WATT TIEDER

BUILDING SOLUTIONS®

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

Attorneys at Law

Spring 2020

Inside...

- Force Majeure: Navigating The Impact Of The Coronavirus Pandemic
  Page 2
- Federal Construction Contracts vs. COVID-19: An "Excused" Delay?
  Page 5
- Coexisting With Covid-19: Navigating Obstacles And Opportunities With Construction Fundamentals
  Page 9
- Your Company Received A PPP Loan – How To Spend The Money And Obtain Forgiveness
  Page 11
- Firm News
  Page 14

The newsletter of
Watt, Tieder, Hoffar & Fitzgerald, L.L.P.

visit us on the web at
www.watttieder.com

BUILDING SOLUTIONS

Force Majeure: Navigating The Impact Of The Coronavirus Pandemic

by Robert C. Niesley, Senior Partner and Colin C. Holley, Partner

Robert C. Niesley

Colin C. Holley

As the tragic and devastating impacts of the coronavirus (COVID-19) pandemic continue to mount, and as the government and private sectors ramp up efforts to address the spread of the disease, we are seeing disruption of businesses on a massive scale. Labor shortages, delays in supply and distribution of materials, unavailability of services, and closures of workplaces, are just a few examples of the disruptions inevitably caused by the travel restrictions, quarantines, cancellations of large gatherings, and other efforts being taken to address the crisis. We understand that our clients are facing a myriad of issues and difficulties as a result of the growing crisis and will be working through the effects for some time to come.

It is critical for our clients to consider the extent to which the coronavirus pandemic may excuse contract performance under force majeure clauses. This article highlights the key points our clients should consider in assessing options under existing contracts and in implementing measures to ensure their interests are protected in the future.

Determining Whether Your Contracts Have Force Majeure Clauses

It is important to first identify which of your contracts are being impacted, or will likely be impacted, by the pandemic and review them to determine if they include force majeure clauses. Force majeure—which translated literally from the French means "superior force"—is the term commonly used for clauses that deal with unexpected events beyond the control of the contracting parties. These are sometimes called "Acts of God" provisions, and may address natural disasters such as floods, tornadoes, earthquakes and hurricanes, or man-made disruptions such as acts of terrorism, riots, strikes, and wars.

Your contracts may have such a clause even if the specific terms "force majeure" or "Acts of God" are not used. Look for any provision that addresses major events beyond the control of the contracting parties. In many contracts the force majeure language is in the "miscellaneous" or "general" provisions near the end of the contract.

When a contract includes a force majeure clause, it will control the parties' rights, obligations, and potential remedies when a disruptive event beyond the control of the parties occurs.

Relying On General Legal Principles For Contracts Without Force Majeure Clauses

If you have an impacted contract that does not have a force majeure clause your performance may still be excused. The doctrine of force majeure is related to general principles of contract law that can apply to any contract unless overridden by the terms of a force majeure or similar clause. Specifically, the law in certain narrow circumstances allows performance to be excused when it would be impossible or impracticable, or the core purpose of the contract has been frustrated, due to unexpected events. However, the contours of rights under those doctrines is less clear and more difficult to enforce than rights existing under a force majeure clause.

Determining Whether The Coronavirus Pandemic Is A Force Majeure Event

Determining rights, obligations, and potential remedies under a contract with a force majeure clause typically requires a complex analysis of the contract language, the governing law, and the totality of the situation. The first step is to determine whether the coronavirus pandemic qualifies as a force majeure "event" under a clause. In other words, does the clause and its

various provisions even apply to a situation caused by the pandemic.

The starting point is always the language used in the clause. Some clauses specifically include "communicable diseases," "disease outbreaks," "epidemics," or "pandemics" as triggering events. If the contract clause lists any of these as covered events, the clause clearly applies and its provisions will control the rights and obligations of the parties. In the absence of such specific terms, assessing whether the coronavirus pandemic is a force majeure event may be considerably more difficult and may require interpretation under the body of law that applies to the contract, such as the law of a particular state. It is possible that established industry or trade practice, or the course of dealings between the parties if force majeure issues have previously arisen, may also factor into the interpretation of the clause.

The laws of most U.S. states require force majeure clauses to be interpreted narrowly—events that do not appear to have been within the contemplation of the contracting parties will not be viewed as force majeure events. (*See Kel Kim Corp. v. Cent. Markets, Inc.,* 70 N.Y.2d 900, 902–903 (1987), and *Constellation Energy Servs. of New York, Inc. v. New Water St. Corp.*, 46 N.Y.S.3d 25 (N.Y. App. Div. 2017)). For example, if a clause lists triggering events as including only "acts of terrorism, riots, strikes, natural disasters resulting from weather, and similar events," a court likely would not find the coronavirus pandemic to be a triggering similar event, because the parties chose to include only man-made disruptions and weather events in the clause.

The coronavirus pandemic, however, may certainly trigger some force majeure clauses that do not include specific references to diseases, epidemics or pandemics. Clauses that include "acts of government" or "states of emergency," for example, may apply if a causal link between a government action and the impossibility of performance can be established. That analysis might not be very clear. For example, assume hypothetically that the next major step in a project is the pouring of extensive concrete foundations and all concrete companies in the area with enough capacity to handle the project have suspended all operations for several weeks after the government declared a state of emergency. Arguably, the government action does not make performance *impossible* because a concrete company *could* continue work without violating any express government directive. Suspending work, however, might be viewed as a highly reasonable step in furtherance of public health under the state of emergency, and could therefore be deemed causally linked to the government action. Ultimately, in any unclear circumstance the specifics of the situation will have to be assessed to determine whether a strong argument can be made that a force majeure event has occurred.

In addition to listing triggering events, force majeure clauses may also have "catch-all" language, such as the inclusion of "any other events not reasonably foreseen and not within the reasonable control of the parties." This broadly inclusive language would likely be interpreted to include a major disease pandemic. (*See Specialty Foods of Indiana, Inc. v. City of S. Bend*, 997 N.E.2d 23, 28 (Ind. Ct. App. 2013)). As discussed above, however, catch-all language may be more limiting if it only includes, for example, "any other events *similar to*" specifically listed events. Whether such a clause is interpreted to include the coronavirus pandemic will depend on what types of events are specifically listed, and if a reasonable argument can be made that a communicable disease pandemic is "similar" to the listed events.

Force majeure clauses also may define a triggering event more generally, simply as an unforeseen event beyond the control of the parties, but the clause may limit applicability in different ways. Such a clause might, for example, say that performance is excused by the event only if performance would be impossible, or commercially impracticable. In many situations it would be difficult to reasonably argue that performance is impossible or commercially impracticable if there is any means whatsoever of performing, irrespective of the unexpected cost and effort required, such as by finding other sources for manufacturing, supplies, or services. On the other hand, if a clause specifically requires only a showing that performance would be "commercially unreasonable" or "an unreasonable financial hardship" under the circumstances, it would be much easier to argue that performance is excused.

