

AGC of Minnesota Update to All Members for the Week Ahead (December 12, 2011)

Important Notice to All AGC of Minnesota Members Regarding: *Amicus Curiae* in *ECI v. Bolduc* – Minnesota Supreme Court

At its recent Board of Directors meeting, the AGC of Minnesota Board of Directors agreed to petition the Minnesota Supreme Court for permission to file an *Amicus Curiae* brief in a case involving two members, Engineering and Construction Innovations, Inc. (ECI) and L.H. Bolduc Co., Inc. The case involves claims at a White Bear Lake jobsite where both firms were subcontractors - ECI to Frontier Pipeline and Bolduc to ECI. Dean Thomson submitted the application for *Amicus Curiae* to the Court and will write the AGC brief.

In his application to the Court, Dean carefully followed the direction provided by AGC's Board. The Board discussed the sensitive nature of this case, especially in view of the many generals and subs that are members, but decided the Supreme Court should be urged to make a decision that provides clarity and certainty for the industry. The Board's position was emphatically not to take a position in favor of ECI or Bolduc, or generals or subs, but to ask the Court to provide a clear decision that contributes to consistency in risk management for the benefit of the industry.

Again, AGC's position is neither for nor against subcontractors or general contractors (ECI and Bolduc were both subcontractors at the time and, like many AGC general and specialty contractors, frequently change roles depending on the project). AGC's position advocates enforcing construction contracts according to their terms. AGC's *Amicus* petition makes that clear to anyone who reads it. Nevertheless, the local chapter of American Subcontractor Association (ASA) has sent communications to its members, many of which are AGC members, stating that AGC of Minnesota is taking a position against the subcontractor. This is not true and is a very misleading statement.

The Supreme Court has accepted review of this case involving the meaning and application of Minnesota Statute §§337.01 - .05, which deals with indemnity agreements and agreements to procure insurance. Through the involvement of both its general contractor and subcontractor members, AGC has developed several editions of its Standard Subcontract forms. These forms have been the most widely used standard forms in the industry in this area and are of great benefit to the entire industry. The value of AGC's forms, however, depends on enforcement according to their terms in accordance with the Minnesota Statutes cited above. If contracts are not enforced according to their terms, then parties to the construction process have no certainty about the scope of their obligations until and unless they are interpreted and declared by a court. AGC believes the industry needs less, not more, judicial involvement and that parties should be allowed to negotiate the terms to their own agreements. AGC's position will advise the Court on the importance of complying with the existing statute and the case law that has interpreted it. AGC believes it is in the best interests of the entire industry - both subcontractors and general contractors alike - to enforce contracts according to their terms. AGC's *Amicus* brief will reflect that position.

We will make the AGC brief available to all members when it is filed with the court. In the meantime, please call or email me with any questions or concerns.

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Notice to All Members – Amendments to Articles of Incorporation

At the Annual Meeting on January 25, the Board of Directors and general membership will be asked to approve amendments to the association's current Articles of Incorporation. Please see the attached for a summary of the proposed changes and the proposed new Articles.

Shutdown Claims Update

The Minnesota Department of Transportation has communicated several pertinent developments having implications for highway heavy contractors that are currently working to process construction claims related to the state government shutdown of 2011.

Canadian Method - Home Office Overhead Rates

The state has indicated a willingness to begin processing and subsequently paying claims filed under the terms and conditions of the Canadian Claims Processing Method. At issue is the applied percentage for home office overhead rate (HOOR) compensation. MnDOT has agreed to initially process Canadian Method claims at the 4% HOOR and will then offer a future adjustment of the HOOR pending resolution of a joint MnDOT - Industry analysis of HOOR rates. The future adjusted percentage will not be lower than 4%. An approach and methodology for determining a representative home office overhead rate for Minnesota contractors is being actively developed and is expected to be deployed shortly.

Data Practices & Proprietary Financial Data

MnDOT has additionally announced they will consider all relevant financial data submitted by contractors for purposes of calculating home office overhead rates to be protected non-public data. The following communication from MnDOT prescribes the manner and fashion in which all relevant data should be handled to ensure its proprietary non-public status:

Financial data submitted to MnDOT to establish a home office overhead rate are classified as trade secret information under Minn. Stat. §13.37, subd. 1(b). Trade secret information is classified as nonpublic data under Minn. Stat. §13.37, subd. 2. MnDOT employees whose work requires access to the data shall have access to the data, but must not distribute the data outside of MnDOT or to employees who do not have a business need to see the data.

All other information submitted to support claims (invoices, verifications of payments made or costs incurred due to the shutdown, justifications of shutdown expenses, etc.) remain public data. Questions may be directed to MnDOT's Data Practices Office at 651-366-4822.

Contractors must clearly mark the financial data they submit to determine a home office overhead rate so that handlers of the data can take appropriate steps to protect the data. We recommend placing the data in a separate folder or separate electronic folder with a cover note similar to this: "The data contained in this folder are financial data submitted to determine a home office overhead rate. We submit the data under the trade secret classification found at Minn. Stat. 13.37, subd. 1(b), and understand the data are nonpublic."

In order to protect the nonpublic status of the data in the instance the cover page becomes separated from the financial data, MnDOT recommends including the following language in the footer of the documents:

The data contained in this document are trade secret information under Minn. Stat. §13.37, subd. 1(b). This document shall be used only by those MnDOT employees having a business need to see the data, and will not be distributed outside of MnDOT.

