

# CONSTRUCTION LEGAL EDGE

Spring 2015

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## The New Markets Tax Credit Program: A Potential Opportunity For The Construction Industry

I just read an article in the January 2015 issue of Virginia Business magazine that brought to mind the New Markets Tax Credit (NMTC) Program, a federal program that has been a significant source of funding for qualified construction projects throughout the United States during the 21st Century. This article (entitled “Forecast: fluffy clouds”), which is mostly about the recent upswing in commercial real estate development in the Commonwealth of Virginia, mentions numerous healthcare-related construction projects currently underway across the state. Reading about these projects reminded me of how, a few years ago, a corporate client of ours used NMTCs to help finance a much-needed, new health care facility in a low-income community. That particular project was an example of the many construction projects that NMTCs have made financially viable. Although the NMTC Program expired at the end of 2014, Congress is currently considering legislation that would extend it indefinitely. Assuming that the NMTC Program is extended at least into 2015, construction industry participants would be wise to familiarize themselves with it and the opportunities it presents. What follows is a brief overview of the NMTC Program.

As part of the Community Renewal Tax Relief Act of 2000, Congress created the NMTC Program to incentivize private investment in “low-income communities” across the United States (i.e., in population census tracts where the poverty rate is at least 20% or median family income does not exceed 80% of the median family income of the relevant geographic area).

In 2004, Congress expanded the definition of “low-income community” to include “targeted populations” (defined as “individuals, or an identifiable group of individuals, including an Indian tribe, who are low-income persons or otherwise lack adequate access to loans or equity investments.”)

The NMTC Program allows individual and corporate taxpayers to receive credits against federal income taxes for making “Qualified Equity Investments” (QEIs) in qualified “Community Development Entities” (CDEs). These investments are expected to create jobs and materially improve the lives of residents in impoverished areas by, among other things, spurring construction projects.

NMTC investors receive a tax credit equal to 39% of the total QEI made in a CDE with the credit realized over a seven-year period, amounting to 5% annually for the first three years and 6% in years four through seven. If an investor redeems or otherwise cashes out a NMTC investment prior to the end of the seven-year credit term, all credits taken up to that point in time are recaptured with interest.

According to a January 20, 2015 policy statement published by Enterprise Community Partners, Inc. (which describes itself as “a national Section 501(c)(3) charitable organization that provides expertise for affordable housing and sustainable communities”), “NMTC investments have been involved in developing or rehabilitating over 109 million square feet of real estate and created over 500,000 jobs in low-income communities.” If these figures are anywhere close to accurate, the construction industry would be well-advised to pay attention to the NMTC Program.



IN NOVEMBER OF 2014, PIETRAGALLO GORDON ALFANO BOSICK & RASPANTI, LLP OPENED THE FIRM’S SIXTH OFFICE IN RICHMOND, VIRGINIA. KENNETH D. MCARTHUR, JR. JOINED PIETRAGALLO TO RUN THE RICHMOND, VIRGINIA OFFICE. HE PRACTICES IN THE AREAS OF HEALTH CARE, COMPLEX LITIGATION (WITH A FOCUS ON ANTITRUST LITIGATION, MULTI-DISTRICT LITIGATION AND CLASS ACTIONS), AND BUSINESS/CORPORATE. FOR MORE INFORMATION, PLEASE CONTACT KENNETH D. MCARTHUR AT [KDM@PIETRAGALLO.COM](mailto:kdm@pietragallos.com).

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## Design Led Construction

It is time for Architects to turn the page on how construction occurs in the industry.

To fully understand the meaning of suggesting an alternative delivery method, it is of utmost importance to understand the basis of the customary delivery system that has been employed in the construction industry for much of the twentieth century. Design-Bid-Build is the

traditional three party paradigm whereby the owner contracts separately with both a designer and a constructor. As a consequence, the process becomes very linear and prototypically fragmented with sequential design, procurement and then construction. There is very little interaction amongst the contracted parties usually resulting in increased errors, disputes, higher costs and ultimately longer schedules. This silo based approach has led owners to gravitate toward a more integrated project delivery with a single point of responsibility and a more enhanced predictability of outcome.

The process ensures that the owner receives a well-designed project, on time, on budget and that is guaranteed by a bond. In many circumstances, this process allows for early project completion allowing the client use of the facility months earlier than would have been made possible by the more traditional methods. Its basis is collaboration wherein design, construction and budget decisions are made by a team of architects, engineers, estimators, construction managers and trade subcontractors.

