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# Department Of Labor Proposes First Comprehensive Changes To Davis-Bacon Act In 40 Years

*by CharCretia V. Di Bartolo, Partner*

On March 11, 2022, the Department of Labor (DOL) announced the publication of a Notice of Proposed Rule Making (NPRM) in which it proposed to amend, update and modernize regulations implementing the Davis-Bacon Act (DBA) and the Davis-Bacon Related Acts (DBRA). These changes, if implemented, would: revert the DBA to its original methodology for calculating rates, potentially resulting in higher costs to contractors; add contractor liability for lower-tier violations; and increase DOL oversight and enforcement on federally funded projects. This article highlights some of these proposed changes.

### A Brief History Of The Davis-Bacon Act And The Davis-Bacon Related Acts

The DBA, originally enacted in 1931, requires the payment of locally prevailing wages and fringe benefits on federal construction projects. The DBA applies to workers on federal construction or public works contracts in excess of \$2,000 or other contracts funded wholly or partially with federal dollars. In enacting the DBA, Congress intended to prevent companies from offering wages lower than those prevailing in the area in which the work was to be performed by hiring workers from outside the local area during the Great Depression. According to DOL, the DBA and DBRA “collectively apply to an estimated \$217 billion in federal and federally assisted construction spending per year and provide minimum wage rates for an estimated 1.2 million U.S. construction workers.”

### Proposed Changes To The Methodology For Determining The Prevailing Wage

During its first fifty years (from the 1930s to the early 1980s), the DBA used a three-step process to determine the prevailing wage:

- First, determine if more than 50% of workers from the specific trade in question in a given area were paid the same rate;

- If not, then determine if any single rate was paid to at least 30% of those workers (the so-called “30% rule”);
- If not, then use the weighted average rate.

During the Reagan administration in the early 1980s, the second step in this process was eliminated, with DOL citing concerns that the 30% rule contributed to inflation. Over time, use of the weighted average rate has come to predominate DBA wage rates, with DOL estimating that 63% of wage determinations now use the weighted average rate.

One of the changes proposed by the Biden administration is to re-implement the 30% rule. DOL argues that the increased use of weighted averages runs counter to the original intent of the DBA and that most workers are not actually paid the average used. Although commenters have noted that this change is likely to result in increased costs to the federal government and to contractors adding to inflationary pressure already existing in the economy, the DOL has focused on the DBA’s original purpose, that is, to protect worker wages, rather than the “speculative effects on the national macro economy.”

Additional proposed changes include periodically updating prevailing wages to address out-of-date wage determinations and providing broader authority to adopt state or local wage determinations when certain criteria are met. The proposed new regulations would also supplement rates for key job classifications when no survey data exists. These changes to the methodology for calculating rates is likely to result in increases to job costs for the government and contractors.

### Proposed Changes To Upper-Tier Subcontractor Liability For DBA Violations By Lower Tier Subcontractors

The proposed rules could also impact liability for certain parties for DBA violations. For example,



in the proposed rule changes, DOL clarifies that upper-tier subcontractors, already required to flow-down DBA requirements to lower-tier subcontractors, may also be responsible for violations committed against the employees of lower-tier subcontractors. The DOL proposes language assigning liability to upper-tier subcontractors “in appropriate circumstances (i.e., where the lower-tier subcontractor’s violation reflects a disregard of obligations by the upper-tier subcontractor to workers of their subcontractors).” In the NPRM, DOL proposes to extend liability to upper-tier subcontractors who have the ability to: (1) choose the lower-tier subcontractors they hire; (2) notify lower-tier subcontractors of the prevailing wage requirements of the contract; and (3) take action if they have any reason to believe that there may be compliance issues. The DOL notes that its intent is not to impose strict liability on upper-tier subcontractors. Rather, it is to clarify that upper-tier subcontractors may be held responsible under those circumstances, subjecting them to “debarment and requiring them to pay back wages jointly and severally with the prime contractor and the lower-tier subcontractor that directly failed to pay the prevailing wage.”

#### **Proposed Changes May Affect Contract Drafting And Interpretation**

The DOL’s proposal would also affect contract drafting and interpretation. The DBA currently applies by incorporation of contract clauses and relevant wage determinations into government contracts. DOL proposes to designate the DBA contract clauses in §5.5(a) and (b) and applicable wage determinations as effective by “operation of law,” regardless of whether they are expressly included in the contract. Under the proposed rule, the DBA “will be considered to be a part of every prime contract” within the statutory coverage of the DBA, regardless of “whether or not they are included or incorporated by referenced into such contract.” Given that the DBA also applies to federally financed construction, including, for example, to state or local construction contracts funded with federal grant money, this change could result in advertent non-compliance with the DBA if enacted.

In addition, under the proposed changes, a DBA violation under one contract may result

in cross-withholding under a different contract with a different agency, strengthening the government’s ability to withhold contract payments for violations. The DOL notes that this provision is intended to strengthen the DOL’s ability to cross-withhold when contractors use single-purpose entities, joint ventures, partnerships or similar vehicles to bid on and enter into DBA-covered contracts.

#### **(5) Proposed Changes Will Aid And Strengthen Enforcement Mechanisms**

Additional enforcement provisions include new anti-retaliation provisions designed to protect employees that identify DBA violations from termination or other adverse employment actions. The DOL proposes to add a contract clause to make it unlawful to discharge, demote, intimidate or commit like conduct in retaliation for engaging in protected conduct such as filing a complaint or cooperating in an investigation. This section would be applicable to prospective or former employers or contractors as well as a current employer. In addition to strengthening the debarment penalty, already a remedy for retaliation as well as violation of the DBA, available remedies include back pay and benefits denied or lost or other actual monetary losses sustained as a direct result of a violation, interest on back pay and appropriate equitable relief such as reinstatement or expungement of warnings or reprimands.

