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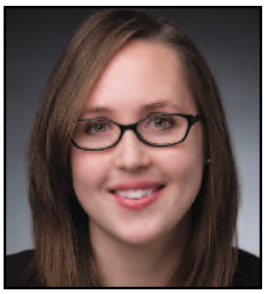

Supreme Court To Decide Fate Of Controversial "Implied Certification Theory" Under The False Claims Act

by Robyn Burrows, Associate

Introduction

On December 4, 2015, the Supreme Court granted certiorari to review the viability of the "implied certification" theory under the federal False Claims Act ("FCA"). The FCA provides that any person who knowingly presents to the government a false or fraudulent claim for payment, or who knowingly makes a falsified record or statement in support of such a false claim, is liable for civil penalties between $5,000 and $10,000, plus *three times the amount* of any false claims actually paid by the government. 31 U.S.C. §§ 3729-3733. Under the theory of implied certification, contractors who have submitted otherwise valid claims for payment have been unwittingly subject to FCA liability because they requested payment while in violation of one of the myriad of rules or regulations governing their contract. Critics of implied certification have complained that the theory has turned the FCA into a regulatory enforcement mechanism, rather than a tool to eliminate fraud and abuse.

The Supreme Court's decision will have an enormous impact on contractors' exposure under the FCA and will clarify a major point of contention among the courts. Currently, the majority of federal circuit courts have adopted some version of the implied certification theory, while the Seventh and Fifth Circuits have rejected it. Even among circuits that have adopted the theory, the courts are split on whether the violation must represent an express condition of payment, or whether *any* violation can trigger liability. The Supreme Court's review of these questions will hopefully help clarify the outer bounds of liability under the FCA.

Express Certification vs. Implied Certification

In the typical case, FCA liability arises when a contractor submits to the government a claim for payment containing misrepresentations about the goods or services provided. For example, a contractor providing bulletproof vests to the government would likely certify in its payment request that it delivered a certain number of vests. This is known as an express certification. If the contractor actually delivered fewer vests than it certified, it could be liable under the FCA for knowingly submitting a false claim for payment.

If that same contractor accurately certified the number of vests provided, but nevertheless violated a contractual requirement that it use a particular material supplier, it could still be subject to FCA liability under an implied certification theory. This is true even if the contractor never certified in its request for payment that it complied with that particular requirement. Circuits adopting an implied certification theory find that the mere act of submitting a claim for payment *impliedly* certifies the contractor's compliance with *all* applicable laws, regulations, and contract terms.

To prevent any violation, no matter how small, from becoming a false claim, some circuits have required that the violation be an express condition of payment. Under this approach, a contractor is only liable under the FCA if the underlying statute, regulation, or contract term *expressly* states that the contractor must comply in order to be paid. *Mikes v. Straus*, 274 F.3d 687 (2d Cir. 2001). Other courts, however, have taken a much broader approach. For example, the D.C. Circuit held that non-compliance with contract terms may give rise to false or fraudulent claims, even if the contract does not specify that compliance with the contract term is a condition of payment. *United States v. Sci Apps. Int'l Corp*, 626 F.3d 1257, 1269 (D.C. Cir. 2010). The First Circuit has also followed this approach, finding that FCA liability arises whenever the violation is deemed material. *United States ex rel. Hutcheson v. Blackstone Medical, Inc.*, 647 F.3d 377 (1st Cir. 2011). This obviously requires contractors to guess in advance which terms might be material enough to trigger FCA liability. Considering contractors are governed by hundreds of pages of contract terms and countless obscure regulatory requirements, this is no small task.

Recent Circuit Split On Implied Certification

The Supreme Court's decision to review implied certification was no doubt motivated by the increasing split among circuits on this topic. Just this past year, two circuit courts reached different conclusions regarding implied certification.

In January 2015, the Fourth Circuit in *United States ex rel. Badr v. Triple Canopy, Inc.*, 775 F.3d 628 (4th Cir. 2015) adopted implied certification, noting that it represented one of the "variety of ways" in which a claim can be false. In *Triple Canopy*, the government awarded a contract to a security firm, Triple Canopy, to provide security services at an Iraq airbase. Upon arriving at the base, Triple Canopy's guards were unable to obtain a qualifying marksmanship score, as required by the contract. To remedy this problem, a Triple Canopy supervisor directed that false scorecards be created for the guards.

Over the course of a year, Triple Canopy submitted invoices and was paid over $4.4 million for its work. After a whistleblower revealed the scheme, the government pursued an FCA claim. The Fourth Circuit found Triple Canopy liable under the FCA through its adoption of implied certification. While the court noted that the theory may be abused "by parties seeking 'to turn the violation of minor contractual provisions into an FCA action,'" it believed that any potential abuse could be curbed by ensuring such violations are material and accompanied by the requisite finding of fraudulent intent. This is in sharp contrast to the Fourth Circuit's prior comments which cast doubt on implied certification and suggested that liability could only attach through an express certification. *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 786 n.8 (4th Cir. 1999).

Following the Fourth Circuit's adoption of implied certification, the Seventh Circuit in June 2015 rejected the theory in *United States v. Sanford-Brown, Limited*, 788 F.3d 696 (7th Cir. 2015). This case involved a college that had entered into a Program Participation Agreement ("PPA") with the Department of Education, a pre-requisite to obtaining federal subsidies. PPAs require colleges to comply with a variety of statutes and regulations under Title IV of the Higher Education Act. The college's former director alleged that the school had violated the PPA by using recruiting and retention practices that violated Title IV, thereby making it ineligible to receive subsidies. He argued that the college's initial certification upon entry into the PPA that it would comply with Title IV created an implied certification that the college would remain in compliance with the statute. Thus, FCA liability would be triggered any time the college received funds while in violation of Title IV.

The Seventh Circuit rejected this argument, explaining that it would be unreasonable to find that the thousands of pages of federal statutes and regulations incorporated by reference into the PPA were conditions of payment for purposes of FCA liability. The court also reasoned the FCA was an inappropriate avenue to enforce regulatory violations. Acknowledging that other circuits had adopted "this so-called doctrine of implied false certification," the Seventh Circuit flatly rejected it.

Supreme Court To Weigh-In On Implied Certification

The Supreme Court's decision to review implied certification has generated significant attention as it will no doubt impact the landscape of liability for many contractors. This issue was placed before the Court in *United States & Commonwealth of Mass. ex rel. Julio Escobar*, 780 F.3d 504 (1st Cir. 2015), which involved an FCA claim brought by parents after their daughter died while under the care of a mental health clinic. The parents claimed that the clinic failed to comply with state regulations governing qualifications and supervision of staff members. The First Circuit found that the clinic fraudulently misrepresented its compliance with regulations requiring mental-health clinics to employ at least one board-certified psychiatrist at all times. Notably, the clinic never expressly certified its compliance with these regulations. Instead, the court found that compliance was a "material condition of payment," explaining that each time the clinic submitted a claim for payment, it *implicitly* communicated that it had conformed to the relevant program requirements.

In granting certiorari, the Supreme Court will decide two issues. First, the Court will decide whether the implied certification theory is viable. If it is viable, the Court will determine whether a contractor's reimbursement claim can be false under the theory if it failed to comply with a particular statute, regulation, or contract provision that does not *expressly* state that it is a condition of payment. Therefore, even if the Court does not indirectly invalidate implied certification, it may significantly curb its application by requiring the underlying law or contract provision to expressly state that compliance is a condition of payment. This would undoubtedly provide contractors more notice as to what violations might expose them to liability.

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Conclusion

Considering the variations in approaches to FCA liability, the Supreme Court's decision to review implied certification has been welcomed by many. Oral argument will likely be scheduled for March or April 2016 with a decision following in June or July 2016. In the meantime, contractors in jurisdictions that have adopted implied certification should remain vigilant in ensuring their compliance with all applicable requirements.