Our most recent Project, a \$70,000,000 Medical Mall, just received the “Building of the Year” award from the Engineering Society of Western Pennsylvania. It was delivered using the approach outlined above, underscoring “Design Led” as the differentiator of this integrated project delivery.



We begin the project by using a Design Research process that we developed which allows us to dig deeply into the needs of the owner, tenant, staff and others. This essential information is then passed along to the architects and engineers as they begin the design process. Our goal is to develop design solutions that solve the needs of the end users from the interactive sessions described above. We always look for more than one solution to give the users the benefit of selecting a design concept that best suits their needs.

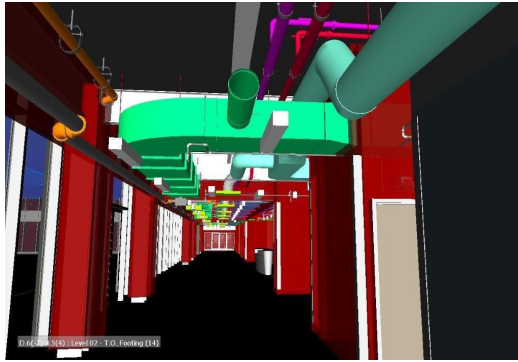
Once the design alternatives are developed, we meet with our internal staff of architects, engineers, cost estimators, construction managers and construction superintendents, together with outside trade sub-contractors, to begin the estimating process. We discuss and develop construction alternatives. These alternatives are not just explored as cost reducers but must also be consistent with the architectural and engineering design intent. Once our first estimate is completed we evaluate it against the owner's budget. This estimate is then discussed with the owner and its representatives and if, for whatever reason it is over budget, we can then review our alternatives to discuss ways in which we can appropriately reduce the costs.

Once we are comfortable that the project is within budget we develop a "Not to Exceed" contract with the owner, which includes the option of bidding the project with incomplete drawings and 100% scope narratives, enabling us to choose the apparent low bidders to work with our AE staff to jointly complete the drawings before the construction begins. The contract also includes a construction schedule and a surety bond. If desired, we can "Fast Track" the project by beginning construction as the drawings progress. This concurrent design and construction process allows the project to be delivered much earlier than had it been scheduled with the normal linear progression. Delivering the project earlier and on budget allows the building to be occupied sooner, thus enabling the owner to capitalize on his investment much sooner than expected.

Another interesting aspect to consider is the enhancement of this delivery with the use of Building Information Modeling (BIM). Through the implementation of a 3D Model, developed with Revit, Autodesk's software platform, the project team is enabled to anticipate constructability problems before they become an issue.

BIM was employed to a high level of development in the Medical Mall project, including all the necessary details required for fabrication. The capabilities of the software permitted total integration between Astorino and the selected contractors. Everyone on the team had access to the model and contributed to its development. The software program Newforma was used to synchronize communication.

**Model 3D Visualization**



**Actual Field Installation**



**Three Dimensional Software allowed for the Ductwork and Piping to be built off-site in the Contractors' Facilities, then it was delivered to the site for installation.**

BIM works best through co-location of the main stakeholders. Astorino made an effort to have owners, architects, engineers, contractors, and consultants work in the same space, in the office, generating the creative feedback that led to informed decisions. The arrangement allowed for team members to always be current on the project. New information and ideas could be readily exchanged. Fabricators could begin their tasks off-site immediately after the modeling of the details was complete because the collaborative environment permitted immediate consensus. Trade contractors were on board with the process, because, obviously, “the faster they got their work done, the more profit they were able to make”.

LOUIS D. ASTORINO, FAIA OF ASTORINO-CANNONDESIGN

THE AUTHOR OF THIS ARTICLE IS THE ARCHITECT FOR THE CHAPEL OF THE HOLY SPIRIT IN THE VATICAN IN VATICAN CITY, ITALY. MR. ASTORINO IS THE ONLY AMERICAN ARCHITECT TO DESIGN A STRUCTURE IN THE VATICAN. POPE FRANCIS CELEBRATES MASS IN THE CHAPEL ON A DAILY BASIS.

