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Preserving Concurrent Delay As A Defense Against The Assessment Of Liquidated Damages, Part II

by Christopher J. Brasco, Senior Partner, Matthew D. Baker, Associate and Noah R. Meissner, Associate

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Part I of this article appeared in the Summer 2019 issue of the Watt Tieder Newsletter. It addressed liquidated damages generally, and also set forth the "emerging rule," in contrast to the more widely accepted Rule of Clear Apportionment.

Legal Challenges To The Emerging "Rule"

The apparent emerging "rule" adopted by some courts threatens the defenses of owner-caused and concurrent delay and contradicts well-established principles of causation. Nevertheless, several arguments exist for contractors faced with the potential consequences of this emerging "rule" of apportionment.

First, the emerging "rule" represents a departure from the evolution of the law of apportionment that has traditionally followed advancements in the science of causation. As the ability to analyze project delays has improved, the law has been more willing to permit apportionment based on responsibility for the damages caused. In contrast, the emerging rule permits the assessment of liquidated damages regardless of cause. Courts that adopt the emerging rule must break with almost a century of doctrinal precedent based on approximating compensatory damages.

Second, the emerging "rule" appears to ignore the distinction between the use of concurrent delay as a sword to permit affirmative contractor recovery and as a shield to prevent the recovery of liquidated damages caused by the owner. The provisions being relied upon to preclude the use of concurrent delay as a defense have their origin in limiting affirmative contractor delay claims. In the context of an affirmative claim, such provisions provide owners with an opportunity to mitigate the damages payable to the contractor for project delay. The logic of enforcing these procedural provisions, however, makes less sense in the context of damages recoverable by the owner. This is particularly the case where the owner is the direct cause of the delay for which it attempts to assess liquidated damages. Any party's recovery of damages for delays it caused, in whole or in part, should not be justified by the contractor's failure to adjust the schedule to reflect the owner's shortcomings.

The distinction between the use of owner-caused delay as a sword as opposed to a shield was discussed in *Stone v. City of Arcola*, 536 N.E.2d 1329 (Ill. App. Ct. 4th Dist. 1989). In *Stone*, the contractor entered into an agreement with the city for the construction of a sanitary sewer facility. The contract contained a provision that the contractor would not be assessed liquidated damages or delay damages where the delay in the work was caused by the owner or originated from unforeseeable causes outside of the contractor's control if the contractor "promptly [gave] written notice of such delay to the owner...." The project at issue in *Stone* was delayed 14 months due to: (i) abnormal rain; (ii) changes in the specifications; and (iii) changes to the method and sequence of the work. Although the city may have had actual notice of these delays, the contractor failed to promptly submit the written notice required by the contract. After the contractor sued to recover withheld project funds, the city counterclaimed for liquidated damages. The trial court ruled in favor of the contractor and found the amount stipulated by the liquidated damages provision to constitute a penalty. In light of this ruling, the appellate court faced the issues of whether the liquidated damages provision was enforceable and whether the

trial court's decision was against the weight of the evidence. Although finding the liquidated damages provision to be enforceable, the appellate court rejected the city's argument that the contractor's failure to follow the written notice provision permitted the assessment of liquidated damages even for delays potentially caused by the city. As noted by the court:

> [T]he failure of the [contractor] to give written notice of the delay may be considered a waiver of a claim for delay, but 'the waiver of a claim for delay does not correspondingly dictate that the party waiving the delay be held liable for the delay.'

Id. The distinction drawn in *Stone* between contractual provisions that allow the use of owner-caused delay as a sword rather than a shield suggests a properly balanced approach to the enforcement of such provisions.

Finally, grounds exist to argue that the emerging "rule" renders the assessment of liquidated damages an unenforceable penalty. The argument that enforcement of procedural provisions limiting the defense of concurrent delay renders the assessment of liquidated damages to be an unenforceable penalty appears largely to be untested, including in key cases such as *Greg Opinski Constr., Inc. v. City of Oakdale*, 199 Cal. App. 4th 1107 (Ct. App. 2011)(applying the emerging "rule," and discussed in more detail in Part 1 of this article). The application of the emerging "rule," however, would appear to contravene several core principles associated with the enforceability of liquidated damages provisions.

For example, liquidated damages provisions are only enforceable when the damages stipulated constitute "a reasonable forecast of the probable damage likely to result from the breach." *See* Restatement (Second) of Contracts § 356 (1981). The causal link between the breach and the stipulated damages amount is essential to ensure the provision does not function as a penalty. The procedural provisions enforced by the emerging rule sever this link between the breach and the stipulated damages amount. By permitting the owner to recover liquidated damages for project delays regardless of whether or not the contractor's actions constituted the but-for cause of such delay, the emerging "rule" permits the assessment of stipulated damages that have no connection to the damages likely to result from the contractor's breach. In the context of construction contracts, liquidated damages provisions generally impose a *per diem* charge for each day of project delay. An underlying assumption of this formula is that each day for which liquidated damages are assessed constitutes a day of delay caused by the contractor. The assessment of liquidated damages for days of delay not caused by the contractor negates this fundamental assumption. By eliminating the causal connection between the breach and the amount of damages recoverable, the emerging rule transforms the assessment of liquidated damages into an unenforceable penalty.

Moreover, liquidated damages provisions are intended to be compensatory rather than punitive. However, by permitting owners to recover damages for delays they caused, the emerging rule permits the recovery of a windfall. Such an outcome is antithetical to long established principles of both contract damages and liquidated damages.

Although largely untested, several meritorious challenges appear to exist to the application of the emerging "rule." Principles of causation are central to the assessment of liquidated damages. The abandonment of these principles by the emerging "rule" would appear to leave it exposed to effective challenge by contractors.

Takeaways For Construction Professionals

In light of the emerging "rule," contractors would be well-advised to protect their ability to rely on the defense of concurrent delay when confronted by the possible assessment of liquidated damages. This begins with a thorough review and understanding of the relevant contractual provisions related to delay, notice, and project completion. As illustrated by courts applying the emerging "rule," all such provisions may impact the assessment of liquidated damages and should be reviewed as a bundle.

Knowledge of the key claims, scheduling, and liquidated damages provisions, however, is not enough. Awareness of contractual requirements must be accompanied by strict compliance with those procedures. Notice requirements for delays and time extension submission requirements should be noted and followed. Regardless of a contractor's desire or intent to pursue compensation for delays, these procedures must be followed to ensure that contractual defenses are preserved in the event of an assessment of liquidated damages at the end of a project.

Conclusion

The future of the emerging "rule" remains uncertain. While decisions applying the emerging "rule" have gained significant attention, several fundamental challenges to

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its application appear to exist. In particular, fundamental principles of causation may provide a safe harbor against the preclusion of the defenses of owner-caused or concurrent delay to the assessment of liquidated damages. Until the fate of the emerging "rule" is resolved, the safest route for construction professionals is stringent observation of all contractual requirements when project delays are encountered. The adoption of the emerging "rule" by some courts illustrates the potential consequences of departing from this fundamental principle of contract administration.

