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PUBLIC CONTRACTS

Annual Review 2022

January 24 – 27, 2022

DAY 3

12:00 p.m. Claims, Terminations & Disputes

2:00 p.m. Construction Contracting

3:00 p.m. Small Business Contracting

4:00 p.m. Mergers & Acquisitions

WEDNESDAY, JANUARY 26, 2022

12:00 PM to 5:00 PM

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Alan Chvotkin
President, Pub K Group
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News for the Government Contracts Community

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PUBLIC CONTRACTS | LAW

Legal decisions and developments for the government contracts community

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Monitoring the government response to cybersecurity threats and trends

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CLEs

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SESSION 8

CONSTRUCTION CONTRACTING

WEDNESDAY, JANUARY 26, 2022

2:00 PM to 2:50 PM

Agenda

■ Infrastructure

- ▷ Infrastructure Investment and Jobs Act
- ▷ Antitrust Enforcement
- ▷ Construction Case Law Roundup

■ Workforce Issues

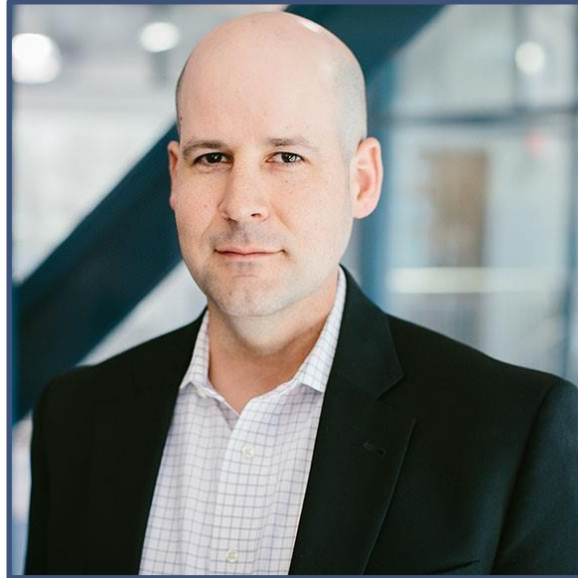
■ Pandemic Pandemonium

- ▷ Mandates and COVID Relief
- ▷ Buy American Developments
- ▷ Cyber Developments



Dan Ramish, Associate Attorney

Smith • Pachter • McWhorter



Jim Van Horn, General Counsel





Susan Warshaw Ebner, Co-Chair

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Infrastructure

Infrastructure Investment and Jobs Act (IIJA)

- \$1.2 trillion signed into law November 15, 2021, including \$550 billion new infrastructure spending over 5 years
 - \$110 billion for highways, roads, & bridges
 - \$66 billion for Amtrak
 - \$65 billion for broadband internet access
 - \$65 billion in upgrades to the electrical grid
 - \$55 billion on water and wastewater infrastructure
 - \$25 billion for airport improvements
 - \$7.5 billion for electric vehicle charging stations

Infrastructure Investment and Jobs Act (IIJA)

More: Climate Change, Cyber, Public-Private Partnerships

- \$47 billion climate change resilience

- \$2 billion cybersecurity

 - \$1 billion state and local government cybersecurity grants

 - \$250 million for Rural and Municipal Utility Advanced Cybersecurity Grant and Technical Assistance Program

 - \$250 million to develop “advanced cybersecurity applications and technologies for the energy sector”

- \$750 million Public-private partnership transportation projects

Infrastructure Investment and Jobs Act (IIJA)

Domestic Sourcing Requirements: Build America, Buy America (BABA)

Federal Assistance Agreement Requirements

“Not later than **180 days** after the date of enactment of this Act, the head of each Federal agency shall ensure that **none of the funds made available for a Federal financial assistance program for infrastructure**, including each deficient program, **may be obligated for a project unless all of the iron, steel, manufactured products, and construction materials used in the project are produced in the United States.**”

Sec. 70914

Infrastructure Investment and Jobs Act (IIJA)

Domestic Sourcing Requirements: Build America, Buy America (BABA)