## **You Think Indemnity Is The Answer? Maybe Not; A National Survey Of Anti-Indemnity Acts**

Some of our readers may recall our recent article concerning the status of anti-indemnity legislation and case law interpreting that legislation in our tri-state area. We specifically explained how the matter of crossing the panhandle from Pittsburgh to Steubenville would result in three (3) dramatically different results for contractors and subcontractors attempting to negotiate and later enforce indemnity agreements and construction contracts. To briefly recap, Pennsylvania does not prevent broad form indemnification clauses in most construction contracts, West Virginia has enacted a limited anti-indemnity statute that prohibits subcontractors from indemnifying contractors for their sole negligence, and Ohio has enacted an anti-indemnity statute that prohibits contractors from requiring

subcontractors to indemnify contractors for either their sole or partial negligence. As a service to our readers who negotiate or enforce indemnity clauses in other jurisdictions outside of our tri-state area, we have prepared a reference chart concerning the current status of anti-indemnity legislation throughout the remaining states. This chart is intended to provide you with an overview of the legislation governing indemnity in each jurisdiction, and we would caution you that case law treating these statutes in each jurisdiction varies widely, as we explained in more detail in our earlier article concerning Pennsylvania, Ohio and West Virginia. Nonetheless, the chart below is a handy reference when trying to determine quickly if a particular jurisdiction has an anti-indemnity statute or if, like Pennsylvania, it's the "Wild West."

State	Type	AI Prohibition	Statute
Alabama	No prohibition		
Alaska	Sole negligence		Alaska Stat. Sec. 45.45.900
Arizona	Sole negligence for private projects. Sole or partial negligence for public projects.	Yes	ARS Sec. 32-1159, 34-226, and 41-2586
Arkansas	Sole negligence		Ark. Code Sec. 4-56-104 and 22-9-214
California	Sole or partial negligence		Cal. Civ. Code Sec. 2782 and 2782.05 (applies post 1/1/2013)
Colorado	Sole or partial negligence	Yes	Colo. Rev. Stat. Sec. 13-50.5-102 and 13-21-111.5
Connecticut	Sole or partial negligence		Conn. Gen. Stat. Sec. 52-572k
Delaware	Sole or partial negligence		Del. Code Sec. 2704
D.C.	No prohibition		
Florida	Sole or partial negligence for public projects		Fla. Stat. Sec. 725.06
Georgia	Sole negligence		Ga. Code Sec. 13-8-2
Hawaii	Sole negligence		Hawaii Rev. Stat. Sec. 431:10-222
Idaho	Sole negligence		Idaho Code Sec. 29-114
Illinois	Sole or partial negligence		740ILCS 35/1-3
Indiana	Sole negligence		IC 26-2-5
Iowa	Sole or partial negligence		Iowa Code Sec. 537A.5
Kansas	Sole or partial negligence		KSA 16-121
Kentucky	Sole or partial negligence		Ky. Rev. Stat. Sec. 371.180
Louisiana	Sole or partial negligence		La. Rev. Stat. Sec. 38:2216.G
Maine	No prohibition		
Maryland	Sole negligence		Md. Code. Ann., <a href="#">Cts. &amp; Jud. Proc.</a> Sec. 5-401
Massachusetts	Sole negligence		Mass. Gen. Laws, ch.149, Sec. 29C
Michigan	Sole negligence		MCL 691.991
Minnesota	Sole or partial negligence		Minn. Stat. Sec. 337.05
Mississippi	Sole or partial negligence		Miss. Code Sec. 31-5-41
Missouri	Sole or partial negligence		Mo. Rev. Stat. Sec. 434.100

