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The Clause

A Quarterly Publication of the Boards of Contract Appeals Bar Association, Inc.

by

Roland Nikles

The President's Column David Black

Dear BCABA Members:

With this issue of *The Clause*, we are initiating a new regular feature, the Quarterly BCA Case Digest. Our goal is to provide a concise, practitioner- and contractor-friendly summary of all substantive decisions of the ASBCA and CBCA (since they have the widest jurisdiction and heaviest case load among the BCAs), as well as notable cases from the PSBCA, GAO-CAB, and DCCAB. We feel this is an important service to provide to BCABA members. We hope that you will look to this resource as a way to quickly get up to speed about the latest BCABA decisions and issues relevant to you.

Our editor of the Quarterly BCABA *Case Digest* is Ryan Roberts, an associate in the Government Contracts, Investigations & International Trade Practice Group of Sheppard, Mullin, Richter & Hampton LLP. Ryan is a 2010 graduate of The George Washington University Law School, where he was the Editor-in-Chief of the *Public Contracts Law Journal*. My thanks to Ryan for his willingness to lead this initiative.

This month, as a trial run of the *Case Digest*, we offer a sampling of cases decided primarily in April 2011. As we fine tune our format and editorial style, we encourage your feedback (*continued on page 3*)

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President's Column (cont'd):

(email comments to Ryan at reroberts@sheppardmullin.com). Starting with the September issue of *The Clause*, we hope to expand the *Case Digest* to cover all cases decided from May-July. We are looking for volunteers to join our growing staff of writers. This is a great way to contribute to the BCABA and demonstrate your professional interest in government contracts law. If you are interested, please contact Ryan.

Thanks once again to Pete McDonald for his tireless efforts producing yet another sparkling issue of *The Clause*.

Next, I am pleased to report that on May 17th the BCABA co-presented with the GW Law School a successful Special Colloquium on the new Federal Awardee Performance and Integrity Information System (FAPIIS). More than ninety people signed up to attend this event, and the program was informative and enlightening about the ways FAPIIS could impact federal procurement, protest practice, contract administration, CDA non-monetary claims, as well as contractors' other business relationships. My thanks to Michele Brown (SAIC and BCABA Past-President) and Joe Hornyak (Holland & Knight LLP) for Co-Chairing this program. I also thank Professor Chris Yukins for his essential support and the GW Law School for hosting this event.

Please check our website (<u>www.bcaba.org</u>) and look for emails about upcoming events, including:

- **BCA Judges Reception** in mid-July, chaired by Susan Ebner (Buchanan, Ingersoll & Rooney PC and immediate BCABA Past-President). This will be a great opportunity to mix and mingle with BCA Judges, who are very friendly. Summer associates and interns are particularly encouraged to attend.
- **BCA Quarterly Meeting** in July (tentative). This new event will provide BCABA members with an opportunity to network with each other and hear a panel discussion regarding a hot topic in government contracts law.
- **Trial Advocacy Program** in September, chaired by Shelly Ewald (Watt, Tieder, Hoffar & Fitzgerald), Peter Pontzer (Army), and Donald Yenovkian (Army).
- **Executive Policy Forum** in September timeframe, chaired by John Pachter and Steve Knight (Smith Pachter McWhorter PLC).
- **Annual Program** on October 26, 2011, at the Renaissance Washington, DC Dupont Circle Hotel, 1143 New Hampshire Avenue NW, Washington, DC. This year's Annual Program Chair is Chip Purcell (Williams Mullen and current BCABA Vice-President). Look for more information about panels and speakers soon on the BCABA website.

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President's Column (cont'd):

We are always looking for volunteers to support our activities. If you have any interest in getting involved with the BCABA, please contact me at david.black@hklaw.com or 703-720-8680.

Our quarterly Board of Governors meetings this year will be held at the office of Holland & Knight LLP, 2099 Pennsylvania Avenue, NW, Suite 100, Washington, DC. Our next meeting is on June 16, 2011, starting at noon.

In closing, as we approach the 235th birthday of our great (and still young) nation, I'd like to share some words from Thomas Jefferson, who offered these reflections on the meaning of Independence Day. Thomas Jefferson wrote these words on June 24, 1826 (when he was 83), in a letter declining an invitation to participate in the 50th anniversary celebration of the Declaration of Independence in Washington, D.C. Remarkably, Jefferson passed away ten days later on that 50th anniversary — July 4, 1826. Of American Independence, Jefferson wrote:

[M]ay it be to the world, what I believe it will be, (to some parts sooner, to others later, but finally to all,) the Signal of arousing men to burst the chains, under which monkish ignorance and superstition had persuaded them to bind themselves, and to assume the blessings & security of self-government. That form which we have substituted, restores the free right to the unbounded exercise of reason and freedom of opinion. All eyes are opened, or opening, to the rights of man. The general spread of the light of science has already laid open to every view the palpable truth, that the mass of mankind has not been born with saddles on their backs, nor a favored few booted and spurred, ready to ride them legitimately, by the grace of god. These are grounds of hope for others. For ourselves, let the annual return of this day forever refresh our recollections of these rights, and an undiminished devotion to them.

As lawyers and judges actively participating in the administration of justice, let us spend time this Fourth of July also renewing our appreciation for and devotion to *the rule of law* and its essential role in securing those rights and freedoms that still serve as "grounds of hope for others."

Best regards,

David Black President BCABA, Inc.



Bored of Contract Appeals (a.k.a. The Editor's Column)

by
Peter A. McDonald
C.P.A., Esq.
(A nice guy . . . basically.)

Leading this issue are the announcements of the new ASBCA judgeships (congratulations to all!). We then present *Case Digests* by Ryan Roberts, and this will be a regular article in future issues. To give credit where it is due, the idea for this new feature rests with Dave Black, our current President. We also have two articles based on informative presentations at the BCAJA annual meeting. One is by Patricia Witte and the other is by Bob Huffman, both well-known government contract practitioners. Finally, Roland Nikles points out the importance of knowing when a project is or is not public.

The Clause will reprint, with permission, previously published articles. We are also receptive to original articles that may be of interest to government contracts practitioners. But listen, everybody: Don't take all this government contract stuff too seriously. In that regard, we again received some articles that were rejected because, frankly, they were simply unsuitable for publication, such as: "Pete Completes Community Service!"; "Episodes in Spreadsheet Adventures!!"; and "EAJA Award Exceeds Claim!!!"



Annual Dues Reminder

This is to remind everyone about the BCABA, Inc., dues procedures:

- © Dues notices were emailed on or about **August 1st**.
- © Annual dues are \$30 for government employees, and \$45 for all others.
- © Dues payments are **due NLT September 30th**.
- © There are no second notices.
- © Gold Medal firms are those that have all their government contract practitioners as members.
- © Members who fail to pay their dues by September 30th do not appear in the Directory and do not receive *The Clause*.
- © The Membership Directory is maintained on the website.



New ASBCA Judges

by David S. Black President, BCABA

Three new judges have been appointed to the Armed Services Board of Contract Appeals, each of whom has extensive experience in government contracts dispute resolution and related issues. We welcome these judges to the bench.

Judge Craig S. Clarke

Judge Craig S. Clarke was appointed to the ASBCA in February 2011. Judge Clarke most recently served as the Chief Trial Attorney of the Contract and Fiscal Law Division of the United States Army Legal Services Agency from 2008 to 2011. Prior to that, Judge Clarke was the Deputy Chief Trial Attorney for the Army's Contract and Fiscal Law Division from 1993 to 2008.

From 1970 to 1993, Judge Clark served on active duty as an Army officer in the Ordnance Corps and Judge Advocate General's Corps. While in the JAGC, he served as trial counsel (U. S. Army Missile Command), contract attorney (U. S. Army Missile Command), trial attorney (Contract Appeals Division), contract attorney (Vint Hill Farms Station), and deputy chief trial attorney (Contract Appeals Division).

Judge Clarke earned his law degree from St. Mary's University School of Law (Texas). He also earned a bachelor's degree in Aerospace Engineering from the University of Michigan and a master's degree in Aerospace Engineering from the University of Arizona. He is admitted to practice of law in Texas, Virginia, and the District of Columbia. He is also admitted to the patent bar

Judge Elizabeth M. Grant

Judge Elizabeth M. Grant was appointed to the ASBCA in February 2011. Prior to her appointment, Judge Grant served as the Associate General Counsel (Acquisition) for the Defense Logistics Agency (DLA) Headquarters, advising on acquisition issues, protests, contract litigation, and ADR. She also worked with DLA Energy in a variety of positions, including deputy counsel, fraud counsel, and litigation counsel. Before joining DLA, Judge Grant was engaged in private practice with the Washington law firm of Crowell & Moring.

Judge Grant is a frequent speaker in the field of government contracts law. She has lectured for the Defense Acquisition University, for the Department of Justice Legal Education Institute, and for the George Washington University/Educational Services Inc. consortium. She has served as an adjunct faculty member of the American University's Washington College of Law, and has given numerous presentations for the American Bar Association (ABA) Section of Public Contract Law as well as for DLA.

Judge Grant received her undergraduate degree in history magna cum laude from Cornell University in 1978. She attended the George Washington University Law School, served on the Law Review, and received her J.D. with honors in 1981. Judge Grant is a member of the District of Columbia Bar, and is a member of the Council of the ABA's Section of Public Contract Law.

(continued on next page)

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New ASBCA Judges (cont'd):

Judge Mark A. Melnick

Judge Mark A. Melnick was appointed to the ASBCA in February 2011. Prior to his appointment, Judge Melnick has served as the Assistant Director of the Commercial Litigation Branch of the Civil Division of the U.S. Department of Justice since 1998. Judge Melnick joined DoJ's Commercial Litigation Branch as a Trial Attorney in 1988 as a member of the DoJ Honors Program. He served as a Senior Trial Counsel from 1996 to 1998.

Judge Melnick earned his law degree from the University of Virginia School of Law in 1988. He earned a bachelors degree in Economics from the Pennsylvania State University in 1985.

We are thankful that each of these well qualified individuals are willing to serve the administration of justice in disputes arising between Department of Defense activities and their contractors and look forward to their service. On behalf of the members of the bar, we look forward to appearing before them and assisting them in our roles as advocates for our clients and as servants to the Board.



BCA Case Digests

by Ryan E. Roberts*

The Quarterly BCA Case Digest will provide comprehensive coverage of the ASBCA and CBCA substantive decisions and notable decisions from other Boards from the previous quarter, beginning with the September 2011 issue. We are assembling a staff of attorneys to concisely summarize and analyze these decisions. This issue, however, will serve as a test run of the format and substance (this issue summarizes the cases from April 2011, as well as a particularly interesting decision from December 2010). To that end, I welcome any comments or suggestions BCABA members may have, and I can be reached at the contact information below.

On behalf of our volunteer staff writers, I am excited to be involved with this new venture and look forward to contributing to the BCA legal community.

CASE INDEX

ARMED SERVICES BOARD OF CONTRACT APPEALS DECISIONS

Phoenix Management, Inc., ASBCA No. 57234 (Dec. 13, 2010)

New Era Contract Sales, Inc., ASBCA Nos. 56661, et seq. (Apr. 4, 2011)

Green Dream Group, ASBCA Nos. 57413 (Apr. 4, 2011)

ARCTEC Services, ASBCA Nos. 56444, et seq. (Apr. 15, 2011)

CIVILIAN BOARD OF CONTRACT APPEALS DECISIONS

Walsh/Davis Joint Venture v. GSA, CBCA No. 1460 (Apr. 13, 2011) KD1 Development, Inc. v. GSA, CBCA No. 2075 (Apr. 2011)

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of Phoenix Management, Inc., ASBCA No. 57234, December 13, 2010 – Judge James

The issue before the ASBCA was whether contradictory government responses to Q&A's created a patent ambiguity. The Air Force contracted for vehicle transport services to support activities at Robbins AFB (GA). The CO denied appellant's claim seeking additional travel and per diem costs, citing the RFP, which explicitly disallowed the reimbursement for travel and per diem costs. In posted responses to offeror questions, however, the Government stated that the AF would in fact reimburse these expenses. Two days later, in responding to a subsequent

question, the Government reaffirmed the RFP statement that it would not reimburse these costs.

The appellant argued that it had no duty to seek clarification of the conflicting responses. It argued that when a solicitation amendment conflicts with the original solicitation, and the contractor follows the language of the amendment, there is no duty to inquire. Appellant clearly missed the heart of the issue, however, by not addressing whether conflicting amendments created a patent or latent ambiguity.

The Board held that these conflicting responses created a patent ambiguity. Basic patent ambiguity law places the onus on the contractor to inquire and seek clarification of the ambiguity, else have the ambiguity construed against them. Therefore, the ASBCA denied the appeal.

Contractors must monitor solicitation Q&A's and evaluate whether they contain conflicting responses. Should they, the contractor must seek clarification of the ambiguity. Furthermore, the ASBCA stated that "when an offeror attempts, but the government's response fails, to resolve an ambiguous solicitation provision, the offeror has the duty to continue to seek to resolve that ambiguity." Be diligent, contractors.