The DOL solicited and received over 37,000 comments from interested parties by the close of the comment period on May 17, 2022, so that these proposed rules, even if enacted, would not go into effect immediately. Given the broad impact on numerous stakeholders and the renewed emphasis on worker wage protection and enforcement by the DOL, however, contractors should continue to be vigilant for compliance with the DBA and related state requirements. Contractors should also review their standard contract language and keep in mind that, if these regulations go into effect, the DBA will apply where federal funds are received on a particular project, even if the contract does not include a specific reference to the DBA.

Watt Tieder will continue to follow the progress of the NPRM and provide updates as warranted in future newsletters. ◀





Lauren E. Rankins

# The Double-Breasted Dilemma

*by Lauren E. Rankins, Partner and Saloni Shah, Associate*



Saloni Shah

## What Is A Double-Breasted Operation?

A double-breasted operation is when a firm has two entities, and one entity performs work under collective bargaining agreements and the other does not. While this type of operation is not outright prohibited, it is often subject to a variety of challenges

and scrutiny. To legally run a double-breasted operation, the two companies must remain separate and distinct. If the companies are not sufficiently separate and distinct from one another, the National Labor Relations Board (“NLRB”) or a court may find that the two companies are operating as a single entity or that the non-union company, also known as the open shop, is merely an alter ego of the union company and, therefore, bound by the terms of the collective bargaining agreement.

In order to determine whether the companies are sufficiently separate and distinct, the two entities must pass either the single employer test or the alter ego test depending on the nature of the double-breasted operation. Typically, the single employer test is used when the two entities run parallel operations, and the alter ego test is used when the open shop replaces the union company. Under the single employer test, the NLRB or courts will generally consider four factors: (1) the interrelation of operations; (2) common management; (3) common control of labor relations; and (4) common ownership. The alter ego test does not require a finding that the companies are a single bargaining unit, but analyzes to what extent the two entities have substantially identical management, business operation and purpose, business equipment, customers, and ownership. While common ownership is a factor considered under both the single employer and alter ego tests, common ownership alone is not dispositive of whether the companies are sufficiently separate and distinct. In other words, the NLRB and courts do not simply look for common ownership to determine whether the double-breasted operation is lawful. It is merely one of many factors to consider.

## The Double-Breasted Operation Must Establish And Maintain Separateness

An obvious challenge with a double-breasted operation is establishing and maintaining separateness. When a firm wants to open another entity, the firm may retreat to using its management, employees, equipment, finances, etc. This will result in an investigation from the NLRB. Therefore, it is advisable that in order to achieve and maintain the required separateness, the firm consider the following:

- 1. Establishing Separate Management:** Establish two separate companies with different individuals serving as the officers, board of directors and other upper management for each company.
- 2. Establish Separate Labor Relations:** There should be two different individuals in charge of labor relations within each company. The companies should establish separate compensation and benefits packages, hiring and firing procedures, employee handbooks, safety rules and regulations, training criteria, etc. The companies should have separate and distinct workforce and the employees should not interchange from company to company, nor should the companies share resources.
- 3. Establish Separate Operations:** The companies should: have their own equipment; obtain their own licenses and required certifications; have their own bylaws and other governing documentation; identify separate registered agents (especially if the ownership is listed as the agent); maintain separate administrative staff, office space, marketing/advertising materials and payroll accounts; and should not file joint taxes.
- 4. Establish Separate Finances:** The two companies should avoid any financial dependency and should establish separate bank accounts, lines of credit, personal guarantors, financial records, and use separate certified public accountants and other financial professionals. A useful tip in ensuring that financials are never comingled

is to use a different bank altogether. The companies should have separate insurance policies and bonding, as well as professionals related to the same.

5. **Miscellaneous:** Little details are often forgotten in maintaining separateness. The two entities should have different phone numbers and addresses. The stationary used should be different for both entities. The two companies should have different email addresses so there is never an accidental sharing of private communications. Any association memberships should be under the entities' name that plans on participating and paying the dues.

While satisfying these considerations does not provide a guarantee for the successful establishment of a double-breasted operation, it would significantly increase the firm's chances of surviving a challenge to its operations.

#### Consider The Benefits And Disadvantages To Double-Breasted Operations.

The primary reason to have a union and non-union entity is so the firm can profit from both union and nonunion work in the same region. A double-breasted operation can provide the firm with the option to enter an area of work that may have originally been considered financially too risky to enter, and provide the firm with options to succeed in a market that constantly fluctuates.

The most notable disadvantage for a double-breasted operation is facing significant liability in terms of ERISA contributions. For example,

if the open shop is not properly separated from the union company, this could expose the open shop to liability under the collective bargaining agreement of which the union company is a signatory, which may include paying welfare, health and pension benefits required by the union. Moreover, a double-breasted operation can get expensive. The firm must adequately allocate resources to the double-breasted operation, which includes time and money, at the inception of the entity. If the firm does not have resources to allocate to the new entity, it will spread itself too thin, thus risking the success of the firm. Lastly, the double-breasted operation can expose the open shop or the union entity to lawsuits which could bankrupt the entire firm. Though these outcomes are not common, they are a possibility, and therefore, it is important for the firm to take appropriate steps in ensuring that the firm's double-breasted operation is a viable option and that the firm is taking all steps to ensure that it operates legally.

