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Winter 2021

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Christopher J. Brasco

"Concurrent Events" And Other Scheduling Issues In The News, Part 2

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

Matthew D. Baker

This article considers common technical and legal concurrent delay flashpoints, the emerging trend of using scheduling techniques and contractual provisions to determine the concurrency conundrum, and insights learned from recent court decisions applying such provisions. Part 1 appeared in Watt Tieder's Fall 2020 Newsletter.

Contracting Around Concurrency: The Rest Of The Story

In addition to utilizing float sequestration techniques to pre-determine delay disputes, project stakeholders are also increasingly incorporating provisions "reinterpreting" concurrent delay into their contracts. Such provisions may contractually define concurrent delay, stipulate to the effect of a finding of concurrent delay, or provide procedural prerequisites to establishing and claiming concurrent delay. The proliferation of these provisions further illustrates how concurrency disputes may be determined by the contract documents more so than the parties' performance.

- **Defining Concurrent Delay**

Parties use contracts to allocate project risks. Consequently, it is not surprising that project stakeholders would attempt to use contract provisions to create increased certainty in delay disputes. Such provisions are increasingly addressing delay exposure by addressing schedule criticality and its inter-related forerunner – concurrency.

A cursory review of standard construction contract specifications used by state transportation departments illustrates not only the trend of defining what constitutes "concurrent delay" but also the possible implications of such definitions. Several states have adopted specifications that would appear to define "concurrent delay" narrowly at least when such definitions are read by themselves. For example, the Ohio Department of Transportation's Construction and Material Specifications provides in relevant part that "[c]oncurrent delays are separate critical delays that occur at the same time." § 108.06(F) (2019 Edition) (Online Version 7/17/2020). The Colorado Department of Transportation's Standard Specifications for Road and Bridge Construction define "concurrent delay" as "[i]ndependent delays to critical activities occurring at the same time." § 108.08(c)(3) (2019). Similarly, the Idaho Transportation Department's Standard Specifications for Highway Construction notes that concurrent delays "[a]re independent critical activity delays occurring at the same time." § 101.04.

Other state departments of transportation, however, have adopted specifications which seem to define "concurrent delay" in a manner that would appear to be more consistent with a broader approach. For example, the Utah Department of Transportation's Standard Specifications define "concurrent delay" as "a non-compensable delay that occurs when both the Contractor and the Department independently delay work on critical path activities during *approximately* the same time period." § 00777, 1.4(F)(2). Such an approach may leave open the possibility that delays occurring within the same analysis period could be considered concurrent.

Finally, some state departments of transportation have adopted definitions of concurrency which may have other implications. The Minnesota Department of Transportation's Standard Specifications for Construction interestingly states in relevant part that "[c]oncurrent delays are independent sources of delay that occur at the same time." § 1806.2(D) (2018 Edition). Such a definition, at least standing on its own,

may permit delays to activities with a negative float path but not the longest negative float path to be considered concurrent delays.

- **Defining The Effect Of Concurrent Delay**

A different genre of contract provision attempts to stipulate what effect concurrent delay will have including if and when a contractor will be entitled to a time extension. A contractor is generally entitled to a time extension when a contractor-caused delay occurs concurrently with either an owner-caused compensable delay or a no-fault excusable delay. Some owners, however, are incorporating provisions into their contracts that alter these well-established principles. For example, provisions such as the following seek to limit when concurrency will entitle the contractor to a time extension:

> Concurrent delays are separate critical delays that occur at the same time. When an excusable, non-compensable delay is concurrent with an excusable, compensable delay, the Contractor is entitled to additional time but not entitled to additional compensation. *When a non-excusable delay is concurrent with an excusable delay, the Contractor is not entitled to a time extension or additional compensation.*

Tennessee DOT, "Standard Specifications for Road and Bridge Construction," § 108.07 (January 1, 2015), (defining "excusable, non-compensable delays" as those "that are not the fault of either the Contractor or the Department" and "excusable, compensable delays" to be "delays affecting the critical path of Work that are determined to be the result of changes in the Work.").

The above provision seeks to preclude the contractor from obtaining a time extension when its own delay is concurrent with an excusable, no-fault delay and possibly even a compensable owner-caused delay. The following similar provision even more unambiguously limits the contractors' entitlement to a time extension in the face of concurrent delay:

> If an Unexcused Delay occurs concurrently with either an Excusable Delay or a Compensable Delay, the maximum extension of the Contract Time shall be the number of Days, if any, by which such Excusable Delay or Compensable Delay exceeds the number of Days of such Unexcused Delay.

Under this provision, the contractor is not entitled to a time extension until its own delay is resolved and either a compensable owner-caused delay or an excusable delay is the sole source of delay. Such a provision largely eviscerates the concept of concurrency and significantly increases the contractor's exposure to delay risks.

- **Procedural Hurdles To Establishing Concurrent Delay**

Notice of claim provisions are a common feature of most construction contracts. How strictly such provisions will be enforced varies by jurisdiction. Many a compensable delay claim, however, has faltered in the face of contractual notice problems. Concurrent delay is frequently viewed as a defensive shield. Such delay can protect an owner from a compensable delay claim as well as protect a contractor from a liquidated damages assessment. Some courts, however, have recently applied notice of claim and other procedural provisions to preclude parties who have failed to follow contractual requirements from raising concurrent delay as a defense.