Be Safe – Have A Program To Avoid Fraudulent Surety Bonds

by Mark Rosencrantz, Partner

Introduction

The use of surety bonds is widespread in public and large private construction projects. General contractors who work on such projects regularly post such bonds either pursuant to applicable laws on public projects, such as the Miller Act, or the requirements of owners.

The use of surety bonds goes back centuries. As the Surety Information Office explains on its website:

> Suretyship was addressed in the first known written legal code, the Code of Hammurabi, around 1792–1750 BC. A Babylonian contract of financial guarantee from 670 BC is the oldest surviving written surety contract. The Roman Empire developed laws of surety around 150 AD that exist in the principles of suretyship today.

Today, surety bonds are used to shift the risk that a project will not be completed from the owner to the general contractor. General contractors then pass some of that risk down to lower tier contractors and their surety companies. The need for contractors and owners to use instruments like surety bonds is underscored by the fact that the construction industry has one the highest failure rates of any business sector.

However, not all brokers and companies that issue surety bonds are equal. There have been numerous cases in recent years of fraudulent bonds being issued. For example, Engineering News & Record reported in 2013 that:

> In a coast-to-coast internet-and-telephone crime spree, alleged forgers who had websites that made them appear to be individual sureties have spread fake Chubb completion bonds across the U.S.
>
> Twenty-two contractors in nine states have lost a total of more than $3 million paid to two men with addresses in Georgia, Florida and Louisiana in the last 18 months. Acting as brokers, the two allegedly forged signatures of a former Chubb executive on bonds made to appear to be from Chubb subsidiaries Pacific Indemnity Co. and Federal Insurance Co.

Given the importance of surety bonds, contractors need to be careful when purchasing surety bonds, and when accepting them from lower tier contractors.

A Case Study

Given how frequently surety bonds are used in the construction industry, it is almost inevitable that most contractors will eventually become involved in litigation concerning a bond. Consider the following scenario, which is based on a case litigated by Watt, Tieder, Hoffar & Fitzgerald.

A general contractor is awarded a project by a federal agency to construct a multi-million dollar building. Under the Miller Act, payment and performance bonds protecting the owner are required, and the general contractor procures them. As a condition to issuing the bonds, however, the general contractor's surety requires that all subcontracts worth at least $100,000 contain provisions requiring the subcontractor to post payment and performance bonds protecting the general contractor to reduce the general contractor's and its surety's ultimate liability.

The project is located in a state in which the general contractor does not have an office. The general contract contains mandatory Disadvantaged Business Enterprise ("DBE") requirements which are difficult to fulfill given the small number of qualified DBE contractors in the region where the project is located. Eventually, the general contractor is able to locate a sufficient number of DBE subcontractors. However, one of the DBE subcontractors, whose subcontract will be for well over a million dollars, has never had a contract of this magnitude, and as such, has never purchased payment and performance bonds with limits approaching the amount of the subcontract. As a result, the subcontractor has significant difficulties finding a surety company willing to provide the required bonds.

Although the subcontract requires subcontractors to provide bonds prior to beginning work, due to an aggressive schedule and to avoid falling behind, the general contractor reluctantly allows the subcontractor to begin work with the agreement that the subcontractor will obtain bonds as soon as possible.

The subcontractor eventually finds a bonding company located offshore, and operating out of a different state than the project, to issue the bonds. One requirement imposed by the bonding company is that the subcontractor utilize a "funds control" company which will receive all payments due to the subcontractor, pay lower tier subcontractors and suppliers, take its fee, and remit the balance to the subcontractor. During work the owner issues a series of change orders to the prime contract that increase the size of the project. As a result, the value of the subcontract rises to more than $2 million. As required, the subcontractor's surety raises the penal sum of the bonds to match each of the change orders.

Unfortunately, the subcontractor falls behind schedule, and despite the involvement of the funds control company, the general contractor begins to receive notices of non-payment from the subcontractor's suppliers. The general contractor then issues a notice of default, which the subcontractor fails to cure.

Ultimately, the general contractor terminates the subcontractor for default. Upon doing so, the general contractor demands that the subcontractor's surety step in and complete the work. The surety refuses to investigate, much less complete the work, and instead claims the termination was wrongful.

The general contractor immediately commences a full investigation. They determine that not only was the subcontractor behind schedule, but also failed to pay suppliers, billed for materials that were never delivered to or removed from the job site, and performed defective work that needs to be removed and corrected. Due to the fact that the job is now behind schedule, the general contractor is forced to immediately hire a replacement subcontractor. It insists on a much higher contract price to assume the risk for work that it did not perform, and to pay significant overtime and other acceleration costs in an attempt to recover the lost time. The owner predictably refuses to pay either to correct defective work or for acceleration costs. Ultimately, the general contractor pays well over $1 million in additional costs to complete the work.

As the project nears completion, the general contractor and its bonding company face lawsuits from unpaid suppliers, but have essentially no defense as the suppliers were easily able to prove that they provided the materials at issue and were not paid. The general contractor then brings claims against the defaulted subcontractor, who does not have sufficient assets to pay a potential judgment, its bonding company, the bonding company's majority shareholder, nor the funds control company that had agreed to pay lower tier subcontractors and suppliers. All of those parties deny liability, claiming that the termination was wrongful.

As discovery progresses, the general contractor makes several startling discoveries. First, it learns that the majority shareholder of the subcontractor's bonding company also owned the funds control company, which was run by a relative with a different last name. Second, the bonding company is not on the Department of the Treasury's Listing of Certified Companies authorized to issue bonds on federal construction projects. Further, the bonding company is not licensed to sell insurance products in the state where the project is located nor in the state in which it operated. Third, the majority shareholder has been banned by several state insurance commissioners from selling insurance products of any kind as a result of having sold fraudulent surety bonds while using multiple names. Worse, and perhaps most problematic, the surety does not have sufficient reserves to pay the entire claim, and appears to have never had enough assets.

The subcontractor's surety, the funds control company, and the shareholder who controlled both of them, then engage in delay tactics by ignoring court ordered deadlines, refusing to

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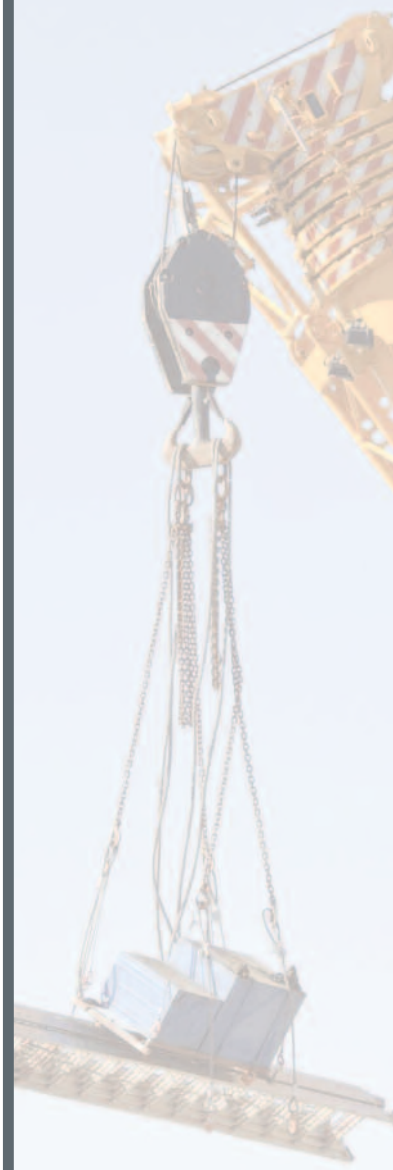


produce documents, hiring and firing multiple law firms, and otherwise delaying the litigation in any way possible. Approximately five years after the litigation begins, the court finally enters a default judgment against all of the defendants for discovery abuses in amounts ranging between $2 million and $5 million.