#### Conclusion

While establishing a lawful double-breasted operation opens the doors for more opportunity, that opportunity does not come without risks. It is important that any firm deliberating on whether to open a business with double-breasted operations first speak with legal counsel familiar with the vast amount of caselaw surrounding double-breasted operations. This article has only provided you with a brief overview of factors for consideration. Each situation should be closely reviewed and analyzed based upon the facts and circumstances of the individual case. ◀

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Joseph A. Figueroa

## Not If, But When: Newly Enacted Virginia Legislation Bans “Pay-If-Paid” Clauses In Construction Contracts

by Joseph A. Figueroa, Associate and Thomas E. Minnis, Associate



Thomas E. Minnis

Recently passed legislation in Virginia is likely to dramatically change contractual relationships between prime contractors and subcontractors in the Commonwealth. Abrogating well-

established common-law principles set forth by the Supreme Court of Virginia, on April 27, 2022, the Virginia General Assembly, after receiving input from Virginia Governor Glenn Youngkin, passed Senate Bill 550 banning “pay-if-paid” clauses in public and private construction contracts. Contractors performing work in Virginia should take note of the new law, which goes into effect next year and will apply to any contracts executed after January 1, 2023.

### The History Of Pay-if-Paid Clauses In Virginia

Broadly speaking, “pay-if-paid” clauses are a commonly used tool by prime contractors on construction projects to shift the risk to subcontractors in the event that the owner does not pay the prime contractor for work. Such clauses usually include language creating an express condition precedent to the subcontractor’s right to be paid for work under a subcontract, stating that the prime contractor shall be under no obligation to pay the subcontractor for work unless and until the prime contractor first receives payment for that work by the project owner. The “pay-if-paid” clause also has a less extreme cousin, the “pay-when-paid” clause, which merely delays the time in which the prime contractor is obligated to pay the subcontractor to the time in which the prime contractor is paid by the owner. It does not, however, extinguish the prime contractor’s ultimate obligation to pay the subcontractor.

Prior to 2022, Virginia found itself in the majority of the states that upheld the enforceability of

such “pay-if-paid” clauses. Indeed, in 1995, the Supreme Court of Virginia made clear in *Galloway Corp. v. S.B. Ballard Const. Co.*, 250 Va. 493, 501 (1995), that “[i]f . . . the parties clearly intend there to be a condition precedent fulfilled before payment comes due, the contract will be construed as written and will not be reformed by the court . . . .” Since then, courts consistently cited *Galloway* in upholding the enforceability of pay-if-paid clauses in Virginia. See, e.g., *Universal Concrete Prods. Corp. v. Turner Const. Co.*, No. 2:08-cv-298, 2009 WL 10701538, at \*3 (E.D.Va. Feb. 20, 2009).

### Senate Bill 550 – A Sea Change

Senate Bill 550 was introduced in the Virginia Senate on January 12, 2022 and initially passed by both Houses of the General Assembly in March 2022. SB550 amends Virginia Code §§ 2.2-4354 and 11-4.6, which govern both public and private sector contracts. Specifically, the amendments require that any construction contract between a general contractor and subcontractor include a provision obligating the “higher-tier contractor” to pay the “lower-tier contractor” within the earlier of 45 days of satisfactory completion of the subcontract work, or seven days after the higher tier contractor’s receipt of payment for the subcontract work from the owner.

Some questions persisted following the passage of SB550. The bill did not indicate whether the new timely payment requirements would apply retroactively - that is, to contracts entered into before the bill’s passage. Nor did the bill address whether a higher-tier contractor was still entitled to withhold retainage amounts from the subcontractor - a common practice by prime contractors to ensure proper performance of the work.

In Virginia, however, the governor is permitted to propose amendments to legislation passed by the General Assembly. Newly elected

Governor Glenn Youngkin did just that with SB550, proposing certain amendments to add more certainty to the new code section. Governor Youngkin's proposed amendments explicitly permitted retainage and added an additional clarifier that the new requirements will not apply retroactively, instead only applying to construction contracts entered into after January 1, 2023. Finally, the Governor's amended version extended the time for payment in the new § 11-4.6, with the statutory language now stating that "[a]ny contract in which there is at least one general contractor and one subcontractor . . . shall require such higher-tier contractor to pay such lower-tier subcontractor within the earlier of (i) 60 days of the satisfactory completion of the portion of the work for which the subcontractor has invoiced, or (ii) seven days after receipt of amounts paid by the owner to the general contractor or by the higher-tier contractor to the lower-tier contractor for work performed by a subcontractor pursuant to the terms of the contract."

Pursuant to Virginia law, the Virginia General Assembly passed Governor Youngkin's proposed amendments to SB550 on April 27, 2022, meaning that the Governor's version is the final one enacted into law.

#### **Enforceability Of Pay-If-Paid Clauses In Other States**

In light of the General Assembly's acceptance of Governor Youngkin's proposed amendments, Virginia now joins a minority of ten other states, including California and New York, that preclude the usage of "pay-if-paid" clauses. The majority outlook accepting the validity of "pay-if-paid" clauses, however, remains dominant in more than 30 states, including Florida, Michigan, and Pennsylvania. Contractors in the majority view states should still be mindful of limitations imposed on "pay-if-paid" clauses in these states.

Almost all courts in the majority view states require that the condition precedent to the subcontractor's payment be clearly and unambiguously expressed. A 1990 Florida Supreme Court decision is instructive on this point. In *DEC Elec., Inc. v. Raphael Constr. Corp.*, the court explained "[i]f a [pay-if-paid] provision is clear and unambiguous, it is interpreted as setting a condition precedent to the general contractor's obligation to pay . . . . In purported risk-shifting provisions between a contractor and subcontractor, the burden of

clear expression is on the general contractor." 558 So. 2d 427, 429 (Fla. 1990). Notably, the burden to ensure that the "pay-if-paid" clause is clear and unambiguous rests with the prime contractor.

