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BUILDING SOLUTIONS

New York City Revises Standard Construction Contract To Address Contractors' Rights to Delay Damages

by Shelly L. Ewald, Senior Partner

On March 17, 2017, the City of New York released a revised version of its Standard Construction Contract, which is effective immediately and to be used for all outstanding bids. The primary purpose behind the issuance of the new Contract was to revise provisions related to delay damages, including the definition of compensable and non-compensable delays, recovery of delay costs and the process for submitting claims for such delays.

Historic Use Of No Damage For Delay Clauses In New York City

New York City's historic use of "no damage for delay" clauses resulted in significant litigation and some of the most often cited cases defining the exceptions to such provisions, including *Kalisch-Jarcho v. City of New York*, 58 N.Y.2d 377 (1983) and *Corinno-Civetta Construction Corp. v. City of New York*, 67 N.Y.2d 291 (1986). In *Corinno-Civetta*, the New York Court of Appeals identified four exceptions to the coverage of the clause, including: (1) the City's bad faith, willfulness, or grossly negligent conduct; (2) uncontemplated delays; (3) unreasonable delays that constituted intentional abandonment by the City; and (4) delays resulting from the City's breach of a fundamental obligation of the contract. These four exceptions provided ample opportunities for contractors to seek delay damages in disputes with the City.

In 2008, New York City began a five year pilot program to evaluate the effect of contract provisions allowing recovery of delay costs on certain public works projects for delays caused by City agencies. The result of the pilot study confirmed that the bid prices for contracts including a "no damage for delay" clause were higher than comparable projects that allowed for recovery of delay costs. Thereafter, the City revised its Standard Construction Contract to allow delay damages in limited circumstances on all City construction projects after December 24, 2013. The new Standard Construction Contract replaces the 2013 version.

Overview Of 2017 Revisions

The 2017 revisions to the City Standard Construction Contract primarily change the provisions of Article 11 regarding compensable and non-compensable delays. The definition of Compensable Delays was revised to require that certain delays attributable to the City be "unreasonable," rather than simply "extended" as provided in the 2013 Contract. (Section 11.4.1.2). Section 11.4 clarifies the following "compensable" delays:

11.4.1.1 The failure of the **City** to take reasonable measures to coordinate and progress the **Work** to the extent required by the **Contract**, except that the City shall not be responsible for the **Contractor's** obligation to coordinate and progress the **Work** of its **Subcontractors**.

11.4.1.2 Unreasonable delays attributable to the review of shop drawings, the issuance of change orders, or the cumulative impact of change orders that were not brought about by any act or omissions of the **Contractor**.

11.4.1.3 The unavailability of the **Site** caused by acts or omissions of the **City**.

11.4.1.4 The issuance by the **Engineer** of a stop work order that was not brought about through any act or omission of the **Contractor**.

11.4.1.5 Differing site conditions or environmental hazards that were neither known nor reasonably ascertainable on a pre-bid inspection of the Site or review of the bid documents or other publicly available sources, and that are not ordinarily encountered in the **Project's** geographical area or neighborhood or in the type of **Work** to be performed.

11.4.1.6 Delays caused by the **City's** bad faith or its willful, malicious, or grossly negligent conduct;

11.4.1.7 Delays not contemplated by the parties;

11.4.1.8 Delays so unreasonable that they constitute an intentional abandonment of the **Contract** by the **City**; and

11.4.1.9 Delays resulting from the **City's** breach of a fundamental obligation of the **Contract**.

Section 11.4.2 was also revised to make clear that a contractor was not entitled to present a claim for delays for early completion unless the Contract provided for additional compensation for early completion or the Commissioner had directed that performance be accelerated. The latter situation had been recognized previously in the 2013 version of the Standard Contract. The components of delay damages that are recoverable were also revised in Section 11.7, including a formula for extended home office overhead.

Section 11.5 of the Standard Construction Contract describes "Non-Compensable Delays" for which "the Contractor agrees to make no claim for, and is deemed to have included in its bid prices ... the extra/additional costs attributable to any delays." Non-compensable delays include delays caused by third parties, the Contractor's means and methods of construction, court orders, *force majeure* events and other foreseeable delays. Section 11.5.2 of the "non-compensable" delay provision was revised to provide that the Contractor would not have a claim for delays that were within the contemplation of the parties at the time of contracting to the extent that they "would be generally recognized by a *reasonably prudent contractor* as related to the nature of the Work[.]"

Finally, Article 11 was also revised to provide for a different process of addressing claims for delays. Previously, claims for delays were submitted to the agency for determination of the merits and payments for delays through a change order. The Claim Submission requirements are set forth in Article 11.1 and provide that the Contractor must notify the Resident Engineer of the condition causing the delay and submit the damages claimed to the Commissioner:

11.1 After the commencement of any condition which is causing or may cause a delay in completion of the **Work**, including conditions for which the **Contractor** may be entitled to an extension of time, the following notifications and submittals are required:

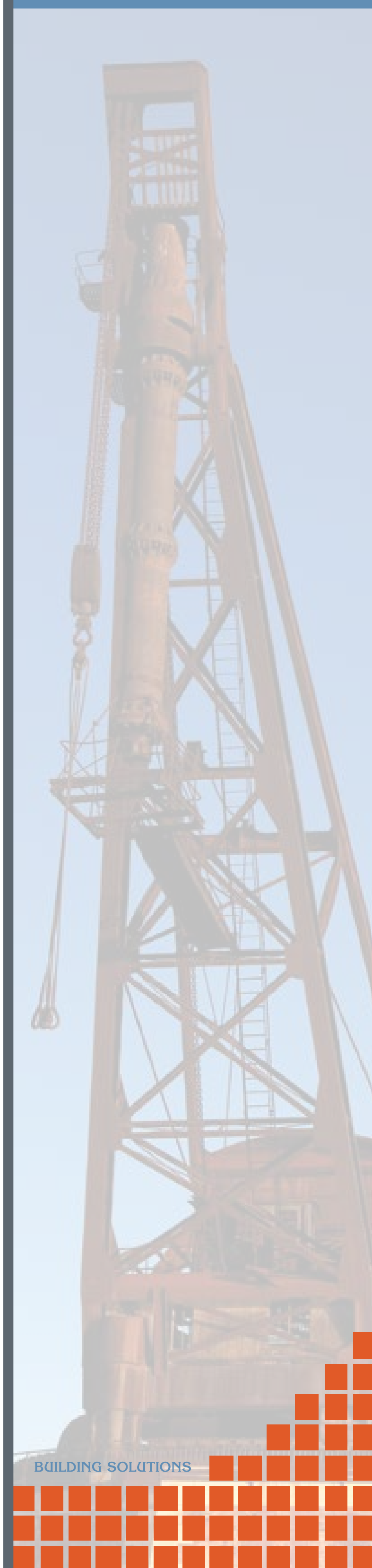
11.1.1 Within fifteen (15) **Days** after the **Contractor** becomes aware or reasonably should be aware of each such condition, the **Contractor** must notify the **Resident Engineer** or **Engineer**, as directed by the **Commissioner**, in writing of the existence, nature and effect of such condition upon the approved progress schedule and the **Work**, and must state why and in what respects, if any, the condition is causing or may cause a delay. Such notice shall include a description of the construction activities that are or could be affected by the condition and may include any recommendations the **Contractor** may have to address the delay condition and any activities the **Contractor** may take to avoid or minimize the delay.

