of Stimulus Act funds expended;
- Description of the “employment impact” of the work, including a description and an estimate of the number of “jobs created and jobs retained”;
 - » Basic information about subcontracts;
 - » Disclosure by primes and first tier subcontractors of the names and annual compensation of the five most highly compensated employees if their companies derive 80% of their annual revenue and \$25 million in annual revenue from federal contracts or grants (unless already disclosed to the SEC).
- The Comptroller General and Agency Inspectors General are given broad powers to audit an extensive set of contractor and subcontractor records and to interview contractor officers and employees on hard bid and negotiated contracts.

Rules for Contracts with States and Local Governments

Contracts with State and Local Governments and other recipients of Stimulus Funds (“Local Stimulus Contracts”) are not directly governed by the FAR. But these contracts are governed by rules imposed within the Stimulus Act, and regulations promulgated by the granting federal agency and oversight agencies. Confusingly, these sources may also incorporate portions of the FAR by reference, which may place local contractors in the position of performing according to unfamiliar federal regulations.

Under these various sources, the following conditions apply to Local Stimulus Contracts:

- Employees are to be paid prevailing wages and prevailing wage notifications must be posted.
- Whistleblowers are extended significant protection and “any employer” is required to post notice of whistleblower rights at the job site.
- Prior to the end of each calendar quarter, fund recipients must report the required information, using the online reporting tool available at www.FederalReporting.gov. To facilitate this reporting, the contractor and its subcontractors are required to supply information as requested by the recipient.
- Contractors must comply with federal anti-discrimination, civil rights, and equal opportunity programs
- The Comptroller General and Agency Inspectors General are given the same broad powers to audit records and to interview contractor personnel.

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With (Stimulus) Privilege Comes (Ethical) Responsibility

Coinciding with the passage of the Stimulus Act, the Federal False Claim Act was amended, which significantly expanded the definition of what constituted a false claim to the government. The amendments included an expansion of the Act to impose False Claim requirements and penalties on all recipients of federal funds, including local projects financed with Stimulus funds. This, coupled with the broad audit and investigative powers that the Stimulus Act gives to federal IGs and the new Recovery Accountability and Transparency Board, will mean that contractors at all levels who engage in business practices that could be characterized as fraudulent will be at risk. Contractors entering public work for the first time, or public contractors used to work-

ing solely at the local level, must become familiar with the broad scope of compliance rules.

Because the Obama Administration has vowed to hold state and local governments accountable for fraud, waste and abuse in the administration and expenditure of Stimulus Act funds, state and local governments can be expected to significantly increase the level of their scrutiny of federally funded contracts. For this reason, contractors would be well advised to ensure that their compliance programs are well designed and fully operational for preventing and detecting the types of potential ethics violations that can occur in the business sector or market in which they operate.

Uncovering the Mystique of the BZA

by **Michelle Honey, FAIA**

Michelle Honey, FAIA is a member of the WBC Marketing and Communications Committee and is Vice President, Development of Educational and Institutional Services at Hess Construction + Engineering Services. HESS, a construction management company, serves clients in primary and secondary education, higher education, Federal Education and facilities' management. Hess is based in Gaithersburg, Maryland with offices in Washington, DC.



Meridith H. Moldenhauer, Partner of Griffin and Murphy, LLP of Washington, DC currently serves as Chairperson for the Board of Zoning Adjustment (BZA) in the District of Columbia. When not hearing BZA cases, Ms. Moldenhauer focuses her law practice on commercial leasing, Tenant Opportunity to Purchase Act matters, condominium

warranty disputes, condominium conversions, real estate contracts and business development.

Ms. Moldenhauer agreed to answer my questions in my pursuit of 'demystifying' the BZA process.

Q: How many members compose the Board of Zoning Adjustment?

A: The BZA is composed of 5 board members—3 are mayoral appointees, 1 representative comes from the National Capital Planning Commission and 1 Zoning Commission Member. Ms. Moldenhauer was appointed by Mayor Adrian Fenty in 2009.