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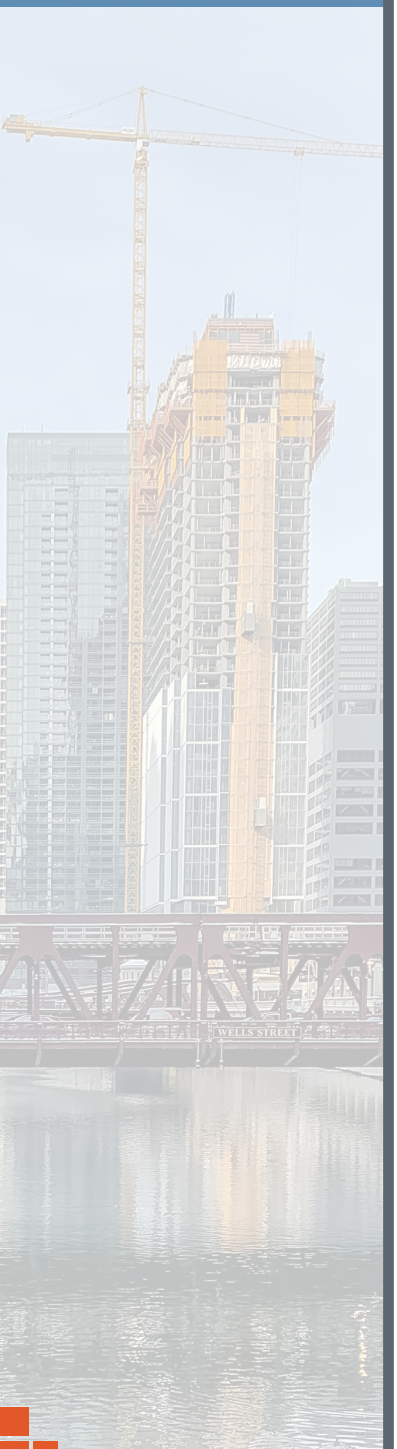

Drone's Eye View: How Drones Are Reshaping The Construction Industry

by Aniuska Rovaina, Associate and Marguerite Lee DeVoll, Associate

Aniuska Rovaina

Marguerite Lee DeVoll

Small unmanned aerial vehicles ("UAVs"), or drones, appear to be everywhere, from flying over vacant lands to hovering alongside high-rise buildings. A possible reason for the increase of drone sightings may be due to their versatile uses, including photography, videography, thermal imagery, and various other forms of capturing data. Drones are produced in many sizes can achieve fast speeds, fit in confined spaces, and reach altitudes that may be difficult to otherwise access. For these reasons, commercial drones are becoming a lucrative tool for a wide range of industries including agriculture, mining, disaster support, and construction. Indeed, a recent report identified the construction industry to be the largest consumer of commercial drones, with a focus on surveying and site mapping. See GOLDMAN SACHS, *Drones: Reporting for Work*, INSIGHTS (2019). This article aims to navigate: (a) the various types of drone usage and applications; (b) how owners, contractors, and design engineers are utilizing drones for projects; (c) the regulations governing the use of commercial drones; and (d) concerns regarding drones.

Small UAVs – Usage And Applications

Aside from providing high-resolution aerial video, small UAVs can capture various types of data that can be used for numerous applications. By using drones, companies can obtain accurate data safely and efficiently in comparison to other methods. Below are a few popular types of technologies used to obtain data in construction planning, tracking, and management:

- GPS Correction Technology: Real-time Kinetics ("RTK") is one GPS correction technology used in the "geotagging" of images. Geotagging adds geographical coordinate information to images that the drone captures as it flies over a project site. Another GPS correctional technology commonly used is Post-Processed Kinematics ("PPK"), where the drone captures aerial images and corrects the geographical position of the project site after the flight. Both RTK and PPK provide accurate GPS information used for surveying and topography. While RTK's real-time technologies may be favored for certain situations, PPK's workflow may be more reliable and accurate because it uses a multi-layering process to complete the surveying.

- Volumetric: The information captured by drones is transmitted to software that calculates volume measurements for certain construction material, like gravel and asphalt. When conducting a field test, drone mapping can accurately estimate the amount of material that needs to be added or removed from a project site.

- 3-D visualization: After a drone captures high-resolution images of a site, the images are then transmitted to software that creates three-dimensional ("3-D") models by compiling all the

aerial images. The final 3-D model consists of a high-definition map of the site that provides a 360° view. The high-definition map includes added textures to easily navigate, view, and find various parts of the design(s) and the construction process. By repeating the visualization process throughout the project and overlaying the various 3-D maps with each other, a time-lapse of the construction process can be created.

- Thermal Imaging: Drones can be equipped with thermal-imaging cameras, which conduct high-resolution thermal inspection of various properties and materials. Most objects give off some level of thermal energy with hotter objects emitting more thermal energy. The drone's thermal-imaging camera detects this thermal energy by recording infrared light levels within its field of view and converts the information to images. Thermal imaging is often used for inspecting roofs, mechanical elements, and underground infrastructures that cannot be easily reached.

Drone Data Application For Various Phases Of A Construction Project

- Surveying Lands: Generally, for construction land surveys, a licensed surveyor is tasked with accurately mapping the location at the project site to ensure that the construction project is completed as designed. The surveyor usually uses hand-held equipment to inspect a wide range of areas around and at the project site, including exterior buildings, elevations, and underground infrastructure. This process can be time-consuming. The surveyor's efforts also may be impacted by weather conditions and varying terrains. Drones are capable of flying for long periods of time, under less than ideal weather conditions, and over different types of terrain. As a result, drone usage can reduce the amount of labor and time required to produce reliable surveys from days or weeks to only several hours. For example, one recent report found that using drones for the surveying process could help complete the survey up to 20 times faster than with hand-held devices. *See* Engineering Council Of India & Pricewaterhousecoopers, Flying High: Drones To Drive Jobs In The Construction Sector (Nov. 2018). The use of drones can also minimize human error in obtaining and processing the same data.

- Improvements In The Bidding Process: Even before construction begins, drones can assist contractors in the bidding process. Sometimes, the amount of available data provided by owners lacks the necessary information for contractors to assess what it will take to complete a project. Other times, bidding packets include inaccurate data that is necessary to properly calculate the project bid. It is often up to the contractor to discover these contractual and factual errors. With drones, contractors can now collect and capture additional data before bidding on the project. Once awarded the bid, the contractor can better assist the owner and/or the design professionals in the planning, designing, and decision-making process to attain the owner's intended purpose for the project.

- Project Management: During the construction phase, drones allow for project managers to monitor specific areas with "as-is" real-time imagery. The real-time imagery allows the parties to more efficiently make decisions regarding future workflow for the construction. Moreover, with 3-D models, contractors can superimpose various drone maps consisting of different layers of the infrastructure to determine whether there are any alignment defects that require repair. Further, instead of having project managers and staff personally administer walk-throughs, drones can access potentially hazardous areas and conduct faster and safer inspections.