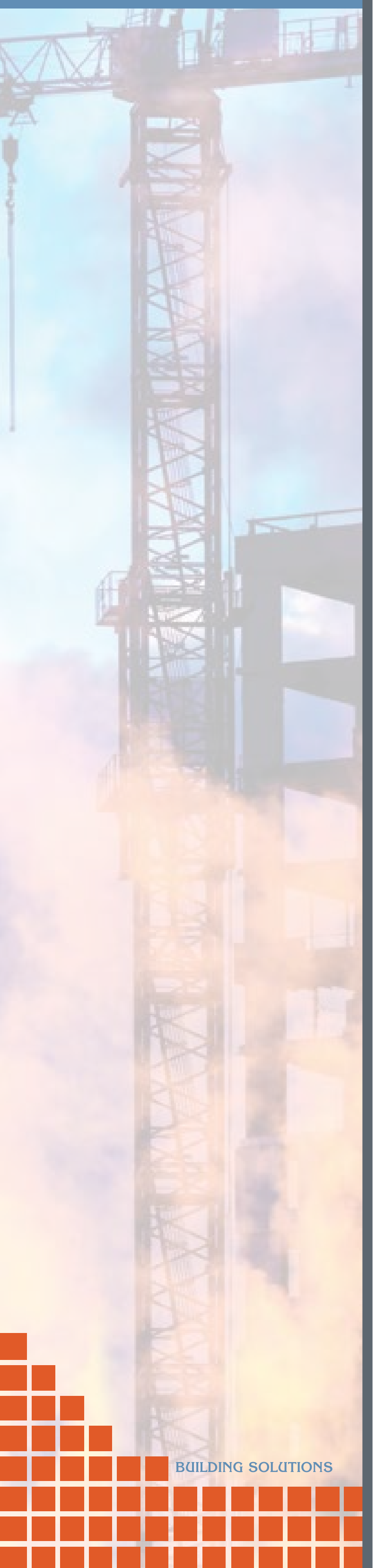
11.1.2 If the **Contractor** shall claim to be sustaining damages for delay as provided for in this Article 11, within forty-five (45) **Days** from the time such damages are first incurred for each such condition, the **Contractor** shall submit to the **Commissioner** a verified written statement of the details and estimates of the amounts of such damages, including categories of expected damages and projected monthly costs, together with documentary evidence of such damages as the **Contractor** may have at the time of submission ("statement of delay damages"), as further detailed in Article 11.6. The **Contractor** may submit the above statement within such additional time as may be granted by the **Commissioner** in writing upon written request therefor.

However, Section 11.9 further provides that all delay claims are to be filed with the Comptroller and any compensation will be determined by the Comptroller. The revised provisions appear to complicate the process of filing such delay claims and failure to comply may jeopardize recovery.

Conclusion

In summary, the revisions to the New York City Standard Construction Contract alleviate some of the draconian effect of the prior "no damages for delay" clause that inspired repeat litigation, but continue to provide an opportunity for disputes, including whether the City's delays were "unreasonable" and whether a "reasonably prudent contractor" would have anticipated the delays.





CALIFORNIA UPDATE

California Public Contract Code 9204 Establishes A Mandatory Claims And ADR Process For Contractors And Raises Potential Concerns

by David F. McPherson, Senior Partner

On November 17, 2016, Governor Brown signed into law AB 626 which adds new Public Contract Code (PCC) 9204. This new section of the PCC (which is effective for all contracts executed on or after January 1, 2017) reflects an effort to resolve contractor claims more expeditiously by requiring public entities to evaluate claims and engage in mediation or other forms of non-binding ADR. The bill's sponsor, United Contractors ("UCON") touted the new law as follows:

> In a historic win for industry, today, Governor Brown signed AB 626, UCON's "change order" reform legislation. This victory comes after a three-year battle to close the loop-hole in prompt payment by public agencies for CA contractors. The UCON-sponsored measure implements a fair and responsible process that requires local agencies, including the UC/CSU system and airports, to respond to a contractor's claim for "extra work" timely, pay the undisputed portions of claims and provides a path for expedited settlement of disputed claims. This is a major victory for California's public-works contractors.

Although the new law benefits contractors by requiring public entities to address claims, there are some potential pitfalls. Only time will tell how effective this new law is and how it interacts with statutes placing additional pre-litigation requirements on public works contractors.

Does PCC 9204 Apply To All California Public Entities?

Most, but not all, California public entities are subject to the new ADR requirements of PCC 9204. The new law applies to state agencies, departments, offices, divisions, bureaus, boards and commissions; the California State University and the Regents of the University of California; and local cities, charter cities, counties, charter counties, city and counties, charter cities and counties, districts, special districts, public authorities, political subdivisions, public corporations, and nonprofit transit corporations wholly owned by a public entity and formed to carry out the purposes of the public entity.

Public entities to which PCC 9204 does *not* apply are: (1) the Department of Water Resources; (2) the California Department of Transportation ("CalTrans"); (3) the Department of Parks and Recreation; (4) The Department of Corrections and Rehabilitation; (5) the Military Department; (6) the Department of General Services; and (7) the High-Speed Rail Authority.

PCC 9204 Requires A Three-Phase ADR Procedure

- <u>Phase I: Claim Submission And Response</u>

A. The contractor in direct contract with a public entity first submits its claim to a public entity. A "claim" is defined as: (1) a request for time extension or a request for relief from liquidated damages; (2) a demand for payment of money or damages arising from work performed; and (3) demand for payment of an amount that is disputed by the public entity. The claim must include "reasonable supporting documentation." While not specifically detailed, the claim package should include items such as time impact analyses, cost records and other project records necessary to demonstrate entitlement and damages. The contractor's claim is to be sent by registered mail or certified mail, return receipt requested.

B. The public entity has up to 45 days to provide the contractor with a written statement accepting the claim or detailing the portions of the claim that are disputed and undisputed. If the public entity believes that it needs more than 45 days to prepare its response, the time may be extended by mutual agreement. Similar to Government Code claims, if the public entity fails to respond within 45 days, the claim is deemed to have been denied.

C. If there are any undisputed portions of a claim, the public entity must pay the undisputed amounts within 60 days after the written response is served. Public agencies will be responsible for interest on untimely payments at the rate of seven percent (7%) per annum, which is less than the statutory rate of ten percent (10%). The requirement to pay undisputed claims may become convoluted for several reasons: (1) some claims will involve requests for time extension, which may or may not be 100% compensable; (2) the ability to assess liquidated damages will complicate matters; (3) in some instances, entitlement to compensation may be undisputed, but there may be no agreement as to the amount of compensation. Unless the claim is simple and straight-forward on the undisputed portion, payment within 60 days seems unlikely.