Creatively Address Problems As Quickly As Possible

In the unfortunate event a contractor finds itself in such a position, the first thing to do is immediately contact counsel and discuss options for recovering losses and recovering attorneys' fees. Also critical is quickly obtaining leverage to use when attempting to negotiate a settlement. Fortunately, a number of potential avenues of damage control exist.

First, consider bringing a direct claim against officers, directors, and owners of such entities under the responsible corporate officer doctrine. Under this doctrine, if an individual with the power to manage corporate affairs participates in wrongful conduct or knows of and approves of wrongful conduct, the officer is personally liable along with the corporation for damages suffered. This claim was first recognized by the United States Supreme Court in the 1943 decision *United States v. Dotterweich*, 320 U.S. 277 (1943), and has been successfully used in the construction arena.

A claim under the federal Racketeer Influenced and Corrupt Organizations Act, commonly referred to as RICO, should also be evaluated. Although the RICO Act was originally created as a tool against organized crime, it has other applications as well. In fact, large construction projects, which frequently involve bonds and checks mailed across state lines, wire transfers made across state lines, and other similar actions can be well suited for racketeering claims. The benefits of such claims can include the right to recover attorneys' fees against all defendants (which can be important where claims are advanced against parties with whom a contractor has no contract and as a result, no contractual attorneys' fees provision), as well as the right to multiply damage awards by up to three times. Thirty-three states have adopted similar laws, which should also be kept in mind, particularly since some carry lower burdens of proof. Similarly, state consumer protection acts may also provide enhanced damages and the right to recover attorneys' fees.

Also potentially relevant are various state insurance licensing regulations. Many such statutes allow injured parties - for example, those who are supposed to be protected by bonds - to recover damages and attorneys' fees against entities that sell or issue bonds and other insurance products without required licenses.

A final strategy to consider is the possibility of asking the court to freeze the surety's assets at the outset of the lawsuit. When available, such orders can help bring a party to the negotiating table much sooner, and ensure that at least some assets can be seized to help satisfy a judgment.

Plan Ahead: Develop A Bond Evaluation Program

To minimize the chance of litigation, contractors should seriously consider adopting a bond evaluation protocol that is strictly followed on all projects. The following is a list of potential steps that could be included:

- Include a provision in all contracts with lower tier contractors providing that a bond is a condition precedent to allowing a contractor to begin work. Ensure that project managers, superintendents, and all people with any decision-making authority on every project understand and enforce this requirement.

- Insert a clause in all contracts with lower tier contractors giving you the power to unilaterally determine whether bonds are acceptable, and to reject any you deem unacceptable. Resist any attempts to add language to the clause that requires you to act in good faith while evaluating such bonds.

- When each bond is received, put someone in charge of checking to see if the company issuing the bond is listed on the Department of the Treasury's Listing of Certified Companies to issue bonds on federal projects, which is available at *http://www.fiscal.treasury.gov/fsreports/ref/suretyBnd/c570*. This is critically important if the owner of the project is a federal agency, but the lack of a listing can be a red flag on other public and private jobs as well.

- Require proof that all bonds are issued by companies which have all required licenses to issue bonds both from the state in which the bonding company issues the bond, as well as the state in which the project is located.

- Insist on receiving contact information for the surety issuing the bond and have someone verify that the issuing company, even if highly reputable, actually issued the bond.

- Consider requiring that all bonding companies prove that they have at least a minimum rating from AM Best. As examples, a rating of C+ indicates that in AM Best's opinion a company has "a marginal ability to meet their ongoing insurance obligations" while a rating of A means that in AM Best's opinion a surety has an "excellent ability to meet their ongoing insurance obligations."

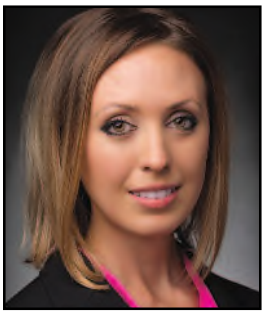
- Be wary of purchasing or accepting a bond from a surety that is not incorporated and based in the United States, particularly one from a country that is known as a tax haven such as Jersey, Guernsey, the Isle of Man, the Seychelles, or The Commonwealth of The Northern Marianas Islands. Such jurisdictions typically have no or much laxer requirements for insurance and surety products.

- Have counsel run a check to see if the bonding company is being or has recently been sued for fraud, racketeering, or other similar causes of action.

Conclusion

Bonds are important tools that should protect contractors from the kinds of issues that inevitably plague problem construction projects. With advance planning, contractors can significantly reduce any chance that bonds are worthless and fraudulent, and fail to provide such protections.

GOVERNMENT CONTRACTS



End Of Year Review: Bid Protest Trends & A Possible Change For Qualifying For Diplomatic Construction Projects

by Brenna D. Duncan, Associate

Each year, the U.S. Government Accountability Office ("GAO") releases a report summarizing data on bid protests before the GAO for the past fiscal year. This information, required by law in the form of a report to Congress, also provides helpful insight for government contractors on trends regarding bid protests. In addition to releasing data, the GAO report also addresses instances in which federal agencies decline to implement GAO recommendations. With respect to this latter point, construction firms seeking diplomatic construction contracts through the U.S. Department of State ("State Department") should take note, as the GAO recommended to Congress that it clarify federal requirements for contractor qualification. This article will first address the State Department's declination to implement a GAO recommendation. It will then briefly address the trends reported by the GAO in bid protest filings for fiscal year 2015.

Agency Failure To Implement GAO Recommendation

The GAO bid protest decision in *Caddell Construction Co. Inc.* involved the construction of a U.S. embassy complex in Mozambique, with an estimated minimum value of $160 million. Pursuant to the requirements of the Omnibus Diplomatic Security and Antiterrorism Act of 1986 ("Security Act"), applicable to construction projects exceeding $10 million, the State Department had solicited prequalification applications from potential offerors for the embassy's construction. Among other conditions, the Security Act requires firms to achieve a minimum business volume "equal to or greater than the value of the project being bid in 3 years of the 5-year period" before the issuance date of the invitation for bids or request for proposals. 22 U.S.C.A. § 4852. The interpretation of this requirement was the basis for both the protest as well as the split in opinions between the GAO and the State Department.

The GAO interpreted this section as requiring the contractor to have achieved business volume equal to or exceeding the value of the project being solicited in *each* of three years of

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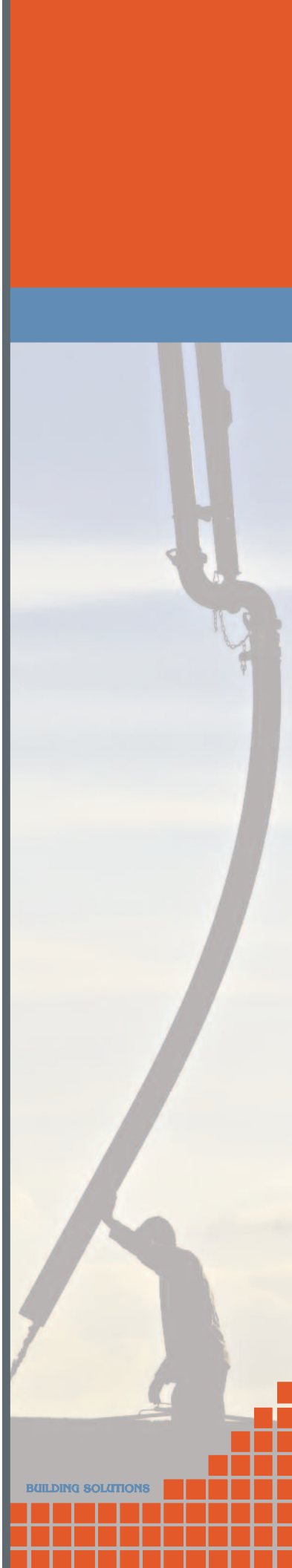


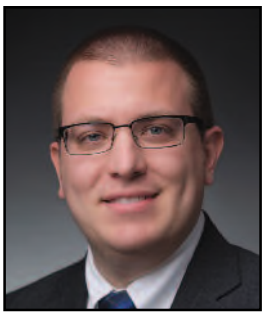
the five-year period prior to issuance of solicitation. It accordingly found that two firms the Department prequalified had not, in fact, met the Security Act's requirement, and recommended that the State Department change its determination and reimburse the protestor the cost of protesting. The State Department declined, citing a decision by the Court of Federal Claims holding that the Security Act allows aggregation of an offeror's business volume in *any* three of the previous five years in order to achieve the minimum required volume.