- Dispute Resolution: The ability of drones to geotag images to add time and geographical coordinate information creates a paper trail for issues that may arise during the construction process. The contractor can use this information to alert the owner and design professionals in real-time of issues that may arise during the construction process. The parties can then find real-time solutions that minimize construction delays and prevent cost-overruns. This information can also be used to help adjudicate disputes, such as which party bears the responsibility for a particular issue and corresponding delay.

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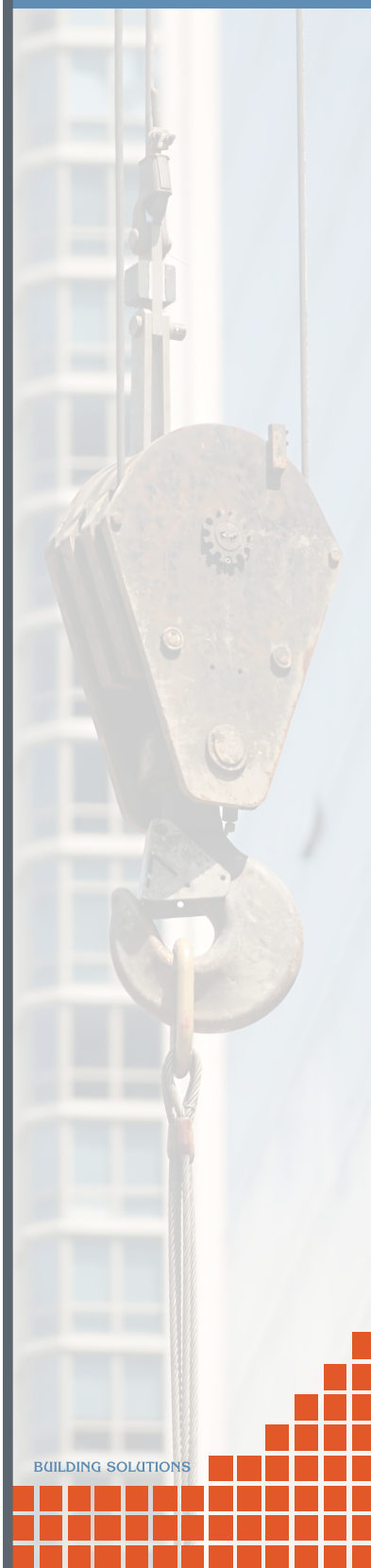

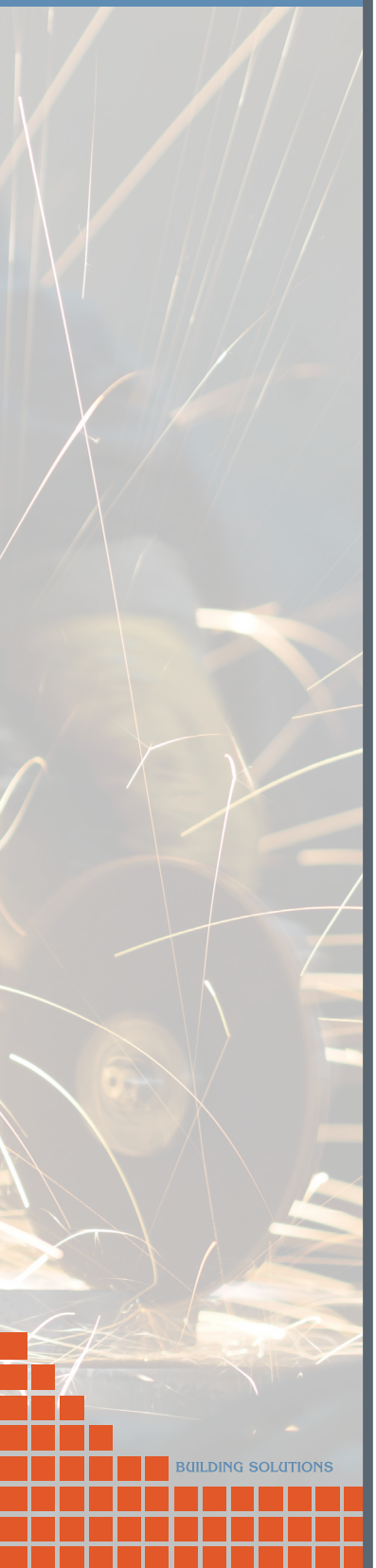

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Federal Aviation Administration Regulations

Generally, the small UAVs that are used commercially are controlled in one of two ways: (i) remotely-piloted drones wherein a pilot on the ground controls the drone via remote link; or (ii) the drone's onboard computer is preprogramed with instructions to complete specified tasks. Currently, the preprogramed drones are more expensive and require additional technical expertise to maintain (and depending on the drone, to program) than remotely-piloted drones.

Regardless of the method of control, companies using drones must adhere to regulations promulgated by the Federal Aviation Administration ("FAA"). The FAA has the exclusive authority to regulate aviation safety, airspace navigation, and air traffic control. The FAA also works with state and local law enforcement to identify and address drone safety concerns. Several states and local law enforcement agencies also have their own regulations regarding the use and operation of small UAVs.

The FAA's regulations on commercial and government use of small UAVs are set forth in the FAA's Air Traffic and General Operating Rules, Small Unmanned Aircrafts Regulations, Part 107, 14 C.F.R. § 107, ("Part 107"). Below is a non-exhaustive list of notable requirements set forth in Part 107:

1. Certification: To operate a drone for commercial or government purposes, an individual must obtain a remote-pilot certificate.

2. Registration: A drone must be registered for operation. Any drone weighing less than 55 lbs. can be registered using the FAA's automated system.

3. Operation:

    a. The pilot, regardless of the method of control, must be within sight of the drone during operation of the drone;
    b. The maximum altitude the drone can reach is 400 feet from the ground, or 400 feet from an infrastructure;
    c. The maximum speed cannot exceed 100 mph;
    d. Drones cannot fly over any person who is not directly participating in the operation of the drone;
    e. Operations can only be conducted in day-light or civil twilight (30 minutes before sunrise to 30 minutes after official sunset); and
    f. The drone can only be operated if there is a minimum weather visibility of 3 miles from the control station, i.e., where the pilot is located.

4. Waivers: FAA may issue waivers for certain Part 107 requirements, as long as the pilot demonstrates that they can operate the drone without endangering other aircrafts or people.

Concerns Regarding Drones

Although drones can be cost-effective and efficient in accomplishing various tasks during the construction process, there are still some concerns about the operation of drones, including shifting employment qualifications, aerial trespass, and privacy issues.

- Shift in Employment Qualifications: Drone pilots are required to be certified. In addition, the information produced by drones and applicable software requires expert analysis before it can be used. Consequently, with the increase of drone usage, there may be a higher demand for skilled or technically proficient workers. Skilled and technically proficient workers generally have more experience and tend to request higher wages from project owners and/or general contractors. Correspondingly, with more accurate and precise data provided by the drones during each phase of construction, the need for lower-skilled labor required to correct any defects at the site may decrease.

