A “Liquidated Damages” clause sets, or liquidates, the amount of damages, usually on a per diem basis, that the owner will recover for project delays attributable to the contractor. Generally, damages can be liquidated if the actual injury to the owner is uncertain or difficult to ascertain and the amount set is reasonable. Such clauses will not be enforced if the clause operates as a penalty. In other words, if no rational basis exists between the owner’s actual damages and the amounts recoverable under the clause, a court will likely refuse to enforce the clause. A typical clause reads:

The damages to the Owner from a delay in achieving Substantial Completion of the Work are difficult or impossible to ascertain with certainty. As such, in the event that the Contractor fails to achieve Substantial Completion of the Work by each of the Substantial Completion Dates described within the Contract Documents, then the Contractor shall pay to the Owner as compensation and not as a penalty, the sum described below for each calendar day that the Contractor achieves Substantial Completion of the Work by each of the Substantial Completion Dates described within the Contract Documents, and Owner agree that such sum is a reasonable approximation, as of the date of this Contract, of the damages to the Owner resulting from a delay in achieving Substantial Completion of the Work (the “Liquidated Damages”). Contractor shall pay the applicable amount of Liquidated Damages to the Owner upon demand, and Owner may deduct all Liquidated Damages owed by Contractor from any monies which may then be due or subsequently become due to the Contractor under this Contract. It is agreed that these Liquidated Damages are the Owner’s sole and exclusive remedy as it relates solely with respect to delays in the Contractor achieving Substantial Completion of the Work. Contractor and its surety or sureties, if any, shall continue to remain liable to Owner until all such liabilities are satisfied in full.

Another clause that affects the ability of both a contractor and owner to recover damages attributable to construction delays is a “Waiver of Consequential Damages” provision. Many form agreements, including the American Institute of Architects’ A201 General Conditions and B101 Architect – Owner Agreement, contain a mutual waiver of these types of consequential damages. The A201 provides:

The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes:

1. damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and

2. damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit except anticipated profit arising directly from the Work.

(Continued on page 6)
It’s all systems go for the U.S. economy—well—nearly all systems go. Job growth recently has been superb, with the nation adding nearly 3 million jobs last year. Job quality improved with construction, manufacturing, and financial services each chipping in a considerable number of net new jobs. Gas prices plummeted, giving consumers even more spending power. Interest rates have fallen, inducing more borrowing, investing, and spending.

True, with oil prices falling, economic growth in Texas, North Dakota and Oklahoma could slow. For the most part, slumping petroleum prices are good news. The decline in oil prices is partially attributable to disappointing economic news emerging from Europe, China, Russia, Brazil, and a handful of other key markets, but much of this is due to perverse supply dynamics. When prices fall, one expects quantity supplied to decline. Because certain nations are totally dependent upon oil revenues, the response in Russia, Iran, and Venezuela has been to boost oil production to maintain revenues to the extent possible. As prices have fallen, the urgency to produce has intensified, creating oil prices that recently fell below $50/barrel. Most Americans and American businesses benefit from lower oil prices, and this represents a net positive for the U.S. economy even though equity market investors have acquired some jitters over the issue recently. Some of this is logical—a stronger U.S. dollar has helped suppress oil prices—

That helps consumers, but also hurts companies that depend upon exports. A stronger dollar can also induce more consumption of imports and makes it more likely that tourists will travel abroad rather than stay home.

Despite all of these complications, the national economy continues to see robust growth. According to the Bureau of Economic Analysis’ final estimate, third quarter GDP advanced at a 5% rate on an annualized basis, the strongest growth in 11 years and a significant leap from the initial estimate of 3.5% growth published in October. The upward revision was primarily the result of stronger contributions from personal consumption, nonresidential fixed investment, and private inventory investment. Economists are optimistic that above-trend growth was sustained through the fourth quarter, with the consensus fourth quarter estimate for annualized growth standing at 3.2% as of this writing.

The combination of a stable economy, ultra-low interest rates and the relatively unattractive investment prospects in much of the balance of the world has produced

(Continued on page 6)
President’s Message

Mike Wolff, President, Timberwolff Construction, Inc.

What an honor it is to be at the helm of the Retail Contractors Association during its 25th anniversary year. This is a significant milestone for our organization, and I hope you will join us at our Annual Conference in Las Vegas to celebrate with us.

An article by Bill Winkel, Winkel Construction, Inc., in RCA’s May 1991 reported on RCA’s first Board meeting, which was held December 18, 1990. Seven elected Board members—David Weekes, Bill Winkel, Joe McLeod, Paul Herbert, Mike Ratner, Dick De Jager, and Guy Thornberg—gathered for a six-hour meeting. They adopted bylaws, approved a logo, drafted a mission statement, and discussed a budget. They approved 12 new members, discussed membership categories, reviewed feedback from a survey, and looked at a draft of a promotional brochure.