Compare this relatively permissive formulation to a handful of states, including Arizona, Illinois, and Maryland, which protect the rights of subcontractors by expressly limiting the use of "pay-if-paid" clauses in certain contexts. Illinois and Maryland, among other states, have enacted statutes preventing prime contractors from relying on "pay-if-paid" clauses to defeat subcontractor claims relying on mechanics' liens.

Arizona, on the other hand, is unique in that it has identified specific exceptions to the enforcement of conditions precedent that limit subcontractor recovery. For example, in *L. Harvey Concrete, Inc. v. Agro Constr. & Supply Co.*, the Arizona Court of Appeals reversed a summary judgment decision that had enforced a "pay-when-paid" clause. 939 P.2d 811, 815 (Ariz. Ct. App. 1997). The court explained that such conditions precedent will not be enforced in the case of gross mistake, fraud, or error leading to a lack of honest judgment, and found that the subcontractor had potentially demonstrated that the owner made a gross mistake of fact.

Thus, even in states that permit "pay-if-paid" clauses, courts are cognizant of the risk that prime contractors hold an advantage over subcontractors in contract drafting and have taken steps to protect the subcontractors.

#### **Conclusion**

In light of Virginia's new law precluding "pay-if-paid" clauses, prime contractors must carefully consider their options in ensuring that prime contract funds will be available to satisfy subcontractor payment applications. Virginia's new law potentially places prime contractors at risk for financing subcontractor pay applications during the pendency of owner payments for subcontractor work, including payment delays arising from contractor claims. Moreover, prudent prime contractors will closely monitor the legality of "pay-if-paid" clauses in the remaining majority-view states which enforce "pay-if-paid" clauses in most circumstances. Further changes to the current landscape regarding "pay-if-paid" clauses may have significant effects on construction subcontracts. ◀





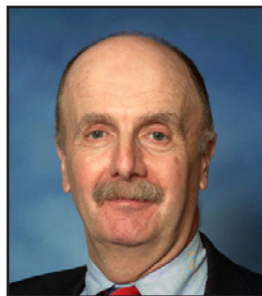
## » UKRAINE REVISITED «

As Watt, Tieder, Hoffar & Fitzgerald marks its 44th year in the legal community serving our clients, it is with profound pride and a heavy dose of nostalgia that we look back and remember the courageous and dedicated attorneys that opened the doors of the firm and crafted the foundation of our construction, surety, and government contracts practices. Although their surnames grace our business cards and letterhead, to us they will always be Bob, Jack, Jules and Fitz (and Larry), our mentors and friends. We are forever blessed by their teachings, intellectual curiosity, humor, and the exacting standards that they set for us. Rarely does a day go by that we do not find a reason to look back and appreciate what we have learned from one of these icons of our profession.

The currently unfolding events in Ukraine and ongoing battle for that country's independence and democracy provide such a reason. Jack Tieder spent hours and hours personally training, testing, and (on occasion too gleefully) challenging young attorneys in our firm. He then would board a plane to lecture eager lawyers in Eastern Europe, Russia, China and the Middle

East. He pursued this passion right up to the end of his life on December 3, 2017. Readers of our Newsletter fondly recall Jack's frequent articles bringing to life the faraway locations from his travels. As we have noted before, Jack was a brilliant, demanding, learned, and creative attorney with a thirst for life and a sense of humor that shone through in his writings.

The article that follows, reprinted from our Spring 2011 Newsletter, recounts a trip by Jack and his lovely wife, Rufus, to Ukraine in November 2010. Upon re-reading this article recently, we were awestruck by how prophetic Jack's warning of a decade ago is today for this "large, resource-rich place which could become one of the most substantial, richest countries in Europe or dissolve into chaos and sectionalism." At a minimum, be sure to peruse the conclusion, as I hope Jack's 2011 wager (he bets "yes") strikes you as profoundly as it does us. Jack clearly saw then what we all know now about Ukraine's truly remarkable spirit. Please enjoy (for some of you, a second time) the creative story-telling and insightful observations of a brilliant mind.



### Ukraine – Greatness In The Making?

by Jack Tieder

Our (my wife, Rufus, and me) most recent teaching trip was to Dnipropetrovsk (knee- pro-pa-trosk)

(it took me a week to learn how to pronounce it), Ukraine where I taught at the Ukrainian Academy of Customs in November 2010. It was the most "foreign" place we have visited so far and also one of the most exciting. Exciting for many reasons which I will try to explain, but most of all because it is a large, resource-rich place which could become one of the most substantial, richest countries in Europe or dissolve into chaos and sectionalism. The tension between these two tendencies is palpable, literally can be felt in the air, but let me try to put it into context.

#### Ukraine – The Place

Like most of the countries of Eastern and Central Europe, the geography of Ukraine has been in almost constant flux. Much of the Country is a



large plain (steppe) and over the centuries has been home to or invaded by various nomadic tribes. It has only existed in its present form since 1991, although the same basic area existed independently from 1917-1920. It is the second largest (area) country in Europe after France (third if Russia is considered part of Europe). Its Western border is on the Carpathian Mountains and its northern and eastern borders are with Belarus and Russia. Its southern border



is the Black and Azov Seas. Geographically and politically, the country is really three regions. The Western part is truly “Ukrainian,” with the Ukrainian language being dominant and agriculture the major part of the economy; it is really part of Central Europe. The Ukrainian, Polish, Romanian, Slovakian border has been contested for centuries. The Eastern part of the country is more industrialized and more “Russian.” The dividing line is generally the Dnieper River which almost splits the country in two. The tension between the two parts was obvious to us after a few days. Westerners are referred to as “Bendezy.” Easterners are referred to as “Moskali.” The terms have almost all the “affection” of “Yankees” and “Rebs” in the in the United States in 1860. The third part of the country is the Crimea on the Black Sea. It is a cosmopolitan region with a Mediterranean climate, atmosphere and outlook reflective of its long history as part of the Ottoman Empire. The residents don’t participate in the “Bendezy”/“Moskali” controversy.