Federal Assistance Agreement Requirements

- Apply to all assistance agreements for infrastructure, not just those funded by the IIJA, in contrast to the American Recovery and Reinvestment Act (ARRA)
- Narrow waiver criteria: public interest, non-availability, cost (only if use of U.S. iron/steel/manufactured products/construction materials will increase the cost of the overall project by more than 25%)
- OMB directed to revise 2 C.F.R. 200 (Sec 70915)

Infrastructure Investment and Jobs Act (IIJA)

- Domestic Sourcing Requirements: Build America, Buy America (BABA)
 - New Statutory Basis for Existing Requirements
 - Support for higher components test percentages (Sec. 70921)
 - Establishment of Made in America Office (MIAO) (Sec. 70923)
 - Waivers disfavored and subject to new uniformity and transparency requirements (Sec. 70921)

Infrastructure Investment and Jobs Act (IIJA)

■ Domestic Sourcing Requirements: Build America, Buy America (BABA)

■ Interplay with Trade Agreements Act

- Provisions “shall be applied in a manner consistent with United States obligations under international agreements” (Sec. 70925)
- Requirement for assessment of impacts of WTO GPA and other FTAs on the operation of Buy American laws, including domestic procurement preferences, in a publicly available report (Sec. 70934)

Antitrust Enforcement on Infrastructure Projects

■ Procurement Collusion Strikeforce

- Interagency partnership with the mission to "deter, detect, investigate, and prosecute antitrust crimes and related criminal schemes that affect procurement, grant, and program funding at all levels of government—federal, state, and local"
- Focus is *per se* Sherman Act violations: bid rigging, price fixing, market allocation
- Director promises "focused deterrence and aggressive enforcement" of antitrust laws on public infrastructure projects
- PCSF's first public indictment was an engineering firm in NC, which led to a guilty plea; other construction-related enforcement actions are ongoing

Antitrust Enforcement on Infrastructure Projects

Antitrust Compliance Issues in Government Contracting

- Contractors may want to review their antitrust compliance programs, including policies and procedures, compliance monitoring and audits, internal reporting, training
- Circumstances that may receive/merit scrutiny
 - Go/no-go decision irregularities
 - Bidding and award patterns
 - Subcontracting with competitors
 - Teaming arrangements reducing competition
- Ensure no improper motive; document business rationale and benefit to gov't

Construction Case Law Roundup

- *Gulf Pacific Contracting, LLC*, ASBCA No. 61434, 21-1 BCA 37,928 – Davis-Bacon price adjustments—or lack thereof
- *Carothers Construction, Inc.*, ASBCA No. 62204, 2021 WL 934953 – Standard for substitution of equal items
- *Sauer Incorporated*, ASBCA No. 62395, 21-1 BCA ¶ 37,845 – Timing of substantial completion and LDs on multi-phase project
- *USA F/U/B/O Ballard Marine Const., LLC, v. Nova Group Inc., et al.* – Stay of Miller Act suit pending outcome of CDA pass-through claim

Construction Case Law Roundup

- *Gulf Pacific Contracting, LLC*, ASBCA No. 61434, 21-1 BCA 37,928
 - RFP & contract incorporated FAR 52.222-30, Construction Wage Rate Requirements – Price Adjustment (None or Separately Specified Method)
 - DOL issued new WD w/ higher rates, which USG included in unilateral mod exercising option
 - Contractor argued clause alone did not provide adequate notice that offerors could not obtain adjustments
 - Majority ruled for USG and denied appeal; contractor could have and should have priced its option years to include risk of increased wages
 - Judge Clarke dissent: clause conflicts w/ FAR policy

Construction Case Law Roundup

■ *Carothers Construction, Inc.*, ASBCA No. 62204, 2021 WL 934953

- School construction contract specified 2.5" roof deck product
- Contractor proposed cheaper 2" roof deck as "equal" per FAR 52.236-5 Material and Workmanship but AF insisted on strict adherence to spec, would only consider 2" roof deck as variant
- ASBCA: 2.5" roof deck system was proprietary, offered by only one vendor; contract did not warn that only the proprietary item would be accepted; vendor provided substitute to AF w/ proof of equivalency, which the AF didn't rebut or even seriously evaluate
- Contractor was entitled to use 2" equal, sustained