If including the recommended footer is not possible, MnDOT recommends making a notation on each page of the submitted data indicating it is trade secret information.

MnDOT Spec Book Review Time Extended

The timeline for accepting industry comments to the new MnDOT Standard Specifications for Construction has been extended. The original goal was to have all industry comments received by January 6. That date has now been extended to Wednesday, February 1. An industry feedback and comment development workshop will be scheduled sometime in the coming weeks. Look for an announcement and details on how to participate and register your comments concerning the new specifications. Contact Tim Worke, 651-795-2185, with questions.

93rd Annual Meeting

Mark your calendars now for the AGC of Minnesota 93rd Annual Meeting, to be held Wednesday, **January 25**, at the Minneapolis Marriott Southwest. The opening keynote speaker will be Steve Siemens, CSP, a behavioral speaker and author. Learn more about Steve and his dynamic presentations at www.thepeoplebuilder.com.

How can you support your association's most important event of the year?

- Attend – registration information will be available shortly
- Sponsor – sponsorship information, not just for the Annual Meeting but for all of 2012, is attached
- Donate items to the silent auction – information is attached
- Exhibit – information is attached

Nominate an Outstanding Member

Nominations for the Skill-Responsibility-Integrity Award and the Lifetime Achievement Award, to be presented at the Annual Meeting on January 25, are now open. Nominations will close on Friday, December 16. Please consider nominating a fellow AGC of Minnesota member you feel exemplifies the qualities these awards represent. The nomination form is attached.

AGC of America Industry Survey

Thank you to the many members that have already completed AGC and Computer Guidance's 2012 Construction Hiring and Business Outlook survey. If you haven't yet completed the brief survey, please take a few minutes to do so. Your answers will help AGC of America craft a legislative, policy and education program bettered tailored to meet the needs of your firms. They are hoping to have as many members as possible complete the survey by Monday, **December 19**. While they intend to release the combined survey results, they will keep all individual responses confidential. [Take the survey now](#).

OSHA 30-Hour Training

On **January 9-12**, AGC of Minnesota and The Builders Group will hold an OSHA 30-hour construction safety course. See the attached registration form for details or contact Dan Hannan, 651-796-2192 or dhannan@agcmn.org.

Lean Construction 101 Now Available

AGC of America has launched the first course in its new Lean Construction Education Program. Lean Construction 101 is a one-hour online course that provides a foundation of the key concepts and terms used in Lean Construction. The course is now available through AGC's bookstore (<http://store.agc.org/Search?search=9500>) at a fee of \$50 for AGC members and \$65 for non-members.

More information about the complete Lean Construction Education Program will be available early in 2012.

Surety Bonding and Construction Risk Management Conference

The 2012 Conference on Surety Bonding and Construction Risk Management will be held **January 30 – February 1** in Naples, Florida. This conference is intended for in-house lawyers, risk managers and other senior executives interested in controlling the costs of managing risks inherent in the changing construction industry. Surety bonds, insurance policies, construction contracts, and construction operations are among the topics to be discussed. Information on the conference, including the schedule of events, agenda, and information on hotel accommodations, is available at www.agc.org/risk.

Paul Dziejdzic

Paul Dziejdzic, owner of Dziejdzic Caulking Inc., passed away unexpectedly on Sunday, December 4. A celebration of Paul's life will be held Tuesday, December 13, from 4 – 8 p.m. at Greenhaven Golf Course in Anoka. His obituary will appear in the weekend newspapers. Our condolences to Paul's family and friends.

Dennis "Denny Bear" White

Denny White, a retired business agent for Local 633 Cement Masons in Duluth, passed away on December 3. A memorial service

will be held at 1:00 pm on Saturday, December 10, at the Lenroot-Maetzold Funeral Home (1209 E. Fifth Street, Superior, WI, 715-394-5112), with visitation one hour before. Our condolences to Denny's family.

**AGC Bookstore Monthly Featured Products –
Construction State Law Matrix – Save \$100**

Through its on-line bookstore, AGC of America offers monthly featured products, available at a discount to AGC members. A link to the bookstore is available through our home page, www.agcmn.org, or at <http://store.agc.org?Affiliateld=AGCO254>.

Available for a reduced price of only \$49 (a savings of \$100), the Construction State Law Matrix is the most comprehensive and concise resource available for locating information on state laws affecting public and private construction projects. Updated annually by AGC and the national law firm of Smith, Currie, and Hancock, LLP, your annual subscription provides access to searchable information and answers for all 50 states, DC, and Puerto Rico. Your purchase provides instant access from a web browser on any computer or mobile device to information that can be easily sorted by state or topic area. Topics covered include requirements for licensing, bidding, contracting, lien, payment, and more than 60 other topics.

This item is available at a \$100 discount through December using coupon code WeeklyFeature.

Projects in the AGC of Minnesota Internet Plan Room (IPR), Powered by iSqFt, on December 9, 2011

Planning: 647, Bidding: 109, New Projects in the last 7 Days: 24, Projects with Plans: 425

Project details, plans, and specs are available at www.isqft.com. Ask for a free trial – **AGC members get a discount!** For a list of 109 bidding projects posted on December 9, use this link: <http://www.agcmn.org/files/This%20Week's%20Bidding%20Projects.pdf> or go to www.agcmn.org.



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