For example, in *Greg Opinski Constr., Inc. v. City of Oakdale*, 199 Cal. App. 4th 1107 (Ct. App. 2011) the intermediate California Court of Appeal enforced various procedural/notice provisions to preclude the contractor from raising concurrent delay as a defense to the owner's assessment of liquidated damages. As a defense to the assessment of liquidated damages, the contractor argued that the delay at issue was caused by the owner. However, the contract contained certain provisions conditioning the contractor's entitlement to a time extension on timely notice and submission of a request for a time extension. The contractor failed to follow this procedure. Consequently, the trial court entered judgment against the contractor for liquidated damages. On appeal, the contractor argued that liquidated damages could not be awarded if the owner caused the delay regardless of whether the contractor followed the contractor's procedural requirements. The appellate court, however, rejected this argument and affirmed the trial court's decision reasoning that:

> If the contractor wished to claim it needed an extension of time because of delays caused by the city, the contractor was required to obtain a written change order by mutual consent or submit a claim in writing requesting a formal decision by the engineer. It did neither. The court was correct to rely on its failure and enforce the terms of the contract. It makes no difference whether Opinski's timely performance was possible or

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> impossible under these circumstances. The purpose of contract provisions of the type [at issue] … is to allocate to the contractor the risk of delay costs—even for delays beyond the contractor's control—unless the contractor follows the required procedures for notifying the owner of its intent to claim a right to an extension.

Id. at 1117-18. Potential grounds exist to challenge the outcome reached in *Opinski*. However, *Opinski* serves as a warning that Courts may be willing to enforce procedural contract provisions to preclude a party from asserting concurrent delay as a defense.

Legal Updates: Breaking News

Courts across the country have begun to weigh-in on the wave of scheduling specifications and contract provisions that attempt to refashion the meaning and effect of concurrent delay. These initial decisions provide some insights into how the legal system may handle scheduling specifications and contract provisions which attempt to re-define concurrency.

As an initial matter, courts continue to hold divergent views on the meaning of concurrent delay. For example, the D.C. Court of Appeals recently indicated that "'concurrent delay' has a special meaning in government contract law and refers to the delay that 'occur[s] when two or more causes have a simultaneous effect on contract performance.'" *Rustler Constr., Inc. v. D.C.*, 211 A.3d 187, 195 (D.C. 2019) (citation omitted). However, the intermediate Court of Appeals of Washington noted that "[c]oncurrent delay occurs when both parties to the contract cause some kind of delay" and that " concurrent delay does not need to exactly overlap; rather, the delay need only be related by circumstances, not necessarily over the same period of time." *Cortinas Painting & Restoration, Inc. v. Corp Inc.*, 200 Wash. App. 1068 (2017) (Unpublished) (citation omitted).

Several recent decisions have addressed attempts to use contract provisions to upend traditional delay concepts including concurrency. In *Star Dev. Grp., LLC v. Darwin Nat'l Assurance Co.*, 813 F. App'x 76, 79 (4th Cir. 2020) (Unpub.), the U.S. Court of Appeals for the Fourth Circuit affirmed the confirmation of an arbitral award rejecting an attempt to use a contract provision to strip a party of its concurrent delay defense. In the arbitral proceeding, the owner sought damages from the contractor for delays for which the arbitral panel found both parties "concurrently responsible." *Id.* at *79. The contract provided:

> [I]n no event shall Contractor [] be entitled *to an extension of the Contract Time*, nor to recover Extended General Conditions nor to recover any other damages, costs or expenses of any kind as a result of a delay or suspension, if such delay or suspension for which Contractor claims entitlement: (a) was caused in whole or in part, directly or indirectly, by the wrongful acts or omissions or other default of Contractor or any other Contractor Party; and/or (b) *is concurrent with a delay caused in whole or in part, directly or indirectly, by the wrongful acts or omissions or other default of Contractor or any other Contractor Party*.

Id. (emphasis added / revised). The owner argued based on the above provision that the contractor could not obtain a time extension for any delays to which the contractor contributed and that the contractor was further precluded from arguing that the owner's concurrent delay barred the owner's claim for delay damages. *Id.* The arbitral panel rejected the owner's argument by finding that the owner's design changes and other conduct waived the substantial completion date so that the above clause precluding a time extension for concurrent delay was inapplicable. *Id.* at *79-80. In addition, the arbitral panel found that a clause purporting to award delay damages to the owner for concurrent delay was unenforceable. *See Id.* at *80 n.4 (brackets in original) (noting the arbitral panel's finding that under the circumstances "neither party [could] make the requisite showing of cause and effect that is needed to recover breach of contract damages….."). The district court confirmed this decision and the 4th Circuit affirmed. *Id.* at *80, 90. Although arbitral decisions are deferentially reviewed, the inability of the owner's theory to gain traction at any stage of this dispute is noteworthy.

In *Cent. Ceilings, Inc. v. Suffolk Constr. Co., Inc.*, 91 Mass. App. Ct. 231 (2017) the court rejected the use of a no-damages-for-delay clause to defeat a loss of productivity / constructive acceleration claim. *Id.* at 236-39. On the project at issue, the contractor was found to have failed to fulfill its obligation to coordinate the work of its subcontractors among other failures. *Id.* at 233. Facing significant liquidated damages on the project, the contractor advised its subcontractor that no extension of time would be granted. *Id.* at 236. The subcontractor completed its work on time but incurred significant additional labor costs. *Id.* at 234-35. The contract between the contractor and subcontractor provided that the subcontractor:

> [S]hall have no claim for money damages or additional compensation for delay no matter how caused, but for any delay or increase in the time required for performance of this Subcontract not due to the fault of the Subcontractor, the Subcontractor shall be entitled only to an extension of time for performance of its Work.

Id. at 235. The contractor attempted to use this provision to defeat the subcontractor's affirmative claim. *Id.* The trial court rejected this argument on two grounds: (i) by indicating no time extensions would be granted, the contractor deprived the subcontractor of any remedy, and (ii) the subcontractor was not seeking damages for delay. *Id.* at 236-238. The appellate court affirmed.

Several takeaways are apparent from these recent decisions. First, lack of consensus among courts regarding the definition of concurrent delay suggests contractual definition may be prudent. Second, contractual provisions redefining the meaning and effect of traditional delay concepts such as concurrency may have limits. Courts and/or arbitral panels may be reluctant to enforce contract provisions in a manner that would produce an inequitable result at odds with traditional legal principles. Finally, courts are likely to narrowly construe specialized contractual provisions. Unless such provision is directly and clearly applicable, courts may be adverse to efforts to invoke its application.