Construction Case Law Roundup

■ *Sauer Incorporated*, ASBCA No. 62395, 21-1 BCA ¶ 37,845

- Three-phase construction project with LDs clause (FAR 52.211-12)
- Phases I and II were on time; Phase III was 33 days late; Corps assessed LDs for 33 days based on single contract LD rate
- 98.7% of construction-related costs were in Phase I
- Contractor argued substantial completion precluded LDs
- ASBCA: questions of fact re substantial completion of phase III, but Corps should have apportioned LDs; partial SJ granted

Construction Case Law Roundup

- *United States of America for the use and benefit of Ballard Marine Const., LLC, v. Nova Group Inc., et al. (W.D. Wash.)*
 - Sub submitted differing site condition claims; prime would not pay until after resolution of pass-through claim to USG
 - Sub made claims to sureties, which sureties denied
 - Sub brought Miller Act suits against sureties; sureties moved to stay
 - Subcontract included pass-through claim clause limiting recovery to amounts recoverable through claim and appeal process
 - Held: Miller Act suits stayed pending resolution of CDA appeal

Workforce Issues

Pre-existing Construction Workforce Challenges

■ Prior to COVID-19

- ▶ Industry raising alarms over workforce
 - ▶ 2019 outlook - Jobs data from Bureau of Labor Statistics – job openings from 2014 – 2019 doubled, but number of hires only increased 14%
- ▶ Deloitte 2019 Engineering & Construction Industry Outlook.
 - ▶ *“Labor shortages are reaching crisis proportions and expected to continue through 2019 as well.”*

Global Pandemic Hits

- The World Health Organization (WHO) on **March 11, 2020**, declared the novel coronavirus (COVID-19) outbreak a global pandemic.
- Most states deemed construction “essential service”
- Federal, State, local government COVID mandates:
 - ▶ Masking, social distancing, vax, etc.

Immediate Workforce Impact

May 2020, ENR Reports:

- ▶ “Construction’s workforce plunged by 975,000 in April—the steepest drop since at least the late 1930s—and the industry’s jobless rate soared to 16.6%, quantifying the first full month’s impact of the coronavirus pandemic.”
- ▶ “The Bureau of Labor Statistics’ latest monthly U.S. employment report, released on May 8, painted a grim picture, showing that construction’s total workforce fell in April by 13% from the March level.”

Workforce Inefficiencies and Impacts

- Almost 2 years later the Construction Industry continues to experience labor force issues.
 - ▶ U.S. CoC Q4 2021[Com. Construction Index]
 - ▶ (91%) of contractors report moderate to high levels of difficulty finding skilled labor,
 - ▶ A majority (62%) of contractors report high difficulty finding skilled workers, up from 55% who said the same last quarter (and up 20 points year-over-year).
 - ▶ Over half (56%) of contractors report a high degree of concern about their workers having adequate skill levels, up six points from last quarter and 20 points year-over-year

Impact on Future Work

- Almost Half of Contractors Are Turning Down Work Because They Don't Have Enough Workers | U.S. Chamber of Commerce (uschamber.com)
 - ▶ Skilled worker shortage
 - almost half (45%) of contractors who report difficulty finding workers say they have turned down work because they can't find enough skilled workers.
 - 72% report a challenge in meeting project schedule requirements (up slightly from 71% in 2020 Q4).
 - Over half (60%) are putting in higher bids for projects (up from 58% in 2020 Q4).
 - ▶ Record materials shortage

Impact on Future Work

- New Investments: *Infrastructure Investment and Jobs Act (2021)*
 - ▷ \$1.2 trillion
 - ▷ 175,000 new construction jobs

How Is This Covered Contractually?

- Compensable and/or excusable impacts/delays
- Force Majeure
 - ▶ FAR 52.249-19 Default (Epidemics)
- Suspension of Work
- Termination for Convenience
- “Acts of the Government in either its sovereign or contractual capacity”?