D. While virtually all public agencies require board approval to resolve a claim, some agencies may also need board approval to provide the written claim response. If board approval cannot be obtained within the time limit, the public entity shall have up to three (3) days following the next regularly scheduled board meeting to provide its written statement. Whether a public entity "needs" board approval to provide its claim response is inherently ambiguous. Contractors can look to the public entity's governance documents to clarify whether board approval of the claim response is necessary.

- <u>Phase II: Informal Resolution</u>

A. If the public entity denies a claim in whole or in part, or if the public entity fails to respond to a claim within the statutory time period, the contractor should next submit a written demand for an informal settlement conference. The demand must be sent by registered mail or certified mail, return receipt requested.

B. Upon receipt of a demand, the public entity must schedule the conference within 30 days. It should be noted that the statute is unclear regarding whether the settlement conference must be held within 30 days or simply scheduled within 30 days. Also, the statute is silent concerning any requirement for a face-to-face meeting. Presumably, the public entity will want to meet in person. However, a meeting by other means such as by telephone or video conference may comply. Most public works contracts have detailed ADR provisions and these should be followed in conjunction with the PCC 9204 procedures.

C. After the settlement conference is concluded, the public entity has ten (10) business days to issue a written statement identifying what portion of the claim remains in dispute and what portion is undisputed. (The use of the phrase "business days" in this portion of the statute suggests that the other deadlines are all calendar days).

D. If the settlement meeting resolves all or a portion of the claim, the public entity must pay the undisputed portion within 60 days.

- <u>Phase III: Mediation Or Other Non-Binding Dispute Resolution Process</u>

A. If, following the settlement conference, all or a portion of the contractor's claim continues to be denied by the public entity, the contractor can compel the public entity to mediate the remaining disputed items. If the parties believe that a mediation would be pointless, the parties can agree in writing to waive the mediation requirement and proceed directly to the commencement of a civil action or arbitration. If mediation proceeds, the statute requires both sides to share in the cost equally. The statute is silent regarding the interplay of the contract's ADR provisions. If the contract identifies an ADR provider, such as AAA or JAMS, and a location for the mediation, those contract terms should be followed. Also, the statute does not require the contractor to submit its mediation demand by registered mail or certified mail, return receipt requested. This implies that email or other forms of correspondence are sufficient. The best practice, however, is to send via registered mail in order to preserve the record.

B. Once the mediation demand has been received, the public entity and contractor have ten (10) business days to select a mediator. If the parties cannot agree, each party is to select a mediator and those mediators are to select a qualified, neutral third party to serve as mediator. The statute does not state when such mediation should take place.

C. In lieu of mediation, the contractor and public entity are able to utilize any other non-binding ADR process, including, but not limited to, neutral evaluation or a dispute review board. Any alternative, non-binding ADR process must conform to all deadlines set forth in PCC 9204.

Subcontractor Claims

If a subcontractor has a pass-through claim, the contractor has the option, but not the obligation,

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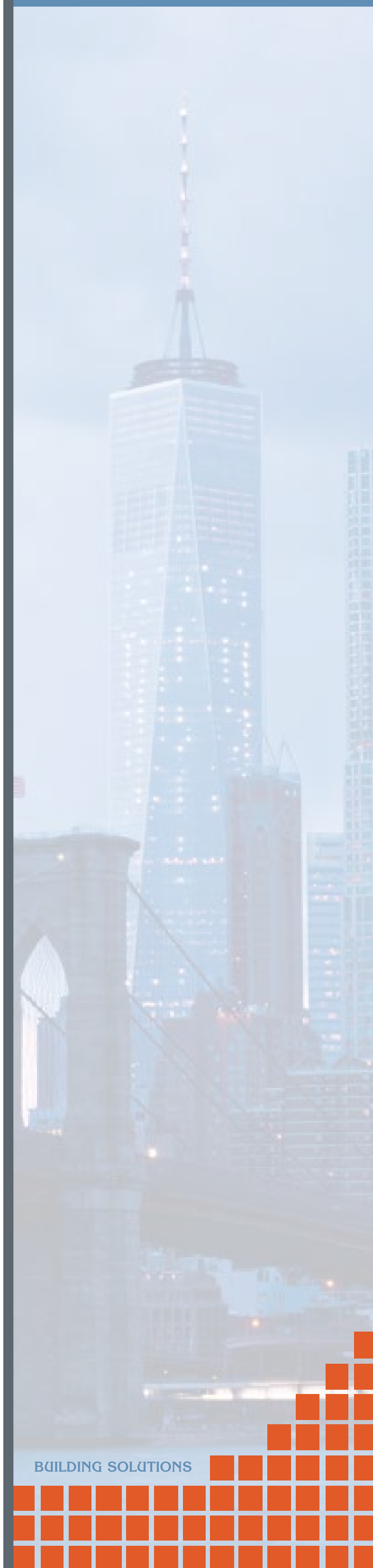

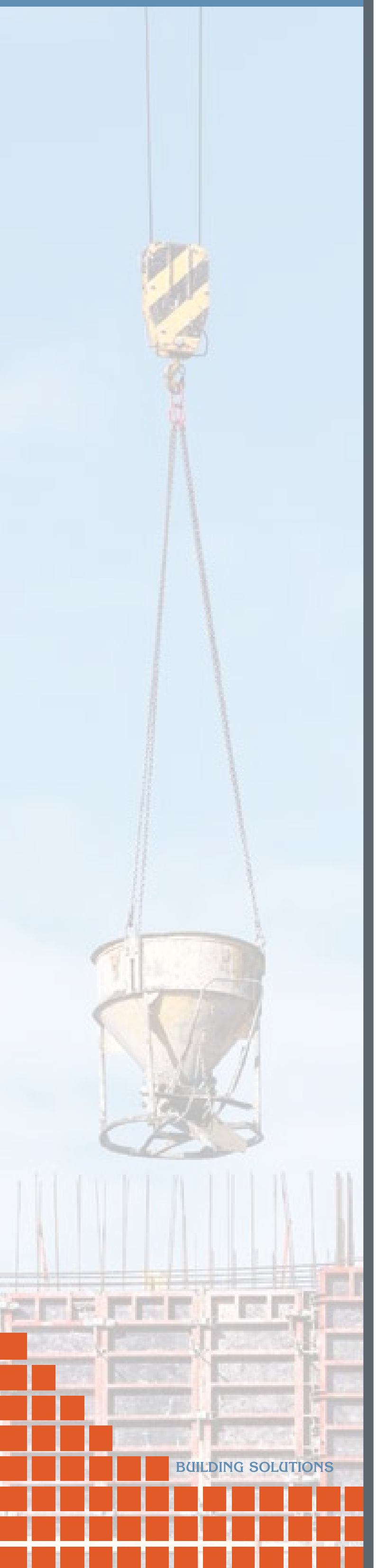

to present the subcontractor's claim to the public entity. The first step is for the subcontractor to make a written request to the contractor to present the pass-through claim. Within 45 days of receipt of the subcontractor's request, the contractor must advise the subcontractor that the pass-through claim was presented to the public entity or provide a statement of reasons why the contractor did not present the claim. It should be noted that only a direct subcontractor, not a second-tier subcontractor, may make a written request to the contractor regarding the pass-through claim. While there is no requirement under the PCC 9204 for a contractor to submit a subcontractor's claim to a public entity, the subcontract terms applicable to subcontractor pass-through claims may influence the contractor's decision.