Q: What projects need to seek BZA review?

A: If you own, develop, renovate or build a project in the District of Columbia, you must review the zoning impact of your plans and answer the following:

- In what zoning district is your project located? To determine this, visit the online interactive Zoning Map <http://dcoz.dc.gov/info/map.shtm>. The DC Office of Zoning recently released the new interactive zoning map which allows users to determine the zoning classification for any property in the District. The zoning map provides a variety of useful information in a user-friendly format.
- Can you develop your building as a "matter of right" in your zoning district? So long as one builds in accordance with the requirements of the zoning district, the project is considered a "matter of right" and does not require BZA approval.
- Does your project/building satisfy the zoning requirements? If so, then you can move forward and obtain a building permit from DCRA. If no, then you need to seek zoning relief.

Q: Are there multiple ways to present your project to the BZA?

A: There are two ways:

- Self-certify. You, your attorney or architect can identify areas of relief required for your project and submit an application to the BZA.
- Zoning Administrator Referral. When you apply for a building permit, the Zoning Administrator (ZA) will review your application and confirm whether you require zoning relief under the DC Zoning Regulations.

Q: What type of zoning relief does the BZA approve?

A: The BZA hears cases related to Variance Relief, Special Exceptions, Appeals and Foreign Mission Cases.

- A Special Exception use is permitted within the zoning districts but subject to certain specific conditions.
- A Variance (area/use) is a request to verify or modify any part of the Zoning Regulations. The applicant must prove the following 3 prong test:

Feature Article

1. The property has an exceptional condition.
 2. Strict application of the Zoning Regulations will result in "practice difficulties" or an "undue hardship" on a property owner.
 3. Granting the zoning request would not cause substantial detriment to the public good and would not be inconsistent with the general intent and purpose of the Zoning Regulations.
- c. Individuals can appeal a decision of the Zoning Administrator.
 - d. Under the Foreign Mission Act of 1982, the location, expansion or replacement of a chancery in certain zoning districts are subject to review by the BZA.

Q: How can I better understand the BZA Process?

A: The Office of Zoning's website is <http://dcoz.dc.gov>. The website provides a comprehensive explanation of the process, the regulations, the application forms, etc.

- a. Prior to the BZA hearing it is recommended that the project owner to reach out to the local Area Neighborhood Commission (ANC) and to neighbors in order to obtain support of the project. However, if support cannot be mustered the Board prefers seeing a good faith effort to identify issues and will work to help the owner reach a compromise with his/her neighbors.
- b. The Office of Planning conducts an independent review of the case and provides an analysis of the relief requested.

Q: How do the hearings work?

A: Typically documentation and evidence used to prove or present a case during a hearing includes:

- a. Oral presentation by the Applicant, articulating facts that satisfy the Conditions of Special Exception or the 'three prong test' of a Variance, as described above.
- b. Have an Architect/Develop/Owner present the plans to the BZA.
- c. Prepare 'expert' testimony regarding the intent/purpose of the Zoning Regulations, if applicable.
- d. Prepare a 'Sun Study' showing the light impact on the neighboring property to rebut opposition from neighbors, if applicable.
- e. Include diagrams or pictures to clarify the case.
- f. Provide Traffic Studies and reports from DDOT (District Department of Transportation), or other applicable government agency.
- g. Review the regulations or call the Office of Zoning to make sure all submission are submitted in a timely fashion.
- h. Be prepared to participate in a quasi-judicial process where witnesses are sworn-in and subject to direct and cross examination.
- i. Length of hearings. Hearing durations may several hours or can last for multiple days.

Once hearings are completed, how long can an owner expect before the Order or decision is released?

The time can vary between the hearing decision and the release of the Order. If your case is not opposed, you can request that the Board waive the requirement for a full Order; a summary Order can then be issued in an expeditious manner.