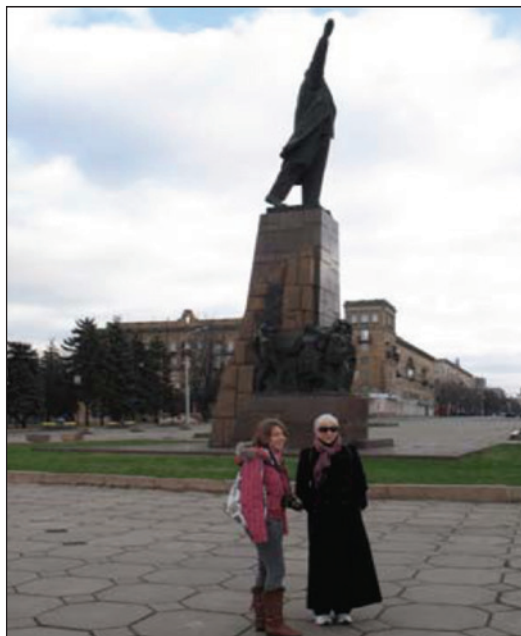
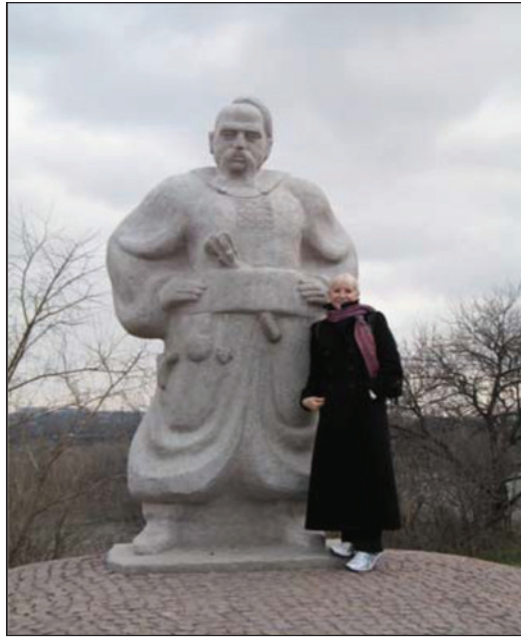
## History

Although Ukraine as a definable geographic/ political place may have a fairly short history, its cultural history is probably best seen as starting with the creation of the Kyivian (Kiev) Rus Empire in the 9th Century, A.D. The founder was a Norwegian, King Oleg; he and his successors established effective control from the Baltic Sea to the Black Sea and as far west as the Danube. The whole empire was converted to Christianity by an edict of King Vladimir the Great in 989 A.D.

The Empire prospered for several centuries until the Mongols, successors to Genghis Kahn, took Kiev in 1240, which in turn eventually succumbed to the Ottoman Empire. To add to the confusion, the Western Part of the Country was long a part of the Polish-Lithuania Commonwealth.



The most famous part of Ukrainian history is the role of the Cossacks. They apparently were a mixture of descendents of the Mongols, serfs



who had escaped from Russia, and a variety of others. By the 16th Century, they were a powerful force which conquered and then lost territory from Istanbul to the gates of Warsaw. Their headquarters was on a large island in the Dnieper River named Zaporizka Sich (Fort). We visited the island where a movie set rendition of the Sich was made for the movie, Taras Bulba, a famous Cossack leader immortalized in a novel of the same name by Nikolai Gogol.

The Cossacks and the territory of the “Ukraine” were eventually all absorbed by the Russian Empire, especially under Katherine the Great in the late 18th Century. The lure of the warm water ports of the Black Sea was irresistible to the Russians. Indeed to this day one of the major political issues in the Ukraine is the

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continued leasing to Russia of Naval Bases on the Black Sea. In what I am sure was not a coincidental decision, about two miles above the old Cossack Sich on Zaporizka island is a major hydroelectric dam and a massive statue of Lenin pointing directly at the island. The Russians have a way of making their point.

Ukraine remained a part of the Russian, and then the Soviet, empires until 1990, except for a brief period in 1917-1920. The Soviet period was particularly awful as Stalin, in an effort to eradicate Ukrainian nationalism, was responsible for the deportation, execution, and starvation of millions of people. It has not been forgotten. Ukraine became independent in 1991 with the general break up of the Soviet Union and the Eastern block.

### Chernobyl

Chernobyl is in the Ukraine and indeed today it is a rather popular but macabre tourist attraction. What I did not fully appreciate before I started visiting Eastern and Central Europe is the huge role Chernobyl played in the disintegration of the Eastern Bloc. The Russian leadership, while taking steps to protect itself and their cohorts down-wind of Chernobyl, did not even inform the population of the accident for two days. The degree of anger over this and “the lie,” it put to Soviet style leadership, had a huge role in disaffecting the population, not only of the Ukraine, but of Bulgaria, Romania, Hungary and indeed, the whole Eastern Bloc.

### Dnipropetrovsk

The guide books for the Ukraine identify the three main stops for any tour: Lviv and the Carpathian Mountains in the West, Kiev, the Capital, and Odessa and the Black Sea in the South. A fourth possible stop is the Crimean peninsula. We did not go to any of these places. Instead we went to Dnipropetrovsk (knee-pro-pa-trosk).