Bill’s article closes with this:

“The remainder of the meeting was devoted to discussions of promoting RCA to future members and clients. The Association will participate in supporting and sponsoring educational opportunities in our industry. Through participation in these opportunities we will learn more about how to better service our client’s needs. Consequently, we will expand our collective abilities to support their needs. The Association is committed to enhancing the industry’s recognition of the professionalism that exists among Retail Tenant Contractors. We also expect to promote the concept of value through the relative worth of hiring professionals at a fair price.”

While our industry and how we operate our businesses has seen monumental changes over the past quarter century, just as much has remained unchanged. The RCA leadership is still focused on providing top notch professional development and programs that help our members be more competitive and provide the highest level of service to their customers. This in turn demonstrates to retailers that RCA members can be depended upon for a quality product.

Some of these programs, like our Safety Program, which provides a comprehensive kit of rules and materials for the jobsite, and Scholarship Program, which supports the educational efforts of the next generation of industry leaders, have been around for many years. They are the hallmarks of what this organization offers the industry and our members. Newer programs, like the Home Depot rebate program, which earns members 2% back on purchases, and the Military Service Initiative, which connects veterans with members looking for supers, have become valuable tools to make our members more competitive. Other industry discounts and incentives, like the BlueBook Building & Construction Network and Extended Stay America programs, provide additional benefits to our members’ businesses.

With progressive and innovative leaders and members, the RCA has evolved since that first meeting in 1980. I’m proud to be part of this organization and excited to see where the next 25 years takes us.

Mike — mike@timberwolff.com

P.S. We’ll celebrate our Silver Anniversary in style with a special event at TPC Las Vegas on March 14. Each Annual Conference registration includes a ticket to the event, which will feature cocktails, seated dinner, entertainment, music and dancing. I hope to see there!

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<td>All-Rite Construction Co., Inc.</td>
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<td>NJ</td>
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<td>Buildrite Construction Corp.</td>
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<td>Chance Construction Co.</td>
<td>D. Jay Chance</td>
<td>409-787-2615</td>
<td>TX</td>
<td><a href="mailto:tellinaw@chanceconstruction.com">tellinaw@chanceconstruction.com</a></td>
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<td>Commercial Contractors, Inc.</td>
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<td>VA</td>
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<td>Desco Professional Builders, Inc.</td>
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<td>DGC Capital Contracting Corp.</td>
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<td>Greg Fish</td>
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<td>OH</td>
<td><a href="mailto:gfish@fortneywagandt.com">gfish@fortneywagandt.com</a></td>
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<td>E. C. Provitz, Co., Inc.</td>
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<td>Eckinger Construction Company</td>
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<td>ELAN General Contracting Inc.</td>
<td>Christopher Johnson</td>
<td>804-284-3704</td>
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<td><a href="mailto:cjohnson@edbweb.com">cjohnson@edbweb.com</a></td>
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<td>Elder-Jones, Inc.</td>
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<td>Kellogg &amp; Kimsey, Inc.</td>
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<td>Kerricook Construction, Inc.</td>
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<td>Lakeview Construction, Inc.</td>
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<td>Montgomery Development Carola Corp.</td>
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<td>Ruscon, Inc.</td>
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<td>Scheiner Commercial Group, Inc.</td>
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<td>Schimenti Construction Company, Inc.</td>
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<td>Trainer Commercial Construction, Inc.</td>
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<td>817-302-2050</td>
<td>TX</td>
<td><a href="mailto:mike@westwoodconstruction.com">mike@westwoodconstruction.com</a></td>
<td>1990</td>
</tr>
<tr>
<td>Winkle Construction, Inc.</td>
<td>Rick Winkle</td>
<td>352-860-0100</td>
<td>FL</td>
<td><a href="mailto:rickw@winkleconstruction.com">rickw@winkleconstruction.com</a></td>
<td>2011</td>
</tr>
<tr>
<td>Wolverine Building Group</td>
<td>Michael Houseman</td>
<td>616-949-3360</td>
<td>MI</td>
<td><a href="mailto:mhouseman@workgroup2.com">mhouseman@workgroup2.com</a></td>
<td>2012</td>
</tr>
<tr>
<td>Woods Construction, Inc.</td>
<td>John Bodary</td>
<td>586-939-9991</td>
<td>MI</td>
<td><a href="mailto:johnbodary@woodconstruction.com">johnbodary@woodconstruction.com</a></td>
<td>1996</td>
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Allocating the Risks... (Continued from page 1)

This mutual waiver is applicable, without limitation, to all consequential damages due to either party’s termination in accordance with Article 14. Nothing contained in this Section 15.1.6 shall be deemed to preclude an award of liquidated damages, when applicable, in accordance with the requirements of the Contract Documents.4

There are also many owner- and project-specific form agreements that contain only a waiver of consequential damages in favor of the owner or no waiver at all leaving the design team, contractor, and its subcontractors exposed to considerable damages when a project does not finish on time.

