WTHF

WATT, TIEDER, HOFFAR & FITZGERALD, L.L.P.®

BUILDING SOLUTIONS®

Attorneys at Law

Summer 2014

Inside...

The newsletter of
Watt, Tieder, Hoffar & Fitzgerald, LLP

visit us on the web at
www.wthf.com

BUILDING SOLUTIONS

Can A Contractor Sue Its Own Surety In Tort For Breach Of Fiduciary Duty And Bad Faith?

by Kevin J. McKeon, Partner

On June 11, 2014, the U.S. Court of Appeals for the Third Circuit issued a decision addressing the ugly situation when a contractor and its surety find themselves at odds, and the contractor seeks to avoid the consequences of having executed a typical general agreement of indemnity ("GAI") by suing the surety in tort.

The typical GAI not only requires the principal/contractor to indemnify the surety, but also provides a relatively broad panoply of other rights to the surety to allow it to protect its interests. Although the principal's and the surety's respective interests are often aligned, when these parties become adverse, the surety's exercise of its rights under the GAI can lead to disputes and litigation. In this situation, the GAI, like any other contract, determines the parties' respective contractual rights. Given the strength and leverage of the surety's position through the terms of a typical GAI, the principal may find itself surprisingly unable to operate independently or to exercise its own judgment about how to handle bond claims and to complete bonded projects. After reviewing the GAI – which is a contract – the principal may look outside the contract to the body of tort law in an effort to exercise extraneous rights to avoid the limitations of a breach of contract claim founded on the GAI.

In *Reginella Construction Co., Ltd. v. Travelers Casualty & Surety Co. of America*, the Pennsylvania-based contractor employed just such a tactic. The contractor/plaintiff alleged that it had been in business for more than 25 years, and had successfully performed millions of dollars of work on public construction projects. In 2010 and 2011, the contractor had several bonded contracts, and it had previously executed a GAI with the defendant/surety.

In the Fall of 2011, the contractor began encountering a variety of challenges that spiraled out of control rapidly. On one bonded project, it terminated a subcontractor, and the subcontractor filed a mechanics' lien. As a result, the public owner withheld payment in the amount of the lien, and the contractor attempted to bond off the lien. The surety refused to provide such a bond, and ultimately the owner terminated the contractor on May 22, 2012.

In the meantime, on April 26, 2012, the surety wrote to the owner of one of the other bonded projects and demanded that payments that were otherwise due to the contractor be directed to the surety. The surety exercised this right under the GAI because it believed that the contractor was in default to a number of its subcontractors who had asserted payment bond claims on the project. The contractor alleged that the surety told the subcontractors that the contractor was going to be terminated, causing its subcontractors to slow down and assert additional and inflated claims. When the owner refused to make further payment, the contractor elected to terminate its performance on this project on June 11, 2012.

Blaming its suddenly deteriorating financial situation on the surety, the contractor promptly filed a complaint against its surety in the U.S. District Court for the Western District of Pennsylvania. More specifically, the contractor asserted a variety of tort claims, including intentional interference with contract, breach of fiduciary duty, and bad faith. Conspicuous by its absence, however, was any claim for breach of contract, or even a reference to the existence of the GAI.

The surety moved to dismiss, and the District Court found that there was no fiduciary relationship between the surety and the principal, such that the breach of fiduciary duty claim failed as a matter of law. The District Court addressed the fundamental nature of suretyship, and expressed skepticism "that a surety could ever assume a fiduciary-in-fact position towards its principal, a sophisticated commercial entity who is aware at the outset that the surety is contractually vested with the right to take steps against its (the principal's) interests if certain contingencies occur."

In that regard, because the Pennsylvania Supreme Court had never explicitly decided whether the surety/contractor relationship could give rise to a fiduciary relationship, the District Court had to predict how the Pennsylvania

Supreme Court would rule on the issue. Noting that the surety/contractor relationship is "riddled with conflicting interests and split loyalties," it predicted that the state Supreme Court would hold, as a matter of law, that a surety does not owe a fiduciary duty to a principal.

Although not raised by the surety's counsel in defense, the District Court applied Pennsylvania's gist-of-the-action doctrine in analyzing the other tort claims. The doctrine is not necessarily unique to Pennsylvania, but is based on maintaining the fundamental distinction between contract claims (where the duties allegedly breached arise out of a contract) and tort claims (where the duties allegedly breached arise out of social policy or a general duty of care). Thus, if the true "gist of the action" arises out of a contractual relationship, the doctrine will bar tort claims unless they are unrelated to the contract.

In this case, the District Court dismissed all of the other tort claims because they arose out of the contractual relationship created by the GAI, and were simply breach of contract claims re-cast as tort claims. While the contractor argued that it had pleaded facts about the surety's conduct that would justify its tort claims for bad faith and intentional interference ("entirely without justification," "arbitrary," "unreasonable," "capricious," "vexatious," "self-serving," "wrongful," "improper," "wanton," "outrageous," "shocking to the conscience," and even "overmastering"), the District Court was obviously unimpressed and concluded that these were not facts, but simply "adjective-laden editorial embellishments that the Court was obligated to cast aside."

The contractor sought leave to amend to somehow further amplify its pleading, but the District Court found that amendment would be futile and reward delay, such that leave was denied. The contractor appealed even though it was already pursuing breach of contract counterclaims in a prior state court proceeding in which the surety was the named plaintiff.

On appeal, the Third Circuit affirmed in all respects. First, the appellate court noted that the contractor had not appealed the District Court's prediction that the Pennsylvania Supreme Court would find no fiduciary duty arising out of the contractor/surety relationship, so the contractor could not state a valid claim for breach of fiduciary duty. Next, the Third Circuit found that the gist-of-the-action doctrine was properly applied to bar the other tort claims because they were all dependent upon the terms of the GAI. Finally, the appellate court agreed that it was within the District Court's discretion to deny leave to amend, because granting leave would only cause delay and encourage "wait-and-see" tactics.