How Is This Covered Contractually (Cont.)

■ Federal, State, local government COVID mandates:

- ▶ Masking, social distancing, vax, etc.
- ▶ FAR 52.223-99 Ensuring Adequate Covid-19 Safety Protocols for Federal Contractors (Oct 2021)

■ 52.243-4 Changes:

- ▶ “The Contracting Officer may...by written order ... make changes in the work within the general scope of the contract, including changes...In the method or manner of performance of the work”
- ▶ If any change under this clause causes an increase or decrease in the Contractor’s cost of, or the time required for, the performance of any part of the work... [C.O.] shall make an equitable adjustment...” (emphasis added).

Outside of the FAR

- AIA Document A201–2017 General Conditions of the Contract for Construction:
 - ▷ **§8.3 Delays and Extensions of Time**
 - ▷ **§ 8.3.1** If the Contractor is delayed at any time in the commencement or progress of the Work by . . . unusual delay in deliveries, unavoidable casualties . . . or other causes beyond the Contractor's control . . . or (5) by other causes that the Contractor asserts, and the Architect determines, justify delay, then the Contract Time shall be extended.
 - ▷ **§ 8.3.3** This Section 8.3 does not preclude recovery of damages for delay by either party under other provisions of the Contract Documents.

Government Issued Health & Safety Measures

■ *Crosslinx v. Ontario Infrastructure*, 2021 ONSC 3567 an Ontario Judge held that health and safety measures undertaken by a construction contractor in response to the pandemic triggered a process that might lead to an extension of time to complete a project.

- ▶ *“Imposing financial penalties for delays caused by the pandemic does not further the purpose of including a Substantial Completion Date in the contract.”*
- ▶ *It merely penalizes a contractor who may be working with heroic efficiency to complete the project in a timely manner even though it is impossible to do so because of circumstances beyond the contractor’s control.*
- ▶ *Imposing financial penalties on contractors for failing to meet a substantial completion date in those circumstances only incentivizes them to cut corners and imperil public health and safety.”*

Relief From Performance Obligations Available Outside of Contract Terms

- What if your Contract does not address unforeseeable causes beyond your control?
- Common Law Principles
 - ▷ Impossibility of Performance
 - ▷ Frustration of Contract

How Are Workforce Impacts Measured?

- Delayed delivery supplies/material easier to measure impact on project.
- What is baseline for measuring labor inefficiencies?
 - ▷ Workforce challenges prior to COVID?
 - ▷ What is COVID's true impact (Does it matter)?
 - ▷ What should a reasonable Contractor have foreseen?

Pandemic Pandemonium

Pandemic Pandemonium

- ▷ Federal, State and Local Government Pandemic Mandates
- ▷ COVID Relief
- ▷ Other Buy American Act Developments
- ▷ SECURE Technology Act and Other Cyber Developments

Federal, State and Local Government Pandemic Mandates

■ Federal Pandemic Mandates

- ▷ Biden Path Out of the Pandemic
- ▷ EO 14042 Ensuring Adequate Safety Protocols for Government Contractors
 - ▷ Safer Federal Workforce Task Force
 - ▷ OMB Director Determination
 - ▷ Litigation and Current Preliminary Injunctions
- ▷ OSHA ETS and CMS Vaccination Mandate Litigation and Potential Impacts

Federal, State and Local Government Pandemic Mandates

- State and Local Mandates on Masking, Social Distancing, Vaccination
 - ▷ State legislation, Gubernatorial Executive Orders, ... County Executives
 - ▷ CDC, State and Local Depts of Health
 - ▷ Various/Changing Standards and Implementation
 - ▷ Federal Preemption???