This split in interpretation continues to exist due to the fact that GAO decisions are not binding on the Court of Federal Claims, and vice versa. The GAO has recommended to Congress that it revisit the language of the Security Act and provide clearer guidance on how the Department should determine contractor qualification. Until such a date, contractors bidding on State Department diplomatic construction contracts should be aware that the agency will continue to certify firms that can establish that their highest annual revenue was valued at at least one-third of the project's value in three of the five years preceding the bid invitation.

Summary Of Bid Protest Filings

The GAO received 2,639 cases—including bid protests, cost claims and requests for reconsideration—in fiscal year 2015. This was up 3% from the previous year. In fact, the general trend over the past five years has been for a gradual increase in filings, with fiscal year 2013 being the one exception.

Of the protests resolved on the merits last year, 12% were sustained. The most prevalent reasons for sustaining protests were: (1) unreasonable cost or price evaluation; (2) unreasonable past performance evaluation; (3) failure by agency to follow evaluation criteria; (4) inadequate documentation of the record; and (5) unreasonable technical evaluation. Note, however, that few protests—about 22% last year—ever reach a decision on the merits. Often times, agencies take voluntary action in response to the protest, data on which is not collected.



Federal Small Business Law Update

by Mitchell A. Bashur, Associate

Introduction

This update addresses recent developments and decisions involving small business issues in federal contracting. The final part of 2015 brought relevant proposed regulations from the Small Business Administration ("SBA") and FAR Council, and decisions by SBA's Office of Hearings and Appeals that are discussed below.

SBA Proposed Regulations

- Proposed Rule—Credit for Lower Tier Small Business Subcontracting, *80 Fed. Reg. 60300; RIN 3245- AG71*

The SBA proposed amendments to the small business regulations which require that "[p]rime contractors must incorporate the subcontracting plan goals of their lower tier subcontractors in their individual subcontracting plan." The SBA recognizes that this new requirement will create costs for the prime contractor in incorporating subcontractor business performance at lower tiers. The proposed regulations will also create costs for the government in evaluating "whether the prime contractor's goals adequately address maximum practicable small business subcontracting opportunity at all tiers."

While the SBA estimates that the costs will be minimal, much will depend on the practical implementation of the proposed rule. For construction contracts, the identity of many of the eventual subcontractors is likely unknown at the time the prime contractor's subcontracting plan is negotiated with the contracting officer. If the proposed regulation requires the subcontracting plan to be amended every time there is a qualifying change at any subcontracting tier, the rule may well prove costly and time consuming. These concerns have been raised in comments to the proposed rule, so hopefully the contracting community will see a clarification in the final rule that will avoid unnecessary compliance costs.

FAR Council Proposed Regulations

- Proposed Rule—Prime Contractor Payments to Small Businesses
  81 FR 3087; RIN 9000–AM98

The FAR Council proposes amending the Federal Acquisition Regulation ("FAR") to

require federal contractors to self-report if they pay a reduced price to a small business subcontractor, or if the contractor's payment to a small business contractor is more than 90 days past due. These proposed regulations would apply to prime contracts that require small business subcontracting plans. The proposed regulations would mirror requirements already set forth in the SBA's small business regulations that were effective in 2013. A finding of three or more unjustified reduced or untimely payments to small business contractors within a 12-month period under a single contract would constitute a history of reduced or untimely payments that is required to be included and considered in past performance evaluations.

While the FAR Council has limited discretion in drafting the proposed regulations due to the terms of the enabling statute, there are questions as to how the requirement will be enforced and what penalties will be assessed for non-compliance. Another issue is whether contracting officers will have any guidance in determining which reductions in price or late payments are justified. The proposed regulations create an uncomfortable situation where contracting officers become involved in prime-sub relationships and allow the risk of findings of unjustified reductions and late payments to be used as a threat and a weapon by underperforming subcontractors.

SBA Office Of Hearings And Appeals Decisions

- *Size Appeal of Potomac River Group, LLC, SBA No. SIZ-5689 (2015)*

A recent Office of Hearings and Appeals ("OHA") decision reminds contractors that they need to be careful if they become involved in the ownership of small or disadvantaged businesses. Imprecisely drafted business entity documents can lead to affiliation-causing control issues. Specifically, as the minority owner in *Potomac River* found out, any supermajority voting requirements may establish control (and affiliation), regardless of whether the minority owner actually exercises the negative control.

In *Potomac River*, the operating agreement of the small businesses provided that a supermajority vote was required to make business decisions. OHA found that "[w]hen a minority owner has the power to block ordinary actions essential to operating the company, that owner has negative control, and that negative control mandates a finding of affiliation." "[The minority owner] has this power under the Agreement, whether it has chosen to exercise it or not." As a result, "[u]nder SBA's regulations, this degree of negative control mandates a finding that [the minority owner] is affiliated with Appellant."

VIRGINIA UPDATE

Employee Or Independent Contractor? Virginia Employers Can No Longer Afford Misclassification

Julia M. Fox, Associate

A 2012 report of the Joint Legislative Audit and Review Commission (JLARC) shed light on a costly and pernicious problem hurting Virginia's construction industry: worker misclassification. To address the problem, Governor Terry McAuliffe established an inter-agency taskforce to examine worker misclassification and payroll fraud. The establishment of this taskforce led to a new Virginia Occupational Safety and Health (VOSH) policy, aimed at preventing the misclassification of workers. The policy went into effect on July 1, 2015 and has significant implications for anyone involved in construction in Virginia.

Misclassification occurs when an employer improperly classifies an employee as an independent contractor. According to the JLARC Report, Virginia could have as many as 40,000 misclassifying employers and 214,000 misclassified workers. These misclassifications have serious negative impacts on Virginia and

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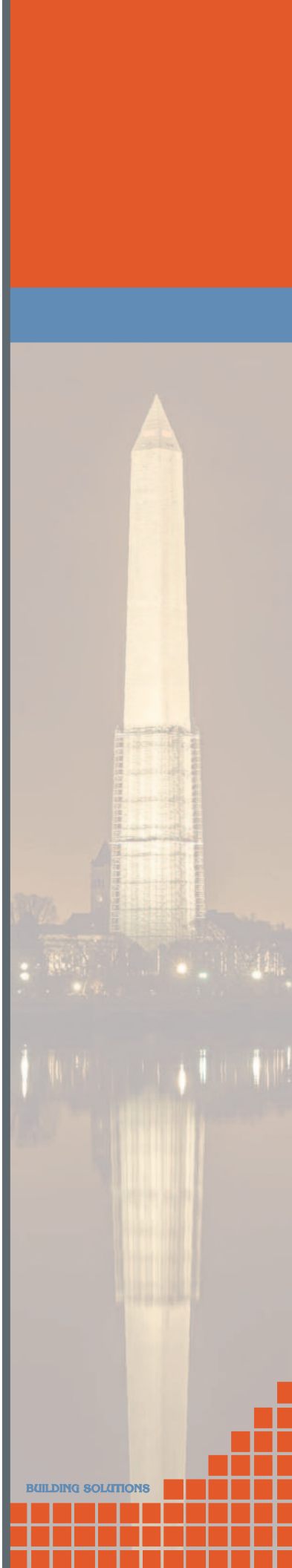

its construction industry, and the new VOSH policy puts its inspectors on the lookout for worker misclassification and improper licensing.