Determining the Consequences Of Claiming That Performance Is Excused

Claiming that performance is excused might not be in a company's best interest even if a force majeure clause would legally allow the company to do so. The contract should be analyzed in full to determine, for example, whether triggering the force majeure clause would in turn excuse other parties from providing valuable consideration or would perhaps even allow termination of the entire contract. In that situation, if performance of the obligation would be much more expensive than expected but not impossible, taking on

...continued on page 4

the added expense might be a better outcome than losing out on the performance of other parties or perhaps abandonment of the entire contract. It is also important to consider the impact that refusing to perform might have on the company's business reputation, as well as on existing and future relationships.

Taking Actions Necessary To Excuse Performance

If a force majeure clause is reasonably interpreted to include the coronavirus pandemic as a triggering event, the next step is to determine whether actions must be taken to excuse performance, or whether actions must be taken to avoid losing certain remedies.

- **Giving Timely Notice**

It is critical to determine whether the force majeure clause, or some other applicable provision of the contract, requires a party to provide notice that it claims that its performance is excused. A clause might require that notice be provided within a specific number of days after occurrence of the triggering event. Failing to provide the required notice could prevent reliance on the force majeure clause to excuse nonperformance if a claim of breach is filed.

- **Mitigation Of Damages**

A force majeure clause might also require steps to be taken to reduce the severity of the impact of nonperformance on the parties. Such steps might include partial performance, resuming performance after a period of delay (if still of some value), or taking alternative actions to achieve some or all of the ultimate intended goal of the contract. Further, even if not expressly required, parties should always consider mitigation, inasmuch as the law of some jurisdictions will impose such a requirement and it will reduce the amount in controversy in the dispute.

- **Alternative Dispute Resolution**

The force majeure clause, or some other applicable provision of the contract, might require the parties to resolve a dispute regarding whether a force majeure event has occurred, or a dispute regarding the consequences of a triggering event, by engaging in mediation and/or arbitration. It is important to follow such requirements, particularly if the contract provides that a party loses rights by ignoring the agreed dispute resolution procedures.

- **Other Required Actions**

Depending on the purpose of the contract, there are any number of other specific actions a force majeure clause might require as a condition of excusing or delaying performance. Ongoing reporting and due diligence regarding potential alternatives to performance could be required. Good faith negotiation of an amendment to the contract could be required. Providing specific types of evidence proving impossibility of performance could be required. Any such required actions should be taken to avoid the risk of a determination that the right to excuse performance was lost through noncompliance with the contract terms.

Further Considerations And Recommendations

In making the assessments and taking the actions discussed above, we strongly urge consultation with experienced counsel. As part of that consultation, we recommend the following:

- Diligently monitor government actions, as new decisions may be made that change the analysis as to whether a force majeure event has occurred in relation to a particular contract.

- Assess the potential consequences of claiming a right not to perform.

- Consider making a good faith attempt to either perform or to take other steps to achieve the contract's goal.

- If excused performance will be claimed under a force majeure clause, make sure to take all actions the contract requires as conditions of excusing performance, such as giving timely notice, mitigating damages, and following any dispute resolution procedures.

- Create and keep detailed evidence proving that the pandemic made performance impossible, commercially impracticable, or commercially unreasonable (depending on the standard required under the force majeure clause).

- Create and keep detailed evidence regarding efforts made to find alternative means of performing; communications with other contracting parties; and financial impacts, costs, and other losses incurred.

- Review all insurance policies for business interruption coverage, coverage for losses resulting from actions by government "civil authority," or other potentially applicable coverage. Determining coverage can be quite complicated and qualified counsel should be consulted. This determination should be made as soon as possible because it may inform the decision on whether to claim excused performance under force majeure clauses. For purposes of future protection, work with counsel and your insurance broker on strengthening coverage for future events of this type.

- When other businesses contact you to claim *their* performance is excused, consider renegotiation on terms that are reasonable given the situation. If warranted, point out ways the other business could still perform or reasonable alternatives it could take in mitigation.

- Work with counsel to ensure future contracts have force majeure clauses specifically including communicable disease outbreaks, endemics, and pandemics, and clear terms addressing the parties' rights and obligations, and applicable procedures after a triggering event. In the context of construction project contracts, for example, the force majeure clause should specifically address and allocate the burdens resulting from the unexpected delays and costs, state limits on the remedies available to each party, and dictate the steps the parties must take to get performance back on track as soon as the threat has passed.

"Epidemic" Is an Excusable Delay On Federal Contracts

Lastly, for our contractor and surety clients engaged in the federal contracting business with the United States of America, be aware that Federal Acquisition Regulation ("FAR") §52.249-14 provides that a "Contractor shall not be in default because of any failure to perform this contract under its terms if the failure arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of these causes are (5) epidemics, (6) quarantine restrictions . . . . In each instance, the failure to perform must be beyond the control and without the fault or negligence of the Contractor." The coronavirus pandemic fits squarely within FAR §52.249-14. *See also* FAR §52.249-10. Make sure you give notice to the government and make efforts to mitigate damages and document problems.

John E. Sebastian

Federal Construction Contracts vs. COVID-19: An "Excused" Delay?

by John E. Sebastian, Senior Partner and Brian C. Padove, Associate

Brian C. Padove

As the Coronavirus (COVID-19) continues its spread across the globe, it will be imperative for construction industry entities, contractors, subcontractors, suppliers, and sureties to be aware of the probable impacts that will arise because of the global pandemic. Here, we have focused on COVID-19's probable impacts on projects with the Government. Federal construction contracts are governed by the Federal Acquisition Regulation ("FAR") discussed below.

Probable Delays

There are certain impacts that will result from the pandemic and will impact labor and material. The government may even mandate construction shutdowns. As such, numerous issues are likely to arise in construction supply chains within the United States and globally. For example, industries including computers

...continued on page 6

and electronics, fabricated metal, and chemical producers have reported that the coronavirus outbreak is impacting their businesses. (U.S. Manufacturing Sector Stalls as Coronavirus Hits Supply Chains - Reuters).

Another likely impact will be a shortage in labor. The Center for Disease Control (CDC) as well as the U.S. Department of Labor Occupational Safety and Health Administration (OSHA) have recommended that (1) employees who are symptomatic should stay home, even if they are not yet diagnosed as having COVID-19, and (2) if the employee has immediate members of their home that are sick, the employees should stay home. As such, it is likely that excessive "absenteeism" of laborers will occur whether such absenteeism is due to the employees/laborers having the illness themselves or the employees' family member(s) having the disease. *See* OSHA Guidance on Preparing Workplaces for COVID-19.