Appeals of New Era Contract Sales, Inc., ASBCA Nos. 56661, 56662, 56663, April 04, 2011 – Judge Dickinson

The ASBCA had to decide whether an increase in costs at the subcontractor level, resulting in a failure to deliver at the prime level, excused the prime's default on the contract. The Defense Supply Center Columbus cancelled three firm-fixed-price delivery orders for fuel pumps when the appellant failed to deliver by the specified date. This failure occurred because the appellant's subcontractor could no longer acquire the fuel pumps from the manufacturer at the previously agreed upon discount. Irrespective of this change in circumstances, the Government terminated the delivery orders for default.

The appellant argued that, under FAR 52.249-8(d), Default (Fixed Price Supply and Service), the manufacturer's decision to discontinue the previously granted pricing discounts resulting in an increased acquisition cost excused the default as "beyond the control of both the contractor and the subcontractor, and without the fault or negligence of either."

The Board disagreed, holding that, absent a showing of impossibility, the prime contractor alone is responsible for deficiencies of its suppliers and subcontractors. The appellant merely demonstrated that a subcontractor experienced an increase in price, not that performance was now impossible. The ASBCA also noted the longstanding that the contractor accepts the risk of any price increases under fixed-price contracts, and therefore a simple increase in price is not a basis to excuse the failure to deliver.

If contractors want to guard against future increases in price under fixed-price contracts, they must negotiate an economic price adjustment clause (FAR 16.203-1) into the contract. Otherwise, the contractor will bear the risk of any price increases.

Appeal of Green Dream Group, ASCBA No. 57413, April 4, 2011 – Judge Tunks

The issue presented before the Board was whether a claim over \$100,000 that was certified using the pre-printed language of SF 1435, as opposed to the required Contracts Dispute Act ("CDA") language, was an easily correctable error.

The Joint Contracting Command – Iraq/Afghanistan awarded a task order for road construction in Iraq. The appellant submitted, and the CO denied, a claim for \$554,400 in increased machinery rental costs. The Government moved to dismiss the claim for these costs because the contractor certified the claim only by signing the SF 1435 (Settlement Proposal). Because FAR 33.207 details the specific certification be used for any claim that exceeds \$100,000, the Government argued that the claim was not properly certified and should therefore be dismissed. The ASBCA held that the failure to use the required CDA certification language was a correctable error. Relying on Federal Circuit precedent stating that a contractor's use of the SF 1436 language was a correctable error, the Board extended the same logic to SF 1435 (the language of which is identical). The ASBCA dismissed the Government's Motion to Dismiss.

The lesson to be learned here is a simple one – if your claim is over \$100,000, use the proper CDA language. Although a failure to do so is a correctable error, it is one that contractors should not waste time or money litigating.

Appeals of ARCTEC Services, ASBCA Nos. 56444, 56631, 57193, April 15, 2011 – Judge Peacock

This appeal concerned the Government's denial of ARCTEC's claims for increased costs from severance benefits paid to former employees after the expiration of the underlying Air Force contract for a variety of services relating to radar facilities. The contract, which incorporated the FAR clauses implementing the Service Contract Act ("SCA"), required ARCTEC to pay minimum wages and fringe benefits as proscribed by the contractor's collective bargaining agreements ("CBAs"). The CBAs negotiated by ARCTEC required the payment of severance benefits for employees.

The parties negotiated the last modification to the contract ("Mod. 529") in the final month of performance. Mod. 529 contained a clause stating that ARCTEC "hereby releases the Government from any and all liability under this contract for further equitable adjustment" relating to increased costs. After expiration of the contract, ARCTEC made severance payments to CBA covered employees who did not obtain employment with the successor contractor. The Air Force refused to reimburse ARCTEC for these costs under the phase-out CLINs of the contract, stating that ARCTEC was not legally entitled to these costs because the

contract contained fixed-price CLINs, and ARCTEC therefore bore the risk of any cost increases. In addition, the Government stated that the waiver included in Mod. 529 precluded ARTEC from even submitting a claim for these costs.

The ASBCA held that ARCTEC was entitled to a price adjustment for the severance costs because the contract incorporated both ARCTEC's CBAs and the SCA Price Adjustment clause (FAR 52.222-43). These provisions entitled ARCTEC to a price adjustment to recover increased costs for fringe benefits paid pursuant to the CBAs.

The ASBCA also held that the waiver executed in Mod. 529 did not preclude a claim for the severance costs. The Board noted that the modification did not explicitly state that it extended to the severance costs. Additionally, the ASBCA reasoned that FAR 52.222-43(b) prohibited ARCTEC from including contingency costs in price adjustment proposals. ARCTEC did not know which employees would be receiving severance benefits when Mod. 529 was executed. Therefore, the ASBCA held that the Government "could not reasonably consider that the modification covered such contingent costs or that appellant was required to estimate them in violation of the unambiguous language of the clause."

Contractors must be careful not to sign away the rights to recoverable costs. This decision, despite siding with the contractor, keeps the door open for a CO to trap a contractor into letting the Government off the hook for costs it's required to pay. Closely examine any waivers the Government presents, and if specified future costs are known at the time, be sure to reserve the right to seek an adjustment for these costs.

Civilian Board of Contract Appeals

Walsh/Davis Joint Venture v. GSA, CBCA No. 1460, April 13, 2011 – Judge Daniels

The GSA contracted for the construction of a complex of buildings to be occupied by the Bureau of Alcohol Tobacco, Firearms and Explosives in Washington, D.C. The appellant submitted a claim for increased costs relating to both the substance of the precast concrete and the finish on the face of the concrete. The CO denied both claims as simply being within the requirements of the contract.

The increase in cost for the substance of the concrete was incurred, in-part, by a subcontractor. The contract required that any subcontractor claims be made before the subcontractor began work or within a week of the subcontractors first knowledge of the change. The Government argued that the claim was barred as untimely by the terms of the contract because the claim was not made until after performance was completed. The CBCA disagreed, holding that when a claim is brought later than permitted by the contract, the claim will be heard unless the Government can prove it was prejudiced by the late notice. The Government could not prove such prejudice here.

The CBCA also held that the contractor was entitled to increased costs relating to the finish of the precast. The contract required a smooth form finish that was "free of pockets" and that did not have "[e]xcessive air voids." The CO interpreted these requirements to be one and the same, and would not accept a finish containing any air voids. The CBCA stated that, "Whenever the defendant orders work done which the plaintiff thinks is in violation of the contract, or in addition to its requirements, plaintiff is required to protest against doing it, or secure an order in writing before doing it, [before making] a claim against the Government for additional compensation." The contractor properly secured a written change order stating that the finish required was different from the contract's requirements, and therefore the CBCA granted the request for an equitable adjustment.

Two key points here: (1) subcontractors – pay close attention to timeliness requirements for submitting claims, even if the prime is not enforcing the terms; and (2) contractors – be sure to either protest a change as an extra-contractual requirement or secure a written change order.

KD1 Development, Inc. v. GSA, CBCA No. 2075, April 20, 2011 – Judge Vergilio

CBCA decision on the parties' cross-motions for summary judgment, arising under two of KD1's leases with the GSA. KD1 claimed that it was entitled to additional operating costs in addition to the base rent for the facilities. Additionally, KD1 disputed the Government's position that it could offset amounts due on the first lease with payments owed on the second lease.

The solicitation for the lease contained GSAR 552.270-33, Operating Costs, which stated that "[b]eginning in the second year of the lease and each year after, the Government shall pay adjusted rent for changes in costs for [operating costs]." The lease itself also included a provision which stated that the "Lessor shall furnish to the Government as part of the rental consideration . . . [a]ll services, maintenance, repairs, utilities, alterations and other considerations" Despite these provisions, for the first 8 years of the lease the Government paid a fixed rate for operating costs in addition to the base rent. In 2006, a new CO concluded that the Government had been wrongly paying for these costs.

The CBCA held that the contract unambiguously included operating costs in the base rent price. The plain language of the contract indicated that the lease rate was a gross rate inclusive of operating costs, and operating costs were not identified as a separate element of payment apart from the pre-negotiated escalations. The CBCA denied summary judgment, however, because the record was insufficient to determine whether the written terms of the contract accurately captured the intent of the parties at the time of contracting.

The CBCA did grant the Government's motion for summary judgment allowing it to withhold payments to offset the contractor's debts. The CBCA cited several cases for the "undisputable" proposition that "the government has the right to offset debts owed to its contractor with a debt

owed to it by the same contractor absent explicit contractual, statutory, or regulatory language stating otherwise." KD1 failed to identify any language prohibiting offsetting, and therefore the CBCA granted summary judgment for the Government.

Although it should go without saying, this case is another example of why contractors must ensure that the written agreement incorporates all of the terms agreed upon during negotiation. Although the CO who negotiated the contract may perform in accordance with the unwritten terms, subsequent CO's are unlikely to honor such an agreement.



^{* -} Ryan Roberts is an associate at Sheppard Mullin Richter & Hampton LLP in Washington, DC. While at GWU Law School, he was the Editor-in-Chief of the *Public Contract Law Journal*. He may be contacted at reroberts@sheppardmullin.com.

The Sound-Bite Theory of Appellate Review

by
Patricia Wittie*

[Note: This article is taken from Patricia Witte's presentation at this year's annual meeting of the Board of Contract Appeals Judges Association. Reprinted with permission.]

Mabus v. General Dynamics C4 Systems, Inc.

F.3d, 2011 WL 343960
Fed. Cir. 2011

reversing

General Dynamics C4 Systems, Inc., ASBCA No. 54988, May 8, 2009, 09-2 BCA ¶34150

Holding at the Federal Circuit: Contractor who had accepted 13 delivery orders issued via email over a 5-year period without objection was estopped from rejecting 11 more emailed delivery orders, received 1-3 days prior to the end of the contract term, notwithstanding unambiguous language in the contract stating that emailed delivery orders were not permitted. In denying the Navy's estoppel defense, the Board erred by applying the wrong standard.

The accepted view of this case among members of the private bar is that the Federal Circuit has done it again, ignoring long-standing legal precedent, misunderstanding the context, and misconstruing the facts. They join in Judge Newman's pithy dissenting conclusion that because this was a case involving a government contract, the law of government contracts actually should be applied. They decry the Court's apparent willingness to confuse findings of fact with conclusions of law. They complain that it is unfair for the Court to bless the Government's insistence on performance to the letter of the contract, but then to refuse the blessing when the contractor insists on the same thing.

One must agree with all of these points. Irrespective of the ultimate conclusion, the manner in which the Court approached the facts and the law in this case is at least unorthodox, if not distressing.

First, the Facts

It would be comforting to begin the factual background of this case with Judge Allegra's frequent statement that "we begin with common ground." See, e.g., Glenn Defense Marine (Asia) Pte. Ltd. v. U.S., ___ Fed. Cl. ___, 2011 WL 696230 at *5; CR Associates, Inc. v. U.S., 95 Fed. Cl. 357, 367 (Fed. Cl. 2010). However, there is very little common ground regarding the facts (or for that matter, the law) as between the Federal Circuit and the Board; thus the following summary borrows from both decisions. It is lengthy because the case turns on the

principles of equitable estoppel, which can only be understood in light of a complete recitation of the facts and circumstances.

A. This was a firm fixed-price development contract

The original contractor here was Motorola, which proposed to provide to the Government, on a firm fixed-price basis, certain high tech radios and associated software that had never yet been manufactured nor even developed to the point of having a prototype. After award was made (at a fixed price per unit), Motorola and one other awardee did develop prototypes, and the Navy conducted a down-select, choosing Motorola. The Navy, presumably happy that it had once again persuaded a major contractor to propose a firm fixed price on a development contract, did not change the FFP requirement; however, as part of the down-select process and presumably in light of its work on the prototype, Motorola offered a reduction in its original firm fixed pricing, based on two assumptions that it lived to regret:

- First, that it would be able to develop and sell a commercial version of these radios and their associated software, to offset some of the development costs; and
- Second, that the Government would actually purchase all of its estimated quantities, so that Motorola would experience a learning curve and lower production costs over the life of the contract. The estimated and ordered quantities of radios were as follows:

	Govt. Estimate	Govt. Orders
Option Year 1 (FY 1999)	100 units	95
Option Year 2 (FY 2000)	142 units	86
Option Year 3 (FY 2001)	80 units	0
Option Year 4 (FY 2002)	211 units	30
Option Year 5 (FY 2003)	<u>228 units</u>	79 (disputed)
Total	761 units	290

The Government actually ordered only 211 radios during the 5-year term, plus an additional 79 that were ordered the day before the last option expired, and which were the subject of this dispute. Thus, the contractor argued, there was no head of steam on production, no learning curve, and no economy of scale. Moreover, Motorola (by now General Dynamics) was not able to develop a commercial market and therefore could not offset the substantial software development costs. The contractor was thus hemorrhaging losses almost from the very beginning. By the end, the total loss exceeded \$250 million.

To the Federal Circuit, this loss was of overwhelming significance. When GD purchased the Motorola unit that was performing this work, the contract was already in a loss position; and GD expected even more losses in the future. The parties accounted for all of the past losses as well as all expected future losses in the purchase transaction.

After the purchase, however, the losses increased by another \$70+ million, a portion of which included the damages sought by GD in this litigation. The Federal Circuit was riveted by the fact that "General Dynamics assumed the contract from Motorola with knowledge that it was not profitable," and repeated that fact at least four times in its opinion.