Conclusion

Scheduling disputes are increasingly being determined by virtue of contract formation rather than the circumstances surrounding the delays to the project. Scheduling techniques and specialized contract provisions can effectively predetermine scheduling disputes. It remains to be seen how far courts will permit parties to go in using such techniques and provisions to tilt the scales in their favor when contracting for construction work. There do appear to be limits. Nevertheless, going forward, stakeholders cannot discount the effect these contract provisions and scheduling techniques may have on project risks.

NOTE: This article is an adaptation of a white paper from which footnotes have been removed for brevity. Please do not hesitate to contact the authors if you would like a copy of the original white paper including all accompanying footnotes.

Robert C. Shaia

Jane M. Kutepova

Termination for Convenience Clauses: Maybe More Than Just Convenience

by Robert C. Shaia, Partner and Jane M. Kutepova, Associate

A contractor begins work on a project and everything is going well, until one day the owner informs the contractor that it is being terminated for *convenience*. Possibly, there is no discussion about alleged defects, reasons for the termination, or any damages the owner might seek against the contractor. In that moment, the contractor may be unaware of any perceived wrongdoing or problems with its work.

The industry has typically accepted that, in this scenario, the owner implicitly waives the right to any remedies against the contractor, except those expressly set forth in the contract. Reasonable minds might assume that, if the owner believed it needed to seek further remedies, it would terminate the contractor *for cause* instead of convenience. And often overlooked during contract negotiations are the benefits of including an express "waiver of remedies" in the termination for convenience section.

A recent California case - *Chinese Hosp. Ass'n v. Jacobs Eng'g Grp., Inc.*, No. 18-CV-05403-

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JSC, 2019 WL 4168949 (N.D. Cal. Sept. 3, 2019) – should cause contracting parties to take a close look at the termination for convenience clause in their contracts.

This article addresses the damages available after an owner terminates for convenience and whether better contracting can avoid an undesired result.

Prior Approach To Seeking Damages After Terminating For Convenience

Termination for convenience clauses first began to emerge in government contracts. *U.S. v. Speed*, 75 U.S. 77, 82-83. By the 1950s these clauses were widespread in military contracts and began appearing in civilian contracts. *Torncello v. U.S.*, 681 F.2d 756, 765 (Ct. Cl. 1982).

Since the termination for convenience clause became a staple in construction contracts, courts, perhaps most prominently in New York, have addressed whether the owner (by terminating for convenience) waives any damages against the contractor. In *Fruin-Colnon Corp v. Niagra Frontier Transportation Authority*, 180 A.D.2d 222 (N.Y.S.2d 1992), the court held that the government agency was not entitled to recover any damages against the contractor after terminating for convenience. More specifically, the court concluded that because the contractor was not provided with an opportunity to cure any alleged defects, even though the defects were not discovered until after the contractor was terminated for convenience, the termination still waived the right of the government to recover damages. *Id.* at 234.

The New York cases that followed all reaffirmed the statement that a termination for convenience prohibits the owner from further collecting funds for any defaults or claims after the termination. *See Nasuf Construction Corp. v. State of New York*, 185 A.D.2d 305 (N.Y.S.2d 1992); *Paragon Restoration Group, Inc. v. Cambridge Square Condominiums*, 42 A.D.3d 905 (N.Y. 2007) (holding that owner could not bring counterclaim for damages to cure alleged default after it invoked the termination for convenience clause.); *Tishman Constr. Corp. v. City of New York*, 643 N.Y.S.2d 589, 590 (1996)("[w]here the . . .[Party]. . . elects to terminate for convenience . . . whether with or without cause, it cannot counterclaim for the cost of curing any alleged default.").

Recent California Case - *Chinese Hospital*

A recent case from Northern California, *Chinese Hosp. Ass'n v. Jacobs Eng'g Grp., Inc.*, No. 18-CV-05403-JSC, 2019 WL 4168949 (N.D. Cal. Sept. 3, 2019) (*"Chinese Hospital"*), has called into question the uniformity of case law on this topic. The court held that an owner terminating an architect "for convenience" did not waive its right to recover monetary damages against the architect for defective design.

The *Chinese Hospital* matter involved alleged breach of contract and defective design claims for the construction of a new hospital in San Francisco. During construction, the owner, Chinese Hospital Association ("Owner"), became aware of alleged defective designs provided by the architect, Jacobs Engineering Group, Inc. ("Architect"). The Owner terminated the contract with the Architect for convenience. To finish the project, the Owner and the Architect entered into a Termination and License Agreement. The Owner then filed suit against the Architect for damages based on the alleged defective construction documents. The Architect moved for summary judgment, arguing that the Owner waived its right to recover damages under the contract when it terminated the Architect for convenience.

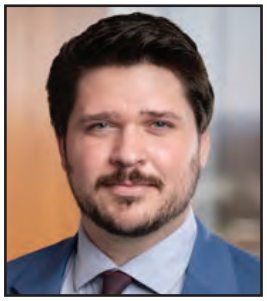
The court found that the termination for convenience clause was silent as to the effect of the termination for convenience and, thus, did not waive the Owner's right to seek damages. The Architect argued that the clause's silence on the available remedies meant that the termination for convenience clause barred additional remedies. Otherwise, it argued, the "for cause" provision - which states the owner "may without prejudice to any other remedy terminate the employment of the Architect" - would be meaningless. That is, the lack of this same language in the termination for convenience clause meant that the drafters intended to exclude additional remedies available under the termination for convenience clause. The court held that the remedy in the "for cause" provision was not meant to be exclusive to that provision. It also held that the contract did not indicate that the "for cause" provision was the *exclusive* method of termination for obtaining future remedies. Therefore, the court held that the absence of language preserving a remedy under the termination for convenience clause did not indicate a waiver of the right to seek a remedy.

Further, the court held that the Architect did not establish that the Owner impliedly waived its rights to a monetary remedy under the termination for convenience provision. The court found that the language in the initial termination letter and the Termination and License Agreement indicated that the Owner did not intend to waive any rights or remedies.

What Now?