Finally, another potential impact will be due to government-mandated construction shutdowns. It is likely that, as COVID-19 continues to spread throughout the country, the Government will suspend construction activities to combat the spread. A good example of that is the City of Boston shut down for all major construction projects. A Government shut down for construction projects that are within a large city is even more likely as additional metropolitan areas begin issuing "shelter-in-place" directives.

These are only a few of the many impacts that are anticipated to occur from COVID-19's spread across the globe. As such, Watt Tieder wants our federal contractor clients to inform themselves of the relevant provisions of their federal construction contracts.

Federal Acquisition Regulation – Covid-19 An "Excused" Delay?

Two sections of the FAR directly address delays related to the COVID-19's likely impact on federal construction projects - FAR § 52.249-10 and § 52.249-14. As these FAR clauses are widely incorporated into most federal construction contracts, it is important for contractors to appreciate their application to your federal projects.

FAR § 52.249-10 relates to the Government's right to hold a contractor in default due to, among other things, delay. This default clause provides, in relevant part, that if the Contractor fails to perform in a way that will ensure completion within the time specified in the contract, or if the Contractor fails to complete work within said time, the Government may (by written notice) terminate the Contractor's right to proceed with work that has been delayed. *See* FAR § 52.249-10(a). The Government's default clause continues by providing that the Contractor and its sureties will be liable for damages "resulting from the Contractor's refusal or failure to complete the work within the specified time . . . [including] any increased costs incurred by the Government in completing the work." *Id.* The Government's right to terminate for default is not absolute, especially in light of a worldwide pandemic.

The "Default" clause provides protections to the Contractor for, among other things, delays "arising from unforeseeable causes beyond the control and without the fault or negligence of the Contractor," including "epidemics," "quarantine restrictions," and a catch-all provision providing excused delayed performance relating to "delays of subcontractors or suppliers at any tier arising from unforeseeable causes beyond the control and without the fault or negligence of both the Contractor and the subcontractors or suppliers." *See* FAR § 52.249-10(b)(1). It is imperative that if a Contractor is faced with such a delay, the Contractor must, within 10 days from the beginning of any delay, notify the Contracting Officer in writing of the causes of the delay. *Id.* at (b)(2). After notice, the Contracting Officer is required to investigate the facts and extent of the delay, and if the facts warrant such action, shall extend the time for the Contractor to complete such work. *Id.* Such findings of the Contracting Officer are final and conclusive, but subject to appeal under the Disputes clause. *Id.*

Accordingly, pursuant to FAR § 52.249-10, while the Government has a right to default its Contractors for delay, the Contractor's delay may be excused if the delay is, in fact, related to COVID-19 – a global pandemic, a potential government-mandated quarantine restriction, and/or the delay to the Contractor's subcontractors or suppliers that was unforeseeable and outside of their control. However, even though the Contractor may have an "excused" delay under this regulation, the Contractor must still provide written notice 10 days from the beginning of the delay to the Contracting Officer.

FAR § 52.249-14 "Excusable Delays" sets forth language providing that Contractors shall not be in default because of "any failure to perform [the] contract . . . if the failure arises from causes beyond the control and without the fault or negligence of the Contractor," including "epidemics," "quarantine restrictions," and "acts of the Government in either its sovereign or contractual capacity." *See* § FAR 52.249-14(a). Similar to above, the regulation continues by stating that the Contracting Officer "shall ascertain the facts and extent of the failure,"

and that "[i]f the Contracting Officer determines that any failure to perform results from one or more of the causes above, the delivery schedule shall be revised . . . ." *Id.* at (c). Accordingly, this clause provides similar rights to Contractors with regard to COVID-19's potential effect on the timing of completing government construction project work.

Complying With Far

While the Government's right to default a Contractor for delayed performance is not automatic given FAR §§ 52.249-10 and 52.249-14, the Contractor's right to "excused" delayed performance is not automatic either. Pursuant to FAR § 52.249-10, the Contractor must provide written notice to the Contracting Officer within 10 days from the beginning of a delay, and only thereafter, will the Contracting Officer investigate the notice and excused delay claim. While it is generally understood that COVID-19 is a global pandemic affecting industries throughout the world, the Contractor nevertheless must still put the Government on notice of any delays caused by COVID-19 in order to trigger the Government's duty to investigate and render a decision and avoid being declared in default for untimely performance.

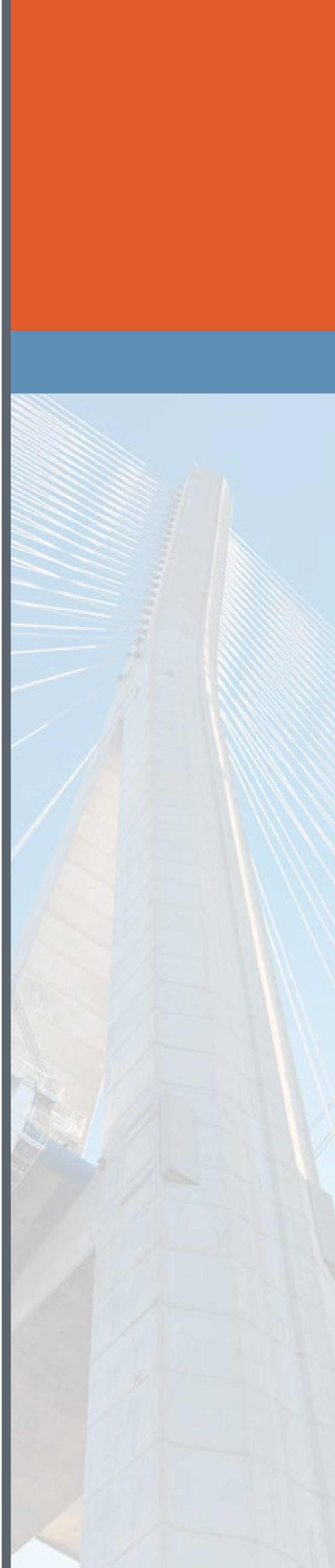
The Contractor's burden of proof with regard to excused delay includes (1) affirmative proof that the delay was caused by or arose out of a situation which was beyond the contractor's control; (2) affirmative proof that the Contractor was not at fault or negligent; (3) demonstrating that the performance would have been timely but for the occurrence of the event which is claimed to excuse the delay; (4) demonstrating that the Contractor took precautions to avoid foreseeable causes to the delay and mitigate the effects; and (5) establishing a specified period of time that performance was delayed by the causes alleged. *See In Matter of Appeal K.C. Printing Co.*, GPOBCA No. 2-91, 1995 WL 488531 (Feb. 22, 1995); *See also In Matter of Appeal of Asa L. Shipman's Sons, Ltd.*, GPOBCA No. 06-95, 1995 WL 818784 (Aug. 29, 1995). Contractors cannot simply sit back and rely on the mere existence of the global COVID-19 pandemic in order assert an excused delay. Instead, Contractors should take proactive action to limit any liability relating to COVID-19 delays.