What Is The Difference Between An Employee And An Independent Contractor?

VOSH guidelines point to seven factors to determine whether a worker is an employee or an independent contractor: (1) who has responsibility to control the worker; (2) who has the power to control the worker; (3) who the worker considers his or her employer; (4) who pays the worker's wages; (5) whether the alleged employer has the power to hire, fire, or modify the worker's employment conditions; (6) whether the worker's ability to increase his or her income depends on efficiency rather than initiative, judgment or foresight; and (7) how the worker's wages are established. Signed releases, tax forms, or other documents do not necessarily determine whether a worker is an employee or an independent contractor.

The most important factors in this test are the first two set forth above: responsibility and power. If an employer can control what a worker does and how he or she does it, that worker should be classified as an employee rather than an independent contractor.

Why Is Misclassification A Problem?

According to the Virginia Department of Labor and Industry's June 2, 2015 Policy Memorandum, misclassification of employees as independent contractors is harmful for three major reasons.

First, there are serious tax implications of misclassification. Misclassification is a form of payroll fraud that deprives the Commonwealth of millions of dollars in tax revenues. The costs to Virginias' taxpayers, employers and employees are in the tens, if not hundreds, of millions of dollars.

Second, misclassified workers suffer. Employees misclassified as independent contractors are denied legal protections and benefits, including workers' compensation, medical and family leave, unemployment insurance, minimum wage protections, overtime, health insurance, retirement benefits, and occupational safety and health protections.

Third, the construction industry suffers. Misclassification hurts competition and undermines employers who properly classify workers by giving an unfair advantage to employers who misclassify their workers. According to VOSH's 2015 Employee Misclassification brochure, employers who misclassify fail to purchase workers' compensation insurance, pay unemployment insurance and payroll taxes, or comply with minimum wage and overtime laws, resulting in a forty percent reduction in costs. This places those employers at a competitive advantage in the bidding process for new projects. Additionally, employers who properly classify workers may be liable for additional unemployment tax and workers' compensation rates, which are adjusted upwards to cover costs avoided by misclassification of workers.

What Will This New Policy Do?

Every year, VOSH conducts thousands of workplace inspections. Beginning in July, 2015, if VOSH finds "reasonable cause" to believe that an employer has misclassified its employees, the following actions may be taken:

- If VOSH imposes penalties or citations, it will not grant penalty reductions for an employer's size or good faith efforts to properly characterize workers;
- In multi-employer worksites, VOSH will ask each contractor to provide proof of their Department of Professional and Occupational Regulation (DPOR) contractor's license and proof of the DPOR license for any of its subcontractors;
- VOSH will make a written referral to DPOR if a construction employer has contracted with an unlicensed subcontractor. DPOR may sanction the contractor and subcontractor with fines, probation, suspension or license revocation;
- VOSH will make a written referral to the Virginia Employment Commission and/or the Virginia Workers' Compensation Commission for a potential audit of employment practices in instances where the contract value for a specific subcontractor's job is less than $1,000 (or in some instances, over $1,000).

Additionally, misclassification issues will now be tracked in the OSHA Information System using the code "Misclassification." Employers should be aware that VOSH offers On-Site Construction Services to help employers better understand and voluntarily comply with VOSH standards at no cost.

What Should Employers Do?

The new VOSH policy means that all contractors should utilize the seven-factor VOSH test to ensure that they are properly classifying their workers as either employees or independent contractors to avoid giving VOSH inspectors "reasonable cause" to pursue actions under the new policy. Additionally, contractors and subcontractors must take care to ensure compliance with DPOR licensing requirement. Maintaining vigilance in employee classification and licensing requirements must be a priority for all involved in the Virginia construction industry.

INTERNATIONAL

Russia – Redux

by John B. Tieder, Jr., Senior Partner

My first teaching experience in Eastern and Central Europe was in 2006 and the venue was Herzen State University, St. Petersburg, Russia. St. Petersburg is one of the great cities of the world and after three weeks, my wife Rufus and I felt we had only scratched the surface. Even for the most jaded museum goer, the Hermitage is worth several days.

My students were extremely bright and enthusiastic, but they almost all felt that in order to achieve anything they would have to move to the West. I was particularly curious to see if the student attitude about leaving Russia had changed. In the past 10 years and in spite of what we think of him in the West, Russia has been dynamically led by Vladimir Putin. We know how he has outmaneuvered the West diplomatically, but for Russians, real income has increased threefold during his presidency and the country has projected a sense of confidence that did not exist in 2006. Had this affected the attitude of those who were 9-11 years old in 2006?

There were several teaching opportunities available in Russia in 2015, but the best fit for my schedule and the course I teach was at the Immanuel Kant Baltic Federal University in Kaliningrad in October, 2015. Why was a Russian University named after a German philosopher and where in Russia is Kaliningrad? The answer to the first question is that Kaliningrad used to be Königsberg, East Prussia. The answer to the second is that it is located between Lithuania and Poland on the Baltic Sea and is several hundred miles from the rest of Russia. How this came about, indeed the entire history of Kaliningrad, is one of the more interesting in a region full of interesting stories.

The first dilemma about teaching in Kaliningrad is "how do you get there?" The simple answer is "you can't get there from here and you can't get back here from there." Of course, that is not quite true since we did both, but it is not easy. The options were: 1) fly to Warsaw, spend the night and fly to Kaliningrad; 2) take an occasional (non-daily) flight to St. Petersburg and then fly to Kaliningrad; 3) fly to Gdańsk, Poland and take a bus to Kaliningrad. We later learned of an occasional Air Berlin flight to and from Berlin but it was ending in November. We were eventually able to fly Washington–Zurich-St. Petersburg–Kaliningrad, which took 20 hours, but the trip was flawless. The last leg was on Aeroflot. The plane was a modern airbus and the service was as good as, if not better than, any comparable service in the U.S. (although no business class was available).

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Like our first trip to Russia, we arrived but our bags did not. Unlike our first trip, the baggage and customs personnel were friendly, helpful, and minimally bureaucratic. At any rate, the bags arrived and were delivered to our living quarters in two days. We later learned that although our bags were checked through from Washington to Kaliningrad we should have checked them through customs in St. Petersburg and rechecked them. Rather obvious in retrospect and that is the procedure when returning to the U.S. from abroad and transferring onward.

First Impressions

The first thing we noticed was the St. Petersburg Airport. In 2006, it was small, old-fashioned and seemed more suited to a mid-size city than an important world city. It is now large, modern, and architecturally interesting, comparable to any new airport in the world. It is certainly better than most U.S. airports. Immigration is speedy and polite. There is a full range of services and numerous international franchise outlets, *e.g.*, Starbucks. This was accomplished in less than 10 years as nothing had been started in 2006.

The people at the University and the others we came to know were hospitable, kind, friendly and generous. There is little apparent joy on the faces of people as you walk around the street, but if you form even the slightest attachment, the warmth and generosity surface. For example, the fare on the city trams is 18 Russian Rubles (about USD .30) person. We jumped on a sparsely populated train one night and held out 36 rubles. The fare collector just smiled and waved us off. When it turned out we were on the wrong train, she did her best to explain how to retrace our route and get on the correct train.

It was also a good feeling that on our first night, there was a magnificent fireworks display readily visible from the windows of our quarters. We chose to regard it as a personal welcome.

Kaliningrad – Its History

To understand Kaliningrad and its physical appearance, it is necessary to piece together its history. It was founded by the Teutonic Knights who came from Germany to convert the heathen Lithuanians, Poles, and Sambians to Christianity. The choice was simple, "convert or die." This approach did little to make the Knights popular so they had to protect themselves by building a fortress in the Sambian town of Twangste (Sambians were the original Prussians), which was around 1255. The Sambians were eventually assimilated into the German population and after approximately 1500 were no longer an identifiable group.