COVID Relief

- Commercial - “Force Majeure” is where a party’s performance of its contractual obligations may be excused where performance is prevented or frustrated due to an unusual event that is beyond the contracting parties’ control.
- Government Contracts – Relief based on contract and funding availability; Can only sue the Sovereign to the extent it agrees to be sued
 - ▶ E.g., FAR 52.249-10 Default (Fixed-Price Construction); CARES Act, Section 3610, *Pernix Serka JV v. DoS*

COVID Relief - 52.249-19 Default (FP Construction)

Potential relief from termination or charge for damages if delay arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor. E.g.,

- (i) Acts of God or of the public enemy
- (ii) Acts of the Government in either its sovereign or contractual capacity
- (iii) Acts of another Contractor in the performance of a contract with the Government
- (iv) Fires
- (v) Floods
- (vi) Epidemics
- (vii) Quarantine restrictions
- (viii) Strikes
- (ix) Freight embargoes
- (x) Unusually severe weather
- (xi) Delays of subcontractors or suppliers at any tier arising from unforeseeable causes beyond the control and without the fault or negligence of both the Contractor and the subcontractors or suppliers

COVID Relief

- OMB Memo M-20-18 Managing Federal Contract Performance Issues Associated with the Novel Coronavirus (3/20/2020)
 - ▶ Federal Worksite Closures, Quarantines, Social Distancing
 - ▶ POP Extensions, Flexible Work Schedules, Retooling for Pandemic Response, Excusable Delay, Available Remedies
- EO 14017 – America’s Supply Chains (status)

COVID Relief

■ CARES Act, Section 3610 [41 USC 6301 note]

Notwithstanding any other provision of law, and subject to the availability of appropriations, funds made available to an agency by this Act or any other Act may be used by such agency to modify the terms and conditions of a contract, or other agreement, without consideration, to reimburse at the minimum applicable contract billing rates not to exceed an average of 40 hours per week any paid leave, including sick leave, a contractor provides to keep its employees or subcontractors in a ready state, including to protect the life and safety of Government and contractor personnel, but in no event beyond September 30, 2020. ... Such authority shall apply only to a contractor whose employees or subcontractors cannot perform work on a site that has been approved by the Federal Government, including a federally-owned or leased facility or site, due to facility closures or other restrictions, and who cannot telework because their job duties cannot be performed remotely during the public health emergency declared on January 31, 2020 for COVID-19: Provided, ... That the maximum reimbursement authorized by this section shall be reduced by the amount of credit a contractor is allowed pursuant to division G of Public Law 116-127 and any applicable credits a contractor is allowed under this Act.

■ Continuing Resolution of FY 2022 (3/2021) Extended Section 3610 through 9/30/21

Other Buy American Developments

- Current: Buy American Act - 41 USC 8301
 - ▷ Government agencies to buy domestic end products and materials (including construction material)
 - ▷ Manufactured domestic end products now require cost of domestic components to exceed **55%** of the cost of all components
 - ▷ Except: COTS manufactured in the US, Public Interest, Nonavailability, Unreasonable Cost, Resale, Commercial Item IT

Other Buy American Act Developments

- EO 13881/EO 14005 and FAR - Changes on Horizon for BAA
 - ▷ Domestic End Product
 - ▷ Potential change to “Domestic End Product” and test
 - ▷ Max 5% Cost = Nondomestic Iron or Steel except COTS fasteners
 - ▷ Move from 55% to 60% (later 75%)
 - ▷ Public Interest (USMCA and other Trade Agreements)
 - ▷ Nonavailability (Website Reporting and Waiver requirements)
 - ▷ Unreasonable Cost (SB 30%, Large 20%; DoD still 50%)



SECURE Technology Act and Other Cyber Developments

- Strengthening and Enhancing Cyber-Capabilities by Utilizing Risk Exposure (SECURE) Technology Act
 - ▶ Encourage cyber incident reporting and information sharing
 - ▶ FASC established
 - ▶ Exclusion and removal orders and route for appeal

SECURE Technology Act and Other Cyber Developments

- EO 14028 Improving the Nation's Cybersecurity (May 2021)
- Basic Assessment in SPRS
- CMMC 2.0
- DOJ Cyber-Digital Task Force and the FCA
- The Monaco Memorandum

Hypothetical

Construction Contracting

■ Any Questions?

THANK YOU!

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