With that as background, we turn to the terms of the contract.

B. Emailed delivery orders were not permitted

As noted, the contract was structured as an IDIQ contract with firm fixed prices for the radios as well as for associated software, repair parts, and manuals. Five option periods were designated; after exercising each option, the Agency was entitled to issue Delivery Orders for radios and related items at the prices designated for that Option Year. The contract incorporated FAR 52.216-22, which provides in part, that "Delivery or performance shall be made only as authorized by orders issued in accordance with the Ordering clause." The Ordering Clause, FAR 52.216-18, included this statement:

(c) If mailed, a [DO] or task order is considered "issued" when the Government deposits the order in the mail. Orders may be issued orally, by facsimile, or by electronic commerce methods **only if authorized in the Schedule**. [Emphasis added.]

The Schedule did not authorize the issuance of DOs via email, and despite numerous bilateral modifications to other terms of the contract, this provision was never changed.

Thus, the argument in this case turned on whether, by accepting at least 13 DOs that were issued by email over a 5-year period, GD was estopped from relying on this unambiguous contract language to reject 11 more DOs that were issued via email on the last three days of the contract term.

C. After the first DO, the Navy issued all DOs via email

Undisputed testimony in the case disclosed that the first DO was issued via regular mail; it was unclear how the 2nd and 3rd were issued; but all of the remaining DOs – up to and including DO #0029 -- were issued by the Navy via email, notwithstanding the unambiguous contract terms. The Navy testified that this was standard operating procedure – it was SPAWAR's command policy to go "paperless" -- and that General Dynamics had nothing to do with its decision to send DOs by email. The evidence further disclosed that various Navy commands continued to issue DOs via email on other contracts with identical restrictions, even after General Dynamics raised the issue under this contract, although the CO testified that after GD raised the issue in this case, he inserted language in subsequent contracts for which he was responsible, to permit emailed DOs.

D. The contractor accepted all of the emailed DOs – until it decided to reject them

Undisputed testimony further established that General Dynamics accepted and performed on every DO, until it rejected the last 11 DOs that were issued on the last three business days of the last option year. Under the terms of the contract, the Navy could only issue DOs against Option Year 5 until September 30, 2003. Between Friday, September 26, 2003 and Tuesday, September 30, 2003, the Navy emailed a total of 11 new DOs. The emails were received by General Dynamics between 27 and 30 September.

On October 2, a GD representative telephoned the Contracting Officer and asked whether paper copies of these DOs were being mailed. The CO said no, and made the "going paperless" statement. On October 6, GD wrote to the CO saying that it was rejecting these 11 DOs because they were sent via email, in violation of the unambiguous terms of the contract. The Navy directed GD to proceed anyway; and GD subsequently submitted a claim for the overruns it incurred on these DOs.

At trial, GD conceded that while it had read the contract initially, it had not focused on or considered the email restriction until these last 11 DOs were issued one to three days before the end of Option Year 5. When that happened, because of the substantial additional losses it would sustain by performing, it immediately cast about for a reason to reject these 11 DOs, and someone discovered the contract restriction on emailing. The Navy asserted that GD "deliberately waited" until Option Year 5 had expired to announce its intention to reject these DOs, so that the Navy could not correct the problem by mailing a hard copy within the September 30 deadline. Noting the chronology, the Board made a specific finding that GD "testified credibly" that there was no deliberate delay in communicating its intent to reject these DOs, and that the facts "do not suggest" that GD was concealing its intent from the Navy. As noted above, the Board also made a specific finding that the Navy's decision to email its DOs was not made in reliance on anything that GD did or did not do. The Federal Circuit decision does not mention these findings.

E. A few other pesky facts

Under the terms of the contract, GD's prices for the radios went down each year (although the related software pricing remained level) -- again, because Motorola had anticipated a learning curve and the development of a commercial market. During the first option year, for example, the radios were priced at \$338,400/unit while in the fifth option year, they were priced at \$170,000/unit.

The Navy did not order any radios during the original Option Year 1 period. In November 1999, just after Option Year 1 had expired, the parties negotiated a bilateral modification that, among other things, extended the option exercise periods for Options 1 through 4 in consideration for a decrease in radio requirements. A second bilateral modification

was negotiated in January 2000, extending the Option Year 1 exercise period (and Option Year 1 prices) to February 29, 2000. The Navy actually exercised Option Year 1 on February 1, 2000.

Two days later on February 3, within the newly extended Option Year 1 period, the Navy ordered the first 95 radios at the Option Year 1 prices.

In March 2001, shortly after Option Year 2 was exercised but before the Navy issued any Option 2 DOs, GD started negotiations with the Navy to extend the higher Option Year 1 prices again, in exchange for consideration. This was expressly because GD had been losing money due to software development expenses and it needed the additional revenues that would be generated by the higher Option Year 1 prices. The Navy agreed; as consideration it received certain software licenses "essentially ... for \$0" as well as other benefits.

Once again, after negotiation and two days after the bilateral modification reflecting these changes was signed, the Navy issued a second DO for 86 radios -- at the Option Year I prices.

Although the Navy exercised Option Year III, it did not order any radios during that option period. Shortly before the Navy exercised Option Year IV in September 2002, the parties started negotiations with a view to once again extending Option Year I prices, in return for additional consideration. The parties also discussed deleting the "HF waveform" CLINs from the contract because that waveform had not yet been developed and was expected to be extraordinarily expensive; this modification was of substantial importance to GD. In January 2003, the Navy drafted a bilateral modification that included a further extension of the Option Year I prices and deleted the HF waveform, and sent the draft to GD. The CO conceded that the Navy "did tentatively agree to" this modification, and GD testified that it believed the parties had reached agreement.

The Navy then requested a separate proposal from GD to obtain the HF waveform through a different contract vehicle. GD provided the proposal in May 2003 with an estimated price, which was substantially higher than the fixed price included in this contract.

One month later, in June 2003 the Navy issued a DO for an additional 30 radios. It is not clear from the decisions what the price of these radios was.

In July 2003, having learned what GD's price for the HF waveform would be under the other contract vehicle, and in contravention of the bilateral modification that it had drafted which deleted the HF waveform CLINs, the Navy issued a DO for 12 HF waveforms under this contract, at the contract price.

When GD objected to the HF waveform DO on grounds that SPAWAR had already written a modification deleting that from the contract, the Navy shrugged its shoulders, (continued on next page)

stating that the parties had failed to achieve a mutually acceptable, executed modification and "therefore, the contract, as written, remains in full force and effect." GD submitted a claim with regard to this DO but it was addressed elsewhere and was not a part of this litigation.

Without further negotiations or agreement on GD's request to extend the Option Year 1 prices again, the Navy unilaterally exercised Option Year 5 in September 2003, 20 days before the ordering period expired. It then issued 11 new DOs (via email) between September 26 and September 30, the expiration date. Less than one week later, GD rejected the DOs on grounds that "the contract, as written, remains in full force and effect" and accordingly the emailed DOs were not effective.

Summary of the Decisions

Not surprisingly, the Navy emphatically asserted both waiver and estoppel. Somewhat surprisingly -- given the unambiguous contract language -- the Navy also asserted that the contract did not require that DOs be issued in a particular manner, and that the contract should therefore be interpreted consistently with the parties' pre-dispute conduct. GD argued first that there could be neither waiver nor estoppel because Navy did not rely on any GD conduct in issuing emailed DOs (it was "SPAWAR policy" to go "paperless" and GD had nothing to do with that). GD also argued that the parties' course of conduct – and particularly the Navy's agreement to contract modifications favoring GD before each of the major DOs was issued, and its repeated insistence when issuing contract modifications that "except as amended, the contract, as written, remains in full force and effect" -- negated any possible reliance on prior conduct when, following failed negotiations for another modification, the Navy issued additional DOs. In other words, as the Board concluded, the "lack of negotiations prior to electronic ordering [was] material in distinguishing the DOs at issue from the DOs pointed to by the government as evidence of the parties' past conduct."

A. In a nutshell, why the Board denied the Navy's waiver and estoppel defenses

The Board rejected the contract argument outright: "[w]hen the contract is clear, there is no ambiguity, and it is not necessary to examine the course of performance," *citing Optic-Electronic Corp.*, ASBCA No. 24962, 84-3 BCA ¶17,565 at 87,532. Its analysis of the waiver and estoppel arguments was brief. Quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), it explained that waiver is "an intentional relinquishment or abandonment of a known right or privilege," and concluded that GD "did not intend to waive its right to decline DOs that were not issued in accordance with" the Ordering Clause. This conclusion was supported by multiple citations to evidence in the record. The Board also opined that, as a matter of law, GD's silence about the improper earlier DOs did not waive its right to object to the same irregularity in subsequent DOs, relying on *Hooe & Herbert v. United States*, 41 Ct. Cl. 378, 382-83 (1906).

On the estoppel issue, the Board relied on the four-part test articulated by the Court of Claims in *Rel-Reeves, Inc. v. United States*, 534 F.2d 274, 297-97 (Ct.Cl. 1976). To prove that (*continued on next page*)

GD was estopped from recovery, the Navy would have to prove that (1) GD knew the facts, (2) GD intended that its conduct be acted upon or acted such that the Navy had a right to believe it was so intended, (3) the Navy was ignorant of the true facts, and (4) the Navy relied on GD's conduct to its injury. The Board concluded that the Navy could not satisfy either of the first or third elements. As to the first, GD "did not appreciate the contract's restrictions against the issuance of DOs by e-mail until it had occasion to examine the matter when the DOs at issue were issued without prior negotiation," i.e., GD did not "know the facts." As to the second, the CO was charged with reading the contract, including the restriction on emailing DOs, and in any event he had "admitted that [GD] had nothing to do with his or SPAWAR's decisions to send DOs by e-mail," i.e., the Navy was not ignorant of the true facts.²

The Federal Circuit ignored the waiver issue and focused its attention on estoppel.

F. In a nutshell, why the Federal Circuit overruled the Board

The Court declared that *Rel-Reeves* is not good law, and that instead a three-part test for estoppel, articulated in a 1992 patent infringement case between private parties, provides the relevant standard. *See A.C. Aukerman Co. v. R.L. Chaides Constr. Co.*, 960 F.2d 1020, 1041 (Fed.Cir. 1992) (en banc). Here is a comparison of the two tests:

Aukerman	Rel-Reeves
Equitable estoppel requires:	Equitable estoppel requires:
1. Misleading conduct, which may include not only statements and actions but silence and inaction, leading another to reasonably infer that rights will not be asserted against it;	1. The party to be estopped must know the facts;
2. Reliance upon this conduct; and	2. The party to be estopped must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended;
3. Due to this reliance, material prejudice if the delayed assertion of such rights is permitted.	3. The party asserting the estoppel must be ignorant of the true facts; and
	4. The party asserting the estoppel must rely on the former's conduct to his injury.

The Court then opined that "both parties" agreed that the Board "failed to analyze estoppel under the correct legal test."³

With regard to the first *Aukerman* test, GD's conduct was misleading, according to the Court, because it accepted and performed on 13 emailed DOs with no objection. This

acceptance was misleading "in light of General Dynamics' later change in course when it refused to accept the final disputed DOs." Moreover:

In the course of performance between the parties, emailing DOs and performance in accordance with those DOs was standard practice. The Navy had no obligation to renegotiate Option V or to offer to pay higher prices. As the Board found, General Dynamics assumed this contract with the knowledge that it was not a profitable contract. The undisputed facts of record support only one possible inference -- that the contractor accepted emailed DOs.

2011 WL 343960 at *5. One might argue that the undisputed facts of record support a different inference – that GD accepted Delivery Orders without ever focusing on their method of delivery. In fact, that was the express finding of the Board.

With regard to the second *Aukerman* factor, the Navy "clearly relied" on General Dynamics' conduct because, in the Court's view, "[h]ad the Navy known of General Dynamics' intention to reject these final orders, it could have placed hardcopy orders in the mail." It does not appear, however, that anyone from the Navy actually testified that the Navy would have done so; and the Board made a specific finding of fact that the Navy did not rely on GD's conduct in issuing emailed delivery orders. Thus, the Court ignored the Board's fact finding, never addressing whether it was "fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence." 41 U.S.C. §609(b).

Finally, prejudice was not an issue for the Court because GD's refusal to accept the emailed orders would have meant that the Navy was deprived of the benefit of its bargain. Thus --

The government has satisfied the elements of our test for equitable estoppel. We hold that the Board abused its discretion in determining that General Dynamics was not equitably estopped from rejecting the disputed DOs based on the Ordering Clause. The Navy simply exercised its rights under the ID/IQ contract to order under Option V. While we understand that these terms were not advantageous to General Dynamics, they were the terms of the contract voluntarily assumed by General Dynamics. We refuse to allow General Dynamics out of this bargain based on the Ordering Clause that General Dynamics consistently ignored. [Emphasis added.]

C. In a nutshell, what Judge Newman thought of the majority opinion

In Judge Newman's dissenting view, what's good for the goose should be good for the (continued on next page)

gander. If the Navy wanted to reject GD's request for a higher price in Option Year V and hold GD to unambiguous contract terms concerning price, then the Navy should not be heard to object when GD wanted to reject the emailed delivery orders and hold the Navy to the unambiguous contract terms concerning how orders must be issued.