Suspension Of Work And Compensation

Non-compensable delays are another salient issue that Contractors should be prepared to face both during and after the COVID-19 pandemic. Though Contractors may be afforded additional time pursuant to the above FAR provisions, where projects are stopped due to COVID-19 or "quarantine restrictions," these Contractors will not receive additional compensation as a result of the excused delay. Unfortunately, with the ripple effects of COVID-19, Contractors can expect an uphill battle in maintaining workers and subcontractors subsequent to a stoppage of work. Furthermore, Contractors can also expect to feel the impacts when the project restarts, such as decreased availability of labor and increased costs of materials. Consequently, project delays may become even more grave where additional compensation is not approved.

However, a prepared and organized Contractor may hold the keys to alleviating the distress of non-compensable delays. FAR § 52.242-14 provides, in relevant part, that "[t]he Contracting Officer may order the Contractor, in writing, to suspend, delay, or interrupt all or any part of the work . . . for the period of time that the Contracting Officer determines appropriate for the convenience of the Government." *See* FAR § 52.242-14(a). This regulation also provides for much needed compensable delay relief to Contractors whereby Contractors may make a claim for adjustments when their performance is delayed for an unreasonable period of time including adjustments for, among other things, increases in the cost of performance. *Id.* at (b). Yet, similar to "excusable delay" clauses, such a right to adjustment of the contract sum is not automatic. A Contractor's claims are limited and specifically not allowed (1) "for any costs incurred more than 20 days before the Contractor shall have notified the Contracting Officer in writing of the act or failure to act involved . . .," and (2) "unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of the suspension, delay, or interruption, but not later than the date of final payment under the contract." *Id.* at (c). As such, if the Contracting Officer invokes the suspension clause, Contractors must assert their claims for adjustment soon after the suspension or any postponement of work on the project has been lifted and performance of work is set to restart. Note, however, that while this FAR contemplates equitable adjustments for unreasonable delays in the performance of the contract, Contractors are only entitled to relief under this FAR where the government takes an unreasonable length of time restarting the work on the project or an unreasonable length of time extending the contract completion time, when such a delay is proximately caused by the government's action, and resulting damages occur. *See CEMS, Inc. v. U.S.*, 59 Fed.Cl. 168, 230 (2003). Thus, to prove successful under this FAR, Contractors must show that the

...continued on page 8



"delay is caused by the government's action or inaction," but "to the extent a delay is caused by the fault or negligence of the contractor, no adjustment is warranted." *Id.*; *See also Sergent Mech. Sys., Inc. v. U.S.*, 34 Fed.Cl. 505, 526-27 (1995). Nevertheless, each construction project has its own nuanced issues which may give rise to supplemental, ancillary arguments regarding Contractors' rights to equitable adjustments.

In summary, Contractors are likely to fare better where the government invokes the FAR "suspension of work" clause and Contractors make a claim thereunder, rather than reliance solely on the FAR "excused delay" clauses. On the one hand, the "excused delay" clauses provide Contractors with additional time to complete performance due to the spread of COVID-19 or quarantine restrictions. However, these clauses do not provide for compensable delays, in the form of equitable adjustments, in a time where many Contractors will need additional funds. On the other hand, the FAR "suspension of work" clause, can provide Contractors with much needed monetary relief, so long as the Contractor complies with all notice requirements and required procedures to make a claim for additional monetary compensation. Thus, while Contractors may be able to rely on the "excused delay" clauses for additional time to perform, Contractors should be aware of the process to make a claim under the FAR "suspension of work" clause should Contracting Officers invoke such a clause. Notably, the clause provides Contractors with the ability to make an adjustment claim which may provide Contractors with greater security and confidence that they will be equitably paid even without knowing, with certainty, the impact COVID-19 will have on construction projects.

Practical Considerations And Tips

Nevertheless, if Contractors do want to enforce the "excused delay" provisions of FAR or make a claim for adjustment should the FAR "suspension of work" clause be invoked, Contractors have an affirmative duty to put the Contracting Officer on notice of such a delay or claim as well as mitigate damages relating thereto. Thus, with that in mind, below are some practical tips for federal contractors to consider moving forward through these uncertain times:

(1) Send timely written notice to the Contracting Officer (or Owners in the case of private contracts) that there is a potential for delay due to the global Coronavirus/COVID-19 pandemic as well as existing (and anticipated) quarantine restrictions. Such notice can and should be given proactively due to the high likelihood of COVID-19 affecting construction projects worldwide.

(2) Compile evidence and supporting documentation relating to your efforts to meet construction schedule deadlines as well as evidence demonstrating the correlation of COVID-19 to any corresponding delay (i.e. communications from suppliers, labor forces, etc.) and the steps taken to mitigate damages/losses including efforts taken to comply with the current schedule. In other words, document everything your business does in relation to COVID-19 and the performance of your construction contract.

(3) Be proactive in coordinating with your material suppliers and stay well-informed of news that may affect your supply chain. For example, stay up-to-date on any restrictions being placed on ports and/or manufacturing plant closures.

(4) Prior to entering into any new contracts, consider the potential impacts of COVID-19 – namely make sure to protect your company with regard material suppliers. Again, as of now, the potential impact of the pandemic is uncertain, but what is certain is that it will have a large impact on the manufacturing and shipping of goods. As such, a Contractor must carefully consider new contract terms and conditions given the amount of information existing as to the global pandemic. Contractors should take such delays and impacts into account as they enter into new contracts in the foreseeable future.

(5) Know that each construction project has its own nuanced issues and problems and that questions, concerns, and uncertainties will arise. However, you are not alone in this process, and should you have any such questions or concerns you should seek the advice of knowledgeable attorneys with experience in the construction industry.

Again, while these are uncertain times, contractors can be proactive and take measures now to ward off and limit potential liability resulting from delays caused by the Coronavirus/COVID-19 pandemic. In this regard, there are experienced attorneys who are well-suited to help you through these times and who are available to discuss these steps with you and answer any questions you may have regarding your Federal or other construction contracts.

Thank you to Timothy E. Heffernan, Senior Partner, Frank J. Marsico, Partner, Lauren E. Rankins and Sara M. Bour, Associates, for their contribution to this article.