- Aerial Trespass: With the increasing number of drones used in the air, concerns over control of public versus private airspace is also growing. Specifically, courts are having to revisit long-established legal precedent regarding where the airspace of private property ends, and public property begins. In a 1946 decision, *States v. Causby*, 328 U.S. 256 (1946), the Supreme Court vaguely defined a person's private property to include the airspace immediately within reach of the property owner while anything above the property was considered public domain. FAA regulations, however, have provided different limitations and allowances as to where commercial drones can fly vis-à-vis private property. Courts may soon have to resolve under what circumstances a commercial drone is deemed to be trespassing on a person's private property in light of the regulation promulgated by the FAA and/or state and local law enforcement.

- Privacy Issues: As federal and state laws attempt to catch-up with drone technology, there is currently insufficient legal guidance regarding personal privacy concerns. Specifically, despite the lucrative benefits of small drone sizes and their capability to capture images that may not otherwise be attainable, the high-resolution imagery raises privacy concerns as drones can often go unnoticed and capture images of people and places previously thought to be unexposed to the public.

Conclusion

Today, drones serve as a valuable tool to capture and process information for a construction project by decreasing safety risks, mistakes, and delays. From land surveys to data mapping, drones allow for owners, contractors, and design processionals to track the progress of a project site with high-resolution aerial imagery at a faster rate than alternative techniques. Still, as the construction industry continues to adopt drones in nearly every aspect of a project, future regulations and court decisions will likely affect how drones can be utilized in the construction industry.

GOVERNMENT CONTRACTS

How Bid Protest Rights May Be Limited At The Court Of Federal Claims

by Ethan J. Foster

Suppose a procuring agency just awarded a contract to your competitor, but you can think of at least three ways in which the agency failed to follow the proper procedures – errors that were prejudicial to your bid. You protest the award to the U.S. Government Accountability Office ("GAO"). The GAO decision is somewhat favorable: the GAO agrees that, for only one of the reasons, the agency violated the procurement procedures. The GAO disagrees with you on the other two grounds. Having suffered no injury from the decision, you wait. The procuring agency then takes corrective action with respect to the prevailing argument, but not with respect to the others. The agency re-awards the contract to your competitor. At this point, you may believe that you can timely protest the re-award on all three grounds at the U.S. Court of Federal Claims. Not so fast. In the U.S. Department of Justice's ("DOJ") view of the law, you may not re-raise arguments at the Court of Federal Claims that you already lost at the GAO.

The DOJ's position is that partial corrective action taken by the GAO, by upholding a bid protest on one or more grounds, serves to limit the scope of issues that can be raised in a subsequent protest at the Court of Federal Claims. In particular, the DOJ has argued (and continues to argue) that, following a successful bid protest and re-award, the only issues open to further protest are those grounds that the GAO upheld and addressed through the corrective action taken. To preserve other grounds that were lost in the initial protest at the GAO, the DOJ maintains that a disappointed bidder must, at the time partial corrective action is taken, protest the scope of the corrective action for not also including such other grounds. The DOJ's position arose from the decision in *Blue & Gold Fleet, L.P. v. United States*. Two sets of cases decided this year, however, demonstrate that the Court of Federal Claims is split over the propriety of the DOJ's efforts to extend the logic of *Blue & Gold Fleet*.

The *Blue & Gold* Waiver Doctrine

In 2007, the United States Court of Appeals for the Federal Circuit issued its well-known *Blue & Gold* decision, holding that any challenges to the terms of a government solicitation not raised before the close of the bidding process are waived as untimely. *Blue & Gold Fleet, L.P. v. United States*, 492 F.3d 1308 (Fed. Cir. 2007). In that case, an incumbent contractor did not protest an award until after the bidding process

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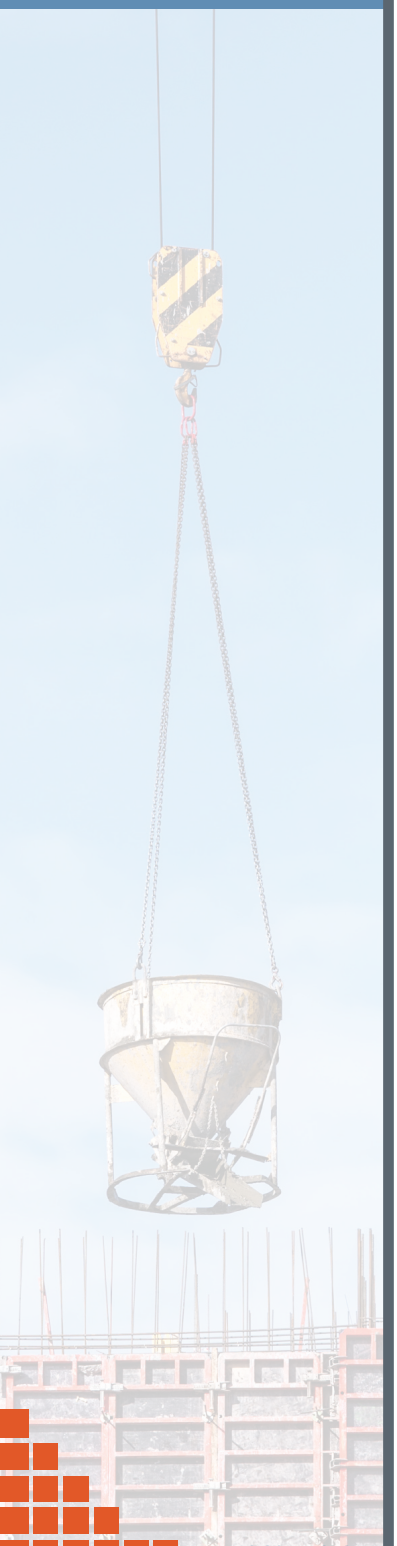

had ended, even though the protest was directed at the terms of the solicitation. In other words, the incumbent contractor already had reason to raise its protest at the start of the procurement process, and could have contested the terms of the protest prior to the award of the contract, but instead waited until it was unseated by a competitor to raise its protest, *post hoc*. The court denied the protest as untimely raised and therefore waived.

The foundation underlying *Blue & Gold*'s holding is that bidders should not benefit by opportunistically waiting to challenge defective aspects of a procurement, because doing so results in costly and time-consuming inefficiencies and reduces the protest process to gamesmanship. *Id.* at 1314–15. In accordance with this principle, judges at the Federal Circuit have since elaborated on the waiver doctrine and found that grounds unrelated to solicitation terms – such as protests premised upon solicitation amendments or inappropriate corrective action – may also be waived if they are untimely raised. *See COMINT Systems Corp. v. United States*, 700 F.3d 1377, 1382 (Fed. Cir. 2012) (applying waiver doctrine to solicitation amendments); *NVE, Inc. v. United States*, 121 Fed. Cl. 169, 179 (2015) (applying waiver doctrine to challenges to corrective action).