Notably, the *Reginella* case is described as "not precedential," but since Federal Rule of Appellate Procedure 32.1 (prohibiting Federal Circuit Courts from restricting citation to any type of opinion issued after January 1, 2007) was adopted in late 2006, the case may be cited and provides valuable insight into the Third Circuit's view of both the typical GAI and the nature of the surety/principal relationship. The practical take-away from the case will be different depending on one's role in that relationship, but it does reflect a relatively clear respect for the rights and obligations negotiated, documented and agreed to in the typical GAI.

New Past Performance System Requires Prompt Contractor Response

by Scott P. Fitzsimmons, Partner

If you are a federal contractor, you know the importance of past performance reviews on your business. Past performance evaluations are required for any service contract exceeding $150,000, any construction contract exceeding $650,000, and any architect-engineering contract exceeding $30,000. *See* 48 CFR § 42.1502. The federal government relies on these reviews to award new work, and a negative evaluation could have a detrimental effect on your bottom line. Understanding the evaluation process is, therefore, critical to successful completion of any federal contract.

On July 1, 2014, the federal government implemented new policies and procedures for preparing and submitting past performance reviews. *See* 48 CFR § 42.1503, 79 Fed. Reg. 31197. These changes modified existing evaluation criteria and significantly altered a contractor's deadline for challenging performance reviews. The government

...continued on page 4

executed these changes after a Government Accountability Office ("GAO") report found that past performance evaluations were not being prepared consistently or timely throughout agencies in the federal government. GAO Report 09-374, Better Performance Information Needed to Support Agency Contract Award Decisions (Apr. 23, 2009). Congressional pressure to make the evaluation system more effective resulted in changes introduced through the 2012 and 2013 National Defense Authorization Acts. *See* Pub. L. 112-81, Pub. L. 112-239.

As a first step to achieving efficiency, the government merged multiple rating programs into a single system. The Architect-Engineer Contract Administration Support System (ACASS) and the Construction Contractor Appraisal Support System (CCASS) are now merged into the Contractor Performance Assessment Reporting System (CPARS). CPARS is available at www.cpars.gov. Previously, CPARS, ACASS, and CCASS contained different evaluation forms, rating elements, and workflow processes. The new CPARS program eliminates inconsistencies and evaluates all contractors on the same factors including: (1) Quality, (2) Schedule, (3) Cost Control, (4) Management, (5) Utilization of Small Business, and (6) Regulatory Compliance. Agencies also are now required to provide a written narrative for each factor. Requiring written justification for each score eliminates scenarios where a contractor receives a low mark without any reason whatsoever. Notably, however, a contractor no longer receives an "Overall" rating for each contract, potentially making the review of past performance more difficult during contract solicitation and bid evaluation.

By merging to a single program, the government hopes to achieve uniform evaluations throughout the federal government. Several agencies have issued guidance on how these new evaluation criteria should be used. *See* US Army Corps of Engineers, Engineering and Construction Bulletin No. 2014-13, CPARS Transition Guide (May 22, 2014). Contractors are highly encouraged to seek out this guidance and understand how agencies will interpret and implement the new CPARS evaluation criteria.

In addition to changing the evaluation factors, the new regulations revise existing deadlines for contractors to respond to an agency's draft evaluation. Understanding these changes is critical. Under the old rules, a contractor had 30 days to submit comments, rebutting statements, or additional information to the government in response to a past performance review. Under the new guidelines, the contractor's response time is cut in half. A contractor is provided only 14 days to respond to the government's review once the evaluation is submitted in CPARS. See 48 CFR § 42.1503(d). On the 15th day, whether the contractor has responded or not, the evaluation automatically posts to the Past Performance Information Retrieval System (PPIRS). PPIRS is available at www.ppirs.gov. Once on PPIRS, the evaluation is available for viewing by all source selection officials throughout the federal government. The 14-day timeline could, therefore, have significant ramifications for a contractor who receives a negative or unjustified evaluation. It also emphasizes the need for contractors to diligently pursue their right to respond to an agency's evaluation.

Historically, contractors who disagreed with a government evaluation would request to meet with the Contracting Officer to discuss their scores and provide feedback or justification for their performance. No requirement exists for the government to meet with the contractor. However, if a contractor requests a meeting, the government may accept the request. Any such meeting, though, does not alter the requirement that an evaluation be posted to PPIRS within 14 days. The reason for this policy is to ensure that source selection officials have access to timely and relevant past performance reviews and to avoid delays in reporting performance on a completed federal contract.

Even though a past performance review must be posted within 14 days, several avenues still exist for the contractor to influence the review. First, the contractor may submit comments after the 14-day period expires and the review has been posted to PPIRS. Under the new regulations, the contractor's late comments must be posted to PPIRS; however, the government's original report will still be available to all source selection officials. Although authorized, an agency is not required to modify its evaluation based upon a contractor's comments. Second, a contractor may appeal its review to one level above the Contracting Officer. Again, the appeal does not stop the 14-day reporting period and the original evaluation will be posted on PPIRS.

The changes implemented for the new past performance reviews are significant. Federal contractors should be aware of these requirements and make every effort to understand the government's expectations. Engaging the contracting officer early, understanding their expectations, asking for a draft evaluation, and seeking timely constructive feedback are all methods a contractor may use to gauge its performance. Because a negative past performance evaluation could adversely impact future business, government contractors should be aware of the new evaluation criteria, immediately review any evaluation, be prepared to substantively respond to a past performance review, and be cognizant of the new 14-day rule.

Robert G. Barbour

Not Pictured:
Vivian Katsantonis

The Scope Of The Government's Duty Of Good Faith And Fair Dealing Under Federal Contracts

by Robert G. Barbour and Vivian Katsantonis, Senior Partners

Like all contracting parties, the federal government is bound by an implied duty of good faith and fair dealing in all of its contractual undertakings. Contractors commonly rely on this implied duty as a basis for seeking additional compensation where the government's representatives have hindered performance under a contract without breaching one of the contract's express provisions. Historically, the United States Court of Appeals for the Federal Circuit applied a "reasonableness" test in assessing allegations that the government breached this implied duty, finding a breach of this implied duty where the government's actions were considered to be unreasonable under the specific circumstances of a particular contract.