For additional zoning questions you may contact the Office of Zoning at (202) 727-6311. **B**

FY'2011 WBC Board of Directors Nominations

The WBC Nominating Committee is seeking the nomination of dedicated members who would like to make a contribution to the overall goals and objectives of our association. The committee has developed a brief nomination form available at www.wbcnet.org to encourage membership participation in the process. Please submit your nomination by Friday, August 20, 2010. The election of FY'2011 WBC officers and directors will take place on Thursday, September 30, at the WBC Annual Meeting and Fall Kickoff Party at Columbia Country Club. The new Board of Directors term commences October 1, 2010.

Officer & Director Positions Available

Chairman-Elect (1-Year Term) One Position
Vice-Chairman (1-Year Term) Three Positions
Treasurer (1-Year Term) One Position
Secretary (1-Year Term) One Position
Director 2010-2013 (3-Year Term) Three Positions

Download nomination form at www.wbcnet.org

Member Projects



George Mason University, Northwest Housing VIII A Complex, Fairfax, Va.

Tompkins Builders was proud to host the **Training and Doctrine Command Headquarters (TRADOC)** topping out ceremony on February 16, 2010 at the site in Fort Eustis, VA. Tompkins is performing this project for the Norfolk District of the US Army Corps of Engineers for whom they recently completed the Sustainment Center of Excellence (SCOE) at Fort Lee, VA. Tompkins is also currently working on the construction of C4ISR Project in Aberdeen, MD for the Philadelphia District of the Corps of Engineers with joint venture partners as part of the Base Realignment and Closure (BRAC) program and one of the first BRAC projects of this magnitude and scope. The TRADOC project includes the design and construction of a 263,000 square-foot headquarters building, a separate 18,000 square-foot band building facility and supporting site work. The facility is being designed and built to achieve LEED® Silver Certification from the US Green Building Council upon completion in the spring of 2011. In topping out, the TRADOC project has come a long way since the ceremonial groundbreaking on June 4, 2009. The project is proceeding ahead of schedule. Tompkins' upper management, project team and staff,

representatives from the US Army Corp of Engineers Norfolk District, representatives of TRADOC, the design team, and subcontractors involved in the completion of the construction were all present at this celebration. As a part of the festivities Tompkins and its subcontractors provided a variety of prizes for raffle to all workers on the job. Prizes included gift cards, t-shirts, hats and several flat screen TVs. The event proved to be a celebration of the achievement of one of the project's major milestones, the topping out of the structures. Ambitions are high as the team moves forward to meet the challenges on the road to completion. There is every confidence that all significant milestones will continue to be reached by the TRADOC team throughout the duration of this project.

Balfour Beatty Construction has been awarded a \$47.5 million contract to design and build a 216,700 square-foot student housing complex at George Mason University's Fairfax Campus. **The Northwest Housing VIII A** complex, which will feature 609 student beds in two buildings, helps George Mason further its strategy of creating an active 24/7 community at its Fairfax Campus to attract the best students, faculty and staff. Design

work on Northwest Housing VIII A is underway, with construction beginning in April. The project's contract completion date is June 2012. Balfour Beatty is currently constructing The Mason Inn Conference Center and Hotel on George Mason's Fairfax Campus. The Mason Inn will be completed by July 2010. The Northwest Housing VIII A buildings, of up to seven stories, will provide mostly four-bed suites for the students. These cast-in-place concrete structures will have durable facades of brick, metal panels and glass curtain wall, and standing-seam metal roofs. The project is being designed and will be built to LEED Silver sustainability standards. Balfour Beatty's scope of work includes finishing the resulting quad area between the buildings with pavers, terraced lawns and bench seating. Additionally, Northwest Housing VIII A features extensive underground utility relocations, including moving the campus' main electrical and telecommunications feeder lines. Building information modeling (BIM) is being heavily utilized on this project, with Balfour Beatty providing the university with an as-built BIM model at project completion. Balfour Beatty's team for Northwest Housing VIII A includes: **JCM Associates**, mechanical/plumbing

Member Projects

design-build contractor; **J.E. Richards Electric**, electrical design-build contractor; JCM Associates and J.E. Richards are also working with Balfour Beatty on The Mason Inn.