A bigger issue for Judge Newman, however, was the Court's insistence on turning the Board's factual findings into legal conclusions, and then declaring that the Board abused its discretion in reaching those conclusions.

The panel majority now redesignates some critical findings of fact as rulings of law, and thereby finds that the Board "abused" its discretion as a matter of law. The issue or equitable estoppel is an equitable determination, based on underlying findings of fact. Findings as to what was "believed," "known," "intended," "aware," "implied," and "relied on" are surely relevant to equity, but they are quintessential questions of fact, not matters of law. No party argued otherwise. Nonetheless, the court now rules that the Board abused its discretion, stating that the Board's findings of fact are really rulings of law and thus subject to *de novo* determination by this court.

2011 WL 343960 at *8.

Finally, Judge Newman objected to the Court's announcement that the test for estoppel against the Government must be the *Aukerman* test. Noting that there are differences between estoppel arising from written contract terms and estoppel arising from threats of patent infringement, she quoted back to the Court its own principle, stated in *Aukerman*, that estoppel is "not limited to a particular factual situation nor subject to resolution by simple or hard and fast rules." By ruling that the Board erred in law by relying on the four-part standard in *Rel-Reeves*, the Court effectively rejected the Board's many findings of fact and turned them into conclusions of law, which it was then able to overturn as an abuse of discretion. In that way, the Court avoided the need to consider whether the Board's findings of fact were fraudulent or arbitrary or unsupported by substantial evidence – which is the standard for overruling the Board's findings of fact as established by the Contract Disputes Act, 41 U.S.C. §609(b).

Some Thoughts for the Day

Judge Newman's analysis is persuasive but it requires a careful thought process that goes beyond sound bites. The Department of Justice prepared a masterful set of briefs with a simple sound-bite theme: GD was one of those greedy government contractors who bid at a loss and then try to get whole at the Government's expense through deliberately misleading conduct. The majority on the Court accepted that sound bite argument hook, line and sinker, relying on a strained reading of *Aukerman* and choosing simply to ignore any of the Board's factual findings that contradicted those conclusions.

Aukerman cannot and should not be read as the Court claimed to read it. In Aukerman, the Court was trying to resolve confusion in certain patent law cases as to the distinction – in a patent litigation context where after an initial notice of infringement the patent holder delays in filing suit -- between laches and estoppel. The Government was not a party in Aukerman, and there was no contract to interpret. More significantly, Aukerman adopted and accepted the notion that estoppel is an equitable doctrine – referred to by this Court and every other court, in fact, as "equitable estoppel" – which, like all equitable doctrines, does not lend itself to cookiecutter analysis and must always involve a fulsome evaluation of the particular facts and circumstances. As this same Federal Circuit explained in Aukerman:

... the trial court **must**, even where the three elements of equitable estoppel are established, take into consideration any other evidence and facts respecting the equities of the parties in exercising its discretion and deciding whether to allow the defense of equitable estoppel to bar the suit.

960 F.2d at 1043 (emphasis added). *See also Heckler v. Community Health Services of Crawford County, Inc. et al.*, 104 S.Ct. 2218, 2223 (1984) (noting that a "hallmark" of the doctrine of equitable estoppel is its "flexible application").

For this reason, to assert that the three-part test articulated in Aukerman is more appropriate than the four-part test from *Rel-Reeves* relied upon by the Board, misses the point. As Judge Newman noted, there is commentary to the effect that the only difference between the two doctrines is semantic, and in fact, courts routinely cite both tests. See, e.g., Foxworth ex rel. Estate of Durden v. Kia Motors Corp., 377 F.Supp. 2d 1196 (N.D.Fla. 2005), aff'd 148 Fed. Appx. 920 (11th Cir. 2005) (three-part test); Doe v. California Dept. Of Justice, 173 Cal.App. 4th 1095, 93 Cal.Rptr. 3d 736 (4th Dist. 2009), review denied (July 22, 2009) (four-part test); Zollinger v. Carrol, 137 Idaho 397, 49 P.3d 402 (2002) (four-part test); Greater Harrodsburg/ Mercer County Planning & Zoning Com'n v. Romero, 250 S.W.3d 355 (Kv.Ct.App. 2008) (three-part test). Indeed, some courts cite a six-part test, and the American Jurisprudence treatise identifies seven. See e.g. Norfolk Southern Railway Co. v. Trinity Indus., Inc., 2009 WL 856340 (N.D.Tex. 2009) (citing both a six-part test and a one-part test discussed in DeLuna v. Burciaga, 223 Ill.2d 49, 306 Ill.Dec. 136, 857 N.E.2d 229 (Ill. 2006)); Lamers v. Organizational Strategies, Inc., 2008 WL 779516 at *2 (E.D. Va. 2008) (quoting six-part test established by the Virginia Supreme Court in Boykins Narrow Fabrics Corp. v. Weldon Roofing & Sheet Metal, Inc., 266 S.E.2d 877, 890 (Va. 1980)); 28 Am.Jur.2d, Estoppel and Waiver §40 (2010) (seven-part test).

Moreover, *both before and after Aukerman*, the Federal Circuit itself has been consistent in claiming to rely on the four-part test when the United States Government is a defendant. The ONLY decisions in which the three-part test was relied upon involved suits between private parties, where the U.S. Government was not involved:

1985: *Am. Elec. Labs, Inc. v. United States*, 774 F.2d 110, 113 – **four** part test (suit against the U.S. Government)

1991: *JANA*, *Inc. v. United States*, 936 F.2d 1265, 1270 – **four** part test (suit against the U.S. Government)

1992: Aukerman, supra – three part test (suit between private parties)

1992: Lincoln Logs Ltd. v. Lincoln Pre-Cut Log Homes, Inc., 971 F.2d

732, 734 – **three** part test (suit between private parties)

1997: *Advanced Materials, Inc. v. Perry*, 108 F.3d 307, 311 – **four** part test (suit against the U.S. Government)

2000: Zacharin v. United States, 213 F.3d 1366, 1371 – relying on the Rel-Reeves **four** part test (suit against the U.S. Government)

The Court's approach to this case thus appears to depart from its own precedent; it ignores the fundamentally fact-based nature of equitable estoppel; and it certainly departs from the statutorily mandated standard of review.

On the Other Hand

My own view of this case is that the contract should never have been written the way it was written and the parties should not have taken up the time of the Board or the Court. The history of firm fixed price development contracts in federal procurement is long and tortured, and this is just another example. The Court obviously thought that the contractor in these situations should simply bear the risk, and that is certainly the theoretical underpinning of firm fixed pricing. But the Navy's repeated willingness to extend contract deadlines and effectively increase the firm fixed price was, in my view, an admission that the contract terms it wrote into this contract were unworkable. To paraphrase FAR 16.202-2, a firm fixed price contract is only suitable for acquiring supplies on the basis of reasonably definite functional or detailed specifications when the contracting officer can establish fair and reasonable prices at the outset, such as when performance uncertainties can be identified and reasonable estimates of their cost impact can be made. Here, given the developmental nature of these radios it is unclear on what basis the CO determined that the original price was fair and reasonable⁴; and it should have been abundantly clear that performance uncertainties had not been identified or quantified by anybody. The Navy's willingness to suspend disbelief in requiring this contract structure is no less troubling than the contractor's unfounded optimism in accepting its terms.

Moreover, the Navy did not arrive at those last 11 DOs with clean hands. Rather, it first agreed to yet another extension of the Option Year 1 pricing, as well as deletion of the HF waveform CLINs – and then, when it learned how much the HF waveform was really going to cost under another, more realistic contract vehicle, it reneged on that agreement. If somebody here was leading the other somebody down the garden path, it is just as reasonable to say that the leader was the Navy, who –

- repeatedly and consistently granted both price and schedule relief to GD over a period of five years, but then
- abruptly reversed course, 3 days before the contract expired, and ordered 79 more radios at the lowest possible contract price, and then
- had the chutzpah to cry foul when GD also claimed that the "contract, as written, remains in full force and effect."

The Federal Circuit, it seems, did not understand any of this, as it was blinded by a single fact: "General Dynamics assumed the contract from Motorola with knowledge that it was unprofitable." The sound-bite theory of appellate review thus prevailed.

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Endnotes

- 1 The Navy also ordered software, repair parts, and manuals. Repair parts and manuals were not at issue in this case, but the price of the software was.
- 2 Although it held that the Board was applying the wrong test for equitable estoppel, the Court nevertheless made clear that it disagreed with the Board's findings on the first and third elements; the Board focused on the wrong facts. With regard to whether GD "knew the true facts," the Court stated that the "knowledge at issue is not General Dynamics' actual knowledge of the contract terms, but rather its knowledge that it was accepting emailed delivery orders." In other words, in the Court's view, it was irrelevant to the issue of equitable estoppel whether or not GD knew the significance of this fact, i.e., whether GD understood or realized that by accepting emailed delivery orders it was acquiescing in a deviation from unambiguous contract terms and conditions. However, given the Court's position that the "real" first factor to be considered is whether or not the conduct was "misleading," it is difficult to understand how GD could be seen as engaging in "misleading" conduct when it was not even conscious of the consequences of its conduct, and when the Navy knew as much about the actual contract terms as GD knew.
- 3 Our review of briefs at the Federal Circuit suggests that the Court's conclusion overstates the facts. Appellant's brief cited *Aukerman* but also took the position that there is, at bottom, no difference between the three-part test and the four-part test of equitable estoppel.
- 4 Because there were two contractors before the down-select, it may be that the CO relied on 'adequate price competition' as a means of establishing fair and reasonable prices. *See* FAR 15.404-1(b)(1)(i). In the author's view, that is too much of a stretch on a development contract where neither of the competitors has production experience to rely on.



Fighting Corruption: Contractor Code of Business Ethics and Conduct and Mandatory Disclosure Rule

by Robert K. Huffman*

[Note: These slides were prepared by Robert Huffman for his presentation at this year's annual meeting of the Board of Contract Appeals Judges Association on April 6, 2011. Reprinted with permission.]

Summary of Rule (73 Fed. Reg. 67064 (Nov. 12, 2008))

- New Contract Clause (FAR 52.203-13) (April 2010)
- New Cause for Suspension/Debarment (FAR 9.406-2(b)(1)(vi) and 9.407-2(a)(8))
- New Definition of Principal (FAR 2.101, 52.203-13, and 52.209-5)
- New Responsibility and Past Performance Information Standards (FAR 9.104-1 and 42.1501)

New Contract Clause (FAR 52.203-13) (April 2010)

2

- This clause must be included in all contracts greater than \$5M with a period of performance longer than 120 days
- Contractors and subcontractors who have the clause must flow it down to all subcontractors with subcontracts greater than \$5M and a period of performance longer than 120 days
- Flowdown obligation includes small businesses, commercial item subcontractors and foreign subcontractors

New Contract Clause (FAR 52.203-13) (cont'd)

- FAR 52.203-13(b) requires all contractors or subcontractors with the clause, including commercial item contractors and small businesses, to:
 - Have a "written code of business ethics and conduct" that is made available to each employee engaged in performance of the contract
 - Exercise due diligence to prevent and detect criminal conduct
 - Otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law
 - Timely disclose to agency IG whenever, in connection with the award, performance, or closeout of the contract containing the clause, the contractor has "credible evidence" of certain criminal violations or violations of the civil False Claims Act by any employee, principal, agent, or subcontractor

New Contract Clause (FAR 52.203-13) (cont'd)

4

- FAR 52.203-13(c) requires contractors and subcontractors with the clause **other than commercial item contractors and small businesses** to implement:
 - o an ongoing business ethics and awareness program; and
 - o an internal control system

New Contract Clause (FAR 52.203-13) (cont'd)

5

Ongoing Business Ethics and Awareness Program

- The Clause requires ongoing business ethics awareness program and compliance program to:
 - Include reasonable steps to communicate periodically and in a practical manner the Contractor's standards and procedures and other aspects of the Contractor's business ethics awareness and compliance program and internal control system by conducting effective training programs, and otherwise disseminating information appropriate to an individual's respective roles and responsibilities
 - Provide the training under the program to the Contractor's principals and employees, and, as appropriate, the Contractor's agents and subcontractors

New Contract Clause (FAR 52.203-13) (cont'd)

6

Internal Control System

- The internal control system required by the Clause must:
 - Establish standards/procedures to timely discover improper conduct in performance of Gov't contracts
 - Ensure corrective action is carried out
 - Assign resources and responsibility at high enough level to ensure effectiveness of program
 - Include reasonable efforts not to employ individuals as principals who have engaged in conduct that conflicts with code of conduct

New Contract Clause (FAR 52.203-13) (cont'd)

- Internal control system must (cont'd):
 - Require periodic review of policies and practices for compliance with code of conduct, including periodic
 - Monitoring to detect unlawful conduct
 - ▼ Evaluation of effectiveness of internal control system
 - Assessment of risk of criminal conduct with appropriate risk avoidance steps
 - Include internal reporting mechanism (*e.g.*, ethics hot line) that is confidential
 - Provide for disciplinary action for violations or failure to take reasonable steps to prevent/detect improper conduct

New Contract Clause (FAR 52.203-13) (cont'd)

8

- Internal control system must (cont'd):
 - Ensure timely disclosure to agency IGs whenever, in connection with the award, performance, or closeout of any of the contractor's or subcontractor's Government contracts, the contractor or subcontractor has credible evidence that a principal, employee, agent, or subcontractor:
 - × Has committed a violation of 18 U.S.C. involving:
 - o fraud
 - conflict of interest
 - bribery
 - o gratuities, or
 - ★ Has committed a violation of the civil False Claims Act (31 U.S.C. §§ 3729-3733)
 - Provide for "full cooperation with any Government agencies responsible for audits, investigations, or corrective actions."