In 2010, however, the Federal Circuit articulated a more stringent test for assessing allegations that the government breached this implied duty in *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817 (Fed. Cir. 2010). In that case, the government had allegedly frustrated the plaintiff's performance by suspending the contractor's operations. The evidence produced at trial reflected that the express terms of the contract at issue contemplated suspension of the contractor's operations under certain circumstances and, further, that the government was compelled to suspend the contractor's operations by a court order issued in an unrelated third-party litigation. In its analysis of the plaintiff's allegations that the government breached its implied duty of good faith and fair dealing, the Federal Circuit chose not to rely on the "reasonableness" test, and instead utilized the "specific targeting" test. Applying that test, the court found that the government had not breached its duty of good faith and fair dealing because the government's actions were not "specifically targeted at the plaintiff[s] contract rights" and "did not reappropriate any 'benefit' guaranteed by the contract." The court reasoned that there could not have been a breach because the implied duty of good faith and fair dealing "cannot expand a party's contractual duties beyond those in the express contract or create duties inconsistent with the contract's provisions."

Following *Precision Pine*, there was much confusion and debate regarding whether the "specific targeting" test had displaced the "reasonableness" test. Many, including the government, interpreted the Federal Circuit's ruling in *Precision Pine* as narrowing the cause of action against the government for breach of the duty of good faith and fair dealing to situations where a contractor could prove that the government breached an express contract provision with the intent to deprive the contractor of the intended benefit of the parties' bargain.

In *Metcalf Construction Company, Inc. v. United States*, the United States Court of Appeals for the Federal Circuit ("Federal Circuit") revisited the issue and clarified the standards applicable to allegations that the federal government breached its duty of good faith and fair dealing.

Background

In October 2002, Metcalf Construction Company, Inc. ("Metcalf"), a small business based in Hawaii, was awarded a $48 million contract for the design and construction of 212 housing units for the U.S. Navy on a Marine Corps base in Hawaii. Metcalf alleged that its performance under the contract was hindered and delayed by unanticipated soil conditions and other issues that were exacerbated by the Navy's failure to administer the contract fairly and according to its terms. By the time the project was finally accepted as complete, Metcalf was nearly two years behind schedule and had incurred additional costs allegedly totaling $27 million. After the Navy's Contracting Officer denied a certified claim for the increased costs, Metcalf appealed to the United States Court of Federal Claims to recover its losses, contending that the Navy's conduct amounted to a breach of the Navy's implied duty of good faith and fair dealing under the parties' contract. The Navy denied the allegations and counter-sued Metcalf for liquidated damages based upon Metcalf's delay in completing the project.

...continued on page 6

The Lower Court Ruling

The Court of Federal Claims denied Metcalf's appeal in large part, granting the Navy's claim for liquidated damages and ruling that the Navy did not breach its duty of good faith and fair dealing. With specific regard to the latter, the Court of Federal Claims' decision rested on a very narrow view of the government's implied duties. Specifically, relying almost entirely on *Precision Pine*, the Court of Federal Claims held that "a breach of the duty of good faith and fair dealing claim against the Government can *only* be established by a showing that it 'specifically designed to reappropriate the benefits [that] the other party expected to obtain from the transaction, thereby abrogating the government's obligation under the contract.'" Further highlighting its narrow view, the Court of Federal Claims added that "incompetence and/or failure to cooperate or accommodate a contractor's request do not trigger the duty of good faith and fair dealing, unless the Government 'specifically targeted' action to obtain the 'benefit of the contract' or where Government actions were 'undertaken for the purpose of delaying or hampering performance of the contract.'"

The Federal Circuit's Rejection Of The Lower Court Ruling

Metcalf appealed the Court of Federal Claim's ruling to the Federal Circuit, arguing that the "specifically targeted" standard articulated in *Precision Pine* applies only in limited factual circumstances, where acts of a separate government agency or authority, like a court order issued in a separate case, impact the contract at issue. Metcalf asserted that in the specific circumstances presented, where the conduct of the government's representatives administering the contract formed the basis of the alleged breach, the Court of Federal Claims should have applied the "reasonableness" standard. The Federal Circuit agreed with Metcalf and held that the Court of Federal Claims misread the standard articulated in *Precision Pine*. The court went on, in two important ways, to resolve the confusion the *Precision Pine* decision had created.

First, the appeals court made clear that *Precision Pine* did not establish a new rule that precludes a contractor from establishing a breach of the government's implied duty of good faith and fair dealing unless it can demonstrate that the government's conduct was "specifically targeted" to reappropriate benefits from the contractor. The Federal Circuit found that the Court of Federal Claims had erred by imposing such a standard based upon its reading of *Precision Pine*, noting that that case "does not impose a specific-targeting requirement applicable across the board," and "does not purport to define the scope of good-faith-and-fair-dealing claims for all cases, let alone alter earlier standards." The Federal Circuit went on to make clear that *Precision Pine's* "specific targeting" analysis applies only in the rare circumstance where a contracting agency's ability to facilitate a contractor's performance is at odds with "the authority of other government entities."

Second, the *Metcalf* court clarified that a contractor is not required to show the government's breach of an express contract provision to prevail on a claim that the government breached its duty of good faith and fair dealing. The government raised this argument at the Court of Federal Claims, citing as support *Precision Pine's* statement that implied duties "cannot expand a party's contractual duties beyond those in the express contract." The court rejected that argument, explaining that "a breach of the *implied* duty of good faith and fair dealing does not require a violation of an *express* provision of the contract." Instead, it simply requires evidence that the government has violated a reasonable expectation of the contractor that is rooted in the original contract bargain.

Overall, the ruling in *Metcalf* has been hailed as a victory for contractors. The Federal Circuit's decision in *Precision Pine* has not been overruled, however, and that decision may still be cited by the government's attorneys in certain situations in an effort to limit the government's exposure to claims that it has breached its implied duty of good faith and fair dealing.