Coexisting With Covid-19: Navigating Obstacles And Opportunities With Construction Fundamentals

by Jonathan C. Burwood, Partner

I promised myself I would not use the terms "unprecedented" or "new normal" in this article. As you can imagine, it was not easy. I also resolved not to talk about the "return" of construction, given estimates that as many as 70% of projects carried on during the months since COVID-19 derailed literally everything else. Most construction professionals are simply returning to the site they left the day before. Though admittedly, those sites look and feel very different than they did several months ago. Things may be new, but they are far from normal. Identifying changes to the post-COVID-19 construction landscape, both significant and subtle, and understanding the forces that drive them, is critical to short-term survival and long-term success. The situation is fluid, the rules are changing, and construction work does not readily lend itself to immediate adaptation. And for those reasons, a focus on construction fundamentals – labor, materials, cash-flow, innovation – is a good place to start in terms of navigating both the obstacles and the opportunities that lie ahead.

Covid-19 Directly Threatens The Construction Workforce, Though May Ultimately Provoke A Labor Revitalization.

Traditionally, construction employment is collateral damage from a broader economic downturn. Financing recedes, new work is shelved, and payrolls are adjusted to equalize supply and demand. That dynamic looms large today. The Association of General Contractors estimates that the construction industry lost 975,000 jobs in April – the largest one month decline ever – and construction unemployment spiked from 4.7% to 16.6%. It is reasonable to expect that some of those job losses are temporary, and construction employment should rebound modestly now that states are lifting restrictions on non-essential work. At the same time, the Paycheck Protection Program authorized by the CARES Act undoubtedly preserved countless construction jobs.

More urgent than macroeconomics, however, is the direct and immediate threat COVID-19 poses to the health and safety of the construction workforce itself. Without question, the industry has responded with a robust and uniform commitment to safety. Governments, project owners and contractors continue to develop, refine, implement and enforce COVID-19 specific safety guidance that simply did not exist months earlier. For the most part, there is enough consistency across the guidance to permit contractors to reasonably plan, budget and implement for compliance. However, not all COVID-19 safety guidance is created equal, which jeopardizes contractor certainty as to compliance and raises the stakes for required certifications. Addressing new and often cumbersome protocols for training, temperature checks, personal protective equipment, social distancing, and hygiene are also impacting costs and schedules. As always, the industry will keep the workforce safe, but construction will be slower and more expensive for some time.

Though no-one benefits from construction unemployment tripling overnight, and the safety risks and mitigation measures are impractical and overwhelming, COVID-19 may ultimately drive changes in the construction workforce that could benefit the industry substantially in the long run. For years the industry has suffered from a skilled labor shortage driven by the elimination of 1.5 million construction jobs during the recession of 2008. Despite significant growth and prosperity in construction over the past decade, the industry has not been able to consistently fill that void as millennials have said "OK Boomer" to construction jobs based on historical perceptions of the industry. Construction's response to COVID-19 could alter that dynamic with a renewed focus on the workforce itself. Using the industry's rapid and comprehensive response to COVID-19 as a spring board, further investments and innovation could shed the perception of construction work as simply dirty, difficult and dangerous and attract a vibrant labor pool that may otherwise pursue alternative careers.

A successful push in that direction will depend on increased attention to diversity and inclusion in the construction industry. Contractors will benefit from looking to their clients in the life science and technology sectors that thrive

...continued on page 10

from attracting and retaining a talented, diverse and inclusive millennial labor pool. Contractors should be actively competing for those employees. In that regard, the AGC recently unveiled its Culture of CARE (commit, attract, retain and empower) program aimed at fostering construction workplaces where employees are uniformly respected, valued and heard.

Organized labor will also play a role in reshaping the construction workforce. Over the past seventy-five years union membership has steadily declined, though the influence of unions in state and local decisions regarding essential construction work was conspicuous, in the form of both political pressure and in some instances suspensions of labor. With almost a million construction jobs lost, devastating unemployment in other sectors of the economy (including retail, restaurants and travel), and disruption to the traditional college model, common interests throughout the labor pool in wages, hours and safety are likely to increase union membership and influence to some degree as the industry rebounds from COVID-19. This will be particularly true if government stimulus and public works drive the recovery.

Innovation and technology will also continue to play a significant role in reshaping the construction workforce. Uber was transformative in convincing two million working-age Americans to sit in traffic for a living. The construction technology sector is hoping to accomplish the same type of makeover for construction, with exponential investment, implementation and influence in recent years. COVID-19 stands to supercharge the contech movement given its broad and efficient application to safety. Actively and accurately monitoring the health of the construction workforce, while simultaneously decreasing site congestion and personal interaction is tailor made for contech that is available and already in use. Thermal cameras can identify potential fevers, wearables can monitor compliance with social distancing, remote working, meetings and inspections reduce proximate interactions, and lasers, sensor networks, drones and robots can collect data in the field that would otherwise require more personnel. Beyond safety, the fallout from COVID-19 is also likely to accelerate the proliferation of other construction innovations, including lean construction, modular and pre-fabrication, which blur the lines between manufacturing and traditional construction, offer a controlled built environment, and reduce the proliferation of field interactions among suppliers, subcontractors, construction managers, design teams, owners and government inspectors.

Covid-19 Disrupts Material Supply Chains, Though May Further Soften Input Prices.

In late March, with governments restricting travel, altering import controls, and closing non-essential businesses, there were concerns about material and equipment delays, and resulting impacts to project schedules. Certain suppliers of construction materials and equipment, including John Deere, suspended manufacturing in response to the decrease in demand and concerns for operational safety. And the supply of PPE necessary to satisfy the demand created by COVID-19 – across all industries – remains unstable. Though construction has certainly been impacted to some degree by supply chain disruptions over the past few months, however, the big picture suggests that material supply is not a critical issue. And in stark contrast to the trend in recent years, the Associated Builders and Contractors reports that construction input prices are down.

The muted impact of COVID-19 supply chain disruptions, at least so far, is largely credited to steps taken by contractors over the past few years to diversify and broaden the supply base for construction inputs. While sophisticated contractors set out to leverage a broader supply chain for better pricing, those efforts created alternative sources for construction materials that are now mitigating COVID-19 disruptions. Going forward, there are calls in this climate for a renewed focus on a reshoring and increase in domestic manufacturing, though the fundamental economic pressures that drove certain manufacturing operations overseas in the first instance are not likely to be reversed during the expected period of financial uncertainty that lies ahead. In the meantime, the market for construction materials appears headed for a correction that may ultimately mitigate construction expense.

Covid-19 Jeopardizes Cash-Flow, Although It Is Already Generating Historic Government Stimulus.