The takeaway from the *Chinese Hospital* decision is that contracting parties should pay close attention to the language of their termination for convenience clauses. More specifically, if the parties intend to limit or eliminate an owner's remedies upon a termination for convenience, that intent should be expressed unequivocally in the contract.

GOVERNMENT CONTRACTS



It Does Not Take Two: Consolidating The SBA's Mentor-Protégé Programs Rolls Back The Red Tape

by Dominick Weinkam, Associate

As of November 16, 2020, the longstanding SBA 8(a) Mentor-Protégé program has been merged with the All-Small Mentor-Protégé program. 13 C.F.R. § 125.9, 85 Fed. Reg. 66146. This consolidation headlines a number of notable revisions affecting government contractors of all sizes, and particularly those contractors electing to form small/large joint ventures through the newly consolidated Mentor-Protégé program. Eliminating the redundancy represents a welcome step towards efficiency and consistency in the administration of the programs, and clarity to contractors seeking to benefit while remaining compliant.

Development Of The SBA Mentor-Protégé Programs

When first instated in 1998, only qualifying 8(a) businesses could avail themselves of the benefits of the SBA's Mentor-Protégé program, including the ability to form joint ventures with established businesses without being considered affiliated. Recognizing the benefits that these relationships could confer, the SBA incrementally expanded the scope of permissible mentor-protégé relationships.

First, through the Small Business Jobs Act of 2010, Congress authorized the SBA to create similar programs for 8(a)-adjacent entities, such as service-disabled-veteran and women-owned small business concerns. Congress further expanded eligibility to all small businesses through the 2013 National Defense Authorization Act (NDAA). The resulting All-Small Mentor-Protégé program was ultimately implemented in 2016. Since that time, the SBA has been concurrently managing both the 8(a) and All-Small programs.

The continued expansion of mentor-protégé opportunities reflects the unassailable benefits to small businesses of all types. These include furnishing expertise in navigating the federal procurement process, financial assistance and backing, business development, and administrative assistance. Numerous GAO and congressional reports over the last decade, however, have reported instances of fraud largely related to "mentor" firms prioritizing their own success over that of their nominal protégés. But these reports also emphasized the insufficient internal controls and lack of regulatory guidance within the protégé programs, thereby creating a difficult environment for contractor compliance. The SBA has taken numerous steps to refine these programs to ensure that properly qualified protégé firms receive the primary intended benefits.

The increased efficiency and reduced overlap effected by the consolidation furthers this purpose in an effort to "eliminate confusion regarding perceived differences between the two Programs, remove unnecessary duplication of functions within SBA, and establish one, unified staff to better coordinate and process mentor-protégé applications." 84 Fed. Reg. 60846.

While the mechanics of consolidation are largely procedural, the new rule implements a significant number of substantive changes as well. Indeed, while the consolidation of these programs serves as the main headline, other revisions touch upon nearly all elements

of small business contracting, including the operation of joint ventures, qualification for the 8(a) program, recertification of status, and affiliation. The changes below reflect only a sampling of those made in the final rules.

Elimination Of The "3-In-2" Rule

The SBA has eliminated the "3-in-2" rule for joint ventures. This rule previously limited a single joint venture to performing three small business contracts within a two-year period. The new rule retains the two-year period, with the SBA noting that joint ventures are not intended to be permanently ongoing entities, but permits the same firms to form new joint ventures to seek additional contracts following expiration of such period.

Joint Venture Employment Of Facility Security Officer And Clearance Personnel

The revised rule corrects the unintended consequence of hindering joint ventures from qualifying for work requiring security clearances. Prior regulations, implemented in order to better track the percentage of work performed by each member of the venture, prohibited a joint venture from hiring its own employees other than for administrative functions.

The "administrative" personnel exception, however, failed to account for a Facility Security Officer. Because some procuring agencies would not award contracts requiring a facility clearance to a joint venture, even if both partners held the appropriate clearance, this restriction on hiring employees placed joint ventures at a substantial disadvantage. Now, joint ventures may directly employ Facility Security Officers to qualify for such contracts.

Protégé Work Percentage Clarification

The rule making process provided the opportunity for the SBA to clarify the distinction between the required percentage of work that must be performed by a mentor-protégé joint venture and the work that must be performed by the protégé firm. The SBA clarified that the limitations on subcontracting contained in 13 CFR § 125.6 apply at a project level. However, certain exclusions, such as the use of similarly situated entities, could not be invoked to reduce the separate requirement that the protégé firm actually perform 40 percent of the work allotted to the joint venture.

The SBA provided the following example relating to service contracts to emphasize this distinction:

> [I]f a joint venture between a protégé and its mentor were awarded a $10 million services contract and a similarly situated entity were to perform $2 million of the required services, the joint venture would be required to perform $3 million of the services (i.e., to get to a total of $5 million or 50 percent of the value of the contract between the joint venture and the similarly situated entity). If the joint venture were to perform $3 million of the services, the protégé firm, and only the protégé firm, must perform at least 40 percent of $3 million or $1.2 million.

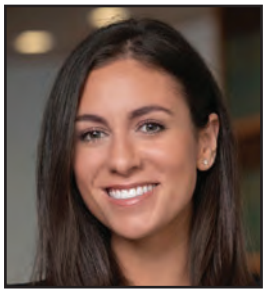
This clarification highlights the common-sense nature underlying the consolidation process and associated program revisions - the mentor-protégé program exists to assist the protégé firm's business development and as such, regulations will likely be interpreted with this goal in mind.

Joint Venture Size Certification

Not all rule clarifications and revisions primarily affect mentor-protégé based joint ventures. In addition to these relationships, regulations also permit joint ventures between small business concerns. Prior rules were unclear as to whether all small business concerns within a joint venture were required to re-certify their size whenever one member underwent a merger or acquisition. The new rule confirms that only the member firm undergoing the merger or acquisition must re-certify its size. Once that member re-certifies its size, however, the joint venture itself must re-certify.