All of our newsletters, past and present, are posted on our website, www.wthf.com, under the News, Publications Tab. If you would like to receive an electronic copy of our newsletter, please contact Cindy Vasko at: **cvasko@wthf.com**

Don't Jump To Conclusions: Termination For Default Federal Project Options And Issues

by Eric B. Kjellander, Associate

Once a surety receives a declaration of default, show cause notice or even a letter of concern, it is imperative that the surety take immediate action to best prepare and position itself should the government terminate the surety's principal on the project. A declaration of default oftentimes is a result of an acrimonious relationship between the contracting officer and the surety's principal. This can lead the government to quickly terminate for default, and more importantly, a demand to the surety to complete the project. Obviously, a termination for default is a serious step that can have long term consequences for a contractor. Courts consider a default termination a drastic measure and place the burden on the government to demonstrate the validity of the default termination.

If the government does terminate for default, the surety has numerous options, such as tendering the penal sum of the bond, executing a takeover agreement, tendering a new contractor, financing the surety's principal, or doing nothing. However, before default-termination occurs and the surety selects one of its rights, there is a brief, yet important, period of time when options are available that may avoid a termination for default.

This article focuses on the alternatives a surety and the government, as well as the contractor, should examine in order to avoid the costly and contentious default-termination process as provided in the Federal Acquisition Regulation ("FAR"). The FAR is intentionally vague and there is little to no case law interpreting the alternatives provided in lieu of termination. The FAR, however, provides alternatives in lieu of termination for default that both minimize costs and potential losses, while at the same time allowing for completion of the project in a timely and efficient manner. The government, the surety and the contractor all have an interest in fully exhausting these options prior to termination.

Alternatives In Lieu Of Termination For Default

The alternatives in lieu of termination set forth in the FAR allow the government to choose one of three options: 1) permit the contractor, the surety, or the guarantor to continue performance of the contract under a revised delivery schedule; 2) permit the contractor to continue performance of the contract by means of a subcontract or other business arrangement with an acceptable third party, provided the rights of the Government are adequately preserved; or 3) execute a no-cost termination settlement agreement. FAR §49.402-4.

- Option 1 - Revised Delivery Schedule

In those rare instances where time is not of the essence, this may be a viable option. Notwithstanding, the government will likely not receive a completed project in a more timely manner should it decide to terminate a contractor for default. With this option, the surety can submit a revised delivery schedule in order to permit the contractor to continue performance on the contract. If the government agrees to the revised delivery schedule, termination for default will be avoided. Under this option, the government may also accommodate delayed delivery of service or materials in exchange for a reduced price.

If the working relationship between the contractor and the government is sound and additional time is available, this option would be the most appropriate option. This option also allows the contractor to retain control of its work.

- Option 2 - Permit The Contractor To Continue Performance By Means Of Subcontract

Option 2 ensures that the contract will continue, and substitutes the contractor by transferring the work to a third party. This option is beneficial to both the government and the surety, because the government's project

...continued on page 8

continues with minimal interruption, while the surety is not required to take any further action.

In *LB&B Assocs., Inc. v. United States*, the plaintiff contractor was required to perform maintenance and repair, including removal of hazardous waste material, for various Navy facilities. 91 Fed. Cl. 142, 147 (2010). Within two years of signing the contract, deficiencies arose concerning the maintenance, repair and handling of the hazardous waste material. *Id.* at 148-49. Instead of immediately terminating for default, the government attempted to avoid termination by allowing the contractor to continue performance through a subcontractor for a certain portion of the work. *Id.* at 150. The government informed the contractor of the failures, allowed it the opportunity to cure the defects, and informed the contractor that default would occur if the deficiencies were not fixed. The contractor subsequently filed claims for additional costs for subcontracting the hazardous material handling.

In granting the government's motion for summary judgment on the claim, the court held that the government's actions were permissible in lieu of termination. *Id.* at 156. By providing an alternative to default-termination, the government provided an option to immediate termination and allowed the contractor to retain some, though not complete, control over the project.

This option can be utilized in the event the relationship between the contracting officer and the principal is not irrevocably damaged. Perhaps the contractor underbid the project, has manpower issues, or just needs a portion of the scope subcontracted to a different party. Perhaps a majority of the contractor's scope of work is subcontracted out to one subcontractor that could increase its role on the project. Despite project issues, the government may not want to lose the original contractor's expertise or project experience.

- Option 3 - Execute A No-Cost Termination Settlement Agreement

This option would allow the parties to essentially rescind the contract and allow the parties to go their separate ways. Courts recognize that a termination for default is "the most drastic of remedies" and a "contractual death sentence." *Pipe Tech, Inc.*, ENGBCA Nos. 5959, 6005, 94-2 BCA ¶26,649; *Martin Constr., Inc. v. United States*, 102 Fed. Cl. 562, 573 (2011). Termination should only be imposed in limited situations and on "good grounds and on solid evidence." *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987).

A termination for default remains a risky measure on the part of the government, because if a court ultimately finds the default excusable, a termination for default converts to a termination for convenience. *Dynalectron Corp. v. United States*, 518 F.2d 594, 602 (Ct. Cl. 1975); FAR §52.248-10. If a default termination is converted to a termination of convenience, recoverable damages are limited to costs sustained before termination, a reasonable profit on the work that has been performed, as well as other additional costs. *Pinckney v. United States*, 88 Fed. Cl. 490, 506 (2009). However, other damages typically associated with breach of contract actions may be available if it is determined the government terminated the contract in bad faith. *Id.*

This option is more viable early in the project, especially if there are other available contractors that submitted similar bids. Option 3 is a more likely option where the termination for default would be contested, additional litigation likely, and a favorable ruling on the government's decision unclear. A surety must also consider the contractor's subcontractors and potential payment bond liability prior to the parties entering into a no-cost termination. One final consideration is whether the contractor desires to bargain for an acceptable evaluation from the relevant agency. The FAR provides examples of no-cost termination settlement agreements for complete or partial termination. See FAR §§ 49.603-6; 49.603-7.