The US General Services Administration has achieved the US Green Building Council's LEED® Gold certification for the **Food & Drug Administration's Building 1**, an historic landmark that was restored and renovated by **Tishman Construction Corporation** of Maryland (TCC-MD), the construction manager on the project in joint venture with **Heery International**. Known for effectively managing the complexities of historic restoration and new construction, Tishman successfully renovated the existing, historic Naval Ordnance Building, built in 1946 and located on the FDA's new headquarters campus in the White Oak section of Silver Spring, MD. This four-story, 102,000 square-foot building was completely gutted; workers stripped everything to structural steel. It has been transformed into the Office of the Commissioner for FDA and serves as the gateway to the FDA campus. The project was designed to LEED Silver standards, but through collaboration between the GSA, which is overseeing the project, the FDA, the LEED consultant, the architect (Kling Stubbins in association with **RTKL Associates, Inc.**) and the construction management team, the project achieved LEED Gold at no additional cost. The restoration brings the exterior façades, historic lobby, and conference rooms of Building 1 back to their original condition. It upgrades the building to reflect current office-space standards and to meet the sustainability goals of the GSA and FDA. In the past, the FDA operated from 40 buildings in 18 locations scattered throughout the Washington, DC metropolitan area. Many of the agency's offices were outdated, obsolete and overcrowded. The FDA is now consolidating its 8,900 employees on 130 acres on the historic site of the Naval Surface Warfare Center. The \$1.4-billion FDA Headquarters Consolidation Project includes renovation of three historic buildings and construction of 17 new buildings, totaling 5.3 million square feet of new laboratories and offices. Tishman has also managed construction of a central utility

plant and parking garages for approximately 5,900 vehicles. Eleven buildings have been completed and are occupied, two are under construction, and several are in the planning, programming or design phase. The project also includes building all new site utilities and infrastructure, more than 2½ miles of roads, and two new bridges. Many of the new and renovated buildings are being built to LEED Silver or LEED Gold standards. Completion is anticipated for 2012. Through collaboration, the construction and design team gained additional credits for bicycle storage and changing rooms, fuel-efficient vehicles, increased water-use reduction, increased recycled content, and increased use of certified wood, at no additional cost. Steps taken included: implementing a transportation management plan involving shuttle buses, connection to the Metro, and dedicated parking for van and car pools; existing structural frame and brick/limestone veneer were reused; using low-volatile organic compound (VOC) paints, coatings, carpets and adhesives; utilizing a highly reflective roof to reduce heat-island affect; installing lighting that reduces light pollution; abating of asbestos and lead paint according to LEED guidelines; using indigenous plant materials that do not require watering; improving mechanical systems, including connection to campus's central utility plant, which generates electricity and uses waste heat to power other equipment; using Forest Service Certified®, easily renewable materials. The plan originally called for a smaller percentage of FSC materials, but the team moved that number to nearly 100%; using materials that come from within a 500-mile radius of the project; using excavation material originally planned to be hauled off site for infill, thereby diverting it from a landfill; and purchasing green power off the grid that is supplied by power companies who use easily renewable materials. On Building 1, the plan was to restore the windows; however, during the abatement testing phase, workers found that the window glazing and caulk contained asbestos. To remediate the asbestos-laden glazing and caulk and keep those windows would have exhausted the budget. It took a year before all the agencies involved agreed that the windows could be replaced with similar