The DOJ has aggressively argued that the logic of the *Blue & Gold* waiver doctrine also applies to protest grounds not included in the scope of an agency's corrective action. To be clear, it is possible to challenge the scope of an agency's corrective action for being underinclusive, especially when the underinclusiveness renders the decision to take corrective action futile for the protester. *See Jacobs Tech. Inc. v. United States*, 131 Fed. Cl. 430, 442–46 (2017). If the contractor is protesting the corrective action itself, it may also protest the scope of the corrective action. For example, if a protest includes an allegation that the procuring agency is biased, and the scope of corrective action does not address the bias concerns, it is appropriate to challenge the scope of the corrective action because, at that point, the decision to take corrective action cannot resolve the underlying concern that the whole process is tainted with bias. *Id.* The DOJ, though, has taken a more aggressive position: "to the extent that a bidder perceives any defect, ambiguity, or error regarding the scope of the proposed corrective action, then it must raise that concern before the agency engages in that action should it wish to preserve its objection." *Synergy Sols., Inc. v. United States,* 133 Fed. Cl. 716, 737 (2017) (quoting the DOJ). As this year's cases show, the Court of Federal Claims is split on whether this theory is correct.

The *Novetta* And *Technatomy* Decisions

On July 31, 2019, the Court of Federal Claims issued two opinions in bid protest cases arising from the same underlying procurement. The first, *Technatomy Corp. v. United States*, 144 Fed. Cl. 388 (2019), involved an initial protest by Technatomy, a disappointed bidder in a multiple-award contract, at the GAO. The GAO sustained two protest grounds and denied several others. The procuring agency, the Defense Information Systems Agency, took corrective action limited to the two sustained protest grounds. When Technatomy filed a post-award protest at the Court of Federal Claims on the re-award, the government and intervening awardees argued that the *Blue & Gold* waiver doctrine "should be extended to preclude the protest grounds that Technatomy unsuccessfully raised before the GAO." *Id.* at 391. In short, the government and intervenors argued that "by complaining about technical evaluation determinations that were not revisited during the corrective action, Technatomy is in reality attempting an untimely challenge to the scope of the corrective action." *Id.*

Judge Victor Wolski provided two reasons for his rejection of the DOJ's theory. First, a disappointed bidder cannot bring a protest to the scope of corrective action since it is not at risk of losing an award and only stands to gain from the corrective action. *Id.* The only entities that stand to suffer an injury from corrective action are initial awardees who can lose their award as a result of corrective action. The court warned that "[t]o find otherwise would open the floodgates to bid protests challenging evaluation minutiae brought by parties that had not yet even been excluded from a competitive range." *Id.* at 392.

Judge Wolski's second reason was his determination that the DOJ's theory undermined the purpose of the *Blue & Gold* waiver doctrine. By timely raising protest grounds at the GAO, a bidder spurns the gamesmanship that *Blue & Gold* discourages. The GAO provides an early venue for such protests, but to punish GAO protesters for not re-raising all of their arguments immediately after their GAO protest undermines the incentive to bring their GAO protests in the first place; i.e., protesters should not incur a greater risk of waiving their protest rights by lodging an initial protest at the GAO. Indeed, the act of filing a GAO protest serves to preserve protest grounds. *Id.* As the court noted, "[f]ar from waiving these protest grounds, Technatomy preserved them by including them in its GAO protest." *Id.* Also, "[w]hile the extension of *Blue & Gold* urged by the government and two intervenors would no doubt make the GAO a less attractive forum for bid

protests, the court does not see how requiring winning GAO protesters to protest their own corrective actions can be considered efficient." *Id.* Because *Blue & Gold* aims at efficiency, an extension of the waiver doctrine as requested by the DOJ would undermine that goal. The court reached essentially the same conclusion in response to nearly identical arguments raised by the DOJ in *Novetta, Inc. v. United States*, No. 19-330C, 2019 WL 3815799, at *2 (Fed. Cl. July 31, 2019).

The *Anham FZCO* Decision

Two months after issuing its decision in *Technatomy* and *Novetta*, the Court of Federal Claims considered a similar argument by the DOJ and found the government's position more persuasive. In *Anham FZCO v. United States*, 144 Fed. Cl. 697 (2019), an incumbent contractor filed a post-award protest challenging the Defense Logistics Agency's ("DLA") contract award to a competitor for food supply services for deployed United States troops. After the GAO denied some of the protester's concerns, the DLA announced it would take corrective action and did not include those denied concerns in its declared scope. *Id.* at 717–19, 723. Judge Patricia Campbell-Smith ruled that the protester's failure to object to the scope of corrective action constituted waiver of several arguments since "plaintiff was on notice that it should have raised the issue in response" and had the opportunity to object to the declared scope of corrective action. *Id.* By failing to object to the scope of corrective action until after a second award, the plaintiff had failed to timely preserve those protest grounds. *Id.* It did not matter that the plaintiff was a disappointed bidder rather than a presumptive awardee. The court found that the plaintiff must continuously preserve its protest grounds by insisting that all of them be included in the scope of corrective action. Clearly, the *Anham FZCO* decision diverges from the decisions in *Novetta* and *Technatomy*.

Takeaways For Contractors

Contractors should take nothing for granted. Given the uneven legal landscape of the *Blue & Gold* waiver doctrine, contractors should not assume that the scope of corrective action is irrelevant to the agency actions they should consider protesting. Until the Federal Circuit addresses the split between the Court of Federal Claim's recent decisions, contractors should prepare for the worst. That means two things, depending on whether a contractor is an initial awardee or non-awardee. First, if a contractor is an initial awardee and is threatened by corrective action, it should promptly protest the *decision* to take corrective action, and possibly its scope if it seems overbroad. After all, corrective action puts the *award* at risk. Second, non-awardees should consider protesting the *scope* of corrective action, even if it results from a partially favorable GAO decision. An underinclusive scope of corrective action may put *future protest grounds* at risk. Non-awardees in this situation should ensure that they obtain a notification of the intended corrective action and pay close attention to the scope of the corrective action being taken. If they are dissatisfied with the intended scope of corrective action, they should consider protesting it. Even if the protest is denied or dismissed, taking that extra precautionary step may prevent the DOJ from asserting that arguments lost at the GAO were waived in a post-award protest at the Court of Federal Claims.

Federal Circuit On Surety Rights: Government Cannot Create Jurisdiction Where It Does Not Exist

by Nicole C. Gregory, Associate

On October 29, 2019, the United States Court of Appeals for the Federal Circuit ("Federal Circuit") issued a decision, *Guarantee Company of North America, USA v. Ikhana, LLC*, that has important consequences for sureties on federal projects. Specifically, the Federal Circuit concluded in *Ikhana* that, under the Contract Disputes Act ("CDA"), the ASBCA lacked jurisdiction over claims even though the claims at issue were being pursued against the government under a settlement agreement between the surety and the government that expressly contemplated that the surety would be allowed to assert those claims. The *Ikhana* decision is an extension of prior jurisprudence

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holding that the ASBCA lacks jurisdiction over sureties' claims that arise prior to a takeover agreement with the government. Here, the court clarified that even when the government and a surety enter into a settlement contract providing that the surety can pursue its principal's claims, the ASBCA lacks jurisdiction over any claim a surety asserts that arises pre-settlement contract. The rule emerging from *Ikhana* (and the precedent on which it was decided) is clear. When it comes to bonding federal contracts, sureties may have a valid assignment but one which, from a jurisdictional standpoint, serves them no purpose.