Even as contractors work tirelessly to find steady footing heading into this next phase, the industry's biggest customers stare down a grim financial road. Brick and mortar retail as we know it is on the ropes, office space is grappling with an overnight paradigm shift to working remotely, and the recently red-hot healthcare sector is caught between a narrowly avoided crisis in capacity during the COVID-19 surge and a precipitous drop in institutional revenue resulting from the wholesale deferral of profitable procedures. As goes the economy goes the construction industry, and it is difficult to see how the robust backlogs of recent years

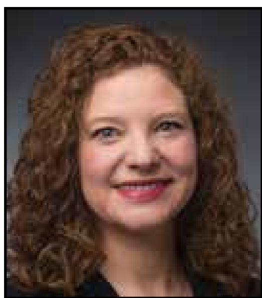
will continue to be replenished. Available data – at least at this early stage – indicates a firm trend towards the deferral or outright cancellation of certain non-essential projects, presumably driven by a lack of clarity about the potential for resurgence of COVID-19 and confidence in future revenues.

State and local governments are particularly exposed to the risk of making long term financial commitments to public works projects in the face of sudden decreases in revenue that funds such work. Forty-five states have balanced budget requirements yet face unbudgeted increases in emergency spending in response to COVID-19 and unexpected decreases in revenue from gas taxes, tolls, transportation user fees, and a general decline in economic activity. Billions of dollars in public works are being scaled-back, deferred or cancelled.

Though at the same time, many state DOTs are actually accelerating ongoing transportation work to increase safety and reduce costs as less people are utilizing roads and public transit networks. Certain states, California for example, are forging ahead with planning and design for significant infrastructure work despite the forecast of monster deficits on the assumption that the federal government will ultimately step-in and provide stimulus in the context of an overall recovery plan. That bet is informed in two ways. First, to blunt the recession of 2008, the federal government provided $800 billion of fiscal stimulus, $100 billion of which went to infrastructure spending. Both parties of Congress and the President have acknowledged for years the dramatic and immediate need for further improvements to the nation's infrastructure, though with proposals reaching $1 trillion a consensus for funding has never been close. Now, it is likely that ideologies will be easier to reconcile with the health of the economy fully on the line, though the significance of the approaching national election could influence the timing.

The other indicator that the federal government will stimulate the construction industry in response to COVID-19 is the fact that historic stimulus is already underway. In March, Congress passed the $2 trillion CARES Act, the largest ever single injection of federal funds into the economy. In May, the House of Representatives passed the $3 trillion HEROES Act, with billions earmarked for state and local governments, highways and transit agencies. As initially proposed, the HEROES Act does not enjoy the support of either the Senate or the White House but the fact remains that Congress has already contemplated $5 trillion in federal stimulus to combat the economic fallout from COVID-19. Given that early momentum, and the consensus that the 2008 stimulus significantly mitigated the Great Recession, federal spending on, among other things, infrastructure construction will increase significantly in the immediate future.

As recently as my last haircut, construction unemployment was reaching historic lows and contractor backlogs were at an all-time high. The sudden reversal is dizzying, but there is still a great deal to be played out. The obstacles are acute, but the industry is responding with innovation and intensity. Contractors by their nature are resilient and resourceful. Without question the construction industry will navigate this challenge, first to survive COVID-19 and then to thrive in its wake.



Your Company Received A PPP Loan – How To Spend The Money And Obtain Forgiveness

by Jennifer L. Kneeland

On March 27, 2020, the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act" or the "Act") was signed into law by President Trump. Section 1102 of the Act implements the paycheck protection program (the "PPP").

Congress provided two tranches of funding to allow lenders to make PPP loans. The first tranche of $350 billion in loans ran out on April 16th, just two weeks after funds were initially made available to lend. In the face of such fierce demand, a second tranche of $310 billion of funding was made available.

...continued on page 12

Demand for PPP loans cooled, however, as a result of concerns raised by many companies that they could not use the money in accordance with the requirements of the program. In response, on May 13, 2020, the Small Business Administration (the "SBA"), in consultation with the Department of the Treasury, liberalized rules governing how PPP loan funds could be spent. Additionally, the SBA established a safe-harbor that frees businesses that took out loans under $2 million from worry of a subsequent audit focused on the PPP borrower's eligibility to take out the loan in the first place.

On May 28 and June 3, the U.S. House of Representatives and the U.S. Senate, respectively passed similar bills dubbed the Paycheck Protection Program Flexibility Act of 2020 (the "PPPFA"). On June 5, 2020, President Trump signed the PPPFA in to law. The PPPFA modifies the PPP to address areas of unworkability for loan recipients such that it is congruent with the May 13th guidance addressed above that the SBA provided.

This article will (1) address the loosened restrictions placed upon use of PPP funds under the PPPFA, and (2) address concerns surrounding the requirement of "necessity" to be eligible to receive a PPP loan and explain the safe-harbor to ease the "necessity" concern that was put in place by the SBA under its recent May 13th Guidelines for borrowers under $2 million.

Relaxed Requirements On Use Of PPP funds

Many small businesses faced a quandary after receiving a PPP loan. The CARES Act required 75% of loaned funds to be used for payroll expenses and required the loan proceeds to be used within 8 weeks from the initial funding. Thus, despite having cash, small businesses had to remain closed under State or local mandates limiting their ability to use the funds for payroll. Meanwhile, non-payroll expenses mounted, and new expenses arose, such as the cost to adjust interiors and other business functions in order to accommodate for social distancing requirements.

In many cases, it also was more beneficial to an employee to remain on unemployment benefits because the CARES Act injected the unemployment benefit with an extra $600/ week. As a result, even if businesses could open, employees were refusing to return to work. The SBA's May 13th Guidelines attempted to address this concern by requiring PPP loan recipients to notify employees in writing that they should come back to their jobs and the employees would be restored to the payroll. If the employee refused to come back to work, the May 13th Guidelines also required the employer to notify the applicable unemployment benefits administrator of the employee's voluntary decision to reject the offer to come back to work.

The PPPFA goes further than the SBA's May 13th Guidelines to address the concerns and issues initially faced by small businesses in light of the realities of the COVID-19 pandemic. The PPPFA reduces the amount of the PPP loan that must be expended for payroll from 75% to 60%. This change increases the amount of PPP funds that can be used for other expenses from 25% to 40%. To be clear, however, the PPPFA does not change the list of expenses eligible for forgiveness which includes rent, mortgage payments, utilities and interest on loans that were in existence prior to the COVID-19 pandemic.

The second take-away from the PPPFA is that it extends the time period to use PPP funds from 8 weeks to 24 weeks after the PPP loan was initially funded. It was difficult for businesses to spend the relief funds that they obtained through the CARES Act in the 8 week period because they were shut down and unable to operate when its PPP loan was funded. This change in the law is meant to address this difficulty. Further, the PPPFA eliminates the previous requirement for a business to wait 24 weeks after loan funding to apply for forgiveness. Now, PPP loan recipients may apply for loan forgiveness as soon as 8 weeks after loan funding.