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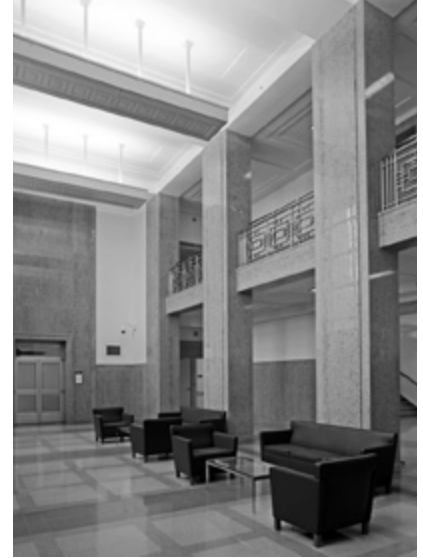


Food & Drug Administration, Building 1, White Oak, Md.

windows. The design team went back to the original manufacturer, Hope's Windows, Inc., to see if they could reproduce the original window design. Working with both the construction management team and the design team, Hope's personnel came up with several designs that mimicked the existing windows. Once the window designs were approved by the historic preservation entities, GSA moved forward with replacement of approximately 276 existing windows. Following this approval, the construction management field team began working with the general contractor and with Hope's to schedule production so the windows could be manufactured, shipped and installed in time for the Commissioner's offices to open on time. Fish Spawn: One of the biggest challenges affecting construction on the entire campus and not just Building 1 was a stream running near the project boundaries. Because this stream is a contributory to Paint Branch Stream, which is protected as "Waters of the US," no construction activities are allowed between October and May within the stream buffer zone due to the sensitivity of native fish that spawn during that time. To build a new six-lane entry road, which was crucial to the development of the entire site, the team had to divert part of that stream, and to do so they had to go to the Maryland Department of the Environment (MDE) for a variance. Approval of

this variance came with the stipulation that it would only be good for a maximum of 14 calendar days. The CM team worked with the general contractor and the utility contractor to develop a material delivery and construction schedule that would meet the stipulations of MDE's variance approval. The team spent two months building a diversion for the stream, used the diversion for just two days during the off-season (which met the stipulation), and then returned the stream to its normal banks.

The team of **Suffolk Construction Company** and The Dietze Construction Group was recently awarded a 600,000 square-foot project for **Raytheon** in Dulles, VA. Raytheon will be moving its Northern Virginia operations into office space on what was formerly AOL's Pacific Corporate Park campus, a move that constitutes the second largest office lease in the nation in 2009. Raytheon, the world's fifth-largest defense contractor, will relocate more than 1,500 employees from Raytheon's Falls Church, Reston and Herndon, VA sites when construction wraps up in September 2010. From Raytheon's standpoint, the move fulfills their need to occupy a modern facility with room for expansion and creates a common location for employees and an opportunity for greater teamwork, collaboration and innovative thinking. This fast-track project includes the build-out of four buildings,



now dubbed Raytheon's "Dulles Hub." The build-out will consolidate two Raytheon sectors: Raytheon Intelligence and Information Systems and Raytheon Technical Services Company LLC. Raytheon will occupy three and one half buildings within the Pacific Corporate Park campus comprising 21 floors. The project is targeting LEED Silver certification and will include a data center and SCIF spaces.

Reducing its carbon footprint is a daily habit for **Centennial Contractors Enterprises**, but in celebration of **Earth Day** last month, the Job Order Contractor decided to leave a positive footprint—planting trees across the US. Centennial's job sites across the country worked with their clients to plant trees at schools, military bases and offices. In Baltimore, the elementary school held a special ceremony to involve all the students in Centennial's tree planting, while in Phoenix and Tucson, Centennial planted drought-resistant Arizona Ash trees at local schools. Trees were also planted at Fort Eustis, VA, Fort Dahlgren, VA, Fort Gordon, GA, Indian Head, MD, a Washington, DC Housing Authority property, and near Centennial's offices in Silverdale and Fife, WA. Centennial's corporate office worked both inside and outside, planting an herb garden for their conference room in used planters they bought at a thrift shop. In addition to safety, sustainability is Centennial's top initiative. Currently over 10% of its work

Member Projects

force are LEED® Accredited Professionals. It 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>.