Background

In September 2013, the United States Army Corps of Engineers (the "Corps") entered into a contract with Ikhana, LLC (Ikhana) to build a secured access lane and remote screening facility at the Pentagon. The federal contract required Ikhana to furnish performance and payment bonds, which it secured through Guarantee Company of North America ("GCNA"). GCNA required Ikhana to execute a general indemnity agreement that assigned GCNA all rights under the federal contract if Ikhana defaulted or if GCNA made payment on any bond.

Throughout the course of the project, problems with the work site and contract modifications caused significant delays and cost overruns. Ikhana submitted several claims to the contracting officer for additional compensation and an extension of the project deadline. The Corps refused to issue a final decision on Ikhana's claims, and instead, terminated Ikhana for defaulting on the contract. Ikhana appealed the termination decision and the claims for additional compensation to the ASBCA.

After the Corps filed a claim against GCNA's performance bond, GCNA and the Corps entered into a settlement agreement. Believing that GCNA's general indemnity agreement assigned GCNA all of Ikhana's rights, GCNA agreed to dismiss Ikhana's pending appeals before the ASBCA as part of the settlement agreement.

GCNA sued Ikhana for declaratory judgment in the Eastern District of Virginia, seeking a declaration that the indemnity agreement authorized GCNA to intervene and dismiss Ikhana's pending appeal. The district court stayed GCNA's action pending resolution of Ikhana's appeal. GNCA moved to intervene and withdraw Ikhana's appeal on the grounds that GCNA was assigned Ikhana's rights under the federal contract. The ASBCA denied GCNA's motion to intervene, however, based upon its finding that GCNA lacked standing. GCNA then appealed to the United States Court of Appeals for the Federal Circuit.

Federal Circuit Limits Sureties' Rights To Bring Claims

Reviewing the ASBCA's conclusions de novo, the Federal Circuit affirmed the ASBCA's decision to deny GCNA's motion on the grounds that that the ASBCA lacked jurisdiction to hear GCNA's claims. The CDA, which governs the ASBCA's jurisdiction, only permits contractors to appeal contracting officers' decisions to the ASBCA. A contractor, as defined by the CDA, is a "a party to a Federal Government contract other than the Federal Government." Although Ikhana assigned GCNA its rights under the indemnity agreement, the court noted that "[a] party seeking to supplant the plaintiff must be able to show that it could have initiated the complaint on its own." Because GCNA is not considered a contractor in the context of the CDA, the court found that GCNA could not commandeer Ikhana's appeal given that GCNA could not have directly appealed the contracting officer's decisions to the ASBCA in the first place.

The Federal Circuit, however, has held in several cases that when a surety executes a takeover agreement with the government the surety is treated as a contractor under the CDA and may appeal decisions directly to the ASBCA. Because a surety is only considered a contractor under its takeover contract with the government, the surety has no right to bring claims arising before the execution of the takeover agreement. Thus, despite any indemnity agreement, the surety is unable to assert any pre-takeover agreement claims of its principal.

Although *Ikhana* did not involve a takeover agreement, the court makes clear that the same principles apply to a settlement agreement between the government and a surety. Specifically, the Corps and GCNA entered into a settlement agreement that attempted to recognize Ikhana's assignment of its rights to GCNA. In affirming the ASBCA's decision, the Federal Circuit established that the government cannot create jurisdiction where it does not exist. As in the cases involving takeover agreements, *Ikhana* illustrated that a surety who enters into a settlement agreement with the government may only assert claims that arise subsequent to the execution of the settlement agreement.

The settlement agreement in *Ikhana* presented an unlikely situation where the government actually preferred that the surety possess the rights of its principal. In a more likely

scenario, the government will oppose a surety's ability to assume its principal's rights and the Federal Circuit's decision in *Ikhana* benefits the government by imposing a clear temporal limitation on the claims that a surety may pursue against the government. Regardless of whether the surety takes over its principal's contract or settles with the government, this opinion clarifies that a surety only has rights to claims that arise *after* it contracts directly with the government.

Unusual Concurrence

The most interesting discussion in the Federal Circuit's opinion, however, may be Judge Wallach's concurring opinion, where he emphasizes the tension between the CDA, which limits ASBCA appeals to only contractors, and the Miller Act, which requires all contractors to post performance and payment bonds on federal contracts. As a general matter, when a principal defaults, a surety is expected to ensure that the federal contract is completed. In *Ikhana*, however, the Federal Circuit made it clear that this obligation does not carry with it the protections afforded by the surety's ability to assert claims assigned to it under the General Agreement of Indemnity. Specifically, under *Ikhana*, the surety cannot seek redress for claims that pre-date any takeover or settlement agreement. In finding that these two fields of public contract law are discordant, Judge Wallach expressed his belief that the precedential cases on which the decision in *Ikhana* rests were wrongly decided.

Judge Wallach's concurrence reasoned that the precedent set forth in two Federal Circuit cases were heavily based on the Senate Report that addressed the policy rationales supporting the creation of the CDA. The CDA's goal in limiting appeals to only contractors was to narrow the claims to those between the government and "a 'single point of contact'— the prime contractor." Judge Wallach's concurring decision argued, however, that a closer read of the Senate Report indicated that the portion relied upon by the Federal Circuit's precedent relates wholly to precluding *subcontractors*, not sureties.

Judge Wallach further noted that the Federal Circuit's interpretation of the Senate Report, and the basis of such in Federal Circuit opinions, bring government contracting law into conflict with basic principles of suretyship and contract law. Judge Wallach argued that a surety's ability to assume all legal rights under indemnity principles are well-defined in contract law and should apply in the situation at hand. Distinguishing a surety from a subcontractor, Judge Wallach's concurring opinion noted that a surety is obligated to engage and negotiate with the party seeking performance to ensure that a federal contract is completed. As a surety must pick up and remedy the situation that a defaulting principal has left, sureties should have a corresponding right to intervene in any pre-takeover litigation involving the principal. In Judge Wallach's view, sureties like GCNA should not be prevented from seeking redress for pre-default disputes on the grounds that they lack standing to assert those claims before the ASBCA.

Judge Wallach further noted that *Ikhana* "is an appropriate vehicle to review our precedent and to resolve a question of exceptional importance, as the issue is raised squarely by the facts." He also noted that the majority's decision in *Ikhana* may instead have far reaching implications for the surety industry because sureties may be reluctant to bond federal projects if they lack the ability to obtain an enforceable assignment of the contractor's rights in the event of a default. Additionally, sureties may charge a higher rate for services due to the heightened financial risk. Despite his concerns, Judge Wallach sided with the majority because the majority's decision rests squarely on precedent.