Conclusion

The consolidation of the mentor-protégé programs reflects a positive trend towards efficiency and clarity to contractors. The accompanying revisions likewise emphasize the importance of complying with the purpose of such programs, which is the business development of protégé firms. Contractors are encouraged to carefully review these rules in their entirety to ensure compliance and effectively adjust their business practices.



ASBCA Denies Agencies' Attempts To Divest It Of Jurisdiction Over Claims Involving Fraud

by Nicole C. Gregory, Associate

Introduction

The Contract Disputes Act of 1978 (CDA) established jurisdiction in both the United States Court of Federal Claims (COFC) and the agency boards of contract appeals with respect to an appeal of a contracting officer's adverse final decision on a contractor's CDA claim. Given the choice between these two appellate forums, many contractors prefer to initiate appeals before the appropriate administrative board because it may be less formal and often less expensive. When fraud is involved, however, the jurisdiction of the boards is limited. Since the boards are only granted jurisdiction to review contracting officers' final decisions, and contracting officers' authority does not extend to resolving claims involving fraud, the boards lack the ability to make determinations of fraud. Unlike the boards, the COFC was granted statutory authority to hear government counterclaims in fraud under the Forfeiture of Claims Act, the False Claims Act, and the CDA.

In two recent cases before the Armed Services Board of Contract Appeals (ASBCA), overzealous agencies have attempted to remove appeals of contracting officers' final decisions from the board to force the appeals to be brought in the COFC. The ASBCA rejected the agencies' overreaching efforts to strip it of jurisdiction on the grounds that the contracting officers had purportedly uncovered fraud in rendering its final decisions. For those contractors preferring the certainty of an administrative appeal of an adverse contracting officer's final decision, the ASBCA's denials of these agencies' motions to dismiss are a welcome result.

Appeal Of Mountain Movers/Ainsworth-Benning, LLC

In 2020, the ASBCA soundly rejected the government's "novel" theory that it should be entitled to unilaterally remove an adverse contracting officer's final decision from its jurisdiction whenever it suspects fraud. In the *Appeal of Mountain Movers/Ainsworth-Benning, LLC*, the U.S. Army Corps of Engineers (USACE) awarded a task order for the rehabilitation of emergency gate control systems to joint venture Mountain Movers/Ainsworth Benning, LLC (MM/AB). 20-1 BCA 37,664 (A.S.B.C.A.), ASBCA No. 62164 (2020). Due to alleged financial issues with Ainsworth-Benning, MM/AB's bonding company would not honor its bonds and, consequently, the contracting officer terminated MM/AB for default. After subsequent negotiations between MM/AB and the contracting officer, and upon MM/AB obtaining bonding and agreeing to not appeal the termination, the parties signed a modification rescinding the termination and reducing the contract price.

MM/AB filed a claim for certain work on the project for which the contracting officer issued a final decision finding partial merit. MM/AB filed an appeal with the ASBCA. Two months after the filing of the appeal, the contracting officer issued a second final decision that rescinded the first decision because the agency claimed that it discovered purportedly fraudulent statements by MM/AB. The contracting officer apparently reviewed the joint venture's operating agreement and concluded that MM/AB knowingly misrepresented the identity of the correct Ainsworth-Benning entity member during their discussions. According to the contracting officer, it was this misrepresentation that induced him to revoke the termination and reinstate the contract. USACE moved to dismiss the appeal for lack of subject matter jurisdiction because the contracting officer's recission of the original final decision was based on a determination of fraud.

The Board carefully rejected USACE's numerous arguments supporting its attempt to create a governmental right of removal that would force contractors to litigate their appeals before the COFC. USACE contended that Congress did not intend for the government to have to defend claims involving fraud in agency boards, and thus, the appeal should be brought in the COFC. To support this theory, USACE argued that, given the recission of the final decision on the basis of fraud, there was neither a valid decision nor a deemed denial of the claim upon which to base CDA jurisdiction

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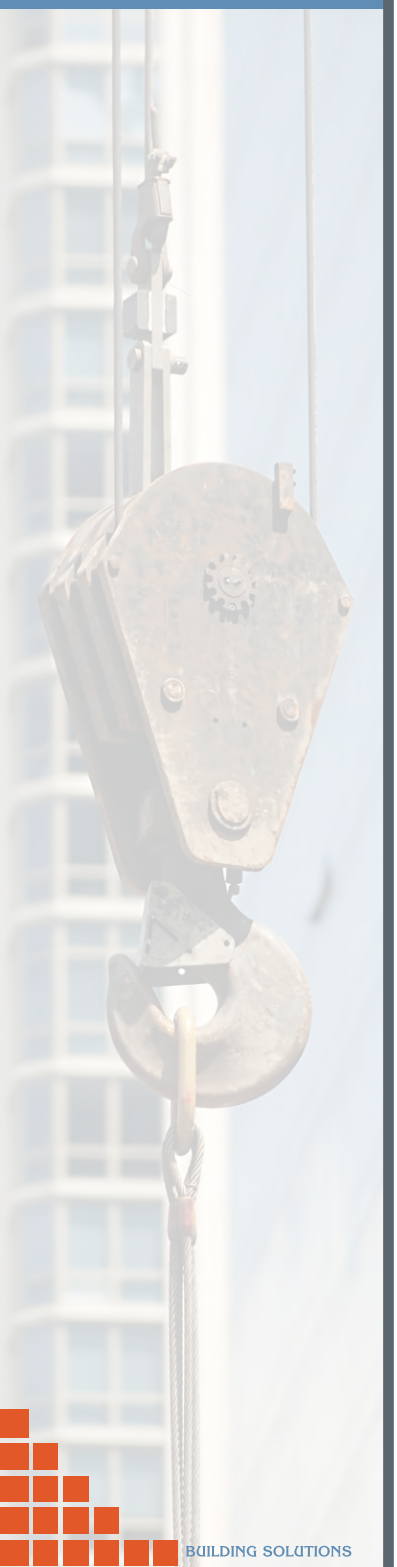

in the ASBCA. The Board noted, however, that USACE failed to explain how this interpretation of the CDA would not similarly divest the COFC of jurisdiction, since both originate with a final decision. In finding that the recission had no effect on jurisdiction, it reasoned that once the Board is vested with jurisdiction over a matter, the contracting officer cannot divest it of jurisdiction by his or her unilateral action. Moreover, the Board disagreed with USACE's argument that retaining jurisdiction would provide a safe forum for contractors perpetrating fraud to sue the government while avoiding liability. This argument ignored the Board's ability to consider affirmative defenses of prior material breach and make findings of material representation of fact in holding contracts void from the outset.