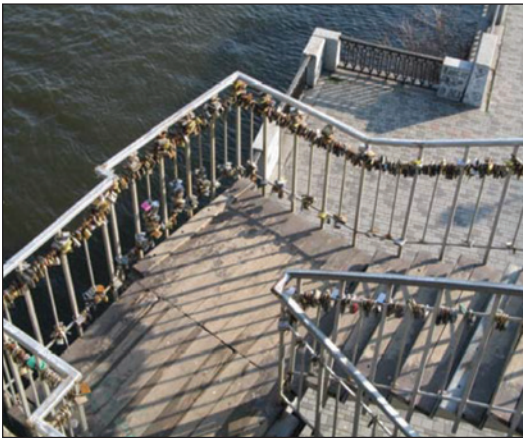
Dnipropetrovsk is the second largest city in Ukraine, located almost exactly in the middle of the Country on the Dnieper River (see map). It was one of the leading missile and armament production centers of the Soviet Union and it was closed to foreigners and indeed most Russians until Ukrainian independence. It still has a large aerospace industry, but much of the city is a rather dreary “rust belt” of closed factories and the ubiquitous and dreary soviet style decaying concrete apartment blocks. (It was again confirmed that no soviet architect will be in the history of architecture texts in 100 or even 50 years from now).



The older part of Dnipropetrovsk was somewhat charming. There is a beautiful esplanade along the river. One of the most striking monuments was a large war memorial. During WWII there was a pivotal battle near Dnipropetrovsk where the Red Army pushed the German Army across the Dnieper River. Indeed the City has an entire museum devoted to this “epic” battle; I assumed the memorial was for this battle, but it was not.

Take a look at the closeup photo; assuming you cannot read the Cyrillic alphabet, what do you notice about the dates? Certainly not WWII. It took me a while, but it finally dawned on me





that these 19-21 year old Ukrainians, born in the mid-1960s and killed in the mid-1980s, died in Afghanistan. I remember being rather pleased to read about the Red Army's disaster in Afghanistan, but looking at the ages of the dead and comparing them to living 19-21 year old Ukrainians, I felt something entirely different. It was particularly poignant that it is a Ukrainian custom for newlyweds to place flowers on a memorial on their wedding day; this memorial was covered in flowers: fathers, older brothers?

Further down the river was a much happier sight. In Ukraine (also Latvia) it is a custom for newlyweds to walk across a bridge, place a lock in the middle, and throw the key in the water. No one could explain the origin of this custom, but the symbolism is obvious.

Dnipropetrovsk appeared to be in the middle of a building boom. Near our "hostel" (more on that below) was a very modern shopping center with the largest internet café we have ever seen. The one English language newspaper even had a series of articles on the immigration of construction workers from Uzbekistan and

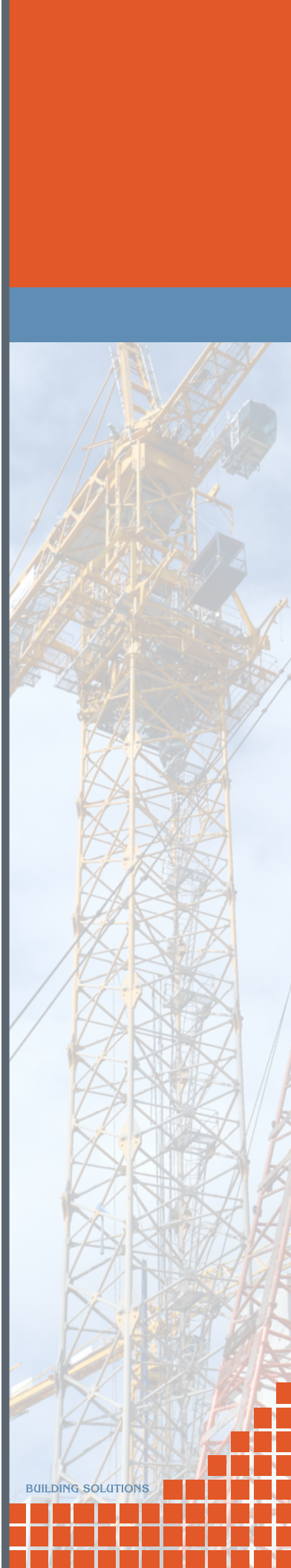
Vietnam. Somewhat surprisingly, there were a large number of new places of worship, including a beautiful new orthodox church, a large synagogue, and a Mormon temple. One of the upcoming projects is the demolition of a large hotel constructed at the end of the Soviet era and never occupied because of structural defects.

A significant building boom for the entire country is the preparation for the 2012 European Cup (soccer) Championships which Ukraine will co-host with Poland. This is requiring several new stadiums with supporting infrastructure.

### The People And Daily Living

Ukraine is considered part of Europe and on the basis of per capita income ranks 39/40. Although this puts it behind Romania and Bulgaria and well behind Poland and Hungary, it is somewhat difficult to translate into how most people live. Ukraine, like Russia, has its

*...continued on page 12*







share of billionaires. There are many luxury stores, high-end night clubs and the requisite German-made limousines with black tinted windows. On the other end were the crumbling soviet-era apartment blocks which obviously hadn't seen any maintenance in some time. The unemployment rate was at least in the high teens, but, there were no beggars on the streets. In general, it seemed bustling with a lively air of commerce and political discussion. We even saw a political protest march, but couldn't make out the issue.

One of the more striking things we noticed was that we never had a conversation with a person older than their early twenties. Before 1990, English was not taught. The foreign languages were Russian and some German. Since 1990, English is the predominant foreign language (travel tip in Eastern and Central Europe - if you need information, talk to a teenager – they will have studied English and are usually eager to practice).

Because we almost always had two or three students with us, language was not usually a problem. An exception was a weekend trip to Zaporozhei (Cossack Island). We thought we had solved the menu problem because most of the restaurants were cafes (i.e., cafeterias) and we simply pointed. One night we found ourselves in an à la carte restaurant. After ordering "piva" (beer) we were stuck until Rufus came up with the idea of animal noises. "Oink-oink" and the waitress pointed to what turned out to be pork, "cluck-cluck" got chicken, and so on. The preparation was a little strange, but we ate identifiable things.