The city and surrounding territory remained in the Teutonic Order until 1466 when it became a fiefdom of Poland. This came about because the Polish-Lithuania Commonwealth defeated the Order at one of the largest battles of the 15th Century - the Battle of Grunwald or the first battle of Tannenberg (the second battle of Tannenberg took place in the fall of 1914 when the German Army defeated a Russian Army of more than 1,000,000). The Teutonic Knights stayed on in Königsberg as a Polish fiefdom until 1615 when it became a separate Duchy. In 1701, it became part of the Kingdom of Prussia and in 1773 was recognized as East Prussia. All of Prussia was merged into and became the dominant power in the German Empire in 1871. Thereafter, its history was the history of Germany.

During WWII Königsberg was virtually destroyed by British bombers and the Russian Army. At the end of the war, the area was ceded to Russia, primarily because it had an "ice free" port on the Baltic. It was renamed Kaliningrad after Mikhail Kalinin, an early Bolshevik. It became the home of the Russian Baltic fleet and apparently had the largest proportion of military to civilian personnel of any of the so-called USSR republics. All Germans were expelled by 1947. Incredibly, I know a woman who was part of the expulsion. She was about five years old at the time and remembers being in a box car with her family and wearing an old pair of her father's shoes. She moved to the U.S. in 1960 and became and remains a close family friend.

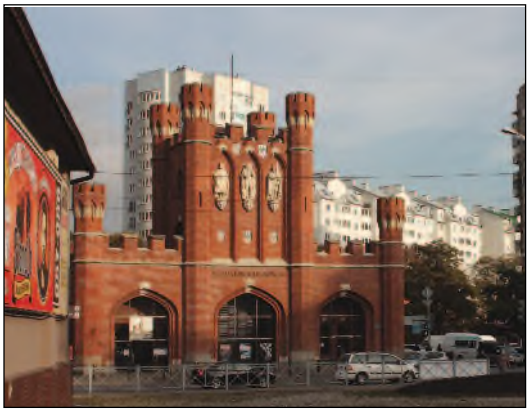
Today Kaliningrad remains part of Russia, land-locked by Lithuania and Poland, although apparently the Russians tried to sell it back to

Germany after 1990. There have more recently been discussions that it should be given back to Germany as a good-will gesture after Russia's reincorporation of the Crimea.

Traveling in and out of Kaliningrad is complicated. As mentioned above, the air routes are somewhat convoluted and irregular. For a resident of Kaliningrad who wants to travel elsewhere in Russia, the choices are to get a visa from Lithuania (single trip only), drive through Belarus, which adds several hundred miles to the trip, or fly. Trains did not seem to be an option. We did learn that the Government subsidizes airfares between Kaliningrad and St. Petersburg or Moscow. In spite of its physical proximity to the rest of Russia, the trip is comparable to a "Lower 48" visit to Alaska.

Kaliningrad – The Place

Because of the destruction during WWII, there is very little left of the old city. There is a German church and a few surrounding buildings dating to the 1500s. A series of city gates dating from the mid-19th century are still in existence. Some are completely restored and used for various public purposes, *e.g.*, museums. Others are almost completely ruined, but maintained as historical sites. There are many handsome buildings of the late 19th and early 20th century, which of course are of Northern German design. We lived in one of



them. Then, of course, there are the ubiquitous Soviet era concrete buildings – some untouched in decades, but some were restored. There also is an effort to maintain at least the façade of some of the pre-WWII buildings. The business center of town is prosperous and new with everything from the upscale retailers of most European cities to worldwide franchises.

The City is well-served by a tram system, but with a rather daunting system of stops. They do not stop on the curb but in the middle of the street beyond two to three lanes of traffic. When it stops, you dash across the traffic lanes to enter the tram. I asked about this system and whether the traffic was required to stop when the tram did. The response was not entirely reassuring: "well, it is supposed to." We adopted the best strategy for such situations, which is to "follow the crowd."

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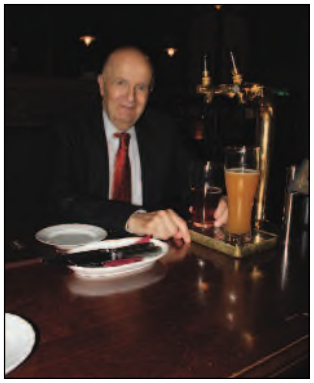
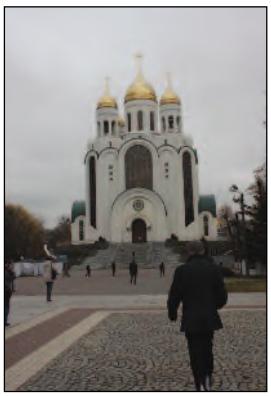
One factor which surprised us was that virtually every public establishment from the trams to the smallest restaurant had a good, free Wi-Fi connection. Everyone has a smart phone. We were never without Wi-Fi.



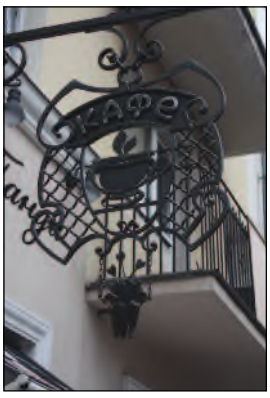
The restaurants were adequate. One restaurant in particular had an innovation I had never seen before - each table had two beer taps. You are given a glass to pour your own beer so there was no waiting for a refill. What a creative group, although I understand the innovation has migrated to the U.S.

One evening we walked into a pleasant looking restaurant. After being seated, a man approached us and spoke in German. Before I could adjust to this unexpected greeting and deploy my limited knowledge of the language, he spoke in English and said, "I know you are not Russian and my first guess was German." It turned out that one night a week, the local German community has a "Stammtisch" in this restaurant. (A "Stammtisch" is a reserved table for a group and only members of the group can sit at it unless invited. Some of you may have mistakenly sat at a vacant Stammtisch in Germany and been asked to move). The gentleman explained that the Stammtisch was for the local German population and anyone else who wanted to practice their German. We were asked to join and had a great evening. We were told that the Kaliningrad region is much different from the rest of Russia, as much German as it is Russian. Several of our dinner companions commute regularly between Germany and Kaliningrad for business. One man is a farmer (the seventh or eighth generation) and has large farms (4,000+ hectares) in both Germany and Kaliningrad. He regularly commutes by car between the two. Other Germans work in Kaliningrad and were very complimentary of the hospitable business environment. It was one of those serendipitous meetings where you learn more about a place in two hours of conversation than in a month's worth of reading.

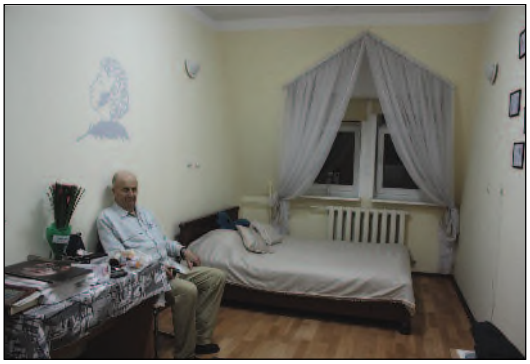


As most of you probably know, the Soviet system strongly discouraged the practice of religion. The oldest church in Kaliningrad was the German Lutheran cathedral in the old section of town, dating from the mid-16th century. With the fall of the Soviet system, there has been a major resurgence of the Orthodox Church. In Kaliningrad, this was evidenced by the new Orthodox Church; indeed, it is still under construction. Although in use, the prevailing aroma was wet plaster, not incense. Several muralists were working on the interior painting. It was strange to see a centuries old Protestant cathedral and a brand new Orthodox church in Russia and it was another indication of Kaliningrad's unique character.