Third, the PPPFA pushes back the June 30th deadline to rehire workers established by the CARES Act. Now, the deadline to rehire workers is December 31, 2020. Many PPP loan recipients had trouble rehiring employees by June 30th. Their businesses were not permitted to return to full capacity or faced delayed re-entry into reopening stages set by local officials. In these cases, it was next to impossible for businesses to rehire workers by the June 30th deadline. The PPPFA hopefully resolves this issue.

Fourth, the PPPFA changes the requirement placed upon the PPP loan recipient to keep the same number of employees on its payroll or rehire the same number of full-time and part-time equivalents by June 30th. Previously, this requirement could only be excused if the PPP loan recipient could produce a writing demonstrating an attempt to rehire an employee and the employee's rejection of the offer. For many businesses, particularly those such as restaurants and bars, it was extremely difficult to track down employees who had been

laid off, as many individuals traveled to other jurisdictions where lock-down restrictions were looser in search of work. Thus, in addition to extending the deadline to rehire workers to December 31st, the PPPFA adds exceptions for a reduced workforce. A business can still receive forgiveness if:

(a) It is unable to rehire an employee that was employed by the PPP loan recipient on or before February 15, 2020;

(b) It can demonstrate an inability to hire similarly qualified employees on or before December 31, 2020; or

(c) It can demonstrate an inability to return to the same level of business activity as was in place on or before February 15, 2020.

There is no guidance on what it means to be unable to hire "similarly qualified employees" or what the standard "to demonstrate the inability to return to the same level of business activity" will be.

Finally, the PPPFA extends the repayment term from 2 years to 5 years at 1% interest for loans or portions of loans that are not forgiven. In addition, the first payment will be deferred for six months after the SBA determines that the loan or a portion thereof is not forgiven. It is important to note that this deferral is on top of the present timeframes in place for the lender and the SBA to determine whether or not the loan will be forgiven. Currently, the lender must determine if a PPP loan will be forgiven within 60 days after the loan forgiveness application is made. Then, the SBA has 90 days after the lender's determination to agree or disagree with the lender's assessment. In short, it could be well in to 2021 before a borrower is required to begin making repayments on a PPP loan.

Look-Backs At To Eligibility To Receive A PPP Loan

When submitting a PPP loan application, all borrowers certified in good faith that "[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant." This certification is referred to as the "necessity" requirement. It generated much press in the early-Spring as many PPP recipients, such as Shake Shack, obtained PPP loans and then returned them to the Federal government, stating that they did not "need" the loans and had access to other sources of capital to weather the COVID-19 pandemic. There is a lack of guidance about what it means to meet the "necessity" requirement. As a result, many PPP loan recipients have expressed concern that the PPP loans that they obtained may not be forgiven because it could be determined that they were never eligible in the first place. The May 13th SBA Guidelines attempted to address this issue and established a safe-harbor where loans under $2 million are automatically deemed to be sought by necessity. The SBA reasoned that borrowers below the $2 million threshold are "generally less likely to have had access to adequate sources of liquidity in the current economic environment than borrowers that obtained larger loans." *See* May 13, 2020 SBA Guidelines, Answer to Question 46.

The SBA offered some hope to borrowers over the $2 million threshold by stating that such borrowers whose loans are not forgiven may repay the loan in order to avoid "administrative enforcement and referrals to other agencies based on its determination with respect to the certification concerning necessity of the loan request." *Id.* The SBA, however, did not clarify the repayment timeframe for borrowers whose loans are not forgiven due to ineligibility to participate in the PPP program. The recently enacted PPPFA extends the repayment period from 2 to 5 years, with 1% interest. Thus, it remains the case that a PPP loan may be a cheaper source of cash for businesses than a loan through either conventional or nonconventional lenders, even if it is still unclear whether a business may subsequently be determined to be an ineligible loan recipient

The landscape surrounding the CARES Act, the PPPFA, and other sources of Federal and State government aid in the wake of the COVID-19 emergency changes at a rapid pace. The foregoing information provides only a high-level analysis of some of the issues that businesses face as recovery gets under way. Please consider contacting Watt Tieder and, in particular, its bankruptcy and creditors' rights team led by Jennifer L. Kneeland (703-749-1026) and Marguerite Lee DeVoll (703-749-7046) for further discussion and support.

FIRM NEWS

Recent Events

ICC-FIDIC International Construction Contracts Conference, February 10-11, 2020; São Paulo Brazil. **Shelly L. Ewald** presented on February 11 in a session entitled "Liability issues during the life of the project in construction disputes."

Walter C. Chandler Inns of Court, February 19, 2020; Washington, D.C. **Jennifer L. Kneeland** was the Moderator/Articles Author and presented on "Tips to Successfully Achieve Denial of Discharge to Individual Debtors Who File for Chapter 7 Protection Under the Bankruptcy Code."

American College of Construction Lawyers (ACCL) Annual Meeting, February 20-22, 2020; Tucson, Arizona. **Kathleen O. Barnes** was the Program Chair and **Shelly L. Ewald** spoke on a plenary panel regarding "Demonstrative Evidence: Getting All of Your Bells and Whistles Admitted."

Association of General Contractors, February 26, 2020; Fitchburg, Massachusetts. **Jonathan C. Burwood** presented to the Construction Management Program at Fitchburg State University on the "Legal Obligations of the Construction Manager."

Risk Management in Underground Construction, March 11, 2020; Houston, Texas. **Kathleen O. Barnes** spoke on a panel regarding risk management and contract issues.

Webinars

Coronavirus Impact on Construction Contracts, March 25, 2020. **Shelly L. Ewald** presented on a panel discussing COVID-19's impact on Government Procurement Policies in Public Contracts.

Force Majeure Clauses, Navigating the Impact of the Coronavirus Pandemic on Contract Performance Obligations, April 1, 2020. **Robert C. Niesley** and **Colin C. Holley** presented.

American Road & Transportation Builders Association ("ARTBA"), April 2, 2020. **Christopher J. Brasco** and **Matthew Baker** spoke on a webinar entitled Covid-19: Evaluating Your Contractual Rights And Minimizing Project Risk.

Vermont Bar Association, April 8, 15 and 22, 2020. **Paula Lee Chambers** spoke during a three-part Webinar Series on Foreclosure and Mediation.

Blockchain Technology: The Impact on the Construction, Surety and Legal Industries, April 22, 2020. **John Sebastian**, **Lauren Rankins** and **Brian Padove** presented.

COVID-19 Impacts on Northeast Construction and Mitigation, May 6, 2020. **Jonathan C. Burwood** presented to the claim and underwriting teams for Frankenmuth Surety.

Please note that materials from most webinars, as well as other COVID-19 related materials, can be found on Watt Tieder's COVID-19 Resources Page (www.watttieder.com/covid-19).