The Government Is Required To Balance Certain Factors Before Termination For Default

If the government elects not to utilize one of the above alternatives, the government must balance specific factors in evaluating whether to terminate for default. Importantly, the FAR requires the government to notify the surety if termination is imminent. FAR § 49.402-3(e). Prior to any action by the surety, the surety should confirm that the government has complied with the balancing requirements for default-termination. Noncompliance with these factors may provide evidence that a contracting officer abused his discretion in terminating a contract for default. *DCX, Inc. v. Perry*, 79 F.3d 132, 135 (Fed. Cir. 1996). Courts review these factors and determine on a case-by-case basis whether the default termination is proper. *Decker & Co. v. West*, 76 F.3d 1573, 1580 (Fed. Cir. 1996) (quoting *Olson Plumbing & Heating Co. v. United States*, 221 Ct. Cl. 197, 602 F.2d 950, 955 (Ct. Cl. 1979)).

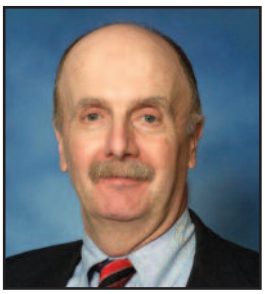
The FAR factors include, among others, the terms of the contract, the specific failure of the contractor and any excuses for the failure, the contract schedule, and the work remaining on the contract. FAR §49.402-3(f). In addition, the FAR provides the contracting officer with broad discretion under a catchall of "any other pertinent facts and circumstances." FAR

§49.402-3(f)(7). After the contracting officer reviews these factors and determines the default termination is warranted, the contracting officer shall issue a notice of termination detailing, among other things, the reasons for the termination and the contractor's right to appeal. FAR §49.402-3(g).

Conclusion

Although a surety has numerous options and rights after the government terminates for default, the government, the surety and the contractor benefit by avoiding termination. The FAR provides alternatives in lieu of termination in order to provide flexible options to mitigate damages for all parties involved and deliver a satisfactory project to the government in a timely and efficient manner.

INTERNATIONAL



All "Reasonably" Quiet On The Western Front – Estonia

by John B. Tieder, Jr., Senior Partner

The line between the Western and Eastern world has never been static. As a baby boomer, the line of which I was first aware was the Iron Curtain, which cast Russia, Poland, Hungary, and even parts of Germany in the East. Having spent some considerable time over the past few years between the old and the "new" lines, I have concluded that West and East are largely determined, not by political categorization or geography, but by attitude, religious tradition and the need and respect for personal freedom. Ukraine provides a good example of this where, despite the political designation as part of the West, significant portions of the population consider themselves to be Eastern. I will not try to categorize all of the places I have visited, but can comfortably state that, despite its years in the Russian Empire and its Eastern location on the map, Estonia is now and probably always was part of the West. (See map).

Given Estonia's history and the unfolding events in Ukraine, on my recent teaching visit to Estonia, we expected to find a high level of concern regarding Russia's intentions. While the individuals we met did voice some concern and held a wide range of views on the subject, the common attitude seemed to be "NATO will protect us, so why worry?" The most concerned individual I talked to was one of my students who was a reservist in Estonia's military and did not want to be called up. While Estonia has a significant ethnic Russian population, several of the people we met with voiced their opinion on how much better things are in Estonia today than they were when the Soviets ran the country.

Our 2014 teaching assignment to Estonia was at the University of Tartu located in the city of Tartu. Estonia's second largest city with a population of approximately 95,000, Tartu exists primarily as a university town. Tartu is located in the southeast part of Estonia, less than 40 miles from the Russian border, and has all the energy and charm one would expect from a city whose dominant age group is below 25. But first, a little background.

Estonia – The Place

Estonia is one of the three Baltic States, Latvia and Lithuania being the other two. Both Latvia and Estonia, despite being reasonably well defined geographically, have spent most of their existence as part of someone else's empire.

...continued on page 10

Estonia borders the Baltic in the North and shares a large border lake with Russia (Lake Peipsi) on the East. Roughly the size of the combined areas of Vermont and New Hampshire, Estonia shares its non-water border with Russia and Latvia. More than a third of the country's population of approximately 1.34 million lives in the capital city of Tallinn, so the countryside beyond is sparsely populated. The eastern half of the country is comprised of mile after mile farmland and pine forests and is dotted with small towns, most of which have 50 or fewer houses and no commercial buildings. Roughly three quarters of the population are ethnic Estonians, with the remaining quarter comprised primarily of Russians. In neighboring Latvia, by contrast, ethnic Latvians are approaching minority status.

A side note on driving: The roads Estonia are well-built and safe, and there is very little traffic. An international driver's license is required, as licenses issued by a U.S. state are not recognized as valid. Most surprising is the scarcity of gas stations, which are few and far between, usually located in remote locations, and sometimes have no gas. It is important to note that towns with gas stations are specifically identified on the map. If driving in Estonia – buy gasoline wherever you can!

With regard to energy, Estonia is mostly self-sufficient as a result of large in-country oil shale reserves. Two power plants fueled by the oil from these reserves provide 90% of the country's power. Several relatively new wind turbines face the Baltic Sea in the North, and biomass plants, which operate like large wood stoves, make use of the refuge of the timber industry. Regular sized wood stoves are used in many homes, and a neatly stacked pile of wood outside a home is a common site. One of my students explained that children in Estonia are taught to stack wood at an early age and that a sloppy wood pile is a disgrace.

Estonia – The History

An active Bronze Age culture existed along the Baltic dating back to approximately 5000 B.C. By 800-900 A.D., people in what is now Estonia were actively involved in trade with the Byzantine Empire and the Arab World. From approximately 1000 A.D. onward, Estonia was a pawn in the power struggles among Denmark, Sweden, the Lithuanian–Polish Commonwealth and, later, between Russia and Germany in a series of wars not generally addressed in college survey courses of European history. Some of the low points (from the Estonian point of view) were the conquest by the Teutonic Knights in the 13th Century, the Livonian War of the mid-16th century and the Great Northern War between Sweden (Charles XII) and Russia (Peter the Great) of the early 18th Century. The people who had the most the most influence, however, especially from an economic and cultural perspective, were the Germans.