Further, the Board found incorrect as a matter of law USACE's argument that, because the contracting officer's reasoning for denying the claim was rescinded, neither the agency, nor the Board, had authority to raise or settle other issues where a reasonable suspicion of fraud existed. Citing the Federal Circuit and its own precedent, the judge reasoned that the Board possessed jurisdiction to review a final decision involving fraud if fraud is not the sole basis for denial. Given that the contracting officer's original final decision found partial merit in the claim, and, in fact, did not include fraud at all, the Board concluded it had jurisdiction to entertain the appeal. A finding contrary would allow the government, whenever it expected to lose on appeal, to divest the boards of jurisdiction by withdrawing any final decision on an alleged suspicion of fraud.

Additionally, USACE asserted that ASBCA precedent created a jurisdictional test, providing that the Board possesses jurisdiction to entertain an appeal involving fraud if it does not have to make factual determinations of fraud. USACE argued that the entire contract performance was fraudulent because the misrepresentations induced the contracting officer to reinstate the contract and, thus, the Board would have to make factual determinations of fraud to resolve MM/AB's claims. Without explicitly affirming or denying the purported jurisdictional test, the judge disagreed with USACE's position that the Board had to make factual determinations of fraud in this case. The Board reasoned that the CDA jurisdictional prohibition applies only to alleged fraud related to a *claim*, and not to the general belief that there was fraud in the contract. Since the Board did not have to determine whether MM/AB agreed to the modification knowingly and with the intent to deceive, it concluded that it could adjudicate the claim based on the terms of the modification.

Appeal Of Sand Point Services, LLC

A 2019 ASBCA decision, *Appeal of Sand Point Services, LLC*, is another recent example of an agency's attempt to utilize the suspicion of fraud as a basis of a denial of a contractor's claim to divest an agency board of jurisdiction. 19-1 BCA 37,412 (A.S.B.C.A.), ASBCA No. 61819 (2019). In this case, The National Aeronautics and Space Administration (NASA) hired Sand Point Services, LLC (SPS) to repair a flight facility's aircraft parking apron. SPS submitted two certified claims that requested damages incurred from extra costs and delays resulting from differing site conditions. The contracting officer issued a final decision denying the claims, in part, on the basis of fraud because SPS's general manager allegedly admitted in a separate action that its subcontractor failed to sufficiently perform. SPS subsequently filed an appeal of the contracting officer's final decision with the ASBCA. NASA moved to dismiss the appeal, arguing that the ASBCA lacked jurisdiction because the final decision was based on the suspicion of fraud.

The Board denied NASA's motion to dismiss on two grounds. First, the Board definitively stated that "we possess jurisdiction over an appeal if we do not have to make factual determinations of fraud." Since the Board did not have to make such determinations to resolve SPS's arguments regarding differing site conditions, constructive changes, and waste, it concluded it had jurisdiction to evaluate the merits of the claims. Without making these factual determinations, the Board still noted that the contracting officer's allegations of fraud were undermined by the fact that she did not refer them to the agency official responsible for investigating fraud, which is an obligation upon finding evidence of fraud. Second, the Board denied the motion because the contracting officer's final decision was not based *solely* upon a suspicion of fraud. In addition to fraud, the claims were denied on the bases that specific claims had been waived via modification, increased costs or delays were not incurred, and non-compliance with specifications.

Conclusion

The ASBCA's recent resistance to agencies' overreaching efforts to dictate where an appeal of an adverse decision is litigated is a jurisdictional win for contractors. *Mountain Movers/Ainsworth-Benning, LLC* warned government agencies that they cannot withdraw their final decisions or allege fraud during the course of appellate proceedings in an attempt to divest the ASBCA of jurisdiction and compel contractors to litigate in the COFC. Moreover,

Sand Point Services, LLC reinforces that contractors cannot assert the suspicion of fraud as a basis of a final decision in an attempt to automatically divest the Board of jurisdiction. This decision stands for the proposition that the ASBCA will uphold jurisdiction over appeals where the denial of the claim includes a basis other than fraud, and where a factual determination of fraud is not required to resolve the appeal. These decisions emphasize the ASBCA's intolerance of agency attempts to circumvent the CDA's intention to provide contractors with the choice of two appellate forums.

SURETY UPDATE

Federal District Court Affirms That Obligee Is Not Proper Claimant Under Payment Bond

by CharCretia V. Di Bartolo, Partner

On October 26, 2020, the United States District Court for the Eastern District of Massachusetts, in *Groveland Municipal Light Department v. Philadelphia Indemnity Insurance Company*, C.A. No. 18-12003-MLW, affirmed that an obligee is not a proper claimant under a payment bond issued pursuant to the Massachusetts payment bond statute, M.G.L. c. 149, §29. The court also agreed with the surety that an obligee was not entitled to recover for amounts paid to a claimant in excess of amounts due on the contract with the contractor/surety's principal under the Massachusetts direct payment statute, M.G.L. c. 30, §39F.

In *Groveland*, the plaintiff, Groveland Municipal Light Department ("GELD"), had entered into a contract with GTC Construction Management ("GTC") to complete exterior renovations of a public building located in Groveland, Massachusetts (the "Project"). Philadelphia Indemnity Insurance Company ("PIIC") issued performance and payment bonds with GTC as principal. GELD received claims for direct payment pursuant to M.G.L. c. 30, §39F which exceeded the amount due under GTC's contract and demanded that PIIC pay the excess amount. PIIC correctly responded that it had no obligation to fund any portion of a direct payment demand, whether or not contract funds were sufficient to cover the amount of the demand.