Balfour Beatty Construction's


Washington Division has partnered with **Shelter House** to improve the lives of homeless families in Fairfax County, VA. Shelter House, a nonprofit organization incorporated in 1981, currently operates the Patrick Henry Family Shelter in Falls Church, the Katherine K. Hanley Family Shelter in Fairfax, and Artemis House, Fairfax County's domestic violence shelter. Shelter House also operates transitional housing programs and an extensive community case management program to prevent families from becoming homeless and to support recently homeless families after they move into permanent housing. Balfour Beatty's commitment to all areas of Shelter House has already benefited both organizations, engaging Balfour Beatty employees and their families in the fight to end homelessness and significantly increasing the resources available to Shelter House. Since the partnership began in the fall of 2009, Balfour Beatty and its local employees have been extremely active in supporting Shelter House and the homeless families served by the nonprofit organization. Balfour Beatty employees formed Shelter House's largest team ever in the Fannie Mae Help the Homeless Walkathon on the National Mall in November with nearly forty participants. During the holidays, Balfour Beatty supported Shelter House's Gift of Giving and Adopt-A-Family programs with donations of toys and gift cards. Generous financial contributions were also made by many employees. To start 2010, Balfour Beatty committed to Shelter House's Adopt-An-Apartment program at the Patrick Henry Family Shelter in Falls Church. Employees gave their time and talents to clean, paint, redecorate, and fully stock an apartment creating a warm and welcoming temporary home for a homeless family. To further support Shelter House, Balfour Beatty has underwritten the cost of an off-site storage unit so that

Shelter House can now accept donations of furniture and other household items for its Adopt-An-Apartment program and for families moving out of its shelters into permanent housing. Finally, the company participated as a Platinum Sponsor for Shelter House's annual Casino Night and Silent Auction on March 13, 2010.

Balfour Beatty Construction is committed to serving the communities in which its employees live and work so it is no surprise that the Washington, DC office has been so generous in its support of Shelter House. Balfour Beatty plans to continue its support of Shelter House and homeless families in Fairfax County throughout the year by staffing the shelters' Kids Night activities, providing one-on-one attention to the programs' youngest residents. Balfour Beatty employees will also share their expertise with Shelter House clients by teaching basic construction skills and other classes.

HITT Contracting Inc., along with design-build partner OPX of Washington, DC, recently completed a 20,000 square-foot facility for **BAE Systems** in Arlington, VA. Built to LEED Gold standards, the project was constructed within a span of 11 weeks that included the end-of-year holidays and a record-setting blizzard in the Washington, DC area. The scope of work comprised a reconfiguration of the existing ninth floor space to accommodate an increase in office space, an expansion of the existing executive boardroom and meeting space including upgraded AV and IT capabilities, and the introduction of a catering pantry. The space was created as part of BAE Systems' commitment to sustainability through the continuous greening of its global operations. Special attention was paid to sustainable design and construction practices in general and LEED certification in particular. As a result, all existing less efficient light fixtures were replaced with more efficient 2 x 2 fixtures, while all recessed down lights were replaced with LED fixtures to further minimize energy consumption. Fixtures in the core restrooms, pantry, and shower facility in B1 level were replaced with low flush / flow fixtures to minimize potable water demand. Combined VAV boxes and thermostats were placed in every office, allowing occupants more control over the

temperature. The finishes specified for the project include zero-VOC paint and finishes with high recycled contents. All project millwork features FSC-certified wood sourced products, with no added urea formaldehyde. Informational signage throughout the space highlights green features, educating BAE Systems employees and the public at large. The design-build team consisted of OPX as the lead architect, KTA Group of Washington, DC as the MEP engineer, Furniture Resources, and IBS Millwork Corp. The team will work together to complete the LEED certification documentation during construction and strives to receive certification by late summer 2010.