Russia will be home to the 2018 World Cup and Kaliningrad will be one of the venues. This was obviously a point of great pride as it was literally spelled out in big RED LETTERS all over the city.



The streets of central Kaliningrad could be those of almost any moderate-sized European city. It is

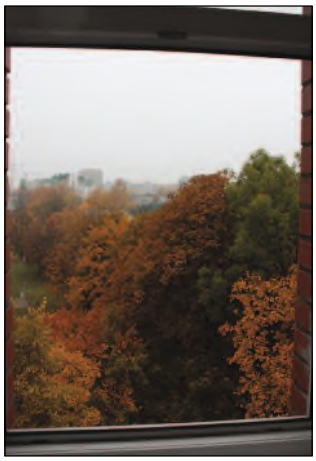


only the Cyrillic alphabet that indicates otherwise. There were many whimsical statues and signs, which indicate both civic pride and a robust arts community. In summary, it is a very pleasant place.

Living & Teaching

One of the more interesting benefits of my teaching experience is that the University provides housing. It is not a five or a four, or for that matter, any sort of "star" accommodation. The benefit is that instead of living as a tourist or even a business traveler's life, you get to live in and know the local community. So far, all of our accommodations have been comfortable, and Kaliningrad was no exception.

Our accommodation was a hostel, primarily, but not exclusively for the University community. It was on the fourth floor of a late 19th century building and architecturally, rather imposing. There was a beautiful park right outside and in full autumn color for our visit.



It did not have an elevator so the day always ended with a "Stairmaster" climb. It was a single room with a private bath and a shared kitchen and common area. We typically ate breakfast in the kitchen, but other meals were in a restaurant. The other occupants were friendly and generous, *e.g.*, giving us fresh fruit, although the language barrier kept most conversations on a fairly superficial level. It is fun for two to three weeks, but we were both ready for the comforts of home at the end of our stay.

The University was the Immanuel Kant Baltic Federal University. It is named after the German philosopher, Immanuel Kant, who was among Königsberg's most famous citizens. According to legend, Kant was so regular in his habits that the local housewives would set their clocks by his appearance on his daily walks. The University had an excellent reputation through 1945 when it was taken over by the Russians at the end of WWII. It was reopened in the 1960s and pursuant to an agreement between Putin and then German Chancellor, Gerhard Schroeder, restored to its present appellation.

The law faculty is housed in what looks like a fairly generic Soviet-era concrete structure from the outside but is very modern in the interior. Like many other Universities in Eastern and Central Europe where I have taught, the investment is in technology, with every classroom fully equipped with overhead projectors, internet access, and all the other latest electronic gadgets. Likewise, the students are the same as their U.S. counterparts - everyone has a smart phone, laptop, etc.

My students were very bright, but their English language skills were somewhat less than I have come to expect. Fortunately, after teaching the same two courses for many years, I can vary the content to suit almost any group. The assignment was to prepare a detailed Request for Arbitration. The results were excellent.

What Did I Learn?

I always hope that I impart some useful knowledge in the field of international business law and arbitration and the importance of the "rule of law" in commercial transactions. My students are now all post-Soviet era, and the older generations' stories of the "old days" carries little interest. I would say that the spirit of capitalism, although often exercised in a brutal and self-serving fashion, is the future. Indeed, Russian capitalism at this stage seems to be going through the same developmental process as U.S. capitalism from the end of the Civil War until the early 20th century. At first, totally unbridled with the rise of the oligarchs

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(read monopolists like Rockefeller and Carnegie) and then gradually harnessed through government regulation. The process may not be pretty and Russia may have its own "Great Depression," but the process seems very much like other economic transitions.

Finally, how do the Russians feel about their President and themselves? There was no overt bragging, but clearly there is pride in how Putin has revitalized his country. It is my understanding that in spite of the reported effects of the sanctions declared by the West, the real income of the Russian population has increased threefold during Putin's period in office. I will confess a certain degree of admiration for Putin. The reincorporation of the Crimea into Russia (it was given to Ukraine by Nikita Khrushchev in 1956) and the current divide between the Eastern and Western parts of Ukraine are less a resurgence of a renewed Russia imperialism than an alignment of the preferences of the population. When I taught in Ukraine in 2010, the topic of the cultural split between Eastern (more Russian) and Western (more European) Ukraine was a major issue. That a split is happening should have come as no surprise to Western diplomats. Finally, I can only see more commonality between the U.S. and Russia than differences. Both countries have energy independence, neither needs "more territory," and radical Islam is a common enemy, perhaps even more threatening to Russia than the United States. Okay, enough politics.

The answer to my question as to whether students still see a move to the West as their best option for a successful life is less clear. I believe I could best characterize it as they now see Russia, in spite of recent tensions, as integrating into the world economic order in which they have a chance to participate.

Next

For 2016, the most interesting opportunity appears to be the University of Pardubice in the Czech Republic. Although we have visited the Czech Republic as tourists, we are looking forward to the more intimate knowledge gained through living and teaching there.

Watt Tieder newsletters are posted on our website, www.watttieder.com, under the Resources Tab. If you would like to receive an electronic copy of our newsletter, please contact Peggy Groscup at: **pgroscup@watttieder.com**

GcilA News & Knowledge Center

GLOBAL CONSTRUCTION & INFRASTRUCTURE LEGAL ALLIANCE

About GcilA

The Global Construction and Infrastructure Legal Alliance (GcilA) was founded in 2012 with the goal of servicing clients on a worldwide basis through a network of construction law specialists in key jurisdictions. This alliance of expert firms devoted to this single field provides the best resource to our clients. Today the alliance boasts five leading international law firms: Watt Tieder, Frilet Société d'Avocats, Karila Société d'Avocats, PS Consulting, and our newest member, German construction law firm, Breyer Rechtsanwälte. We hope to add two new firms in 2016, one in South America and one in China.

GcilA members are regularly requested to teach and participate in seminars and write extensively on current topics related to international construction. In order to disseminate this information, GcilA has launched an integrated Knowledge Center which is accessible through our website. Through this Center, an active exchange of information will help develop best contracting practices worldwide.

Watt Tieder is now pleased to include excerpts from this most valuable resource as part of our quarterly newsletter. Over the next year we will be profiling each of the GcilA members as well as sharing a sample of that member's contributions to the Knowledge Center. To learn more about GcilA and the Knowledge Center, please visit *www.gcila.org*.

About Our Featured Firm

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SOCIÉTÉ D'AVOCATS

Founded in 1998, Frilet – Société d'Avocat is a boutique law firm with a unique culture for assisting private and public clients in the design and implementation of complex, and often innovative, construction projects and transactions. The firm focuses on complex projects in the infrastructure, utility, PPP, oil and gas, and mining sectors, as well as in joint ventures, mergers and acquisitions, structured finance, ADR, and arbitration. Its practice includes the preparation and negotiation of contracts, regulatory arrangements and negotiations among private sector companies and consortiums, as well as governments and multilaterals. The firm has been involved in complex projects in France, but is quite often called upon to assist in matters in developing countries around the globe, especially in African countries with a French legal and language tradition.

Marc Frilet, the managing partner, has been particularly active with the World Bank and the United Nations in developing best practices for PPP projects. He is the main force behind the United Nations "Center of Excellence" concept for this type of work.

Foreign Investments In Public Infrastructure And Mining: Facing The Challenge In Civil Law Africa

by Marc Frilet, Managing Partner, Societe d'Avocat

Africa has always been a continent of challenges. It is now becoming a continent of changes and a continent of the future for foreign investments, especially in the public infrastructures and mining sectors.

If the international business and banking communities do not put Africa to the top of their priority list, the situation may change faster than anticipated for responsible promoters and real entrepreneurs. There are several reasons for this, as set out below.