One of the side benefits of religion, wars and the concentration of wealth in a few people is the great sightseeing opportunities they provide in later centuries, and Estonia is no exception. Were it not for the Lutheran Church and the German nobility, there would be little to see as a tourist in Estonia. As a result of those institutions, large baronial estates exist throughout the country, several of which are now in the process of being renovated to serve as hotels or resorts. We stayed in a particularly nice estate that was purchased and renovated by an American Artist – Kau Manor. It may not be worth a separate trip to Estonia, but if in the neighborhood, it is worth a night's stay.

Back to history, when Sweden lost the Great Northern War, Estonia became part of the Russian Empire. Germany, however, remained the dominant financial influence on the region. One of the most interesting developments of this period was the emergence in Estonia of song fests in the early 19th century. These song fests are large gatherings where people sing about the country and its culture. The tradition continues to this day, and we had an opportunity to attend one put on by the University of Tartu student body. There is obvious reverence and pride, especially when the National Anthem is sung. It was, and presumably still is, a way of celebrating the concept of Estonia.

Though its boundaries have been reasonably well-defined for centuries, the Republic of Estonia was first recognized as an independent country by the treaty of Tartu in 1920, after Estonians fought and won a war for independence from Russia. Estonia's independence was short-lived, however, and came to an end in 1940 when Eastern Europe was divided between Russia and Germany under the notorious Molotov-Ribbentrop Pact. Estonia was annexed by the Soviet Union and was absorbed, again, into the Russian Empire. It was not until 1991, with the disintegration of the Eastern Bloc, that Estonia was again recognized as an independent country. Thus, like most European countries, it took centuries of dynastic warfare before Estonia emerged as an identifiable political entity with relatively static geographic borders. Estonia became one of the first countries in the former East to become a full member of the European Union.

Estonia – Today

The rule of law is well established in Estonia. We had the good fortune to spend some time with a justice of Estonia's Supreme Court and, thus, got some real insight into the country's legal system. The Supreme Court has a total of seventeen justices, but most cases are heard by a panel of three. As in most civil law countries, oral argument is rare. The dominance of the rule of law and the corresponding lack of corruption is verified by Transparency International, which places Estonia 28th out of

172 countries in lack of corruption. For comparison pur-poses, the United States is 19th.

Another meaningful indication of the lack of corruption and the corresponding perception that a level playing field provides a fair chance for success in a competitive environment was that none of my students wants to leave Estonia. In stark contrast, my students during previous teaching assignments in Russia, Bulgaria and other places often voiced their desire to move to the West. The retention of young people, especially of the caliber I was teaching, bodes well for Estonia's future.

Estonia gives the general impression of being a prosperous, if not a rich, country. The Estonians are quite innovative and adept at high tech manufacturing. For example, Skype is an Estonian innovation, and there are free Skype stations in the Tallinn Airport. The country, perhaps attributable in part to its relatively small geographical size and relatively flat topography, has 100% wireless coverage. There also appears to be little poverty in the country. In the more rural areas, the homes seemed in good repair and most of the automobiles were of relatively recent vintage. We saw very few homeless people.

The population, unlike many of the other places we have visited, has stabilized and may even be growing. We were told that many young people, especially those with minimal skills and education, immigrate to Scandinavian countries, but that the better educated people tend to stay in Estonia. Our anecdotal observation was that there was something of a baby boom ongoing, as there seemed to be an unusually high number of toddlers, baby carriages, strollers, and pregnant women. This may be due to the fact that we were in a University town with a lot of young people, but it was still extraordinary.

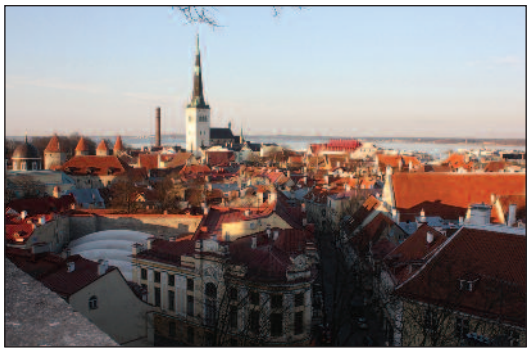
One of the faculty members at the law school had re-emigrated from the United States. His parents left Estonia following WWII, but he returned in 2004 and he is now a dual citizen, married, with two young children. Remarkably, he was able to regain title to an apartment building the Soviets had expropriated from his family, though decades without proper maintenance left the apartment of little value.

...continued on page 12

Lutheranism is the foremost religion in Estonia, having been introduced by the Swedes and the Germans. The countryside is dominated by Lutheran churches in various stages of repair, and many are deserted. We attended a Lutheran service on the Saturday night before Easter and there were about 40 parishioners in attendance. This was in contrast to Sunday service we attended in the Russian Orthodox Church in Tallinn the next day (Orthodox and Roman Easter were on the same Sunday this year), which was well-attended. We met, quite by accident, an evangelical minister from the United States who has been coming to Estonia for several years. While we had no way to judge factually, he asserted that the evangelical movement is taking hold in Estonia.

Tallinn

We reached Estonia via a connecting flight from Frankfurt that flew into Estonia's capital city, Tallinn. Tallinn is beautiful and, for good reason, is a mandatory stop on all Baltic cruises. Its old city has been magnificently restored and is included as a UNESCO World Heritage site. After a cold, wet winter in the eastern United States, we arrived in Estonia just as spring was arriving; the days were a little cool, and with the



exception of one day, were beautifully sunny. The days were also long, with the sun rising by 5:00 A.M. and twilight still lingering at 6:30 p.m. Spring unfolded before us. The trees were only budding when we arrived but were almost in full leaf by the time we left.