Concerns And Potential Pitfalls

The dispute resolution procedures set forth in PCC 9204 could potentially raise traps for impetuous contractors. There are a number of other laws that contractors must adhere to in pursuing litigation against California public entities.

Generally, before a contractor can sue a public entity for breach of contract, the contractor must present the claim prescribed by Government Code § 910 within one year of the last breach of the contract (Gov. Code § 911.2). Government Code § 945.6 provides that an action against a public entity on a cause of action for which a claim must be presented must be commenced within six months after notice of rejection of the claim. *Gonzales v. County of Los Angeles* 199 Cal. App. 3d 601 (1988). If no notice is given, then the action must be filed within two years after accrual of the cause of action. Government Code § 945.6(a); *Paniagua v. Orange County Fire Authority* 149 Cal. App. 4th 83, 88 (2007). No Government Code claim is required for disputes arising out of contracts with the state. PCC 19100. These disputes go directly to arbitration under PCC 10240 *et seq.*

It is possible that the public entity's written decision (or expiration of its time to respond thereby rejecting part of a claim) triggers the 90-day period in which to initiate arbitration under PCC 10240.1; yet that 90 days may expire before mediation takes place under PCC 9204. Also, the time frame to submit a Government Code claim and initiate an action may also conflict with the procedures and spirit of the PCC 9204 mediation.

There are also concerns regarding the implementation of the new law. For example, although PCC 9204 provides for new mandatory ADR procedures before contractors can initiate arbitration or litigation, there is no assurance of receiving earlier payment or that an uncooperative public entity will stop stonewalling a contractor.

Conclusion

PCC 9204 may benefit a substantial number of contractors in California by creating a new procedure to compel public entities to pay attention to and negotiate claims. However, uncooperative public entities may use these procedures to delay claim resolution to the detriment of contractors. More importantly, the new dispute resolution protocol may conflict with other laws governing the initiation of litigation or arbitration against public entities and the contractor should be cognizant of all pre-litigation requirements.

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Lease-Leaseback Agreements In California Post-*Davis v. Fresno Unified School District*

by Amanda L. Marutzky, Associate

A lease-leaseback agreement in California historically allows a school to lease land it owns to a contractor for a nominal amount in return for the contractor's agreement to build school facilities on that site. In the aftermath of the Fifth Appellate District of California's ruling in the 2015 decision *Davis v. Fresno Unified School District*, 237 Cal. App. 4th 261 (2015), rev. denied (Aug. 26, 2015), regarding the validity of lease-leaseback agreements, the climate surrounding the issuing and maintaining of these agreements has drastically shifted. The *Davis* court stated that the purpose of the lease-leaseback agreement as an exception to competitive bidding established in California Education Code Section 17406 was "to provide a new source of financing for the construction of schools" and that lease-leaseback agreements "allow a school to acquire facilities that it might not be able to pay for using other financing methods." The court ruled that the exception to the competitive bidding statute under Section 17406 must be strictly construed such that a "true lease" is required for a lease-leaseback agreement. A lease cannot be deemed a "true lease" if: (1) it provides financing for a nominal amount; (2) the payments are for construction rather than for use; and (3) the government owner does not occupy the school before issuing the final payment. Specifically the court held that the agreement in *Davis*: (1) was not a true lease-leaseback because the contract was found to be a traditional construction contract, rather than a true lease as defined by the court; (2) there was no financing component in the contract; and (3) the government did not occupy the school during the lease term. The court nullified the agreement and ordered a complete disgorgement of funds.

The California Supreme Court declined to issue a ruling in *Davis* in August 2015. Thereafter, in April 2016 these issues were brought to the attention of the Second Appellate District of California in *McGee v. Balfour Beatty Construction, LLC*, 247 Cal. App. 4th 235, reh'g denied (May 23, 2016). The *McGee* court, citing the then-current language of Section 17406, expressly rejected *Davis*, holding that the "plain language of Section 17406 does not require a competitive bid process, and although the Legislature has amended the statute, it has not amended it to require competitive bidding in lease-leaseback agreements." *Id.* at 239. Therefore, even if the school districts funded the projects themselves and regardless of whether the leases were site leases or subleases, the districts were exempt from having to obtain competitive bids when entering into lease-leaseback agreements to improve school property. *Id.* Notwithstanding the ruling in *McGee*, however, *Davis* has yet to be overturned.

In response to these decisions, the California Assembly passed Bill 2316 in April 2016 by a 66-4 vote, which reformed the lease-leaseback exception to bidding and amended Section 17406. The current version of the Code requires a competitive bidding process prior to entering into any lease-leaseback agreement. "[B]efore awarding an instrument, the governing board of the school district shall adopt and publish required procedures and guidelines for evaluating the qualifications of proposers that ensure the best value selections by the school district are conducted in a fair and impartial manner." Educ. Code §17406.

Even if a lease-leaseback agreement under the amended statute is held invalid by a court, the statute prescribes that the contractor can still be paid the reasonable cost of labor, equipment, materials and services furnished if the contract was entered into prior to July 1, 2015 and certain conditions are met. Specifically: (1) the contractor proceeded with the work based on a good faith belief that the agreement was valid; (2) the district reasonably determined that the work performed is satisfactory; (3) no contractor fraud occurred in relation to the agreement; and (4) the lease-leaseback doesn't otherwise violate state law. Educ. Code § 17406(d)(1). A contractor meeting these requirements will nonetheless not be paid in excess of the contractor's costs under the agreement plus approved change orders or lease payments made, less profits, at the time the agreement is deemed invalid. *Id.* The *Davis* and *McGee* decisions as well as the amendments

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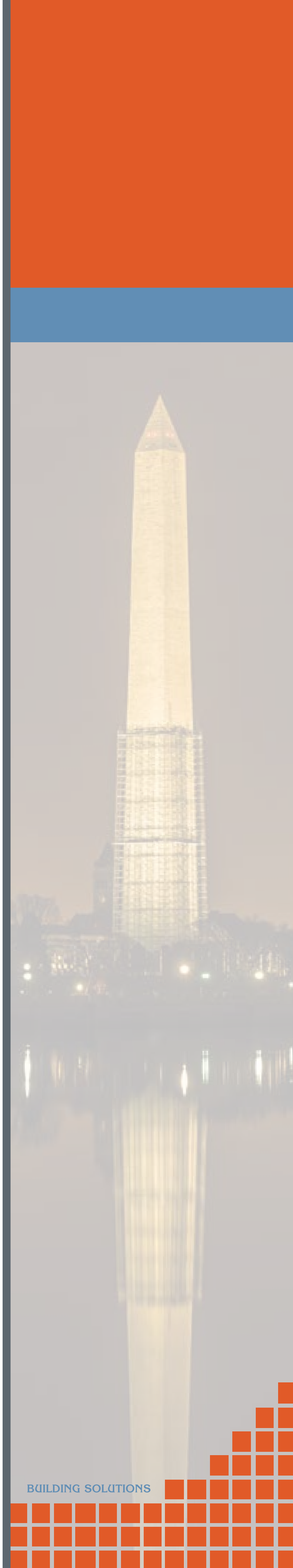

to Section 17406 beg the question: What does this mean for current and future lease-leaseback agreements?