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The African Continent, which is on the doorstep of Europe, has a population of more than one billion people and projections in terms of world population indicate that it may become the most populated continent before China and India. According to a UN report, its population is likely to be in the region of 2–2.5 billion people in 2050 and represent 22% of the world's population (29% of the world's youth population).

The world is committed to alleviating poverty and in this regard there is increasing focus on Africa, since its needs are probably greater than those of anywhere else in the world (41% of the population live below the poverty line). If the growth rate of Africa as a whole does not reach seven per cent to nine per cent per annum, there is little chance of achieving substantial poverty reduction and attaining the millennium development goals (MDG) that were set by the United Nations. One of the main bottlenecks is the poor state of infrastructures in Sub-Saharan Africa – its electricity, water, roads and information and communications technology (ICT) – which decreases national economic growth and reduces productivity. In this sector alone, the cost of addressing Africa's infrastructure challenge is around US $93 billion a year.

Those needs and many others have to be put into perspective with the immense potential of Africa's natural wealth, both for itself and for the planet: Africa's natural resources; African potential in agriculture, both for its own needs and for the rest of the world; Africa's potential in renewable energy; with the second largest forestry basin in the world, timber resources and biodiversity in Africa are both a major asset for the planet.

The above objective factors have so far been insufficient, with a few exceptions, to permit the economic development of African states and this is for many well-known reasons, ranging from political instability to corruption, lack of essential infrastructures and poor levels of education. In a nutshell, most of the African states are considered to be fragile states by international standards.

This is obviously a deterrent to foreign investors. A quick look at the World Bank *Doing Business* report, where African states have a very low-ranking average, could be enough to eliminate Africa from potential investors' radar screens. This bird's-eye-view approach, which is often sufficient for traditional investments in a competitive world, is in fact short-sighted in the area of mining and public infrastructure.

Indeed, for legal practitioners who have been advising international investors involved in projects in civil law Africa for many years, there are tangible signs of improvement or changes in many of those 'civil law' countries and the opportunities to develop large public infra-structures or mining projects in a sustainable and profitable manner have increased.

This is due essentially to a new level of understanding on the part of stakeholders and also by the states themselves, which, on the basis of the lessons learnt, are altogether more ready to accept and promote a new 'partnership approach' and modern legal security standards.

In the author's experience, the way forward is to organise at the outset a due diligence exercise, substantially different in focus and much more ambitious than the ones generally carried out in accordance with international standards.

In addition, since most of the countries at issue are still in the process of streamlining their laws and procedures, and since anticipation is the key for any long-term investment in an area in this matter, it is often essential to contact the international stakeholders and more particularly the multilateral, bilateral and NGO community.

In conclusion, it appears that it is increasingly possible to securitise investments in public infrastructures and mining projects in civil law Africa at acceptable and competitive levels by international standards.

However, it is subject to particular efforts in the understanding of local practice and sociology in a world where legal certainty is often reached by a legal and contractual approach substantially different from other regions in the world and where the concept of responsible partnership with the state is often the more secure way to protect an investment in the long term.

This excerpt is from an article published in Business Law International, Vol. 12, No. 2 (May 2011). For the complete text, please visit GcilA's Knowledge Center at www.gcila.org.

Watt Tieder Partner Hanna L. Blake Speaks At 95th Annual Meeting Of Transportation Research Board

From January 10-14, 2016, more than 12,000 people from over 70 countries attended the 95th Annual Meeting of the Transportation Research Board (TRB), held at the Walter E. Washington Convention Center in Washington, D.C. Referred to as the "World's Largest Gathering of Transportation Professionals," the meeting was well attended by policymakers, administrators, practitioners and researchers from government, industry and academia. During the five days, the TRB held more than 800 sessions and workshops, with more than 5,000 presentations covering transportation innovations and hot topics in all transportation modes. Watt Tieder partner **Hanna L. Blake** presented on the topic "Current Trends in P3 Project Delivery in the U.S. and Canada," sponsored by the TRB's Standing Committee on Contract Law.
Other meeting highlights included:

- "The Road to Opportunity," U.S. Department of Transportation Secretary Anthony Foxx's discussion of the role that access to reliable, safe and affordable transportation plays in economic opportunity;
- "State Department of Transportation CEO Roundtable 1: Mainstreaming Innovative Technology," a panel of state DOT leaders highlighting success stories and exploring challenges of creative approaches used to expand travel options and increase efficient movement of people and goods; and
- "Bridge Sliding: ABC Method to Reduce Construction Time," a discussion of slide-in bridge construction (SIBC) to save construction time, reduce traffic impacts, and provide a safer work environment.

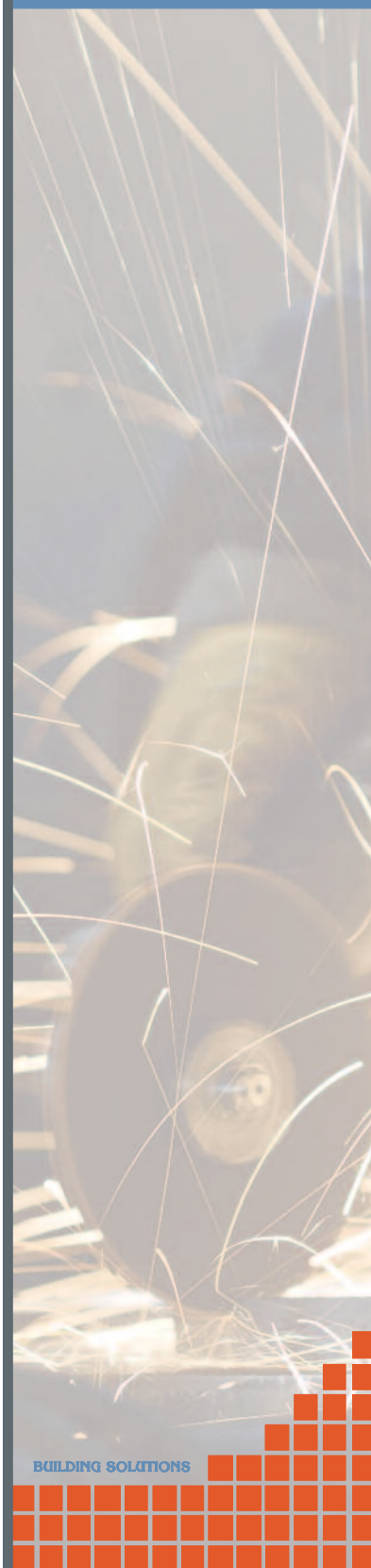
Recent and Upcoming Events

American Bar Association Tort Trial & Insurance Practice Section, Fidelity and Surety Law Committee 2016 Midwinter Meeting, January 20-22, 2016; New York, New York; **Christopher J. Brasco** spoke on "A Practical Approach to Understanding the Ethical Limits on Attorney Behavior in the Arena of Settlement Negotiations."

2016 American Arbitration Association Construction Conference: Ahead of Schedule and Under Budget, April 1, 2016; Miami, Florida; Sponsored in part by Watt Tieder; **R. Miles Stanislaw** to speak. Watt Tieder will host an evening reception on March 31, 2016 at the Conrad Miami Hotel. Please contact Lisa Breighner at *lbreighner@watttieder.com* if interested.

Inter-Pacific Bar Association Conference, April 13-16, 2016; Kuala Lumpur, Malaysia; **Keith C. Philips** to speak on April 14 at a session titled "Latest Developments in Construction Law – Around the World in 90 Minutes;" and **Christopher Wright** to speak on April 15 in a session titled "Time Related Claims and Concurrent Delay – Civil Law vs. Common Law, A Mock Arbitration."

American Bar Association Tort Trial & Insurance Practice Section 2016 Spring CLE Conference, May 11-15, 2016; Atlanta, Georgia; **John E. Sebastian** to speak.



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**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**.

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