New Cause for Suspension or Debarment

- A contractor may be suspended or debarred for the "knowing failure by a principal, until 3 years after final payment on any Government contract awarded to the contractor, to timely disclose to the Government, in connection with the award, performance, or closeout of the contract or a subcontract thereunder, credible evidence of —
 - Violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code;
 - o Violation of the civil False Claims Act (31 U.S.C. §§ 3729-3733); or
 - Significant overpayment(s) on the contract, other than overpayments resulting from contract financing payments as defined in FAR 32.001."

New Definition of "Principal" (FAR 2.101)

10

- "Principal means an officer, director, owner, partner, or a person having primary management or supervisory responsibilities within a business entity (e.g., general manager, plant manager; head of a subsidiary, division, or business segment; and similar positions)."
- Preamble states that "this definition should be interpreted broadly, and could include compliance officers or directors of internal audit, as well as other positions of responsibility."

"Credible Evidence"

- The FAR Councils initially proposed a "reasonable grounds to believe" standard for mandatory disclosure.
- Preamble states that credible evidence "indicates a higher standard, implying that the contractor will have the opportunity to take some time for preliminary examination of the evidence to determine its credibility before deciding to disclose to the Government."
- "This does not impose upon the contractor an obligation to carry out a complex investigation, but only to take reasonable steps that the contractor considers sufficient to determine that the evidence is credible."

"Credible Evidence" (cont'd)

12

- Black's Law Dictionary defines "credible evidence" as "evidence that is worthy of belief; trustworthy evidence."
- Black's also defines "credible evidence" as "[s]uch evidence as is sufficient to produce a belief that the thing is true."
- Caselaw uses similar language

"Credible Evidence" (cont'd)

13

• HHS OIG Guidance for Pharmaceutical Manufacturers states that "where the compliance officer, compliance committee, or a member of senior management discovers credible evidence of misconduct from any source and, after a reasonable inquiry, believes that the misconduct may violate criminal, civil, or administrative law, the company should promptly report the existence of misconduct to the appropriate federal and state authorities within a reasonable period, but not more than 60 days, after determining that there is credible evidence of a violation." 68 Fed. Reg. at 23742 (May 5, 2003) (emphasis added).

"Credible Evidence" (cont'd)

14

- OIG Guidance: "Credible evidence" is what prompts a reasonable inquiry
- FAR Rule: "Credible evidence" is what results from a reasonably inquiry
- Logical Inference: "Credible evidence" includes all facts and circumstances developed in the reasonable inquiry, not just the information that gave rise to the inquiry.

"Credible Evidence" Of What?

- Examples of types of conduct that could constitute covered criminal or civil FCA violations:
 - False statements
 - **▼** False TINA certification
 - Concealment of a material fact
 - **▼** Incomplete OCI information
 - Product substitution
 - o Failure to perform required tests
 - TAA/BAA violations
 - Kickbacks
 - Defective pricing

"Credible Evidence" Of What? (cont'd)

16

- Examples of types of conduct that could constitute civil
 FCA violations or significant overpayments:
 - Delivery of nonconforming products
 - Labor mischarging
 - Failure to credit overpayments
 - Inaccurate cost estimates for forward pricing rates
 - Inaccurate estimates for pension costs
 - CAS noncompliance

"Timely Disclosure"

- For purposes of the clause, timeliness is measured from the later of:
 - The date a contractor determines that there is credible evidence of a violation;
 - The date the contract clause was incorporated; or
 - The date that the contractor's internal control system was established

"Timely Disclosure"

Look Back Requirement

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- "Timely disclosure" for purposes of the clause and the new cause for suspension and debarment requires all contractors and subcontractors (regardless of whether they have the new clause in any contract) to "look back" to all contracts or subcontracts on which final payment had not been made for more than three years as of December 12, 2008
- This look-back requirement is not limited to the knowledge of "principals" unless the contractor does not have the clause in any contract or subcontract

"Significant Overpayment"

- Not defined
- Does not include contract financing payments under FAR 32.001 (e.g., payments before final acceptance of goods/services)
- Preamble states: "This rule is aimed at the type of overpayment that the contractor knows will result in unjust enrichment, and yet fails to disclose it."
- Beware potential overlap with "reverse false claims"
 [See next slide]

2009 FCA Amendments

Reverse False Claims

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- Broaden Scope of Liability for Reverse False Claims
 - Reverse false claim provision expanded to reach one who "knowingly conceals or knowingly and improperly avoids or decreases" an obligation to pay or transmit money or property to the Government
 - No false statement or record needed for liability
 - × "Improper" unclear
 - New unclear definition of "obligation":
 - "Established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment" (emphasis added)

"Full Cooperation"

- "Full cooperation" must be given to all Government agencies responsible for audits, investigations or corrective actions
 - Full cooperation is defined as "disclosure to the Government of the information sufficient for law enforcement to identify the nature and extent of the offense and the individuals responsible for the conduct. It includes providing timely and complete response to Government auditors' and investigators' request for documents and access to employees with information." FAR 52.203-13(a) (emphasis added).
 - Preamble states that: "compliant contractors will encourage employees to both make themselves available and to cooperate with the Government investigation."

"Full Cooperation" (cont'd)

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- "Full cooperation" does not require:
 - A contractor to waive its attorney-client privilege or attorney work product protections
 - An officer, director, owner, or employee of contractor to waive his/her attorney client privilege or Fifth Amendment rights
 - A contractor to refrain from conducting an internal investigation or defending a proceeding or dispute arising under the contract or related to a potential or disclosed violation

"Unwritten Rules"

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- Contractors should err on the side of disclosure. "Abundance of caution" disclosures are acceptable
- There is no requirement for contractors to characterize their disclosures as criminal violations, civil FCA violations, or significant overpayments. Contractors are required to disclose evidence, not legal conclusions
- There is no de minimis exception to the requirement to disclose credible evidence of covered criminal violations or violations of the civil FCA

"Unwritten Rules" (cont'd)

24

- All DOD-related disclosures should be made to the DOD OIG, not the sub-agency OIGs
- Contractors need not use the disclosure forms or certifications provided by the agency OIGs
- Both prime and sub should disclose credible evidence of a violation by the sub
- Disclosures of significant overpayments should be made to the OIG, not the CO alone

Internal Control Systems and the DCAA

25

- Some DCAA auditors have taken very aggressive positions in reviewing contractor internal control systems.
- DCAA auditors have sought to "verify" that system provides disclosure to **DCAA** and the ACO of all findings that significantly impact government contracts within 5-10 days of identification.
- DCAA auditors have requested a list of violations of the code of conduct/ethics as well as all hotline and other reports of misconduct that occurred in prior 12 months.
- DCAA auditors have requested copies of all internal policies and procedures for timely reporting as well as documents relating to "management overrides."

DCAA Policy Guidance

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- DCAA Headquarters recently issued audit guidance that addresses verification of contractor internal control systems and new mandatory disclosure rules. (DCAA Audit Guidance Mem. 09-PAS-014(R) (July 23, 2009).
- This guidance is much less specific and sweeping than some earlier DCAA requests.
- Guidance:
 - "Request a copy of any disclosures made and verify that the contractor complied with their policies and procedures."
 - o "Auditors should ensure that the contractor's policies and procedures include a reasonable definition of credible evidence, and a reasonable timeframe for disclosure once credible evidence is obtained."

DCAA Policy Guidance

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Guidance (cont'd):

- "Contractors are allowed to take time for preliminary examination of the evidence to determine its credibility prior to disclosure."
- Once the contractor has had sufficient time to take reasonable steps to determine that the evidence is credible, the contractor should disclose the violation in a timely manner."
- o "Auditors should verify that the contractor did not delay disclosing the violation once it was determined that credible evidence exists."
- "If the auditor finds that the contractor failed to disclose the violation in a timely manner, an internal control deficiency should be reported."
- "Review any disclosures reported to the OIG and contracting officer and ascertain if the contractor has taken the necessary corrective actions to protect the Government's interests."
- "If the contractor has not taken the appropriate corrective action, the auditor should report this as an internal control deficiency."

The Contractor Code of Ethics and Business Conduct and Mandatory Disclosure Rule (MDR) – Recent Developments

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- Ongoing issues under the MDR include:
 - Role of DCAA
 - Suspicions raised by too few disclosures or too many disclosures.
 - Application or non-application of de minimis rule
 - Situations involving multiple disclosures (subcontractors, etc.)
 - Role of MDR in *qui tam* relator suits and Government investigations (attorney-client privilege)
 - Disclosure obligations arising out of discovery
 - FOIA
 - Potential suspensions or debarments for failure to make timely disclosure
 - Meaning of credible evidence

HYPOTHETICAL

• A company performing both government and commercial contracts abroad learns that an employee bribed a foreign official to expedite approval of a permit necessary to continue performance on a strictly commercial contract. The bribe was paid with funds from a business development account. There is no cost impact to the government and the offending employee is terminated. Is there any reporting obligation? Would the answer change if the bribe was booked to an allowable overhead account?

HYPOTHETICAL

• A subcontractor uncovers a series of errors in expense reports ultimately charged to the government through the prime contractor. The company notifies the prime contractor, who asserts that it will assume responsibility for dealing with the matter. The prime contractor elects to notify the Contracting Officer, but not the Inspector General. Is that sufficient? Must subcontractor report?

HYPOTHETICAL

• An anonymous employee believes that his company has falsely charged the government for work performed at a certain plant location and informs the company of the allegation. The employee in the past has reported potential violations of the company code that could not be corroborated. The General Counsel decides to undertake a preliminary investigation with an eye towards a possible disclosure. Prior to interviewing employees, what, if any, warnings or disclosures should the General Counsel provided to the employees?

HYPOTHETICAL

• Company A sends out a notice to all its employees requesting them to report to the Company's Compliance Officer and General Counsel any information they have regarding whether the Company or its officers, employees, or subcontractors committed a crime or violated the Company's code of conduct and ethics in connection with any Government contracts. One employee, a mid-level manager, responded that he had information that the Company had violated the Anti-Kickback Act in connection with several existing Government contracts. In fact, the employee wrote that he possessed "credible evidence" of such violation. However, the employee stated that he was consulting with his own lawyer and others about the matter and would not discuss it further with any Company representative until that process was complete.

HYPOTHETICAL

• Company B is a defendant in an FCA *qui tam* suit in which the Government elects to intervene. The Government learns through discovery in the case that the Company's General Counsel was aware several years before the suit was filed of the information that formed the basis for the Government's intervention, but did not disclose that information to anyone in the Government.

HYPOTHETICAL

• In defending against a False Claims Act *qui tam* suit, Company C's counsel learn, in preparing for discovery in the case, additional information that supports the relator's or Government's theories of FCA liability and/or information regarding other potential criminal or FCA violations? What disclosure obligations does Company C have under the Rule?

HYPOTHETICAL

• Company D conducts a "look-back" investigation and finds that an internal investigation was conducted that found evidence of receipt of a significant overpayment that was subsequently repaid, but no written record exists that such overpayment was disclosed to a Government official. What are Company D's obligations under the Rule? What should it do?

HYPOTHETICAL

 Company E learns that one of its divisions has delivered goods to the Government that do not conform to the specifications. What obligations does Company E have under the Rule? What should it do?

Questions?

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Editor's Note: Robert K. Huffman represents defense, health care and other companies in contract matters and in disputes with the federal government and with other contractors. Mr. Huffman has extensive experience litigating contract and related issues in the Court of Federal Claims, the Armed Services Board of Contract Appeals, the federal district courts, and the Federal Circuit and other federal appellate courts. He also represents clients in bid protests. Mr. Huffman has been recognized as a leading lawyer in 2010 by Chambers USA: America's Leading Lawyers for Business in the area of government contracts.



"Is It Public, or Is It Not?" What to Watch for When Public and Private Become Entwined, and Why It Matters

by Roland Nikles*

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Public-private entanglements on major infra-structure projects are not new. The real change afoot is the extent to which such entanglements are becoming routine on projects large and small. The challenge of properly characterizing a project as "public" or "private" is thus becoming commonplace, if not easy. Courts have focused on (1) the nature of the ownership, (2) the source of funding, and (3) the use of which a project is placed. This article will examine some of the consequences of mischaracterizing a project as "public" or "private," provide a checklist of issues to look for, and examine how the courts have approached the problem. The concluding section offers a modest bit of advice.