One of the most charming aspects of all of Eastern and Central Europe is the endurance of folk tales and customs. I have already mentioned the locks on the bridges. Another is never to shake hands over an entry way - you must be either fully inside or fully outside before shaking hands. The giving of flowers is much appreciated; however, you always give an odd number. Even numbers are only for funerals (the bouquets left on the Afghanistan

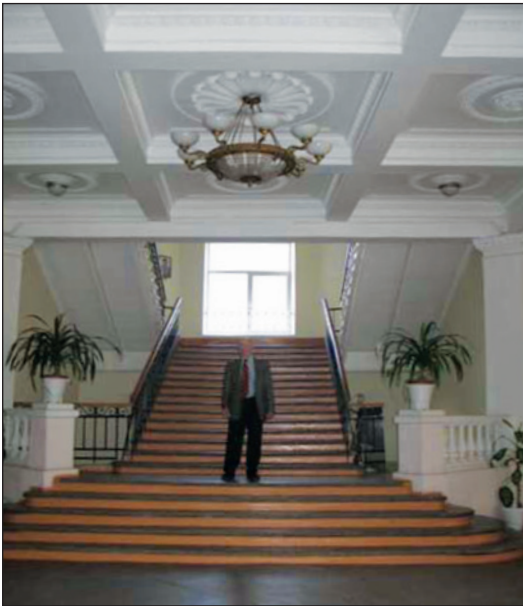


War memorial – even). You always toast before drinking, but never cross arms and must look each individual directly in the eyes. The Ukrainian word for "Cheers" is "Boud-mo" (phonetic). A particularly charming and readily proven belief is that you will have good luck if you stand between two people of the same name.

#### Ukrainian Academy Of Customs

The school where I taught was the Ukrainian Academy of Customs. It is a unique and laudable institution in a variety of ways. First, the Customs Service in Ukraine is a uniformed, quasi-military service. A rough comparison would be a combination of the United States' Customs Service, TSA, AFT, and some elements of the FBI. The Academy itself is somewhat akin to our West Point, Naval Academy, or Air Force Academy. Its regular students are selected after a rigorous entrance process, pay no tuition, are paid a regular, if modest, stipend, wear uniforms at least some of the time, are trained in martial arts and weapons use, and are obligated to serve 4 years in the Customs Service after graduation. This last requirement is actually considered a blessing because of the high unemployment rate, especially for recent University graduates. It differs from the U.S. service academies in that students can major in one of three faculties - economics, political science, or law. Graduates of the first two faculties generally start their careers at Customs facilities throughout the country while graduates of the law faculty become lawyers for the Service. It also differs from U.S. service academies in that lesser- qualified students can





apply and attend by paying tuition. All of my students, however, were cadets, and thus the result of the highly selective admission process. They were all very bright, spoke excellent English, and were highly motivated.

The School itself consisted of several beautiful 19th century buildings that were quite modern inside. Our living quarters were in a student hostel (dormitory). Unlike the students, however, we had a private bathroom and hot water. We had a television but only Ukrainian/Russian language programs. There were endless soccer games (a passion in Ukraine) and one sitcom, which was a Ukrainian version, character for character, of "Married with Children," although I could not understand a word. (Aside – this was an insight into the Ukrainian sense of humor, which very much tended toward the bawdy). The living quarters were, as in all our other Eastern European stays, comfortable but not fancy.

Every school day started with military precision at 9:00 a.m. with a knock on our door and 2-3 students would plan our events for the day: breakfast, sightseeing, lunch, class, break, and

evening entertainment, e.g., an organ recital, opera (Barber of Seville sang in Russian), etc. The next day, 9:00 a.m., a different 2-3 students would make the plan. Unlike other institutions, I never met and had no interaction with the faculty, although several times it was on the daily schedule. We eventually figured out that this was due to the lack of English-speaking ability among the faculty. Indeed, I don't believe we conversed with a single person over the age of 25 during our entire stay.


If a country's future is determined by its youth, then Ukraine has a bright future. The students were self-reliant, intelligent and pragmatic. A problem we ran into everyday is that the students were very reluctant to allow us to buy them even a coffee, much less a meal. They said that we were guests in the Ukraine and that they would treat us. I knew their monthly stipend was less than USD 100/month and that even buying us a cup of coffee would probably deprive them of at least a day's worth of meals. We only ended this stand-off on our Thanksgiving when we convinced them that it was an American tradition to have a meal for your family and friends and that they were our family substitute. Even then I had to cajole them to order more than a bowl of soup. It was a major breakthrough when I got the two men to have a beer with me.

Rufus is particularly interested in anti-human trafficking laws worldwide. Since Ukraine is well known both for the attractiveness of its women and as a source for trafficking, she was very interested in the views of the female students. They told us that through a variety of official sources, they are well aware of the dangers of trafficking and warned of offers to work abroad. They were not particularly sympathetic to those who "fell" for the promise of good foreign jobs. Incidentally, these young women were not only smart, tough and ambitious, but they also knew martial arts and were qualified in the use of a variety of weapons.



*...continued on page 14*





An interesting aspect of almost all of the students is that they had one Ukrainian and one Russian parent. Whether they were Westerners (Bendezy) or Easterners (Moskali) depended on where they live. Several of them told me about their family “arrangements” as to the use of Ukrainian or Russian at home. Not surprisingly the mother’s language was the language used at home although grandparents would be accommodated in their preference.

A final note on the Academy. The students receive real grades. Apparently in other Universities, professors demand and students pay for their grades. One of my female students told us that her boyfriend was partying and paying his way through medical school – scary thought. I was assured that this did not happen at the Academy.