Conclusion

The Federal Circuit's opinion in *Ikhana* reinforces a bright-line rule: on federal projects, the ASBCA has no jurisdiction to hear claims asserted by a surety if the claim at issue arose prior to a takeover agreement or settlement agreement. In fact, the same outcome holds even if the government expressly consented in the settlement agreement that the surety *could* assert the defaulted contractor's pre-takeover claims. Following precedent, the court reiterated that the ASBCA does not have jurisdiction over any sureties' claims that arise prior to the surety's agreement with the government. Whether the agreement is in the form of a takeover or a settlement, the ASBCA will *only* have jurisdiction over a surety's claims that arise post-agreement. As such, and as in *Ikhana*, sureties will not be entitled to any additional compensation for wrongful termination claims that arose under the federal contract between its principal and the government.

Although the Federal Circuit declined in *Ikhana* to resolve any potential errors in its previous precedent, it is worth monitoring this issue to see if the court will follow Judge Wallach's admonition and broaden a surety's ability to assert claims under federal contracts that predate the surety's takeover or settlement agreement.

Jane G. Kearl

Trailblazing California Consumer Privacy Protection Act Requires Review Of Data Policies And Procedures Nationwide

by Jane G. Kearl, Senior Partner and Colin C. Holley, Partner

Colin C. Holley

Businesses that work with California residents, or use information regarding California residents, must pay close attention to California's new privacy protection act. The California Consumer Privacy Act of 2018 (the "CCPA") has a potential national reach and will greatly change the way certain businesses interact with California residents.

The first data protection privacy act of its type in America, the CCPA continues the trend that began with the European Union's 2016 General Data Protection Regulation. Codified as California Civil Code sections 1798.100 to 1798.198, and effective January 1, 2020, the CCPA regulates how affected businesses compile, use, sell, store, and protect California residents' consumer information.

Businesses Governed By The CCPA

Subject to certain limited carve-outs, the CCPA will be applicable to any company that meets the following criteria:

(a) is organized or operated for profit;
(b) (i) has annual gross revenues of more than $25 million, or (ii) annually buys, sells, receives, or shares the personal information of 50,000 or more consumers, or (iii) derives 50 percent or more of its annual revenue from selling consumers' personal data;
(c) does business in California; and
(d collects or processes a California resident's personal information.

CA Civ. Code §1798.140(c).

Businesses that "control" or are "controlled by" or have "common branding" with a business which meets the above criteria will also be governed by the CCPA.

Under Civil Code section 1798.140(o), "personal information" will be broadly defined as "information that identifies, relates to, describes, is capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household." Without limiting the breadth of this definition, section 1798.140(o) lists eleven categories of data that constitute "personal information," including such basic items as name, social security number and similar identifiers, credit card information, IP addresses, and more unusual items such as biometric information, and audio, electronic, visual, thermal, olfactory or similar information; even inferences that could be gathered from other protected information is protected in its own capacity. CA Civ. Code § 1798.140(o)(1).

The CCPA Will Have Applicability To Certain Transactions Outside Of California

The CCPA will have a provision that specifically addresses geographic scope. Civil Code section 1798.145(a) will provide, in pertinent part: "The obligations imposed on businesses by this title shall not restrict a business's ability to…(6) collect or sell a consumer's personal information if *every aspect of the commercial conduct takes place wholly outside of California.*" (Emphasis added.)

The section then specifies that commercial conduct takes place wholly outside of California only if all of the following apply:

- the personal information was collected 'while the consumer was outside of California;'
- no part of the sale of the consumer's personal information occurred in California; and
- no personal information collected while the consumer was in California is sold.

Given these criteria, companies located outside of California, but doing business with California consumers while the consumer is within California, would be bound by the CCPA if the other criteria are met – i.e., the businesses would not be excluded solely by virtue of their out-of-state location.

General Requirements Of The CCPA

The CCPA will grant broad new rights to covered consumers. Under the CCPA, a covered business must put into place protocols to protect these new rights. These rights include the consumer's right to:

- notice of the protections of the CCPA;
- access the consumer's data;
- require deletion of the consumer's data;
- opt-out of the selling of the consumer's data;
- be free from discrimination for exercising its rights under the CCPA, subject to limited exceptions; and
- improved remedies in the event of a data breach, including penalties between $100 and $750 if the business does not cure the violation within 30 days.

Additionally, government regulators may impose increased remedies, up to $7,500 per violation, for data breaches.

The CCPA will provide specific guidance regarding mandatory protocols to protect these new rights. Civil Code section 1798.130 will provide that a covered business must "[m]ake available to consumers two or more designated methods for submitting requests for information required to be disclosed…including, at a minimum, a toll-free telephone number, and if the business maintains an Internet Web site, a Web site address. For businesses that maintain an Internet Web site, Civil Code section 1798.135 further provides that such businesses shall, in a form that is reasonably accessible to consumers:

1. Provide a clear and conspicuous link on the business's webpage, titled "Do Not Sell My Personal Information," to a page that enables a consumer to opt-out of the sale of the consumer's personal information. A business shall not require a consumer to create an account to direct the business not to sell the consumer's personal information.
2. Include a description of a consumer's rights along with a separate link to the "Do Not Sell My Personal Information" page in: (a) its online privacy policy or policies if the business has an online privacy policy; and (b) in any California-specific description of consumers' privacy rights.

Section 1798.135 will further provide, however, that if the business maintains a separate and additional homepage that is dedicated to California consumers and that homepage includes the required links and text, and the business takes reasonable steps to ensure that California consumers are directed to the homepage for California consumers (and not the homepage made available to the public generally), the business is not required to modify its *public* homepage so as to conform with the aforementioned requirements.

In addition to these notification protocols, the CCPA will impose, in Civil Code section 1798.130, a requirement that covered businesses provide various disclosures and other rights provided under the CCPA to consumers upon receipt of a "verifiable consumer request," and that businesses develop procedures to ensure that personal information is not released to others fraudulently claiming to be consumers.

Third Party Liability And Safe Harbor Provisions

Importantly, businesses will be responsible for data collection, use, sharing, storage, and deletion. They will also be responsible for ensuring that such procedures are followed by their "service providers." Thus, a covered business must not only ensure accurate privacy notices and policies, data inventories and processes, as well as that individual rights are correctly protected, but the business also has a duty to ensure that their providers are also CCPA compliant.

The CCPA will provide certain safe harbor provisions. For purposes of the CCPA:

> A business that discloses personal information to a service provider shall not be liable under this title if the service provider receiving the personal information uses it in violation of the restrictions set forth in the title, provided that, at the time of disclosing the personal information, the business does not have actual knowledge, or reason to believe, that the service provider intends to commit such a violation.

CA Civ. Code §1798.145(h).

To take advantage of the protection to be provided by section 1798.145(h), a business will need to (1) ensure that it discloses personal information of consumers only to "service providers," and (2) take steps to maximize its ability to later argue it did not have reason to believe the service providers intended to commit a violation of the CCPA.