The Proper Characterization of a Project as "Public" or "Private" has Broad Implications

When public and private become enmeshed in creative new ways, it is of utmost importance to properly characterize the project as "public" or "private." The answer to the question "Is it public, or is it not?" has far-reaching consequences. It drastically affects many applicable rules of the game, including: (1) which delivery models may be used, (2) how and when contractors may be selected, (3) contract clauses that are required or permitted, (4) what kinds of claims can be made and when, (5) what remedies may be available or foreclosed, and (6) what penalties might be imposed. The answer to the question may determine the makeup of the workforce and the wages that must be paid. The cost of a project may be substantially affected by the determination. The consequence of getting it wrong can be severe. In cases of uncertainty, properly allocating the risks of what happens if a project is challenged and the assumptions about the nature of a project prove to be incorrect is a matter of great concern to all participants.

For state projects, the implications of "Is it public, or is it not?" are necessarily local. Individual states have different statutory schemes governing public works, and within states different rules apply to different types of public entities and different types of public projects. A project may be treated as "public" for some purposes but not all. Rules change constantly in the to-and-fro of legislative tussles. Nevertheless, certain themes endure, and here is a checklist for some of the main issues to look for when you see a red flag: "Is it public, or is it not?"

The Checklist

Prevailing Wages. Legislatures in every state have adopted prevailing-wage laws (a/k/a the "Little Davis-Bacon Acts") that require contractors working on state-funded projects such as roads, schools, and public buildings to pay at or above the average wage for the various trades. These figures are typically calculated on a county-by-county basis. *Prevailing* wages, however, are usually much higher than average wages, with the result that public works construction projects that require prevailing wages are more expensive than an equivalent private project. For example, a February 11, 2009, editorial in West Virginia's *Charleston Daily Globe* laments: "According to a report by the conservative Public Policy Foundation of West Virginia, the prevailing wage is now 74 percent higher than average wages in 12 occupations. For example, roofers average \$10.22 an hour in this state, according to the report. But the prevailing wage is \$24.68."

Supporters of prevailing-wage laws point out that in addition to higher wages, prevailing -wage laws facilitate apprentice programs, and that a better-paid, better-trained workforce is more efficient and does better quality work.² However, on an individual project basis, no one disputes that the price of the work will be higher where prevailing-wage laws apply.

There is a substantial body of case law grappling with the prevailing wage question and "Is it public, or is it not?" in the different states. The cases focus on (1) the nature of the entity awarding a contract, (2) the source of funding for a project, and (3) the public or private use that a project is put to. In addition, the wording of the applicable governing prevailing wage statute is important. For example, in *Mobile, Alabama-Pensacola, Florida Building & Construction Trades Council v. Williams*³ the court held that a county school board was a "contracting authority" within the meaning of the state prevailing-wage act, which defined the term as including "any state institution supported in whole or in part by state funds, authorized to enter into a contract for public work." The court declared that the board's construction of a school was covered by the act, observing that, in construing the act, it was compelled to give effect to the act's intent. Canvassing the constitutional and statutory regulation of the state school system, the court found that school boards were state institutions supported by state funds.

The Nature of the Entity Awarding the Contract. In Hardin Memorial Hospital, Inc. v. Land,⁴ the court—applying the proverbial "is it a duck?" test—held that a remodeling project undertaken by a private corporation operating a county hospital was subject to the prevailing-wage act.⁵ The court found the private corporation was a mere alter ego of a county fiscal court, a public entity. The court observed that (1) the public entity could cancel the lease under which the corporation operated the hospital, (2) the public entity held title to the hospital building and the property on which the hospital was located, (3) the lease required the corporation to obtain the public entity's consent to any material alterations to the hospital, including the remodeling project, (4) any improvements made to the hospital belonged to the county, and (5) the public entity had both the right to remove any director of the corporation at any time without cause and the right to fill all vacant directors' positions. Viewing the relationship between the public entity and the corporation as a whole, the court concluded it "walked and talked" like a public entity and thus it was a public entity.⁶

Source of Project Funding. The nature and source of funding often determines whether prevailing wages will apply. By way of illustration, in *People ex rel. Bernardi v. Illini Community Hospital*, a private, not-for-profit hospital entered into a contract for construction of a new canopy over its emergency room entrance. The work was covered by the Illinois prevailing-wage act because the act defined "public body" to include any institution supported in whole or in part by public funds. The hospital's receipt for three years of monies raised pursuant to a county tax specifically authorized to raise funds for local hospitals was sufficient, the court declared, to render the hospital a public body for purposes of the act. The court noted that the clear language of the act encompassed institutions supported "in part" by public funds.

Nature of Use. In addition to the nature of the awarding entity and the source of funds, the applicability of prevailing-wage laws sometimes turns on the public or private nature of the use of a project. For example, in *Opportunity Center of Southeastern Illinois, Inc. v. Bernardi*, the court found that the remodeling project of a privately-owned rehabilitation center was subject to the state prevailing-wage act. The act defined a "public work" as any fixed work constructed for "public use." The court observed that the rehabilitation center received over one-half of its income from contracts with the state, and received additional income from tax monies and state grants, and held that the remodeling project was for a "public use" and thus subject to prevailing wage laws. The court of the nature of the awarding entity and the source of funds, the use of t

Risk-Transfer Provisions

In general, parties on private projects are free to structure and allocate risk as they see fit, but there are limits to that proposition. For example, public policy in most states prohibits shifting the burden to indemnify for claims arising out of the sole negligence or willful misconduct of an indemnified party. On public projects, however, legislatures often take a more hands-on approach to regulating the risk allocation between parties. A degree of state paternalism is justified for public works contracts because, in general, public contracts are not negotiated but presented by public entities on a take-it-or-leave-it basis.

This paternalism on public projects is expressed in many ways. For example, in California indemnity clauses designed to relieve a public agency from liability for its active negligence are void and unenforceable, ¹³ public agencies must assume the risk posed by any undisclosed underground utility lines, ¹⁴ local public entities may not require a bidder to assume responsibility for the accuracy of plans or specifications except on design-build projects, ¹⁵ public entities may not include provisions in their contracts that would purport to waive a contractor's damages for delay, ¹⁶ local public entities must assume the risk of unforeseen sight conditions, ¹⁷ public owners may not shift more than 5 percent of the cost of replacing work damaged or lost due to acts of God to a general contractors. ¹⁸ Similar risk-transfer restrictions apply for public works in other states. ¹⁹ Therefore, when that "Is it public, or is it not?" red flag goes up, remind yourself to check which risk-shifting provisions may apply, or be taken away, depending on the answer to your question.

Work Force Mandates on State Projects: DBE, WBE, VBE, LBE, etc.

Owners and general contractors on private projects are generally free to contract with whomever they wish. By contrast, the award of public projects by states and local public entities is usually circumscribed by various public policies. Some of these policies are expressed in the form of preferences in awarding contract work to certain classes of citizens in order to achieve social policy goals. Many state and local public works projects are impacted by preferences for employers of local labor, small businesses, historically disadvantaged minority businesses, women-owned businesses, and veteran-owned businesses. Project labor agreements between local public owners and local unions to assure labor tranquility may apply. Other state programs may target the legal status of workers. For example, South Carolina's Illegal Immigration Reform Act regulates the documentation that contractors must gather on public works projects to assure they are not employing any illegal immigrants.²⁰ Although many of these programs have been challenged on constitutional grounds, they persist and are widely used to achieve local social policy goals. When applicable, such programs require experience, and a great deal of administrative effort to implement, by public entities as well as contractors. So when the "Is it public, or is it not?" red flag goes up, consider the groups and organizations that may benefit if the work is a public project, because that is where a challenge to a public-private hybrid project may come from.²¹

Materials and Equipment Procurement Restrictions

The Buy American Act²² applies when the federal government directly buys products or builds public buildings or works via a procurement covered by the Federal Acquisition Regulation (FAR). The Federal Highway Administration's (FHWA) "Buy American" statute applies similar restrictions principally to highway and transit-related projects.²³ The American Recovery and Reinvestment Act (ARRA) contains significant direct spending programs, tax incentives, loan guarantees, and bond programs that may become entwined in various public-private hybrid projects. The ARRA's "Buy American" rules borrow provisions from the existing Buy American statutes. The application of Buy American rules can be tricky, even without the additional layer of "Is it public, or is it not?"

Many states have similar statutes. For instance, California Government Code section 4303 provides:

The governing body of any political subdivision, municipal corporation, or district, and any public officer or person charged with the letting of contracts for (1) the construction, alteration, or repair of public works, or (2) for the purchasing of materials for public use, shall let such contracts only to persons who agree to use or supply only such unmanufactured materials as have been produced in the United States, and only such manufactured materials as have been manufactured in the United States, substantially all from materials produced in the United States.

Other statutes establish preferences for materials and goods manufactured within the state where a project is located.²⁴

Private owners are free to select and specify brand names and products or materials as they see fit and deem to be in their best interest. Public owners, by contrast, are generally required to state the needs of the government in a manner that encourages maximum competition and eliminates, as much as possible, restrictive specifications. Sole-source specifications, therefore, are generally prohibited for public projects. So when that "Is it public, or is it not?" red flag goes up, ask whether public funds are involved and what strings might be attached to such public funds, and specifically, whether there are restrictions on procurement of materials that might apply if the answer is, "It's public!"

Procurement Restrictions: Competitive Bidding, Best Value

Private owners generally may select their contractors freely. By contrast, public owners are severely restricted in how they may select contractors. Typically, federal, ²⁶ as well as state, and local entities, ²⁷ are required to award public works projects to the lowest responsive, responsible bidder determined through a sealed bidding process. If mandated procedures are not complied with, the consequences can be severe. Contracts may be deemed void. For example, Texas Local Government Code section 252.061 provides: "If the contract is made without compliance with this chapter, it is void and the performance of the contract, including the payment of any money under the contract, may be enjoined by any property tax paying resident of the municipality." Case law has reached similar conclusions. ²⁸ Any payments made under a void contract may have to be disgorged.

Even where sealed, competitive bidding is not required, public entities are constrained by requirements designed to make a selection process open and transparent. Public entities may also be subject to debt limits that may be exceeded by entering into a particular contract.³⁰ The chance of making a mistake in following the prescribed statutory scheme increases as local agencies and individual government officials combine private and public resources for completing projects, and as the private or public nature of a particular project becomes less clear. The moral is that when the "Is it public, or is it not?" red flag is present, consider carefully whether the involvement of the public entity is pursuant to statutory authority, properly exercised, and what the possible consequences might be if the answer is, "No."

Bonding Requirements

One consequence of characterizing a work as "public" is the bonding requirements that apply. The Miller Act was enacted in 1935 to provide a separate fund for payment of unpaid workers and materialmen on federal projects. Statutory performance bonds and payment bonds are also required on most state and local entity public works projects. Statutory payment bond requirements on the state and local entity level were enacted on the heels of the Miller Act, and

they make the award of a state or local entity contract conditional on the contractor's issuing a separate surety guarantee of its performance and payment obligations.³² Public entities are mandated to verify the existence and proper rating of bonds, and, when they fail to do so, the public entity,³³ and even individual government officers,³⁴ may become responsible to pay any claims that would have been covered by a proper payment and materials bond.

Application of the Miller Act or the equivalent state statutes may depend on whether a project involves federal funds, a fact that is not always apparent to claimants and that may not always be apparent to contracting parties. For example, in *United States v. Mattingly Bridge Co.*, ³⁵ a supplier to the general contractor on an interstate highway project cautiously pursued actions in federal court (on the theory that a payment bond was a Miller Act bond) and in state court (on the theory that it was a state statutory payment bond). The continued intertwining of public and private projects through cooperative federal-state and public-private partnerships makes it difficult to properly characterize payment bonds as common law, Miller Act, or state statutory bonds. ³⁶ Accordingly, when that "Is it public, or is it not?" red flag goes up, be sure to take a closer look at the type of bonding that might be available or required.

Remedies

The correct characterization of a project as public or private, state or federal, greatly affects the available remedies in the event of a dispute. A wrong decision in classifying a project can result in a loss of claims due to a failure to give proper notice, failure to ascertain the proper bond rights, failure to recognize the applicable statutes of limitation, misapprehension regarding the proper court or venue, or failure to properly present a claim.

Mechanics' liens are not available on public works.³⁷ Therefore, the more byzantine the project funding becomes, and the more the public and private entities become intertwined, the more difficult it is to establish whether mechanic's lien rights will or will not apply. Proper characterization is important at the contract formation stage for potential claimants so that available security for payment can be identified. If lien rights do not apply, what will claimants look to for payment if the project runs into financial difficulties?

For public works there are frequently statutory schemes regarding the presentation of claims that apply in addition to what may be spelled out in a contract. In California, for example, Government Code sections 910 requires claimants to submit government code claims for any contract claims against a public entity before any suit is commenced. Failure to recognize a project as a public work may result in a loss of claims. For example, in *W.T. Andrew Co. v. Mid-State Surety Corp.*, ³⁸ a supplier's bond claim was disallowed due to a failure to give two notices required by statute, even though the notice given satisfied the notice requirements contained in the bond.

The timing for commencing an action to foreclose on payment bonds or stop notices can

be different depending on whether a project is private, public, federal, state, or local. Thus in *A.C. Legnetto Construction, Inc. v. Hartford Fire Insurance Co.*, ³⁹ a subcontractor's payment bond claim was barred because the bond was deemed a statutory bond and the subcontractor failed to commence its suit within the statutory period. By contrast, in *T&R Dragline Service, Inc. v. CNA Insurance Co.*, ⁴⁰ the subcontractor mistakenly assumed that bond was a statutory bond, and the claim was barred because, although suit was commenced within the required statutory timeframe, suit was not commenced within the shorter bond period.