We spent a weekend in Tallinn and opted to stay in a bed & breakfast built in the 15th century. It was an intriguing spot with one exception — the stairway and many of the doorways were built for the average size person of the 15th century. This is also true of many of the Old Town buildings. If you are an average size person of the 21st century, the difference will be clear. You will hit your head- often!

Tartu And The University Of Tartu

Tartu is a university town, and with a population of approximately 95,000, is Estonia's second largest metropolitan area. Between 18,000 and 20,000 of Tartu's residents are students. Add in faculty, other employees, associated research facilities, and the University is the town.

The University was founded by a directive of King Gustavus Adolphus of Sweden in 1632, at which time Estonia was part of the Swedish empire. The University runs along both sides of the Emajogi River and architecturally is quite impressive. Many of the University's buildings date from the early 19th Century, although a few of its buildings (including the law facility) date from the Soviet era and have been, thankfully, remodeled. The center of the town is a large pedestrian-only square, highlighted by the "students kissing" statue.

Our living quarters were in an area of town in the midst of gentrification. Our apartment was

recently remodeled, both inside and out, and was easily the nicest living quarters we have had in this program. The neighborhood around our apartment was known as "soup town" because all the streets were named after vegetables. Among other intriguing aspects, there was a brewery with a retail outlet a stone's throw from our front door. Another intriguing aspect of soup town was Riku, a stray dog who had become a favorite of all the residents. When he died, the neighborhood commissioned a full-size statue and placed it at his usual spot.

Student Days

We were extremely fortunate to be in Tartu during student days, which were kicked off with a song fest. The next day brought a parade of all the University's fraternities and sororities. Although the most active portion of these groups is the current student body, people belong and participate for life. I became friendly with some of the members of Rotalia, which is one of the largest fraternities. The youngest members were 18 year-old pledges, while the oldest members were in their 80's. Each fraternity and sorority has a distinctive hat. They march through the campus and to the town hall where the mayor is required to drink a beer and then turn the town over to the students for the week. They next march to the University's main administration building where the President of the University also drinks a beer and turns over the University to the students. Finally, they march to their respective houses and party until midnight at which time they open the door to all comers. My Rotalia friends

encouraged us to come, but I am afraid our post midnight party days are behind us.

The rest of the week-long student days is basically a party with various contests, races, fireworks, a night where everyone dresses as a witch. I did miss a contest I wanted to see that challenged students to make the tallest pile of books and stand on it without it collapsing.

My Classes

I have now refined my course, which is titled "Introduction to International Business Transactions," to a point where I am quite proud of it. The goal of the course is to introduce students to the world of international business transactions and to stress the importance of those transactions, especially for a small country like Estonia. I had a core class in Tartu of about 16 students, with additional students joining in from time to time to try out their English.

I really enjoyed them. Their English was excellent, and they had no problem correcting me when I made a mistake regarding the local laws. We had an end of class oral presentation session where the reports were concise and creative.

...continued on page 14

Likewise, the faculty was supportive and friendly. They took us on many excursions, hiking in a forest preserve, visits to nearby estates, and several lunches and dinners. We reciprocated with a formal dinner. It was, all in all, a wonderful experience.

Afterword

It is impossible to have spent April 2014 fewer than 50 miles from the Russian border and not have an opinion on the events in Ukraine. Moreover, my teaching program has afforded me the opportunity to meet and talk with many Ukrainians. Rufus and I spent two weeks in Dnipropetrovs'k, Ukraine, at the Academy of Customs in November 2010. The Customs service is a uniformed service, and the students at the Academy of Customs are comparable to the officer cadets and midshipmen at the United States service academies. Like our officer cadets and midshipmen, the students in the Academy of Customs are intelligent and patriotic and are receiving a free education in return for future years of service.

We had numerous discussions in 2010 with these students regarding the future of Ukraine. All of them were committed to the fight against corruption, and many were vocal that they felt more comfortable with the Russian way of doing things than with the Western way. Many of them had at least one Russian parent. The east/west split (philosophically) was generally along the east/west divide (geographically) of Ukraine. I provide this anecdotal background because the revulsion towards corruption and the east/west split were active topics of conversations. The current Russian administration may have encouraged and escalated these tensions, but they are not a pretext. I have no trouble accepting that the "separatists" are Ukrainians who believe in what they are saying. I quote from my 2010 article on Ukraine:

> [Ukraine] is exciting for many reasons which I will try to explain, but most of all because it is a large, resource-rich place which could become one of the most substantial, richest countries in Europe or dissolve into chaos and sectionalism.

The most disturbing aspect of the current situation in Ukraine is that it was allowed to reach the boiling point. Active engagement and some reasonable solution, maybe even a plebiscite or orderly referendum and certainly a more concerted effort to change the climate of corruption could have led to a solution and avoided the current crisis. In my opinion, the U.S. and other Western diplomats were not paying adequate attention to the situation.

Where To Next?

I am undecided where I will next teach my course. I have been asked to go back to Bulgaria and may well do so, as we have developed close friendships there. We would really like to round out our experience in the former Yugoslavia by going to Bosnia-Herzegovina or Montenegro. Also, teaching in Romania, Albania or Lithuania would be exciting. Perhaps most compelling, however, would be another visit to Russia. My first assignment, almost ten years ago, was in St. Petersburg. It would be interesting to revisit that country and to see how, if at all, attitudes have changed over the past decade.

FIRM NEWS

Honors

Chambers USA Guide To America's Leading Lawyers For Business

Watt, Tieder, Hoffar & Fitzgerald, L.L.P. is recognized in the 2014 edition of Chambers USA Guide to America's Leading Lawyers For Business as a Band One Construction Law Firm in the United States. Chambers and Partners has consistently named **WTHF** and its attorneys among the top construction firms and attorneys both nationally and regionally since 2004.

Chambers also recognized the McLean, Virginia and Irvine, California offices as Band One construction law practices in Virginia and California. The following **WTHF** attorneys are recognized as "leaders in their field for Construction Law: **Robert G. Watt, John B. Tieder, Jr., Robert M. Fitzgerald, Lewis J. Baker, Carter B. Reid, Vivian Katsantonis, Robert C. Niesley,** and **Gregory J. Dukellis**.