### Legal System

The legal system is emerging. Ukraine has a modern civil code which is similar to most other European countries. Its constitution is, like most new constitutions, a wonderful guarantee of basic human rights, but the implementation of these rights through the court system is only slowly evolving. Ukraine is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, but the enforcement record is, at best, spotty. Corruption in the legal system is commonly regarded as a major problem. In summary, Ukraine’s legal system is a work in progress with corruption (Ukraine ranks as one of the most corrupt places in Europe) adversely affecting most aspects of its operation.

### Construction Opportunities

As mentioned above the Ukraine ranks 39/40 of European Countries in terms of economic development. This may be misleading because Ukraine seems to have great potential. It is both a substantial agricultural and industrial country with considerable mineral resources. It ranks fourth in the world in steel production. It was one of the major industrial areas of the Soviet Union, although like much of Eastern European industry is in need of modernization.

Roughly 40% of its power comes from nuclear plants and in spite of Chernobyl, plants are being expanded and upgraded. Thus, there seems to be meaningful opportunities for the construction industry in large scale projects such as mining, industrial plant, and power plant construction. Infrastructure would follow. The downside is of course the corrupt and still opaque legal system.

### The Future

It is hard to predict. We had numerous conversations with the students about how they are the first generation to grow up outside the socialist system with its horrible legacy of favoritism, corruption, and stifling of individual initiative. They are just now reaching voting age. They ask if democracy really works; is some sort of autocracy needed to end corruption or does it foster more corruption? Can they put the “Bendezy”/“Moskali” conflict aside; can they vote out corrupt politicians; can they fulfill personal ambitions? Seeing the future through their eyes (I never did hear the older generation’s view because of the language issue), I’ll bet “yes.”



## Recent And Upcoming Events

**Maryland Bankruptcy Bar Association's 24th Annual Spring Break CLE Weekend**, May 5-6, 2022; Annapolis, Maryland. **Jennifer L. Kneeland** was a panelist for "Hot Topics In Business Bankruptcy Cases" and **Marguerite Lee DeVoll** was a panelist for a panel entitled "Small Business Reorganization Act."

**Construction Financial Management Association's 2022 Annual Conference & Exhibition**, May 16, 2022; Atlanta, Georgia. **John E. Sebastian** and **Brian C. Padove** co-presented "From Supply Chains to Inflation – Managing Fluctuating Challenges and Risks."

**Western States Surety Conference**, "When the Bill Comes Due: Consideration of Damages in Surety Litigation," May 19-20, 2022; Seattle, Washington. **Watt Tieder** co-sponsored and

**Amanda L. Marutzky** served as Conference Chair; **Jennifer L. Kneeland** and **Marguerite Lee DeVoll** co-presented on the topic "The Surety's Desk-Guide to Recovering and Advancing Claims for Damages in Bankruptcy or When the 'Zone of Insolvency' is Reached."

**AACE National Conference**, June 26-29, 2022; San Antonio, Texas. **Christopher J. Brasco** and **Matthew D. Baker** will present the topic "Progress is Best Measured One 'Half-Step' At A Time."

**ABA FSLC's Midwinter Meeting**, August 18 – 19, 2022; Nashville, Tennessee. **CharCretia DiBartolo** will be co-chairing the fidelity program "Litigating The Fidelity Claim." ◀

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## Announcements

**Marguerite Lee DeVoll** was elected to serve as the Assistant Treasurer on the Board of Directors for the Maryland Bankruptcy Bar Association.

**Jennifer L. Kneeland** was elected to serve as an officer for the Northern Virginia Bankruptcy Bar Association. ◀

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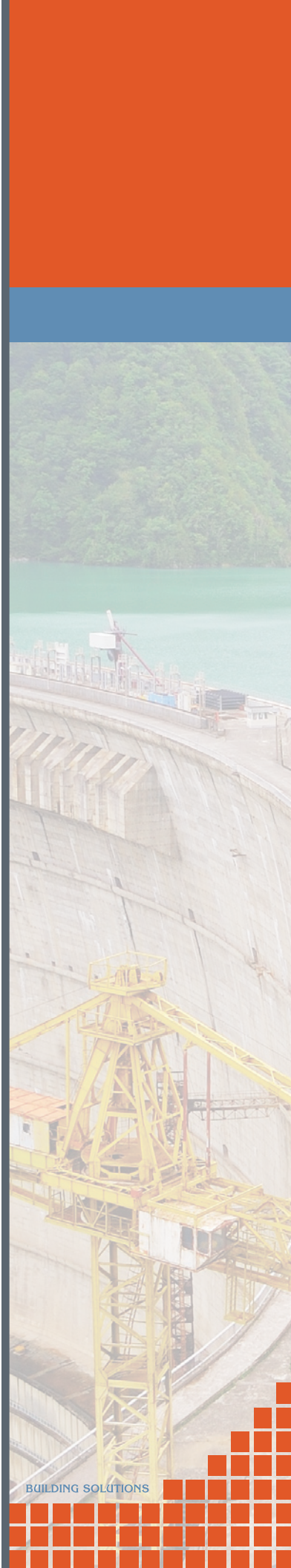
## Watt Tieder Welcomes New Associate



**Kristopher L. Hiser** joined **Watt Tieder** as a first-year associate in our McLean, Virginia office. He focuses his practice on construction, government contracts, and suretyship law.

Kris graduated Magna Cum Laude from the Antonin Scalia Law School

at George Mason University in 2021. He served on the Trial Advocacy Board and as a research editor on the George Mason Law Review. He also interned for the National Association of Manufacturers and the Arlington County Public Defender's Office. Before entering law school, Kris worked as a commercial wallcovering subcontractor, where his responsibilities included project oversight and personnel management. ◀





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

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