Sovereign immunity may come into play. For example, in *Florida Department of Environmental Protection v. Contractpoint Florida Parks, LLC*, the state agency partnered with a private concessionaire to provide camping cabins and services in state parks pursuant to "Partnership in Parks" program. When the concessionaire sued the state for nonpayment the department asserted a defense of statutory sovereign immunity. In that case the court found that the state had implicitly waived its sovereign immunity, reasoning that if the state were immune from suit the nonmutuality of remedy would render such contracts illusory.

Some states, such as Arkansas, recognize a doctrine of acquired immunity for a contractor that performs its work according to the terms of the contract with a governmental agency, and under the governmental agency's direct supervision. The theory is that the contractor was merely operating as the agent of a disclosed principal, the public entity, so that the principal's immunity also applies to the agents. Consistent with classic principal/agency law, however, acquired immunity does not insulate the contractor from its independent liability for negligence or intentional torts. Thus, when it comes time to submit claims or file suit, revisit the question "Is it public, or is it not?" to ensure that proper notice is given, proper procedures are followed, and suit is commenced timely and in the correct court and jurisdiction.

Is It Public or Is It Not? How Can You Tell?

As a practical matter, when the ownership, funding, and use of a construction project become entwined between public and private, a project may fall within the scope of some laws that apply to "public works" projects, but not others. Consistent with the discussion on the applicability of prevailing-wage laws, above, courts tend to look at three factors: the nature of a project's ownership, the source of funds or financing, and the use to which the project will be put. As a general rule, whenever (a) a public entity directly *or* indirectly owns or will own part or all of a construction project, (b) a public entity disburses funds for, assumes debt on behalf of or any financial risk for, or guarantees a construction project, or (c) a construction project is being built for a public use, these are red flags that the project *may* be subject to some or all of the laws that typically govern public works projects. Unfortunately, deciding which laws apply requires a statute-by-statute, ordinance-by-ordinance review of all the statutes that may potentially apply to public works within a jurisdiction.

Project Ownership Is a Red Flag

Direct or indirect ownership of the project by a public entity may subject the project to some statutes that apply to "public works" projects. A classic area of concern lies in so-called lease-leaseback arrangements. In *Department of General Services v. Harmans Associates Limited Partnership, the State of Maryland* entered into a "creative financing" arrangement with a developer under which the state leased land to the developer for \$1 per year in exchange for the developer's promise to build on the land and subsequently enter into a sublease-to-own agreement with the state. Even though the state did not enter into a direct contract with the construction contractor, the court concluded, after reviewing the facts and carefully examining the statutory language, that the project was "public" for the purposes of the competitive bidding statutes, certain dispute resolution statutes, and statutes requiring contractor-friendly differing-site clauses. 46

Project ownership can be a vexing issue. For example, under Pennsylvania law, projects owned or contracted for by a charter school are covered by the prevailing-wage statute. In 500 James Hance Court and Knauer and Gorman Construction Co. v. Pennsylvania Prevailing Wage Appeals Board, 47 a developer and charter school attempted to get around this restriction by dividing the project into "shell" and "fill-in" portions and entering into separate contracts for each. The court found that the "shell" portion to be built by the developer's contractor was exempt from the prevailing-wage statutes, while the project's "fill-in" work to be completed by the charter school's separate contractor (including site work, framing work, windows, HVAC, and electric work) was governed by the prevailing-wage statutes.

Public Grants or Financing: a Red Flag

Public financing of a project frequently triggers "public works" statutes such as prevailing-wage statutes. For example, in California the prevailing-wage statutes apply to any "public works," which is defined to include any project that receives financing by a public agency. However, California's Labor Code definition of "public works" is restricted to application of the prevailing-wage statutes and should not be used to define "public works" for other purposes. Other statutory schemes, such as California's lien laws, have their own governing definitions. In Connecticut, laws requiring outreach to minority and small businesses broadly define "public works contract" to include not only construction work actually paid for by the state, but also any construction work involving "grants, loans, insurance, or guarantees" provided by the state. However, like the definition of "public works" that governs application of California's prevailing-wage laws, Connecticut's definition of "public works" for outreach programs is limited in scope.

Public financing alone may not be sufficient to characterize a project as "public." *City of Long Beach v. Department of Industrial Relations*⁵⁴ illustrates the principle that the "public" character of a project may turn on the statutory language that governs the particular issue in dispute. The cases involved the development of an animal shelter on privately-owned land. The city gave a cash grant to a private foundation for preconstruction activities and design

services on the project. The state's department of industrial relations contended that the grant of city funds meant that California's prevailing-wage statutes should apply to the entire project. However, after a close examination of the statutory language defining "public works" and the statutory language mandating prevailing wages, the California Supreme Court ruled that the prevailing-wage statutes applied only when public funds were paid for "construction" activities, not preconstruction activities.

The meaning of "public financing" itself becomes uncertain when public and private entities adopt novel or creative financing schemes to fund construction work. In *Pennsylvania State Building and Construction Trades Council, AFL-CIO v. Prevailing Wage Appeals Board*, ⁵⁵ the Harrisburg Redevelopment Agency (HRA) offered "tax increment financing" to an insurance company, PNI, as an inducement to build its new headquarters building in the city of Harrisburg. HRA issued \$10,500,000 in "tax increment" bonds to be repaid from the increased tax revenue attributable to construction of the new headquarters buildings (the "tax increment"). The insurance company purchased the bonds, and the bond proceeds were held in trust by HRA for payment of a portion of the construction costs of the headquarters project. The scheme required that tax authorities pay the tax increment to HRA to pay off the bonds. Essentially, HRA and the taxing authority allowed the insurance company to fund its construction costs through tax rebates on the improved property. As one of the witnesses before the trial court confirmed, the money that paid for the new headquarters essentially moved in a "loop" from the insurance company, to the public entities, and back again to the insurance company.

The scheme came at an unexpected cost to PNI. The local unions contended that, as a result of the "tax increment bonds," the project was a "public work" for the purposes of Pennsylvania's prevailing-wage laws. The Pennsylvania Supreme Court agreed:

Based upon the statutory scheme and the foregoing testimony, in our view, the monies paid to the tax authorities as tax increments, which, in turn, are used to pay off the bonds that are used to pay the cost of construction are public funds for purposes of the Wage Act. . . . [A]s noted by the Commonwealth Court, for a time these monies do rest in the public coffers. Significantly, the statutory financing at issue here is not a tax abatement, where the taxing authority agrees to forego receiving property taxes on a certain property for a certain time.

Pennsylvania State Building thus offers a cautionary moral: Developers who enter into creative financing relationships with public entities do so at their own peril.

A Project's End Use May Determine Its Character

A project's end use may determine its character in some jurisdictions. For example, in *Comstock & Davis, Inc. v. City of Eden Prairie*, an engineer was allowed to pursue a mechanic's lien recorded against property owned by a public agency because the public entity that owned the land planned to sell it to a private entity for private commercial use. ⁵⁶

L. Suzio Concrete Co. v. New Haven Tobacco, Inc. 57 is an example in which a supplier erroneously assumed a project was public because it failed to appreciate the significance of the project's end use. In that case, the Town of East Haven sold property to a private entity for construction of a factory. However, to discourage the purchaser from reselling the property after it took title, and to encourage the purchaser to build the factory and warehouse that the purchaser promised it would build, the town included a number of restrictions on the sale, including one that required the purchaser to pay for and build a foundation for its facilities on the land before title would be transferred. The purchaser engaged a contractor that built the foundation but defaulted on payments to its supplier. When the supplier attempted to put a lien on the property, it learned that title was still held by a public entity. Assuming the project to be a "public work," the supplier refrained from recording a lien on the theory that it could pursue a payment bond remedy. The supplier then learned too late that the public entity never required the developer to post a payment bond, as Connecticut law requires for all public works projects. The supplier sued the officials who failed to require a payment bond for the damages it suffered as a result of the contractor's default. The court sided with the officials, reasoning that despite the clause requiring that the purchaser build a foundation before title would be transferred, the sales agreement was, at its core, a land sales agreement, not a construction contract. Furthermore, the ultimate use of the project was private, not public. The claimant paid dearly for its erroneous assumption about "Is it public, or is it not?"

Similarly, in *Rhode Island Building & Construction Trades Council v. Rhode Island Port Authority and Economic Development Corporation*, ⁵⁸ a project built on public land by a private developer was found to be exempt from Rhode Island's prevailing-wage statutes because the ultimate use of the project was private, not public. The project involved the construction of an office building complex on land owned by an economic development corporation. The project was funded with \$25 million in taxable bonds issued by the economic development corporation. The project would be leased to a private entity for an annual rent of \$1 plus the interest and principal due on the bond. The applicable statute provided that prevailing wages would be paid on any "public work" funded through a bond issued by an economic development corporation. Was this project, which was built on public land and funded through a public obligation a "public" project? The Rhode Island Supreme Court answered "no." The court reasoned that it should be "guided by the nature of the use to which the ultimate project is to be put rather than the source of the funding."

In *James J. O'Rourke, Inc. v. Industrial National Bank of R.I.*,⁵⁹ a group of claimants made a similar painful mistake about "Is it public, or is it not?" A port authority facilitated the financing for construction of a meatpacking plant by issuing \$2.1 million in bonds. To make the issuance of bonds possible, the meat-processing company donated the land to the port authority, and the port authority leased the land back to the company for rental payments that equaled the principal and interest on the bond. Under the terms of the lease, the facility owner could repurchase the land for \$1 after the bond was redeemed. The company executed a contract with a general contractor for construction of the plant, but the contract was immediately assigned to the port authority. When the general contractor defaulted on payments

to subcontractors during construction of the facility, the subcontractors sued the port authority for damages on the grounds that the port authority failed to demand a payment bond from the general contractor. Even though the port authority owned the land, had issued the bonds, and held the general contract for construction, the Rhode Island Supreme Court ruled that the project was not a public project, finding the facts that the project use was private and its funding was essentially private to be dispositive. The court acknowledged that its decision left the subcontractors without a remedy, but it nevertheless ruled that "this litigation can afford the plaintiffs no relief."

As the cases discussed above illustrate, owners, developers, contractors, and sureties must closely examine the potential application of "public-works" statutes whenever a public entity is involved in a project, even if the involvement is tangential.

Statutorily Established Public-Private Partnerships

In addition to the foregoing factors, the character of a project may be defined by reference to enabling laws that expressly authorize public-private partnerships. Examples of statutes authorizing such partnerships include California's statutes relating to the State Court Facilities Construction Fund, 60 the "High Speed Rail" voter-approved initiative, 61 and private toll-road franchises. 62 Other states are passing similar statutes, some of which attempt to provide some guidance regarding whether statutes that ordinarily govern public works contracting apply to the project developed under their purview, and some of which do not. For example, the statutes authorizing the California Judicial Council to pursue alternative projectdelivery methods for projects developed under the aegis of the Court Facilities Construction Fund specifically exempt the projects from the Public Contract Code. 63 Even this express guidance is incomplete, however. While the statute expressly excludes projects from the Public Contract Code, it is silent concerning application of other state statutes, such as California Civil Code section 3247, which requires an "original contractor" on a project "awarded" by a "public entity" to post a payment bond. Express statutory exemptions notwithstanding, the prudent developer, public owner, contractor, and potential claimant on any project must closely examine all public works statutes within the jurisdiction for possible application of any of the traditional public works restrictions and rules when dealing with any construction project involving public funds, public owners, or public use.

Conclusion

Public construction is pervasively regulated. Prevailing wages, government code claims, bonding requirements, false claims, public sector financing, sealed bidding, negotiated bidding for "best value," human rights commissions, affirmative action goals, and "Buy American" and other restrictions on procurement of materials are but a few of the considerations. Nevertheless, through it all contractors and developers must "turn square corners" when dealing with the government. Public entities cannot exceed their statutory authority in entering into or amending a contract; when they attempt to do so, the contract may

be void. It is indeed a lot for all parties involved to keep track of.

When public entities deviate from the established rules in order to take advantage of opportunities for greater efficiencies, to bring private sector financing to public projects, or due to preferences for private sector solutions, the answer to the question "Is it public, or is it not?" can become obscured. It is important for all parties, therefore, to recognize the red flags: (1) public ownership is involved, (2) public money is involved, or (3) the project is fundamentally for public use. When one or more red flag is present, careful analysis is essential. Ask yourself, what are the consequences if the project is really public, or really private? Which rules apply, and which do not? What is the payment security if there are no lien rights? Does the public entity have statutory authority to do what it's doing? What are the consequences if the answer is no? Who bears the risk?