Super Lawyers

2014 Virginia Super Lawyers recognized **John B. Tieder, Jr., Robert M. Fitzgerald, Lewis J. Baker,** and **Vivian Katsantonis**. 2014 Southern California Super Lawyers recognized **Robert C. Niesley**. **Brent N. Mackay** was selected as a Rising Star. 2014 Washington Super Lawyers recognized **Christopher A. Wright** and **R. Miles Stanislaw**. 2014 Illinois Super Lawyers recognized **John E. Sebastian**. 2014 Mountain States Super Lawyers recognized **Jared M. Sechrist** as a Rising Star.

Legal 500

Legal 500 United States recognized **Watt, Tieder, Hoffar & Fitzgerald** as a top tier construction law firm for 2014. **Lewis J. Baker** of the McLean, Virginia office was recognized as a Legal 500 Leading Lawyer.

Upcoming Events

Proving Delay in International Construction Arbitrations – What Works Best? Secretariat, Delta Consulting; September 22, 2014; Munich, Germany. **John B. Tieder, Jr.** and **Shelly L. Ewald** to speak.

Liberty Commercial Group Seminar; September 23, 2014; sponsored by **Watt, Tieder, Hoffar & Fitzgerald, L.L.P.**, 10 S. Wacker Drive, Chicago, Illinois.

FIDIC Americas Contract Users' Conference, October 14-15, 2014; sponsored by FIDIC and IBC Legal; Miami, Florida; **John B. Tieder, Jr.** and **Carter B. Reid** to speak on Disputes, ADR and Arbitration.

Annual Conference of the International Bar Association, October 19-24, 2014; Tokyo, Japan; **John B. Tieder, Jr.** to speak on Arbitration Under the FIDIC Terms of Contract.

William C. Vis International Moot Team

WTHF extends congratulations to the Kabul University Vis Moot Team of Nabila Barmaki, Rohila Burhanzoi, Arghawan Habibi, and Duniya Stanikzai on their hard work and participation in the 11th Annual Willem C. Vis (East) International Commercial Arbitration Moot in Hong Kong, as well as the 4th Annual Vis Middle East Pre-Moot in Doha, Qatar. This was the first time that Afghanistan has ever competed in the Vis Moot.

The Willem C. Vis International Commercial Arbitration Moot began in 1994 with the assistance of the United Nations Commission on Trade Law (UNCITRAL) as an educational competition to promote the use of the U.N. Convention on Contracts for the International Sale of Goods (CISG) and international commercial arbitration to settle disputes in addition to a general understanding of international commercial law. The competition has grown to be one of the most prestigious moots in the world and is considered by many to be the "Olympics of international trade law." The Vis Moot (East) was created in 2004 to provide a more convenient venue for teams unable to make the trip to the Vis Moot held in Vienna, Austria.

Left to Right: *Rohila Burhanzoi, Arghawan Habibi, Matt Brown, Daniel Rodriguez, Nabila Barmaki, Duniya Stanikzai*

Between the competitions held in Vienna and Hong Kong, nearly 400 teams from over 90 countries competed against each other to resolve a simulated dispute that arises out of a contract of sale between companies from two countries that are party to the CISG.

WTHF Associate and Vis Moot Alum **Daniel Rodriguez** served as a coach for the Kabul Team along with his colleague and former Vis Moot teammate Matthew Brown of the Institute of International Banking Law and Practice. Through Skype, long-distance phone calls, and in-person meetings with the students in Islamabad, Doha, and Hong Kong, they worked with the team to provide a foundational understanding of commercial law and arbitration procedure and to provide instruction in legal research, writing, and oral advocacy in preparation for the rigorous level of competition of the Vis Moot.

In Doha, the team first participated in a three day moot-workshop, along with six other teams from the Middle East and North Africa, culminating in a pre-moot competition among the participating teams from Saudi Arabia, Qatar, Bahrain, Tunisia, Egypt, and Iraq. **Daniel Rodriguez** and Matt Brown were among the instructors of the workshop, working with all the teams present. This provided the Kabul team with its first taste of international experience on a small scale before they entered the Vis East in Hong Kong.

While the team did not advance to the knockout stages in Hong Kong, they impressed everyone as they held their own in the general rounds against perennial heavyweights Humbolt University of Berlin, Bond University (Australia), and Pace University (USA).

WTHF

WATT, TIEDER, HOFFAR & FITZGERALD, L.L.P.®

» BUILDING SOLUTIONS®

Attorneys at Law

PRSRT STD
US POSTAGE
PAID
PERMIT #6418
DULLES, VA

WTHF

WATT, TIEDER, HOFFAR & FITZGERALD, L.L.P.®

8405 Greensboro Drive, Suite 100
McLean, Virginia 22102

8405 Greensboro Drive
Suite 100
McLean, Virginia 22102
(703) 749-1000

2040 Main Street
Suite 300
Irvine, California 92614
(949) 852-6700

10 South Wacker Drive
Suite 2935
Chicago, Illinois 60606
(312) 219-6900

6325 S. Rainbow Boulevard
Suite 110
Las Vegas, Nevada 89118
(702) 789-3100

1200 Brickell Avenue
Suite 1800
Miami, Florida 33131
(305) 777-3572

1215 Fourth Avenue
Suite 2210
Seattle, Washington 98161
(206) 204-5800

HFK Rechtsanwälte*
Maximilianstrasse 29
D-80539 Munich, Germany
Phone 011 49 89 291 93 00

**Independent Law Firm*

The Watt, Tieder, Hoffar & Fitzgerald newsletter is published quarterly and is designed to provide information on general legal issues that are of interest to our friends and clients. For specific questions and concerns, the advice of legal counsel should be obtained. Any opinions expressed herein are solely those of the individual author.

Special Thanks to Editors, **Robert G. Barbour, Keith C. Phillips, William Groscup** and **Heather Stangle**.

BUILDING SOLUTIONS