Contractors And Owners Already Engaged In A Lease-Leaseback Agreement

If the agreement is not compliant with the *Davis* terms and/or the current statue, it should be amended as much as possible to fit within the *Davis* parameters. If construction has not begun on the project, the owner should consider letting the contract out for competitive bidding to prevent the contract being nullified by a later court ruling. Without competitive bidding, there is a chance a ruling of disgorgement will be upheld.

Disgorgement is undoubtedly one of the biggest blowbacks from the *Davis* decision. Rather than forcing the contractor to pay back all of its earnings on the project, the amended statute allows contractors to recover their reasonable costs even if there is a determination of invalidity. Despite this safety net, school districts and contractors should tread lightly when entering into lease-leaseback agreements and should attempt to avoid public works projects that do not involve a competitive solicitation process. Consideration should also be given as to whether the lease-leaseback agreements entered into contain a financing component as that was one of the cornerstones of the *Davis* decision. Although the *McGee* court held that this financing element was not necessary, that decision was based on the old statutory language.

When faced with a challenge to the validity of your existing lease-leaseback arrangement, a potential course of action is self-validation. In *Los Alamitos Unified School District v. Howard Contracting, Co.*, 229 Cal. App. 4th 1222 (2014), the court ruled that if no action is brought against a contract within 60 days, the agreement self-validates itself, making it "immune from attack whether it is legally valid or not." However, validation statutes may not apply to contracts that lack a financing component. According to Government Code Section 53511, a local agency is authorized to bring an action to determine validity of its bonds, warrants, contracts, obligations, or evidences of indebtedness. Looking to case law, in *Kaatz v. City of Seaside*, 143 Cal. App. 4th 13 (2006) the court ruled that the term "contracts" referenced in Section 53511 should be strictly interpreted to mean contracts constituting a financial obligation of a public agency. Thus, the contracts that can be validated under that Section can only be those that directly relate to the bonds, warrants, or other evidences of indebtedness of a public agency. One should be wary that in an agreement without a financial component such as that seen in *Davis*, self-validation as outlined by Section 53511 may not apply.

Owners And Contractors Looking To Enter Into Lease-Leaseback Agreements In The Future

When drawing up a contract of the lease-leaseback variety, it is important to take into account the terms set forth in *Davis* and the current version of Education Code Section 17406. A lease-leaseback agreement that is compliant with Section 17406 will have certain characteristics:

- <u>The Contract Will Be Open To A Competitive Bidding Process</u>

As outlined by Section 17406, the school district will: (1) provide a description of the project, including an estimate, an example of how the proposals should look, and the rubric they will use to evaluate the proposals; (2) announce the request for sealed bids at least ten days prior to the deadline; (3) prequalify the contractor and any anticipated subcontractors pursuant to state standards; (4) release a request for bids that identifies all criteria used to evaluate the proposals; (5) identify the rating system used to evaluate the proposals and a minimum acceptable score; (6) evaluate the proposals based on the standards outlined in Section 17406(a)(2)(F); and (7) have the right to deny all proposals and request new ones. The selected proposal will contain the best value, as defined by the Code.

- <u>The Contract May Or May Not Have A Financing Component</u>

One of the chief criticisms handed down from the *Davis* court was that "to fulfill the primary statutory purpose of providing financing for school construction, the arrangement must include a financing component" and the contract in question did not include one. Yet the *McGee* court expressly held that "additional requirements – such as the timing of the lease payments, the duration of the lease, and the financing – are not based on the plain language of the statute." *McGee*, 247 Cal. App. 4th at 244. Neither the prior nor the current version of Section 17406 contains language that states the bidding exception only applies when a contractor funds the project. Thus, although a *Davis* compliant lease-leaseback will contain some type of financing component, under the current statute, a lease-leaseback that is school district funded will not be invalidated on that ground.

- <u>The Contract May Or May Not Include An Extended Payment Plan With Timed Installments</u>

The *Davis* court cited a 15-year period as an example of a good lease but again, the *McGee* court declined to opine on a required lease duration or the timing of lease payments in light of the statutory language. Just as the current version of Education Code Section 17406 is devoid of any financing restrictions, it is silent on lease terms.

- <u>The Public Agency May Or May Not Be Required To Occupy The Facilities As A Tenant</u>

In *Davis*, there was never a time when the district was occupying the new facilities as a rent-paying tenant. Once the final installment was paid, the district no longer owed "rent" and thus did not abide by the leaseback regulations. *McGee* held that it did not matter whether the leases were site leases or subleases. This requirement may not be necessary under the current statute.

Conclusion

Contractors, sureties and school boards should diligently watch this ever-evolving statute to make sure their lease-leaseback agreement is compliant with current law. Notably, the current version of Education Code Section 17406 will be repealed in 2022. The amended version effective July 2022 contains no language regarding competitive bidding, lease terms, owner occupancy or pre-2015 lease-leaseback agreements. Given the changing landscape involving lease-leaseback agreements, and with the *Davis* decision still standing, it is in all construction professionals' best interests to be aware of current precedent. It is also worthwhile to keep close tabs on cases subsequent to *Davis* interpreting Education Code Section 17406 that may provide further clarifications on the terms necessary for a legally viable lease-leaseback agreement. In order to minimize the chances of a judicially ordered nullification of a contract or a total disgorgement of funds, as seen in *Davis*, owners and contractors should henceforth draft all contractual agreements with a prior competitive solicitation process and compare lease or occupancy requirements with the existing case law and statutes. Owners can then take the necessary steps to preclude possible legal issues down the line.

GOVERNMENT CONTRACTS

Government-Wide Contracting Trends: Decreased Defense Spending With Significant Use Of Indefinite Delivery Vehicles

by Mitchell A. Bashur, Associate

Introduction

The Government Accountability Office (GAO) recently released report GAO-17-244SP reviewing contracting trends across the federal government from Fiscal Years 2011-2015. This report is helpful for contractors to stay ahead of federal market trends and remain agile. The report addresses defense and civilian trends in contracting, and specifically reviewed: (1) the kinds of products and services acquired; (2) the rate of competition; (3) the use of various procurement methods and contract types; and (4) the categories of vendors providing products and services.