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Endnotes

- 1. The editorial can be found at http://www.dailymail.com/Opinion/Editorials/200902100475?
 page=1&build=cach.
- 2. See prevailing-wage studies compiled by the Sheet Metal and Air Conditioning National Association (SMACNA) discussing the benefits of prevailing-wage laws at http://www.smacna.org/legislative/index.cfm? fuseaction=studies.
- 3. 331 So. 2d 647 (Ala. 1976).
- 4. 645 S.W.2d 711 (Ky. App. 1983).
- 5. Ky. Rev. Stat. Ann. §337.010(3)(d).
- 6. For other cases focusing on the nature of the awarding entity, see Western Mich. Univ. Bd. of Control v. State, 455 Mich. 531 (1997); Bridgestone/Firestone v. Hartnett, 175 A.D.2d 495 (N.Y. 1991) (private contract for replacement of roofing material pursuant to 10-year warranty subject to prevailing wage because state's general contract required the warranty); Stephens & Rankin, Inc. v. Hartnett, 160 A.D.2d 1201 (N.Y. 1990) (Niagara Falls Bridge Commission, established under federal law, was a "commission appointed pursuant to law" within meaning of state prevailing-wage act); Newark Laborers' Pension Welfare Funds v. Commercial Union Ins. Co. 126 N.J. Super. 1, 312 A.2d 649 (1973) (state housing authority was an "instrumentality exercising public and governmental functions"); Male v. Pompton Lakes Borough Municipal Utilities Authority, 105 N.J. Super. 348, 252 A.2d 224 (1969) (municipal utilities authority had broad independent power to acquire property, issue bonds, and set rates for its services).
- 7. 163 Ill. App. 3d 987 (4th Dist. 1987).
- 8. For other cases focusing on the nature of funding, see Lycoming County Nursing Home Ass'n v. Dep't of Labor & Indus., 627 A.2d 238 (Pa. Commw. 1993) (nursing home construction by private, nonprofit corporation); State *ex rel*. Webster v. Camdenton, 779 S.W.2d 312 (Mo. App. 1989) (lease-leaseback for police station and fire house). *Compare* Nw. Ohio Bldg. & Constr. Trades Council v. Ottawa Cnty. Improvement Corp., 122 Ohio St. 3d 283 (2009); Mosaica Educ., Inc. v. Pennsylvania Prevailing Wage Appeals Board, 925 A.2d 176 (Pa. Commw. 2007) (charter school renovation project that did not involve public funds); Carson-Tahoe Hosp. v. Building & (continued on next page)

Endnotes (cont'd)

Constr. Trades Council of Northern Nevada, 128 P.3d 1065 (Nev. 2006) (private hospital construction financed in part through city revenue bonds); Coats v. State, 170 Or. App. 32 (2000) (contractor's quarry work ten miles away from public project not subject to prevailing wages); Found. for Fair Contracting, Ltd. v. Dep't of Labor, 316 N.J. Super. 437 (App. Div. 1998) (construction of state-funded, low to moderate income housing); Elliott v. Morgan, 214 Wis. 2d 253 (Wis. Ct. App. 1997) (sidewalks, decorative lighting, and landscaping along river not subject to prevailing wage-rate statute, even though city provided grant money); McIntosh v. Aubry, 14 Cal. App. 4th 1576 (1993) (privately run residential shelter care facility for minors on land leased from county); Nat'l R.R. Passenger Corp. v. Hartnett, 169 A.D.2d 127, 572 N.Y.S.2d 386 (1991) (construction of new Amtrak line was not public works project); Alaska State Federation of Labor v. Dep't of Labor, 713 P.2d 1208 (Alaska 1986) (new community hall owned and operated by Indian tribes not covered by state prevailing-wage act, even though state grant funded 25 percent of the project costs for construction).

- 9. 204 Ill. App. 3d 945 (5th Dist. 1990).
- 10. ILL. COMP. STAT. ch. 48 §§39s-1, et seq. (1987).
- 11. See Long Island Lighting Co. v. Indus. Comm'r, 40 A.D.2d 1003, 338 N.Y.S.2d 751 (1972) (erection of streetlight standards had a public objective); compare City of Long Beach v. Dep't of Indus. Relations, 34 Cal. 4th 942 (2004) (private animal shelter); Elliott v. Morgan, 214 Wis. 2d 253 (Ct. App. 1997); Cattaraugus Cmty. Action, Inc. v. Hartnett, 166 A.D.2d 891 (N.Y. 1990) (home for adolescent mothers undertaken by a private non-profit corporation); Columbia-Pacific Bldg. & Constr. Trades Council v. Oregon Comm. on Pub. Broad., 102 Or. App. 212 (1990); State ex rel. Webster v. Camdenton, 779 S.W.2d 312 (Mo. App. 1989) (sale-leaseback for construction of a combination fire station and police station); Hunter v. Bozeman, 216 Mont. 251 (1985) (lease-leaseback of land for constructing a building); Daniels v. Ft. Smith, 268 Ark. 157 (1980) (construction of industrial park on city-leased land); Int'l Bhd. of Elec. Workers v. Bd. of Harbor Comm'rs, 68 Cal. App. 3d 556 (1977) (oil and gas lease for production of oil from tidelands held in trust by city).
- 12. See, e.g., CAL. CIV. CODE §2782.
- 13. CAL. CIV. CODE §2782(b).
- 14. CAL. GOV'T CODE §4215.
- 15. CAL. PUB. CONT. CODE §1104.
- 16. CAL. PUB. CONT. CODE §7102.
- 17. CAL PUB. CONT. CODE §7104.
- 18. CAL. PUB. CONT. CODE §7105.
- 19. For a summary of anti-indemnity statutes, for example, see International Risk Management Institute, Inc., Construction Risk Management, Vol. II at X.E.4 (May 1998).
- 20. 2008 Act No. 280, added Chapter 14 to Title 8 of the South Carolina Code of Laws; see also, e.g., Cal. Pub. Cont. Code §6101.
- 21. *E.g.*, Ne. Florida Contractors v. Jacksonville, 508 U.S. 656 (1993) (contractor's group challenged city ordinance that 10 percent of the budget for city contracts be set aside each year for minority business enterprises); Laborers Local Union No. 374 v. Felton Constr. Co., 98 Wash. 2d 121 (1982) (union challenge to award of sewer contract for failing to comply with statutory requirement to hire specified percentage of state residents).
- 22. 41 U.S.C. §§10a to 10d. Section 10(b) of the act pertains to construction contracts and reads: "Every contract for the construction, alteration, or repair of any public building, or public work in the United States heretofore made or hereafter to be made shall contain a provision that in the performance of the work the contractor, subcontractors, material men, or suppliers, shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States. . . . "
- 23. U.S.C. §313; *see also* 23 C.F.R. §635.410. Essentially, the FHWA "Buy American" statute requires that all steel and/or iron materials that are permanently incorporated into a covered project must be manufactured and fabricated in the United States. Here is the first loophole, however: If a state's transportation department

Endnotes (cont'd)

determines that a bridge structure (even a bridge structure that is to remain in place for years and possibly then moved for a secondary, continued use at another location) is "temporary" rather than permanent in nature, then the Buy American protection does not apply. Then there is a second loophole: Buy American protection does not apply to bridge structures funded totally from state revenue, even if application of federal funding to another state highway project freed state funds to be applied to build a bridge through loophole number two. The FHWA Buy American statute also does not apply if: (1) the state accepts alternate bids from both foreign and domestic steel mills or fabricators, and the foreign company's bid is lower than the domestic company's bid by more than 25 percent, or (2) the use of foreign steel and iron does not exceed 0.1 percent of the total contract value, or \$2,500, whichever is greater. See 23 C.F.R. §635.410(b)(1)(4).

- 24. See, e.g., CAL. GOV'T CODE §4331: "Price, fitness and quality being equal, any body, officer, or other person charged with the purchase, or permitted or authorized to purchase supplies for the use of the State, or of any of its institutions or offices, or for the use of any county or city shall always prefer supplies grown, manufactured, or produced in the State, and shall next prefer supplies partially manufactured, grown, or produced in the State."

 25. E.g., CAL. PUB. CONT. CODE §3400.
- 26. See FAR 36.103(a) ("The contracting officer shall use sealed bid procedures for a construction contract if the conditions in 6.401(a) apply. . . ."). FAR 6.401(a)(1) provides: "Contracting officers shall solicit sealed bids if (1) Time permits the solicitation, submission, and evaluation of sealed bids; (2) The award will be made on the basis of price and other price-related factors; (3) It is not necessary to conduct discussions with the responding offerors about their bids; and (4) There is a reasonable expectation of receiving more than one sealed bid."

 27. See 2000 Model Procurement Code for State and Local Governments §5-202(2)(h) ("Competitive sealed bidding . . . shall be used to procure construction in design-bid-build procurements"); see also 2007 Model Code for Public Infrastructure Procurement, AMERICAN BAR ASSOCIATION, available at http://meetings.abanet.org/webupload/commupload/PC500500/relatedresources/5IntroductionToModelCodeforPublicInfrastructure Procurement.pdf.
- 28. See, e.g., J&J Contractors/O.T. Davis Constr., A.J.V. v. Idaho Transp. Bd., 118 Idaho 535 (1990) (contract in violation of competitive bidding laws is void, and contractor may not recover in quantum meruit); Miller v. McKinnon, 20 Cal. 2d 83 (1942) (ordinarily, compliance with the terms of a statute requiring the letting of certain contracts by a public agency such as a municipal corporation or county by competitive bidding and the advertising for bids is mandatory with respect to those contracts coming within the terms of the statute; a contract made without compliance with the statute is void and unenforceable as being in excess of the agency's power).

 29. See J&J Contractors; Miller, supra n.28. Compare OR. REV. STAT. §279C.470 (contract that fails to comply is to be ratified and contractor paid unless fraud or criminal conduct is involved).
- 30. See, e.g., J. Kent Corp. v. Town of Dillon, 648 P.2d 669 (Colo. Ct. App. 1982).
- 31. See generally Patrick J. O'Connor, Statutory Bonds or Common-Law Bonds: The Public-Private Dilemma, 29 Tort & Ins. L.J. 77 (1993); 48 A.L.R. 4th 1170 (cases regarding what constitutes a public work for purposes of payment bond statutes).
- 32. See O'Connor, supra note 31.
- 33. See, e.g., Western Waterproofing Co. v. Springfield Housing Authority, 669 F. Supp. 901 (C.D. Ill. 1987); N.V. Heathorn v. County of San Mateo, 126 Cal. App. 4th 1526 (2005); Platt Elec. Supply, Inc. v. JC Nw., Inc., 159 Or. App. 328 (1999); Palm Beach Cnty. v. Trinity Indus., Inc., 661 So. 2d 942 (Fla. Dist. Ct. App. 1995); Green Elec. Sys., Inc. v. Metro. Airports Comm'n, 486 N.W.2d 695 (Minn. Ct. App. 1992); Redbird Engineering Sales, Inc. v. Bi-State Dev. Agency, 806 S.W.2d 695 (Mo. Ct. App. 1991); Charlie Brown Constr. Co. v. City of Boulder City, 106 Nev. 497 (1990); Joseph A. Fortin Constr., Inc. v. Massachusetts Hous. Fin. Agency, 392 Mass. 440 (1984).
- 34. See, e.g., OR. REV. STAT. §279C.625 (imposing individual liability upon public officials who fail to obtain statutorily required bonds).
- 35. 344 F. Supp. 459 (W.D. Ky. 1972).
- 36. See O'Connor, supra note 31.
- 37. See 53 AM JUR. 2d, Mechanics' Liens §§31-37 (2006); CAL. CIV. CODE §3109; Meyerhofer v. Bd. of Educ., 89 Cal. 110 (1891).

Endnotes (cont'd)

- 38. 221 Mich. App. 438 (1997).
- 39. 92 N.Y.2d 275 (1998).
- 40. 796 F.2d 133 (5th Cir. 1986).
- 41. 986 So. 2d 1260 (Fl. 2008).
- 42. *Id*.
- 43. Lopez v. James Constr. Grp., 432 F.3d 829, 833 (8th Cir. 2005).
- 44. Id.
- 45. 98 Md. App. 535, 633 A. 2d 939 (1993).
- 46. *Id*.
- 47. 2009 Pa. Commw. LEXIS 1594 (2009).
- 48. For another charter school case using creative ownership mechanisms see *Mosaica Educ., Inc., supra* note 6. A New York court has ruled that charter schools are categorically not subject to New York's prevailing-wage statutes because charter schools are not identified in the statute as a public entity whose projects are covered by the prevailing wage statutes. In the Matter of New York Charter School Ass'n v. Comm'r of Labor, 2009 N.Y. App. Div. LEXIS 2452 (2009).
- 49. CAL. LAB. CODE §1720.
- 50. Id. ("As used in this chapter. . . .").
- 51. CAL. CIV. CODE §§3100, et seq.
- 52. CONN. GEN. STAT. §46a-68b.
- 53. *Id.* ("As used in this section and sections 4a-60, 4a-60a, 4a-60g, 4a-62, 46a-56 and 46a-68c to 46a-68k, inclusive: 'public works contract' means. . . .").
- 54. 34 Cal. 4th 942 (2004).
- 55. 570 Pa. 96 (2002).
- 56. 557 N.W.2d 213 (Minn. Ct. App. 1997).
- 57. 28 Conn. App. 622 (1992).
- 58. 700 A.2d 613 (1997).
- 59. 478 A.2d 195 (1984).
- 60. CAL. GOV'T CODE §§70371–70379.
- 61. Cal. Sts. & High. Code §§2704–2704.21; Cal. Pub. Util. Code §§185000–185038.
- 62. CAL. STS. & HIGH. CODE §143.
- 63. CAL. GOV'T CODE §70374(b).