State	Type	AI Prohibition	Statute
Montana	Sole or partial negligence	Yes	Mont. Rev. Code Sec. 28-2-2111 (private), Mont. Rev. Code Sec. 18-2-124 (public)
Nebraska	Sole or partial negligence		Neb. Rev. Stat. Sec. 25-21, 187
Nevada	No prohibition		
New Hampshire	Sole or partial negligence		N.H. Rev. Stat. Sec. 338-A:1 and A:2
New Jersey	Sole negligence		N.J. Stat. Sec. 2A:40A-1
New Mexico	Sole or partial negligence		N.M. Stat. Sec. 56-7-1
New York	Sole or partial negligence		N.Y. Gen. <u>Oblig.</u> Laws Sec. 5-322.1
North Carolina	Sole or partial negligence		N.C. Gen. Stat. Sec. 22B-1
North Dakota	No prohibition		
Ohio	Sole or partial negligence		Ohio Rev. Code Sec. 2305.31
Oklahoma	Sole or partial negligence	Yes	Okla. Stat. Sec. 15-221
Oregon	Sole or partial negligence	Yes	Or. Rev. Stat. Sec. 30.140
Pennsylvania	Primary negligence - design professionals only		68 P.S. Sec. 491
Rhode Island	Sole or partial negligence		R.I. Gen. Laws Sec. 6-34-1
South Carolina	Sole negligence		S.C. Code Sec. 32-2-10
South Dakota	Sole negligence		S.D. Codified Laws Sec. 56-3-18
Tennessee	Sole negligence		Tenn. Code Sec. 62-6-123
Texas	Sole or partial negligence	Yes	Tex. Civ. <u>Prac</u> & Rem. Code Ann. Sec. 130.002, 151.102, and 151.104
Utah	Sole or partial negligence		Utah Code Sec. 13-8-1
Vermont	No prohibition		
Virginia	Sole negligence		Va. Code Sec. 11-4.1
Washington	Sole or partial negligence		Wash. Rev. Code Sec. 4.24.115
West Virginia	Sole negligence		W.Va. Code Sec. 55-8-14
Wisconsin	No prohibition		
Wyoming	No prohibition		



FOR MORE INFORMATION, CONTACT PHILLIP R. EARNEST AT [PRE@PIETRAGALLO.COM](mailto:PRE@PIETRAGALLO.COM) OR CHRISTOPHER E. BALLOD AT [CEB@PIETRAGALLO.COM](mailto:CEB@PIETRAGALLO.COM).

## Company Loses Right To Sue For Failing To Register To Do Business In Pennsylvania

On January 23, 2015, the Superior Court of Pennsylvania issued an opinion overturning a breach of contract verdict in a commercial dispute on the basis that the Plaintiff corporation failed to timely register to do business in Pennsylvania in the case of *Drake Manufacturing Company, Inc. v. Polyflow, Inc.*, 2015 PA Super 16 (Pa. Super. 2015). Drake, a Delaware corporation entered an agreement to sell Polyflow couplings for use as termination fittings for its Thermoflex brand tubing. Drake shipped the couplings from its plant in Sheffield, Pennsylvania to Polyflow's place of business in Oaks, Pennsylvania as well as to destinations in California, the Netherlands and Canada.

Drake filed a complaint alleging Polyflow's failure to pay for the couplings and other items. In answering the complaint, Polyflow raised as new matter Drake's lack of capacity to sue because Drake was not registered and authorized to maintain suit in Pennsylvania. In a non-jury trial, Polyflow did not dispute its nonpayment and presented evidence only on Drake's failure to obtain a certificate of authority to do business from the Pennsylvania Department of State. The trial court entered a verdict in favor of Drake in the amount of \$291,766.61. The same day, Drake filed an application for issuance of a certificate of authority to do business. Polyflow filed a timely motion for judgment n.o.v. on the basis of Drake's lack of capacity to sue.

During the pendency of the Polyflow's post-trial motion the Department of State issued the certificate of authority and Drake filed a copy with the court. The trial court denied Polyflow's motion and derided its position as "gamesmanship". On appeal the Superior Court disagreed, stating that Polyflow properly preserved the lack of capacity issue in its new matter, and cited the relevant Pennsylvania statutes. Section 4121 of Title 15 requires "a foreign business corporation, before doing business in this Commonwealth, shall procure a certificate of authority to do so from the Department of State, in the manner provided in this subchapter..." Section 4141(a) provides that a "nonqualified foreign business corporation doing business in this Commonwealth...shall not be permitted to maintain any action or proceeding in any court of this Commonwealth until the corporation has obtained a certificate of authority."

Although section 4122 states that simply maintaining or defending an action in Pennsylvania does not in itself constitute doing business in Pennsylvania, the Court held that Drake's maintaining an office, entering into a contract with Polyflow and shipping products to Polyflow in Pennsylvania constituted doing regular, systematic and extensive business in the Commonwealth. The Superior Court held that Drake's late filing of the application for the certificate of authority and subsequent filing of it did not constitute timely evidence

of record that the trial court could rely on to deny Polyflow's post-trial motion. In an earlier opinion, the Superior Court held that a foreign corporation may comply with section 4141(a) by obtaining a certificate of authority during the course of a lawsuit. *International Inventors Inc., East v. Berger*, 363 A.2d 1262 (Pa. Super. 1976).