GAO's conclusions include that: 1) defense obligations have decreased, including fewer contracts for planned military construction projects; 2) the majority of contracts government-wide were for services, which includes construction services; 3) there was a high rate of competition for contracts, with slightly more civilian contracts being competed; 4) most of the government-wide obligations

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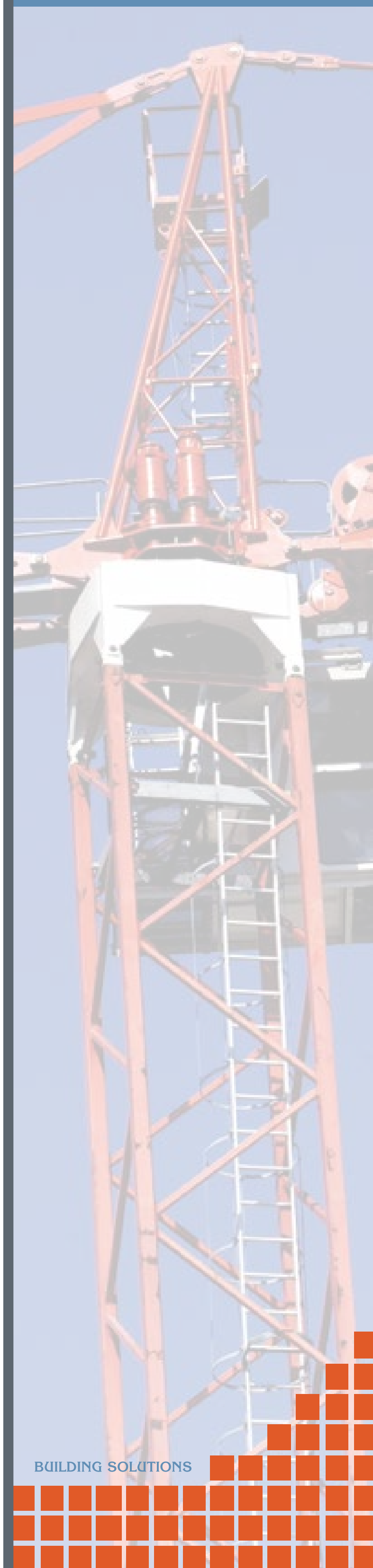


were awarded as fixed-price contracts, while approximately half of all obligations were awarded using an indefinite delivery vehicle; 5)0 $100 billion in obligations were awarded to small businesses in 2015; and 6) the top ten vendors received nearly 30 percent of all obligations in 2015. GAO's report also raised general concerns about the use of certain types of services, such as professional and management support services, which required increased management attention.

For government contractors, the report shows a tightening marketplace with consolidation in the top vendors. While defense contracting showed the largest decrease in obligations, the white house's recently proposed budget would significantly cut funding for most civilian agencies, so the reduced marketplace may not be limited to defense spending. Given recent changes to the Small Business Administration's mentor-protégé program, larger contractors should consider partnering with small businesses to survive in a more competitive marketplace.

Products And Services Acquired

The federal government is a large and complex organization comprised of 18 cabinet-level departments and nearly 100 other independent agencies. The government spends more than $3.5 trillion annually. Federal agencies obligated over $430 billion through contracts for products and services in 2015, accounting for almost 40 percent of the government's discretionary spending.

Despite spending over $430 billion through contracts in 2015, the federal government actually decreased its obligations relative to 2011. In 2015, federal agencies procured approximately $438 billion in products and services, which is nearly a 24 percent decrease from 2011 levels. The biggest decrease was with defense obligations, which decreased by almost 31 percent from 2011 to 2015, from $399 billion to $274 billion. The same impact was not seen for civilian obligations, which remained fairly steady over this time, only decreasing by less than 7 percent over the same period. The military departments also awarded fewer contracts for planned military construction projects. The largest decrease in obligations for both defense and civilian agencies occurred around the time of sequestration in 2013.

The contracts awarded by the federal agencies demonstrate significant consolidation in the largest contractors. In 2015, the top 10 vendors receiving federal contracts accounted for over 27 percent of total contract obligations. For defense contracts, the top 10 vendors accounted for about 36.7 percent of defense obligations, while the top 10 vendors receiving civilian agency contracts accounted for about 17.5 percent of total civilian obligations.

As for the types of products and services acquired, approximately 60 percent of government contract obligations are for services, with civilian agencies obligating 80 percent of their contract dollars for services. Services are defined to include construction services. The top five services at defense and civilian agencies accounted for approximately 51 and 60 percent respectively of total obligations on services in 2015. These services ranged from professional and management support to IT services. Ten civilian agencies obligated more than 90 percent of their 2015 contract spending on services, including the Department of Energy and NASA, which largely contracted for research and development efforts. Defense obligations had a lower percentage of services as a result of significant investment in major weapons programs.

The GAO report did provide a warning note on certain services. Federal agencies obligated around $50 billion annually for services such as professional and management support services, which may require increased management attention. The GAO report finds that contractors performing these types of services are at a heightened risk of performing inherently governmental work.

Competition

From 2011 through 2015, the government-wide competition rate remained relatively steady at just below two-thirds of total contract obligations, with civilian agencies competing nearly 80 percent of contract obligations during that time. There is one caveat to this competition rate, however. Out of the $282 billion obligated through competed contracts in 2015, 14 percent – or $40 billion – were on contracts awarded competitively where the agency received only one offer in response to the solicitation.

Civilian agencies had a significantly higher rate of competition than DOD. Within defense obligations, there was a much higher level of competition for services than products. DOD only competed approximately 72 percent of contract obligations for services as opposed to 41 percent for products. This lower rate of competition resulted from reliance on original equipment manufacturers during the life cycle of major programs such as weapons systems and foreign military sales, which are generally noncompetitive.

Procurement Methods

From 2011 through 2015, federal agencies obligated nearly two-thirds of total contract obligations on fixed price contracts. The remaining third was on various kinds of cost contracts. In 2015, DOD obligated a higher percentage of its total dollars for fixed price contracts than the civilian agencies.

From 2011 through 2015, roughly half of total contract obligations were awarded on indefinite delivery vehicles (IDV), such as orders under Federal Supply Schedule, Government-wide Acquisition Contracts, and blanket purchase agreements. In 2015, DOD and civilian agencies used IDV for 47 percent and 55 percent of total contract obligations, respectively.

Small Business Participation

Small businesses received almost $100 billion in contract obligations in 2015. This degree of small business participation resulted from the federal government's long-standing policy of maximizing procurement opportunities for small businesses, including setting-aside contracts for small businesses. Congress has set an annual government-wide goal of awarding not less than 23 percent of prime contract dollars to small businesses. Most agencies met or exceeded their overall small business participation goals in 2015, according to the Small Business Administration's annual scorecard report, though not all goals were consistently met.

To further this goal, and increase the pool of responsive small businesses, the Small Business Administration has recently expanded its Mentor-protégé program to allow smaller businesses to partner with larger businesses to bid on all types of set-aside contracts, provided the partners meet the requirements of the program. This significant change will likely result in additional money obligated to small businesses, while shrinking the market for medium-sized businesses. All contractors should consider whether participation in the Mentor-Protégé program can help them maintain and grow their businesses.

Agency Specific Spending

GAO's report finally provides detailed information for certain government agencies. For the army, the top five services accounted for just under a quarter of the department's total obligations for services. The third largest service was the Construction of miscellaneous buildings which accounted for $1.670 billion in 2015. Additionally, $38.7 billion, or 53.3 percent, of the Army's contract obligations were on definitive contracts and purchase orders. The remainder, $33.9 billion, or 46.7 percent, were on various types of indefinite delivery vehicles, which was a decrease from 2011 when, obligations on indefinite delivery vehicles accounted for 56.6 percent of total obligations.