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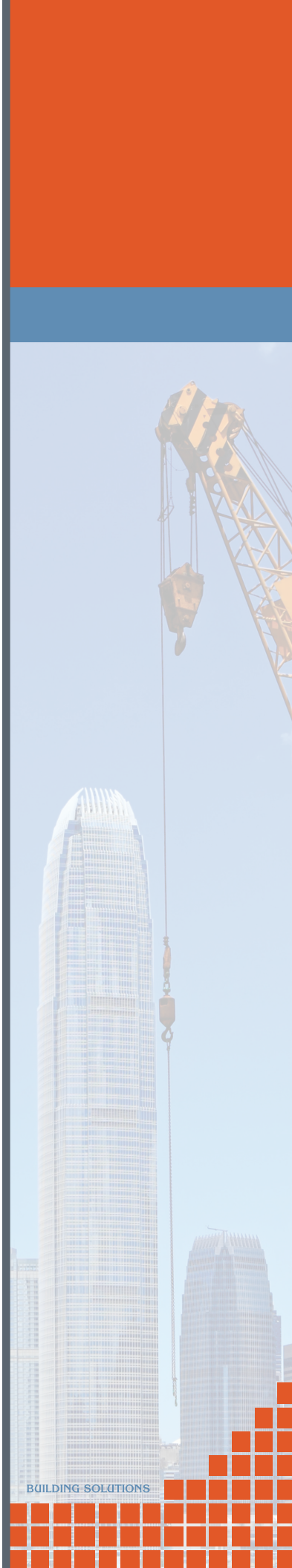


Civil Code section 1798.140(v) will define a "service provider" as an entity that:

> [P]rocesses information on behalf of a business and to which the business discloses a consumer's personal information for a business purpose pursuant to a written contract, provided that the contract prohibits the entity receiving the information from retaining, using, or disclosing the personal information for any purpose other than for the specific purpose of performing the services specified in the contract for the business, or as otherwise permitted by this title, including retaining, using, or disclosing the personal information for a commercial purpose other than providing the services specified in the contract with the business.

Accordingly, to ensure that the subcontractors/trades with which it does business are deemed "service providers" under the CCPA, businesses should consider carefully the terms of these contracts. Specifically, they should consider whether it is necessary to expressly reference the CCPA and include an express statement that the subcontractor/trade is prohibited from retaining, using, or disclosing personal information provided for any purpose other than for the specific purpose of performing the services specified in the contract, or as otherwise permitted by the CCPA.

Because the CCPA is a complex act with many nuances beyond the scope of this article, owners and contractors are urged to consult with counsel to review all requirements of the CCPA, as well as measures and precautions to implement to ensure compliance.

California Enacts Sweeping "Tenant Protection" Measures For Multi-Family Developments

Surprising many developers, California enacted state-wide rent control in 2019. California Assembly Bill 1482 (or "AB 1482") was signed by California Governor Gavin Newson on October 8, 2019. The law, known as the "Tenant Protection Act of 2019," will be in effect from January 1, 2020 to 2030 (unless extended), and generally restricts owners of multi-family housing and corporate property owners from annually increasing rent more than 5% plus inflation, or 10%, whichever is less, statewide. Also under AB1482, evictions for applicable housing will be limited, with owners faced with either supporting a "just cause" eviction or paying the tenant to vacate under certain permitted circumstances. Limited exceptions to the rent control and "just cause" eviction provisions include certain single-family housing not owned by corporations or REITs, duplexes, dormitories, and housing built within the last 15 years.

Other requirements under the law include statutory notices that owners must provide to all tenants advising them of their rights, including whether or not the property is exempted from rent control and "just cause" evictions.

Given the caps on rent and the "just cause" evictions, multi-family property returns may likely plateau, but property taxes, mortgage rates, and other expenses will continue to increase beyond a property's first exempted 15-years—and steadily so until, some would argue, the owner's operating cost-per-unit exceeds each unit's rent. Before AB 1482, California owners could mitigate these losses with rent increases and economic evictions. However, under the new regulations, those choices may no longer be an option for many residential properties.

Developers and property owners are urged to consult with experienced real estate counsel to determine how this sweeping new law applies to their property.

FIRM NEWS

Recent and Upcoming Events

Virginia State Bar 40th Annual Construction Law and Public Contracts Seminar, November 1, 2019; Charlottesville, Virginia. **Jennifer L. Kneeland** and **Marguerite Lee DeVoll** gave a presentation entitled "From the Surety's Perspective: When a Contractor Hits the Zone of Insolvency or Files for Bankruptcy."

American Road & Transportation Builders Association's ("ARTBA") Central Regional

Meeting, November 6-7, 2019; Savannah, Georgia. **Christopher J. Brasco** and **Matthew D. Baker** presented on liquidated damages.

IGV Retreat Series, December 10th, 2019; Newport Beach, California. **Nathan P. Walter** will speak on "The Human Mind in the Age of Intelligent Machines," and "Specialized eDiscovery: Rethinking the Notion of Relevancy."

Construction SuperConference, December 16-18, 2019; Los Angeles, California. **Shelly L. Ewald** will speak on December 17 in two programs entitled "Is There a 'Gold Standard' in Schedule Delay Analysis? When is Contemporaneous Schedule Analysis Not the Right Method? Choosing the Right Schedule Analysis Method for Your Case," and "Know Your Audience: Customizing Jury Trial Skills for a Mediation."

ICC-FIDIC International Construction Contracts Conference, February 10-11, 2020; São Paulo Brazil. **Shelly L. Ewald** will present on February 11 in a session entitled "Liability Issues During the Life of the Project in Construction Disputes."

Announcements

Christopher J. Brasco was awarded the **Paul F. Phelan Memorial Award** which is "given annually in recognition of outstanding contributions to the ARTBA Materials & Services Division and the transportation construction industry as a whole." *See* https://newsline.artba.org/2019/09/23/2019-division-award-winners-announced/.

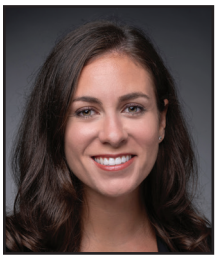
Hanna L. Blake, the Chair of the **Virginia State Bar Construction Law and Public Contracts** section, received a plaque on behalf of the Board of Governors from the Virginia State Bar to commemorate the 40th Anniversary of the founding of the section, in Charlottesville, Virginia on November 1 - 2, 2019 at the 40th Annual Construction Law Seminar.

Publications

Construction Disputes: Representing the Contractor, Fourth Edition, "*Proving and Pricing Unabsorbed Home Office Overhead Claims*," **Adam M. Tuckman** and **Aniuska C. Rovaina**, Wolters Kluwer.

Fidelity & Surety Law Committee's Fall 2019 Newsletter, *Delegated Design and the Black Hole of the Inartfully Drafted Contract*, **Albert L. Chollet** and **Sara M. Bour**. **John E. Sebastian** served as editor for this issue.

New Associates



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Thomas E. Minnis is also an associate in Watt Tieder's McLean office. Tom focuses his practice on construction, government contracts, and suretyship law. He joined Watt Tieder after clerking for the firm as a summer associate. Tom graduated cum laude from George Mason University School of Law in 2019. While in law school, Tom was a member of the George Mason Law Review, an intern at the Fairfax County Circuit Court, and a clerk for the Neighborhood Legal Services Program.

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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**.

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