The upshot of the Drake case for foreign corporations doing business in Pennsylvania is that obtaining a certificate of authority is mandatory in order to bring lawsuits in this Commonwealth. The takeaway for practitioners is that what may appear as a mere technicality can scuttle an otherwise strong breach of contract case.



FOR MORE INFORMATION, CONTACT MARK T. CALOYER AT  
[MTC@PIETRAGALLO.COM](mailto:MTC@PIETRAGALLO.COM)

## **Document Everything: How To Ensure A Successful Inefficiency Claim**

Inefficiencies, or losses in productivity, are often daily occurrences on a construction project. However, tracing the cause and quantifying the amount of that inefficiency are rarely on the contractor's mind until the project is complete or even later when a dispute arises over releasing retention. Unfortunately, this is typically too late. While attorneys, claims consultants, and experts can analyze a contractor's productivity after the fact, this analysis is only as strong as the contractor's contemporaneous documentation of the project.

Regardless of the size and nature of the project, construction is a document-heavy endeavor. From drawings and specifications to contracts and purchase orders to change orders and RFIs, documents drive almost every aspect of a project from start to finish. As a result, it is easy to assume that all relevant data for a project is being captured at all times. While this may be true for most issues, it is rarely the case with inefficiency. Productivity claims are an animal all their own and consider many more factors than the more typical construction claims or delay or defect.

If you were to ask a contractor how he knows his productivity has been reduced, his answer would sound like the Supreme Court's view on pornography: "I know it when I see it." Unfortunately for that contractor, and for the claims consultants and attorneys advocating on his behalf, courts require a more nuanced analysis. Specifically, the contractor must be able to show not only that its productivity has decreased measurably, but also that another party actually caused the loss in productivity as well as the quantum of this loss. Neither of these is particularly easy to show, much less so if the contractor's documentation is not robust.

### **Documenting Causation**

Showing that any one party is responsible for a contractor's reduced productivity requires ruling out all of the other potential causes, a myriad of which exist on even the smallest construction projects. For instance, a contractor may face reduced productivity due

to climate issues, problems with labor and unions, financial circumstances of its own or of its subcontractors and suppliers, regulatory decision, miscommunication or lack of communication with other parties involved in the construction, or coordination and scheduling issues and site conditions. While any one of these issues may disrupt a contractor's efficiency, these issues are not mutually exclusive and can (and often do) combine to create a measurable impact. This is what makes contemporaneous documentation so critical—separating the wheat from the chaff.

When looking at a project retrospectively, as is typically the case when developing an inefficiency claim, an inefficiency expert must rely on certain data points to try to recreate which of the various potential issues actually or primarily caused a reduction in efficiency. These data points are typically contained in labor and costs reports that capture project expenditures weeks or months at a time. However, without context, the expert can only say whether the contractor was more or less efficient at any given time; the expert cannot say from this data alone what drove the changes in efficiency. This is where the expert must rely on the contractor's ability to create a context for the changes. Often, the starting point for developing this context is relying on the contractor's statements pointing the finger at the owner. This alone is not enough. To bolster the argument, attorneys and experts will look at the contractor's daily reports and minutes of weekly or bi-weekly on-site project meetings for clues that may elucidate the underlying cause.

While a critical snapshot on a project's progress and productivity, daily reports are often seen by on-site supervisors and foremen as simply a way for the project executives to keep tabs on their employees. Certainly, this is an aspect of the daily report, but this view leads to the reports as being a mere replacement for roll call or time cards. Instead, what is necessary to provide the context discussed above is a true statement and narrative of the daily actions, inactions, and operations of the contractor's on-site personnel. In other words, the difference between a daily report that simply lists the amount of labor-hours expended on a given day and a daily report detailing the occurrences of that day is the difference between a simple sheet of paper in a file and a potential piece of evidence.