As for the Department of Transportation, in 2015 more than 85 percent of their contract obligations were for services, and its top five services accounted for more than 40 percent of the department's total obligations for services. The top service was Professional Engineering and Technical Support, while the second was Construction: Roads & Railways.

Conclusion

Understanding the government-wide contracting trends described in GAO's report, a contract can remain agile and thrive in a changing marketplace.

Mitchell Bashur is the Co-Chair of the American Bar Association's Section of Public Contract Law: Small Business & Other Socioeconomic Programs. The Committee monitors, reviews, and comments on issues and regulations related to small business and socioeconomic policies such as labor standards and affirmative action. The Committee meets regularly to discuss issues and legal procedures impacting small businesses. For information on Committee meetings, see our Firm News section on Recent and Upcoming Events, or visit the Committee's website at http://apps.americanbar.org/dch/committee.cfm?com=PC408500.

On The Fast Track: The ICC's New Expedited Procedure Rules

by Christine J. Lee, Associate

The International Court of Arbitration of the International Chamber of Commerce ("ICC") is arguably the world's leading institution for international commercial arbitration. A common complaint regarding ICC arbitration, however, revolves around the often excessive amounts of time and money incurred in completing ICC arbitration from start to finish. Such costs have had the effect of discouraging some parties from utilizing ICC arbitration (or even contractually providing for ICC arbitration during the front end stage of a project), particularly for smaller-scale projects and/or claims involving relatively low amounts in dispute. Although other arbitral institutions, such as the Singapore International Arbitration Centre, the Stockholm Chamber of Commerce, Swiss Chambers Arbitration Institution, and the International Centre for Dispute Resolution, have implemented expedited arbitration options, the ICC has lagged behind despite the fact that there has been a noticeable decline in ICC arbitration for smaller matters during the past decade.

In response to the need for speedy and cost-effective arbitration, the ICC amended its Rules of Arbitration in December 2016 to add provisions for an expedited procedure ("Expedited Procedure Provisions" or the "Provisions") that would, among other things, shorten the time required for arbitration of claims equal to or less than USD $2 million (or a higher amount, if the parties mutually agree) to approximately six months and decrease administrative and arbitrator fees. The Expedited Procedure Rules took effect on March 1, 2017.

Overview Of The ICC's Expedited Procedure Provisions

The Expedited Procedure Provisions are contained in Article 30 of the ICC Rules and Appendix VI. The Provisions mandate that parties, by agreeing to arbitration under the ICC Rules, agree that the Provisions shall take precedence over any contrary terms in an arbitration agreement or arbitration clauses.

The Expedited Procedure Provisions apply in the following circumstances:

- The arbitration agreement was executed after March 1, 2017;
- The amount in dispute is equal to or less than USD $2,000,000;
- The parties have not agreed to opt out of the Expedited Procedure Provisions; and
- The arbitral tribunal has not ruled, upon request or motion by a party, that it is inappropriate to apply the Provisions to a particular dispute.

The Expedited Procedure Provisions also provide that:

- The arbitral tribunal may appoint a sole arbitrator within a time limit set by the ICC Secretariat notwithstanding any contrary provision of the arbitration agreement. The arbitral tribunal may, however, also appoint three arbitrators if appropriate in the circumstances;
- The parties may not bring new claims once the sole arbitrator has been appointed (unless expressly authorized to do so);
- The Case Management Conference must take place no later than 15 days after the arbitrator has received the arbitration file from the ICC;
- Terms of Reference are not required;
- Written submissions by the parties are limited unless otherwise authorized by

the arbitrator upon consultation with the parties;

- Requests for document production are not permitted unless otherwise determined by the arbitrator upon consultation with the parties;
- The arbitration may be heard on documents only (no hearing and no witness testimony) unless otherwise determined by the arbitrator upon consultation with the parties;
- The deadline for final award is six months from the date of the Case Management Conference unless the arbitral tribunal decides to extend the deadline; and
- Fees of the sole arbitrator are based on a reduced fixed fee scale (contained in Appendix III of the ICC Rules). Expedited Procedure arbitrator fees are twenty percent less than the arbitrator fees required in traditional ICC arbitration.

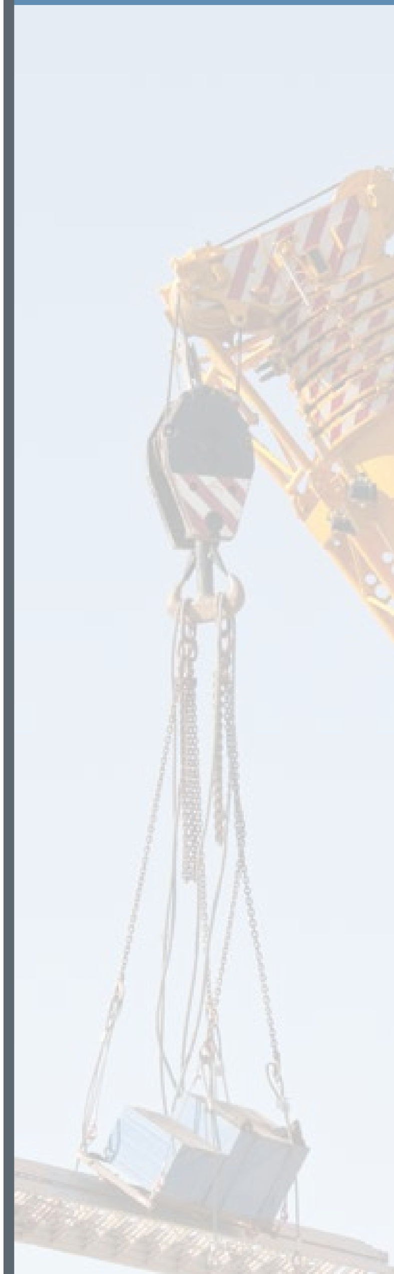
In a nutshell, the Expedited Procedure Provisions may not be suitable for all disputes, but they should be seriously considered by parties in situations where: (a) the amount in dispute is relatively low and/or has minimal impact on the parties' respective businesses; (b) the dispute is straightforward, not complex, and can be sufficiently heard on the basis of documents only; (c) both parties agree to utilizing the expedited procedure; and (d) the amount of time and money invested in the arbitration is of significant concern.

Takeaways And Considerations

The ICC's Expedited Procedure Provisions have major ramifications for parties not only during the back-end dispute resolution stage of a project but also during the initial contracting stage. Because the Provisions apply automatically to all disputes not exceeding USD $2 million on projects with ICC arbitration dispute resolution clauses, parties will need to decide at the contract stage whether to expressly exclude application of the Provisions. Parties may also specifically draft contract language agreeing to apply the Provisions to disputes exceeding USD $2 million and/or set a different amount in dispute triggering application of the Provisions.