Gaithersburg, MD based **KANE Construction, Inc.** announces the recent award of a 112,078 square-foot commercial build-out for **Booz Allen Hamilton** in Herndon, VA. At Dulles Overlook. Located at 575 Herndon Parkway, the project covers five floors of the 135,376 square-foot building. Substantial completion is set for July 2010. Construction includes selective demolition of existing offices and finishes, interior fit-out of new office layouts, modifications to the existing mechanical and life safety systems, and the installation of new finishes including carpet, vinyl tile, fabric wall panels, paint, and a combination of acoustical and hard ceilings. New millwork, fixtures, and appliances will be installed in pantry and copy rooms, as well as throughout the floors in breakout workstation locations. In the spirit of LEED-CI design, all existing light fixtures will be re-used, and the design team has incorporated the majority of the existing office construction into the new layout. Further, construction services will include the implementation of a waste management plan with an emphasis on recycling demolished building materials, an indoor air quality management plan, and the use of FSC-certified millwork, doors, and rough carpentry materials Booz Allen Hamilton was represented by **Jones Lang LaSalle** while Cambridge Property Group represented the landlord in the lease transaction. Booz Allen Hamilton has been at the forefront of strategy and technology consulting for nearly a century. To learn more, visit www.boozallen.com. 

New Members

Companies

Site Support Services, Inc.

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Sponsor: Boston Properties

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and **Danny Smith**

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and **Mark T. Baugh**

Plaza Construction Corp.

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f. (866) 821-2328

www.plazaconstruction.com

Representatives: **Michael J. Leavitt**
and **Daniel L. Peyton**

Ruppert Landscape, Inc.

23601 Laytonsville Road
Laytonsville, MD 20882
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f. (301) 414-0422

www.ruppertlandscape.com

Sponsor: Rob Wenger-Foulgar Pratt
Representatives: **Shane Carmadella**
and **Brad Rowland**

Company Profiles

Site Support Services, Inc.

Site Support Services, Inc. (SSS) is a commercial HVAC/R and electrical contractor specializing in computer rooms and other high tech environments. It provides state-of-the-art environmental and electrical support programs for data centers and firms of all sizes throughout the mid-Atlantic region. These programs include electrical power distribution and conditioning, computer power cabling, uninterruptible power supply (UPS), remote monitoring, and environmental conditioning.

SSS designs and builds data centers as well as providing ongoing preventative maintenance support and service. Customers include financial and real estate institutions, insurance companies, governmental agencies, building facilities, military installations, hospitals, and universities.

Hensel Phelps Construction Co.

Since 1937, Hensel Phelps Construction Co. (Hensel Phelps) has delivered the best value in building services by placing expert construction professionals on every project undertaken. Hensel Phelps is consistently ranked among the top general contractors and construction managers in the nation by ENR (Engineering News Record). Closely directed by personnel in district offices strategically located throughout the United States, Hensel Phelps builds a diverse range of project types, including new construction and renovations of commercial office, airport, distribution and industrial, correctional, public assembly, sports, healthcare, educational, institutional, residential, mixed use, retail, hospitality, mass transportation, entertainment, microelectronics, research and development, and laboratory facilities. These projects have been built for both public and private clients using various delivery methods, and many have incorporated significant green building features.

Plaza Construction Corp.

Plaza Construction Corporation is a Manhattan-based construction management and general contracting company with regional offices in Miami, Los Angeles, Newark and Washington, DC. Plaza has operated for 75 years as the construction division for the Fisher Brothers, a preeminent real estate development and investment company. Plaza incorporated separately in 1986 and is still owned by members of the Fisher family with annual revenues exceeding \$1B.

Ruppert Landscape, Inc.

Ruppert Landscape specializes in high-quality, technically-challenging and large-scale commercial landscape construction. Most are performed in-house, but they have capable to select and manage specialty trades allowing them to provide full-service site contracting. Ruppert provides high-caliber, award-winning landscape construction from concept to completion. The 30 years of experience in all facets of landscape construction has allowed them to excel at complex jobs with tight

schedules. In addition, past successes have been recognized by long and rewarding customer relationships and through numerous craftsmanship and management awards.