Cancelled And Postponed Events

AACE Northeast Symposium, originally scheduled for March 26-27, 2020; McLean, Virginia. **Christopher J. Brasco** and **Matthew D. Baker** are scheduled to speak on liquidated damages (Postponed – TBD).

Society of Construction Law, New England, originally scheduled for April 2020; Boston, Massachusetts. **Jonathan C. Burwood** to speak on "Trends in Construction Insurance, Financing & Technology."

Boards of Contract Appeals Bar Association, originally scheduled for April 23, 2020; Washington, D.C. **Scott P. Fitzsimmons** and **Sarah K. Bloom** will moderate a panel at George Washington University on litigating federal contract cases before the federal Boards. The panel will include judges from the Armed Services Board of Contract Appeals, the Civilian Board of Contract Appeals, and the Federal Aviation Administration Office of Dispute Resolution, among others.

2020 Western States Surety Conference, originally scheduled for April 24, 2020; Seattle, Washington. **Rebecca Glos** and **Amanda L. Marutzky** were scheduled to give a presentation entitled "Can Bonding Establish Knowledge Under the False Claims Act?" (Cancelled).

eDiscovery & Information Governance Retreat, Enterprise Software Ventures, originally scheduled for April 21 and 22, 2020; Newport Beach, California. **Nathan P. Walter** will be moderating, and speaking on, a series of panels regarding eDiscovery & Information Governance, as well as Legal Operations and Law Practice Management.

National Association of Surety Bond Producers 2020 Annual Meeting & Expo, originally scheduled for May 18, 2020; Colorado Springs, Colorado. **Timothy E. Heffernan** is scheduled to speak on "What Have We Learned from Scollick: Keep Your Eyes Open! A Fraud Warning to the Surety Industry."

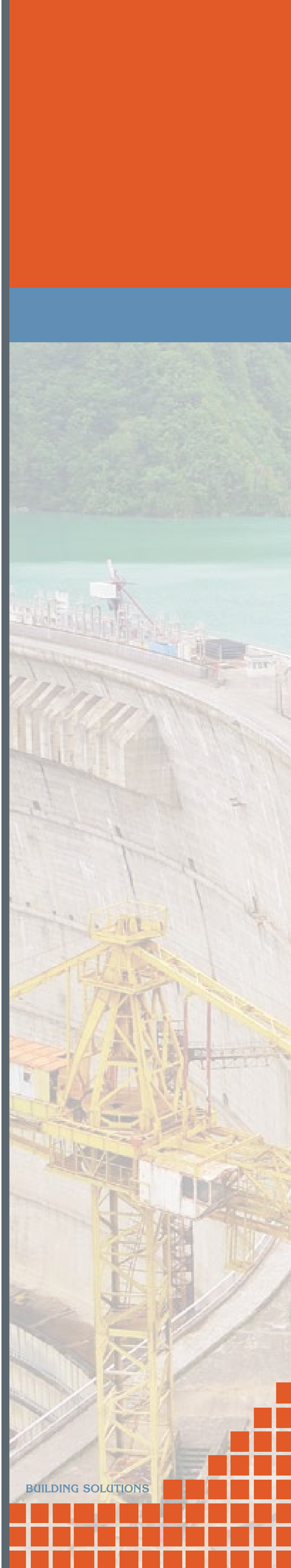
Announcements

Shelly L. Ewald was elected to serve as the Treasurer of the **American College of Construction Lawyers (ACCL)** on February 22, 2020. She was also appointed to the **AAA Construction Industry Panel** as a registered arbitrator in December 2019. Finally, **Shelly** was also admitted to the bar of the **United States Supreme Court** on January 27, 2020.

Publications

National Association of Surety Bond Producers, *Bankruptcy Court: Surety's Interests Bests a Bank's Interests*, **Jennifer L. Kneeland** and **Marguerite L. DeVoll**, January 2020.

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**



Attorneys at Law

1765 Greensboro Station Place, Suite 1000
McLean, Virginia 22102

PRSRT STD
US POSTAGE
PAID
PERMIT #6418
DULLES, VA

1765 Greensboro Station Place
Suite 1000
McLean, Virginia 22102
(703) 749-1000

4 Park Plaza
Suite 1000
Irvine, CA 92614
(949) 852-6700

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

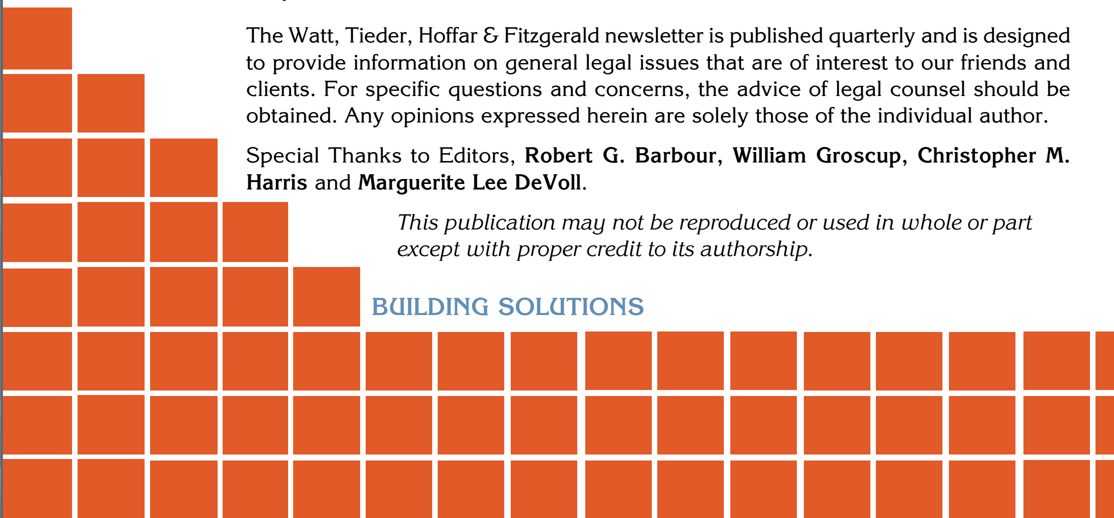
10 South Wacker Drive
Suite 1100
Chicago, Illinois 60606
(312) 219-6900

175 Federal Street
Suite 1225
Boston, MA 02110
(857) 504-1140

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

Independent Law Firm

Global Construction & Infrastructure
Legal Alliance
91, rue du Faubourg Saint-Honoré
75008 Paris, France
Phone 33 (0)1 44 71 35 97



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**, **William Groscup**, **Christopher M. Harris** and **Marguerite Lee DeVoll**.

This publication may not be reproduced or used in whole or part except with proper credit to its authorship.

BUILDING SOLUTIONS