Additionally, it will be interesting to see how the ICC will enforce the Provisions in practice. The timeline of six months from the date of the Case Management Conference to final award is extremely tight by traditional ICC arbitration standards, with little room for deviation or error. Thus, consequences of such a timeline will include, among other things, limited submissions from the parties, limited (if any) requests for document production, completion of document production in a significantly shorter time period, no bifurcation of proceedings, and the parties' inability to nominate their own arbitrator(s). If there is any hope for a truly effective expedited arbitration, the ICC will need to firmly enforce the Provisions by implementing strong procedural measures. For example, the ICC must come up with effective responses to obstinate parties that fail to adhere to the Provisions' requirements. Choice of arbitrators will also likely prove crucial to the overall success of the Provisions.

The Expedited Procedure Provisions viewed through a big picture lens, however, reflect immense potential to significantly enhance the speed and cost-effectiveness of ICC arbitration for smaller disputes and serve as an effective response to the concerns of the international business community regarding the time and costs of utilizing one of the world' preeminent arbitral institutions. Only time will tell whether the Expedited Procedure Provisions will provide parties a truly effective "fast track" alternative to traditional ICC arbitration.



FIRM NEWS

Honors

Chambers USA Guide To America's Leading Lawyers For Business

Watt, Tieder, Hoffar & Fitzgerald, L.L.P. is nationally recognized in the 2017 edition of **Chambers USA Guide to America's Leading Lawyers for Business** for its representation of clients in the construction industry. Chambers and Partners has consistently named **Watt Tieder** and its attorneys among the top construction firms and attorneys both nationally and regionally since 2004.

Chambers also recognized the McLean, Virginia office as a Band One firm and the Irvine, California office as a Band Four construction law practice. The following **Watt Tieder** attorneys are recognized as leaders in their field for Construction Law: **Lewis J. Baker, Robert M. Fitzgerald, Vivian Katsantonis, Robert C. Niesley, Carter B. Reid** and **John B. Tieder, Jr.**

Appointments and Elections

Watt Tieder is proud to announce that **Scott P. Fitzsimmons**, a Partner in the McLean, Virginia office, was recently selected for promotion to the rank of Captain (O-6) in the United States Navy Reserve. In his Navy career, Scott serves as the Deputy Commode for Navy Reserve Littoral Combat Ship Squadron TWO (LCSRON TWO) in Mayport, Florida, where he is responsible for 11 Reserve Units and more than 500 Navy Sailors. Please join us in congratulating Scott on this incredible accomplishment reflecting his dedicated service to the Unites States Navy.

Jennifer L. Kneeland was elected to serve as **President** of the **Bankruptcy Bar Association for the District of Maryland**. The Bankruptcy Bar Association is the premier bar association for attorneys who practice bankruptcy law in Maryland. Jennifer's term will begin on July 1st and conclude on June 30, 2018.

Watt Tieder Launches Updated 50 State Survey

Watt Tieder is proud to introduce our updated **50 State Survey Of Key Issues Related To Construction & Engineering Contracts**, which addresses major issues that arise in all aspects of contracting in all 50 states. The 50 State Survey is an interactive website available at your desktop as well as on all mobile devices. To learn more, visit us at www.watttieder.com.

Recent and Upcoming Events

iLaw2017, ILS Global Forum on International Law (Sponsored by the International Sections of the Florida and New York Bar Associations), February 17, 2017; Miami, FL; **Mariela Malfeld** chaired a panel on "International Construction Arbitration – Trends and Best Practices," and **Shelly L. Ewald** presented.

University of Stuttgart, March 9-11, 2017; Stuttgart, Germany; **John B. Tieder, Jr.** taught a session on North American construction law as part of the University's International Construction Practice and Law Master's degree program.

Maryland Bankruptcy Bar Association (Greenbelt, Maryland Chapter), March 22, 2017; Greenbelt, Maryland; **Jennifer L. Kneeland** gave a seminar focusing on individual debtors who file for bankruptcy protection. A link to Jennifer's written materials can be found at www.bankruptcybar.org/edmaterials.htm.

Western States Surety Conference – "On the Waterfront," April 20-21, 2017; Seattle, Washington; **Rebecca Glos** and **Amanda L. Marutzky** spoke on "Subcontractor Default Insurance: Relevant Considerations for the Surety Claims Professional;" **Christopher M.**

Bunge spoke on "California Case and Statute Updates."

ABA Public Contract Law Section, Small Business Committee, April 25, 2017; Washington, D.C.; Halimah Locke, Professional Staff, Procurement, House Committee on Small Business, Democratic Staff, provided an update on current and upcoming small business legislation (Co-Chair **Mitchell A. Bashur**).

Maryland Bankruptcy Bar Association's Annual Spring Break Conference, May 6, 2017; Annapolis, Maryland; **Jennifer L. Kneeland** gave a panel presentation with the Honorable Wendelin I. Lipp (U.S. Bankruptcy Judge for the District of Maryland) on the impact of a bankruptcy filing on joint defense agreements.

2017 AACE International Annual Meeting, June 11-14, 2017; Orlando, Florida; **Christopher J. Brasco** and **Kathleen O. Barnes** to speak on "Hot-Tubs and Other ADR-Remedies for the Disputes that Ail You."

U.S. Construction Law Lecture Series, hosted by the International Contractors Association of Korea (ICAK) and Kim & Chang, June 19-20, 2017; Seoul, Korea; **Edward J. Parrott**, **Christopher J. Brasco**, and **Christine J. Lee** to speak on general principles of construction law and contracting in the U.S. on Day 1 and advanced topics in construction law and contracting in the U.S. on Day 2.

American Arbitration Association 2017 Construction Conference, Navigating the Unique Aspects of Construction Arbitration, June 22, 2017; New York, New York; **David F. McPherson** to speak on the "Global Construction Disputes" panel.

ABA Public Contract Law Section, Small Business Committee, June 27, 2017, 12:00 - 1:00 p.m.; Washington, D.C.; Holly Schick, SBA All Small Mentor-Protégé Program Director, will provide an overview and update on the SBA's All Small Mentor-Protégé Program (Co-Chair **Mitchell A. Bashur**).

American Road & Transportation Builders Association ("ARTBA") - 2017 Transportation Construction Law & Regulatory Forum, August 3, 2017; Washington, D.C.; **Christopher J. Brasco** to speak on "Rapid Resolution ADR Techniques for Prompt Claim Resolution."

10th Annual Breakthroughs in Tunneling Short Course, August 14-16, 2017; Chicago, Illinois; **Robert M. Fitzgerald** to speak on disputes and claim resolution.

National Women in Construction's 62nd Annual Meeting & Education Conference, August 16-19, 2017; Anaheim, California; Vivian Katsantonis to speak on a panel entitled "The Law, the Analysis, and the Accounting of Delays."

International Bar Association, Annual Conference 2017, October 8-13, 2017; Sydney, Australia; **Shelly L. Ewald** to speak on October 12 on "Projects under pressure: is there any escape?" with consideration of suspension, termination and renegotiation possibilities and consequences, as well as mock negotiations.

Publications

Christopher M. Bunge published an article in the ABA Fidelity & Surety Law Committee Newsletter, "Risks of Federally Supported P3 Projects Case Study: The Fargo Moorhead Area Diversion Project" (Spring 2017).

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

Special Thanks to Editors, **Robert G. Barbour, Keith C. Phillips, William Groscup** and **Heather Stangle**.

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