Nevertheless, GELD subsequently paid four GTC subcontractors and demanded that PIIC reimburse GELD under PIIC's payment bond for amounts paid in excess of the contract funds otherwise due to GTC. GTC, in turn, advised the surety that it disputed both GELD's contract accounting and its legal right to recover the alleged overpayment to GTC's subcontractors. PIIC denied the claim.

After some additional back and forth between PIIC and GELD, GELD made a demand to PIIC under the Massachusetts Consumer Protection statute, M.G.L. c. 93A, claiming that PIIC had violated the statute by denying its claim under the payment bond and seeking exemplary damages. In doing so, GELD stated that "[u]nder the terms of the Payment Bond, PIIC is contractually obligated to cure GTC's default by making GELD whole and by failing to do so, PIIC is breaching is[sic] obligations under the bond . . . ." PIIC again denied GELD's claim, noting first that GELD, as obligee, was not a proper claimant under the payment bond. PIIC then also referred GELD to language in M.G.L. c. 30, §39F specifically directing that "[a]ll direct payments . . . shall be made out of amounts payable to the general contractor at the time of receipt of a demand for direct payment from a subcontractor and out of amounts which later become payable to the general contractor . . . ." Thus, in making payments to subcontractors in excess of amounts otherwise payable to GTC, PIIC asserted that GELD had acted as a volunteer and that there was no proper claim made against PIIC under either the Payment or the Performance Bond. GELD thereafter filed suit against PIIC.

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On cross motions for summary judgment, the court held that the payment bond, when read in conjunction with the contract and the statutory payment bond scheme pursuant to M.G.L. c. 149, §29, limits payment bond claimants to subcontractors and materialmen. Citing to the limited case law on this issue, the court noted that an owner-obligee may generally not recover damages from the surety under the payment bond, as the bond is intended to provide payment to persons supplying labor and material to the contractor, not to provide a financial recovery to the owner-obligee. *See Travelers Cas. & Sur. Co. v. Dormitory Auth.-State of New York*, 735 F. Supp. 2d 42, 87 (S.D.N.Y. 2010); *Ayers Enters., Ltd. V. Exterior Designing, Inc.*, 829 F. Supp. 1330, 1333 (N.D.Ga. 1993).

The court also rejected GELD's alternative argument, that is, that it was entitled to proceed against the surety on the payment bond under an equitable subrogation theory. The court noted the limited exception to the general rule that an owner may not assert a claim under a payment bond where an owner has been effectively compelled to pay directly a subcontractor who could have in turn brought a claim under the payment bond. GELD asserted that it had not acted as a volunteer in making payments to subcontractors in excess of the contract amount because it was compelled by the direct payment statute to pay the four GTC subcontractors in full. The court held that GELD had misinterpreted the statute in this regard.

M.G.L. c. 30, §39F(1)(d) provides that subcontractors on public construction projects may make demand for direct payment on an owner if they are not paid by the general contractor within 70 days after the subcontractor completes its work. If the general contractor does not dispute the claim in a sworn reply within ten days, the owner must pay the demand within fifteen days, less any amount retained by the owner to complete unsatisfactory or incomplete work or barred by court order. The court noted, however, that M.G.L. c. 30, §39F(1)(g) provides a limitation on the owner's obligation to pay such demands:

> All direct payments . . . *shall be made out of amounts payable to the general contractor at the time of receipt of a demand for direct payment* from a subcontractor and out of amounts which later become payable to the general contractor . . . .

M.G.L. c. 30, §39F(1)(g) (emphasis in court's decision).

As indicated by this express language, the court held that GELD was not required to make direct payments to subcontractors that were in excess of the amount due under its contract to GTC. Accordingly, GELD acted as a volunteer in overpaying the four subcontractors and was not entitled to proceed under the payment bond by asserting the rights of the subcontractors to this payment. While noting that this theory was also raised by PIIC as a basis to deny a claim on the performance bond, had GELD made such a claim, the court noted that GELD waived any such claim by failing to press it when given the opportunity to do so by PIIC.

The court's decision in *Groveland* affirms that the Massachusetts statutory payment bond scheme affords protection to laborers and materialman, not to obligees, on public projects. While the principles discussed in *Groveland* may seem obvious to surety practitioners, published cases are not always available to provide support for those concepts. In addition to the limited case law available, the surety's arguments were crafted from a number of sources, including the language of the bond and the contract and the principles underlying the statutory schemes. The decision also provides guidance to general contractors when dealing with an owner who fails to follow the statutory scheme for direct payment of subcontractors. Knowledge of the parameters of complex statutory mandates, like the Massachusetts payment bond and direct payment statutes, is essential to protecting both the surety and its principal from overreaching owners.

Watt Tieder Announces New Managing Partner Robert G. Barbour

Watt, Tieder, Hoffar & Fitzgerald L.L.P. is pleased to announce that its Board of Directors and partnership have elected Robert G. Barbour as the firm's Managing Partner, effective January 1, 2021. He succeeds Larry Baker, who served as Managing Partner since 2012.

Mr. Barbour is a litigation partner in Watt Tieder's Tysons Corner office and is widely recognized as one of the elite construction litigation lawyers in the United States. He has spent his entire career with the law firm, and for the past six years has served on the firm's Board of Directors, as well as numerous management and administrative committees.

"Rob is absolutely the right person to succeed me as Managing Partner, and he will be an exemplary leader of Watt Tieder," Larry Baker says. "Rob has a deep commitment to the law firm's culture, which is built on teamwork, collegiality, and collaboration. He is highly regarded and respected by his partners, not only because he has built a very successful litigation practice, but also because of his unqualified commitment to the firm's strategic focus to deliver the highest level of legal counsel for our clients today and in the future."

In his practice, Mr. Barbour counsels developers, builders, and owners through every phase of complex public and private construction. He has successfully represented clients in connection with major infrastructure, energy, and commercial projects across the country. He draws on his engineering background and deep legal experience to assist clients on project planning and contract issues and to resolve disputes through negotiation, arbitration, and litigation.