Representatives

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Representative:

Joe Wargo

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WBC Calendar & Advertising Information

Events Calendar

June

- **June 14**
Summer Golf Outting, Landsdowne and Belmont Golf Clubs
- **June 15, 9:30 – 10:45 a.m.**
Marketing and Communications Committee Meeting, WBC Office
- **June 23, 4:00 – 6:00 p.m.**
Board of Directors Meeting #5, WBC Office

September

- **September 15, 4:00 – 8:00 p.m.**
Board of Directors Meeting & Dinner
- **September 30, 5:30 – 8:00 p.m.**
Fall Kickoff and Installation, Columbia Country Club, Chevy Chase, Md.

2010 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

Member Charitable Giving

February

Effective Urban Planning

March

Green Building

April

54th Annual Craftsmanship Awards

May/June

Industry Legal Issues

July/August

Rebuilding Together

September

Economic Update and Outlook

October

TBD

November

TBD

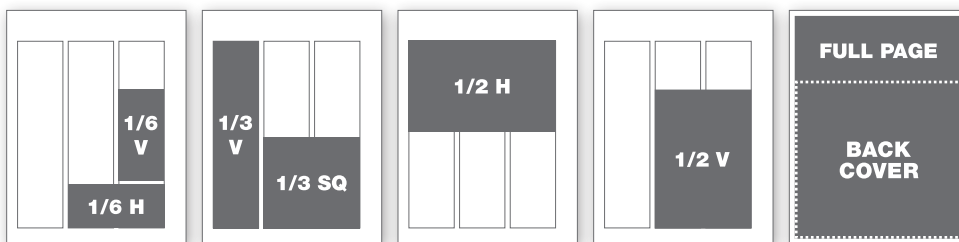
Ad Rates

	1 time	5 times	10 times
Member Rates:			
Black and White			
1/6 horizontal or 1/6 vertical	\$155	\$130	\$110
1/3 vertical or square	\$230	\$190	\$150
1/2 horizontal or vertical	\$430	\$350	\$290
Full-page	\$630	\$510	\$410
Color			
Inside Front Cover	\$730	\$590	\$480
Inside Back Cover	\$730	\$590	\$480
Back Cover	\$830	\$670	\$540

	1 time	5 times	10 times
Non-member Rates:			
Black and White			
1/6 horizontal or 1/6 vertical	\$210	\$176	\$149
1/3 vertical or square	\$311	\$257	\$203
1/2 horizontal or vertical	\$581	\$473	\$392
Full-page	\$851	\$689	\$554
Color			
Inside Front Cover	\$986	\$797	\$648
Inside Back Cover	\$986	\$797	\$648
Back Cover	\$1,121	\$905	\$729

Magazine trim size: 8.5" w x 11" h | Live area: 8.375" w x 10.875" h

Ad Sizes



1/6 horizontal	4.43" w x 2" h
1/6 vertical	2.1" w x 4.2" h
1/3 square	4.43" w x 4.2" h
1/3 vertical	2.1" w x 8.6" h
1/2 horizontal	6.75" w x 4.2" h
1/2 vertical	4.43" w x 6.38" h
Back Cover	8.0" w x 7.5" h
Full-page	8.25" w x 10.75" h
Full-page + bleed	8.5" w x 11" h +125" bleed

WBC
BULL & OYSTER
PARTY

SEPTEMBER 30, 2010 5:30 – 8 PM

COLUMBIA COUNTRY CLUB
7900 CONNECTICUT AVE. CHEVY CHASE, MARYLAND

BUSINESS ATTIRE PLEASE — JACKET REQUIRED BY CLUB

Please join us as we celebrate the culmination of another outstanding year for the Washington Building Congress and our leadership team. The 73rd annual celebration is being held in conjunction with the always popular Bull & Oyster event held the last six years. The menu will once again include a variety of freshly shucked oysters, peeled shrimp, crab cakes, steamship round of beef and a full hosted bar.