Daily reports and meeting minutes need to be sufficiently detailed such that an individual who has never stepped foot on that project site can review the documents years after the project is complete and understand why the number of labor hours varied each day, or why certain equipment did not run for a period of time, or why a contractor completed one percent of his work in one month and twenty-five percent the next month. This level of detail will allow an attorney or claims consultant to identify root causes of changes in efficiency. Specifically, the impact of actions of owners or other third parties can be separated from impact of circumstances for which the contractor likely assumed certain risk, such as disruption due to weather or labor disputes. Yet, even when any one individual cause cannot be separated out from the rest, an expert in labor productivity can perform a cumulative

impact analysis with more reliable data points.

Cumulative impact analysis attempts to track the impact that any one change may have on the total productivity of the project over the remaining project duration. Essentially, this analysis tries to capture the way in which one change may create ripple effects that expand and multiply over time, affecting productivity more than perhaps originally anticipated. However, knowing what is an expanding ripple and what is another rock thrown into the pond is essential to this analysis. By having more detailed data from the project to compare, a productivity expert can factor superseding causes into or out of the analysis as necessary to strengthen the conclusions. After all, if and when the expert is cross-examined by the owner's attorney, every assumption and detail in the expert's analysis will be scrutinized and questioned. The analysis may survive this scrutiny if there is a strong documented record supporting the conclusions. Otherwise, the validity of the expert's conclusions, and with it the basis of the contractor's entire argument for entitlement, may entirely fall apart on the witness stand.

### **Documenting Quantity**

Similarly, a contractor's claim for damages due to reduced efficiency is only as strong as his ability to accurately quantify the actual impact. There are a number of different ways that experts can try to calculate reduced efficiency, but not all analyses are created equal. Attempts to use standardized or industry data in a comparison with individual projects typically are too inaccurate and require too many assumptions. Therefore, analyses using work sampling or industry-based productivity curves fail under any level of scrutiny by an opposing party's expert. This is unfortunate, because these analyses require the least detailed data from the impacted project, which of course may also account for the inaccuracy.

On the other hand, statistical analyses of actual project data can not only provide realistic approximations of a contractor's damages due to inefficiency, they have been recognized as reliable and reasonable by a number of courts. The two best methods of quantifying inefficiency are the Measured Mile and the Baseline Analysis.

The Measured Mile approach has been adopted by most courts as the best (or only) way to quantify inefficiency. This analysis relies on real project data to determine two points of comparison, the impacted period and the unimpacted (or least-impacted) period. Essentially, the Measured Mile attempts to establish a contractor's level of productivity when he is the most productive and use this as a standard against which the levels of productivity during periods impacted by a substantial and clear issue (commonly referred to as the "cataclysmic event"). The challenge in this analysis is having a strong foundation for any conclusion regarding what is the unimpacted or least-impacted period. Once again, this analysis is only as strong as the real project data from the contractor. If, for instance, the contractor is missing days, weeks, or months from its documentation, the statistical analysis of this period

and the periods of time around it will be less and less accurate. Alternatively, if the contractor keeps extensive and detailed records throughout the project, the statistical analysis may be sufficiently comprehensive as to be almost iron-clad. Additionally, the productivity expert should be able to more confidently determine the impacted and unimpacted periods to ensure a proper comparison.

Unlike the Measured Mile approach, the Baseline Analysis does not require a cataclysmic event to occur to compare productive and less-productive periods. Instead, the Baseline Analysis looks at the project data overall and determines the baseline level of productivity when the contractor is at his best over the entirety of the project and not limited to a certain period of time like the Measured Mile. Theoretically, this allows for more pointed and specific comparison of points of reduced productivity as opposed to larger periods of time. However, the Baseline Analysis is only viable if the contractor can clearly show substantial, detailed breakdowns of productivity throughout the project as well as specific causes and effects of issues and third parties to the contractor's work.

### **Conclusion**

Detailed, contemporaneous documentation is the contractor's best way to mitigate and potentially recover damages due to losses in inefficiency. While most contractors have enough experience to know when they have been made less efficient by outside forces, courts require the data to back up these claims. And, while claims consultants and attorneys can create good statistical and legal analysis after the fact, they cannot recreate information that could only accurately be determined during the project. Therefore, the best offense in an inefficiency claim is a strong defense of detailed and comprehensive contemporaneous documentation. Contractors should work with attorneys and claims representatives regularly to determine whether they are properly capturing project data.

CHRISTOPHER M. SWEENEY, PECKAR, & ABRAMSON, P.C., WASHINGTON, D.C.

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