Mr. Barbour received his law degree from William & Mary Law School and his undergraduate degree in Systems Engineering from the University of Virginia.

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**

Recent And Upcoming Virtual Events

Boards of Contract Appeals Bar Association (BCABA), December 3, 2020 (via Zoom). **Scott P. Fitzsimmons** moderated a panel titled "Are Virtual Hearings Here to Stay?" The panel featured Judges from the federal Boards including the ASBCA, CBCA, PSBCA, and the FAA ODRA.

Virginia State Bar's 41st Annual Construction and Public Contracts Seminar, December 4, 2020. **Kathleen O. Barnes** spoke on "Swimming with Sharks: Litigating a Construction Case to a Jury."

35TH Annual Construction SuperConference, December 9, 2020. **Christopher J. Brasco**, **Vivian Katsantonis** and **Kathleen O. Barnes** spoke on "Concurrent Events and Other Breaking News Affecting the Recovery of Delay Damages."

2021 ABA Construction Forum Midwinter Meeting, January 2021. **Kathleen O. Barnes** gave a presentation entitled "All About the Benjamins, Where Tomorrow's Construction Dollars Will Come From and Where Are They Headed?"

Walter Chandler American Inn of Court, January 13, 2021. **Marguerite Lee DeVoll** wrote course materials and taught a continuing legal education course titled **"Circuit Splits in Bankruptcy."** She presented specifically on issues of sovereign immunity in fraudulent transfer actions brought under the Bankruptcy Code.

Northern Virginia Bankruptcy Bar Association, January 21, 2021. **Jennifer L. Kneeland** wrote course materials and taught a continuing legal education course titled "The Difference Between a Carve-Out and a Surcharge under the Bankruptcy Code." [Carve-Outs and Surcharges under the Bankruptcy Code are tools that can be used to recover a party's legal fees from a debtor's estate and a secured creditor's secured collateral.].

ABA Tort Trial & Insurance Practice Section, Fidelity & Surety Law Committee Mid-Winter Virtual Conference, February 2021. **Adam M. Tuckman** co-presented on "Price Disasters: Material Price Escalation."

Washington Building Congress, Capital Area Food Bank's DC distribution center; February 21, 2021. **Marguerite Lee DeVoll** and her fellow WBC members helped sort and pack food to be distributed to the Washington, D.C.-Metro area.

Marguerite Devoll (far left) with fellow WBC members.

Washington Building Congress, Capital Area Food Bank's DC distribution center; March 28, 2021. **Zahra S. Abrams** and her fellow WBC members helped sort and pack food to be distributed to the Washington, D.C.-Metro area.

Zahra Abrams (far left) with fellow WBC members.

Travelers' BSI Strategic Severity Management Symposium, April 20, 2021. Rebecca Glos to speak.

Associated General Contractors 2021 Surety Bonding and Construction Risk Management Conference, June 4, 2021; Bonita Spring, Florida. **Timothy E. Heffernan** will present a CLE session entitled "DOJ Fraud Investigation Warning: Construction and Surety Industry Hotspots.

Northern Virginia Bankruptcy Bar Association, June 17, 2021. **Zahra S. Abrams** will present on "New Caselaw Developments and Hot Topics in Bankruptcy Cases in the Fourth Circuit."

AACE International, June 20-23, 2021. **Christopher J. Brasco** and **Matthew D. Baker** will co-present on "Concurrent Events & Other Scheduling Issues in the News."

Maryland Bankruptcy Bar Association, September 9, 2021. **Jennifer L. Kneeland** was chosen to serve as a panelist in a discussion lead by the Honorable Laurie S. Silverstein, U.S. Bankruptcy Judge for the District of Delaware and the Honorable Brian F. Kenney, U.S. Bankruptcy Judge for the Eastern District of Virginia. Ms. Kneeland's discussion is titled "Recovering From COVID-19: The Pandemic's Impact on the Bankruptcy Code, Bankruptcy Cases and Bankruptcy Solutions."

Maryland Bankruptcy Bar Association, September 9, 2021. **Marguerite DeVoll** was chosen to serve as a panelist in a discussion lead by the Honorable David E. Rice, U.S. Bankruptcy Judge for the District of Maryland. Ms. DeVoll's discussion is titled "The Small Business Reorganization Act."

Honors

U.S. News and World Report - Best Law Firms 2021

Watt, Tieder, Hoffar & Fitzgerald, L.L.P. is once again ranked as a Tier 1 Law Firm by **U.S. News and World Report**. **Watt Tieder** is ranked as a Tier 1 Firm nationally in Construction Law and Construction Litigation. **Watt Tieder** is also recognized as a Tier 1 Firm in Washington, D.C. for Construction Law, Construction Litigation, Arbitration and Mediation, as well as in Orange County, California for Construction Law and Construction Litigation. **Watt Tieder** is also ranked in Boston as a Tier 2 Firm in Construction Law and Construction Litigation and as a Tier 3 Firm in Commercial Litigation. Additionally, **Watt Tieder** is ranked as a Tier 3 Firm in Washington, D.C. in Bankruptcy.

U.S. News and World Report - Best Lawyers 2021

The following **Watt Tieder** attorneys were named among the **Best Lawyers** in America for 2021: **Lewis J. Baker**, **Kathleen O. Barnes**, **Christopher J. Brasco**, **Bradford R. Carver**, **Shelly L. Ewald**, **Robert M. Fitzgerald**, **Vivian Katsantonis**, **Jennifer L. Kneeland**, **Robert C. Niesley**, **Edward J. Parrot** and **Carter B. Reid**.

Publications

Substance, Illinois Mechanical & Specialty Contractors Association, Winter 2020; "Quantifying Lost Labor Productivity Claims, **John E. Sebastian** and **Brian C. Padove**.

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**Independent Law Firm*

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

Special Thanks to Editors, **Timothy E. Heffernan, William Groscup, Christopher M. Harris** and **Marguerite Lee DeVoll**.

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