It is crucial in today’s economy for all project participants to have an open and informed discussion about unanticipated delays at the commencement of every project and to allocate the risks and costs knowingly and accordingly within the contract documents.

The Light... (Continued from page 2)

surging stock prices. The Dow Jones Industrial Average reached above 18,000 for the first time in history on December 23, 2014 ending the year with 7.5% growth. Other U.S. domestic indices finished the year with two-digit growth rates: the S&P 500 with 11.4% and the Nasdaq Composite with 13.4% growth. Despite the remaining concerns regarding the end of QE3, the spread of ISIL and Ebola, share prices quickly refiatted after a near-correction in major financial exchanges.

Perhaps the most upbeat aspect of recent economic performance takes the form of labor market healing. The Bureau of Labor Statistics reported that the nation added 252,000 jobs in December. Over the past year, the nation has added 2.952 million jobs, the strongest year-over-year growth since June 2000. Of that total, nearly a quarter (732,000) was in professional and business service sectors. The list of other rapidly growing employment sectors includes distribution (e.g., retail and wholesale trade), health services, and leisure and hospitality.

The unemployment rate continues to fall. In December, the rate dropped by two-tenths of a percentage point to 5.6%, the lowest rate since June 2008 when the nation was just six months into the recession and on the verge of the global financial crisis. As has been the case during much of the current economic expansion, the decline in unemployment was partially attributable to reduced labor force participation. According to the most recent employment report, (Continued on next page)
273,000 individuals left the job market in December. During the year, however, the nation welcomed more than 1,000,000 net new workers to the nation’s workforce. The labor market participation rate continues to hover around a 35-year low of 62.7%, but much of this is due to accelerating retirement attributable both to aging and surging stock prices, which allow more people to comfortably retire.

The owner-occupied housing market refuses to recover robustly. This is incredible. The nation is adding more than 200,000 jobs per month, the stock market is at record highs, unemployment is below 6%, and the 30-year fixed mortgage rate sits at almost precisely 4%. The nation’s housing market should be booming. It’s not. Though home sales expanded on a monthly basis in September, they were down 1.7% relative to the same month one year ago. Much of the problem revolves around the lack of first-time buyer participation, which reached a 27-year low this year. Normally, first-time buyers account for 40% of all existing home sales. Right now, they aren’t even coming close due to a combination of student debt, tougher lending standards, and altered attitudes toward homeownership.

Despite growing momentum in the broader economy and positive signals from the Architecture Billings Index, nonresidential construction spending shrank on a monthly basis in November. Only 5 of 16 sub-categories (lodging, communication, sewage and waste disposal, and highway and street) registered monthly growth in November. The monthly decline in spending, however, does not signify the end of momentum. November’s figure would have represented a continuation of nonresidential spending’s steady recovery were it not for a sizable upward revision to October’s data (+$11.1 billion). Through the first 11 months of 2014, nonresidential spending is up 6.4% from the same point in 2013 and with only December’s spending data yet to be revealed, it is a near certainty that yearly nonresidential spending will top the $600 billion mark for the first time in the past five years.

The Conference Board Leading Economic Index along with a host of other leading indicators suggests that the U.S. economy is positioned for a solid year in 2014. Many economists, including Sage’s, are predicting roughly 3% growth in 2015. It could end up even better than that, but one needs to account for a few key headwinds, including federal fiscal realities, slower export growth, and diminished capital investment by segments of the U.S. energy sector. Those items will subtract from economic growth along with a handful of more exotic considerations, including the impact of terrorism, cyberattacks, oil company defaults, rising junk bond yields, etc.

Looking Ahead

Inflation will remain low in 2015, which should give the Federal Reserve additional time to be patient. In our estimation, the recent slump in gas prices will end up delaying Federal Reserve action on interest rates for 3 to 6 months, with rate hikes unlike to arrive until the summer of 2015 or perhaps a few months thereafter.

Anirban Basu is Chairman & Chief Executive Officer at Sage Policy Group, Inc., an economic and policy consulting firm in Baltimore, MD. Mr. Basu consults on behalf of numerous clients, including prominent developers, bankers, brokerage houses, energy suppliers and law firms. Join us at the RCA 25th Annual Conference on March 14 and hear him speak give an economic update in his presentation “The Pit and the Pendulum.”
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