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# CONSTRUCTION LAW

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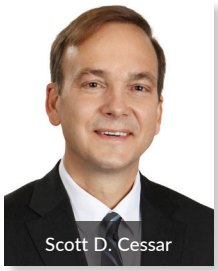
## How not to prove a delay claim


Scott D. Cessar

Imagine, if you will, a project involving the renovation and repair of a building on an Air Force base that was contracted to be completed in one year and that takes four years to complete. Add to the equation that the government issued seven bilateral contract modifications in which the government accepted responsibility for 986 days of delay and assessed liquidated damages for 35 days.

These facts sound like they would form the basis for a strong claim for additional compensation for the contractor for 986 days of project delay. That is what the contractor in *Appeal of Wright Brothers, the Building Company, Eagle, LLC*, before the Armed Services Contract Board of Appeals (ASCBA), surely thought.

In *Appeal of Wright*, the contractor presented a certified claim to the contracting officer for additional compensation for $753,816 based on claimed delays and disruptions, particularly to its subcontractors, based on starts and stops on the project for 986 days. The contractor submitted an affidavit, authored by a claims consultant, which explained the basis for the claim and quantified the claimed damages using a total cost methodology that subtracted the amount the contractor expected to spend to complete the work from the total amount the contractor actually

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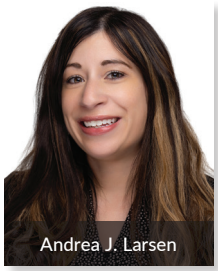
## Joint ventures must be registered in SAM


Andrea J. Larsen

A recent decision by the United States Court of Federal Claims demonstrates the importance of strict compliance with Federal Acquisition Regulation (FAR) provision 52.204-7.

In *Thalle/Nicholson Joint Venture v. United States*, joint venture Thalle/Nicholson protested a decision by the United States Army Corps of Engineers (USACE) to award a construction contract to Shimmick Construction Company. Specifically, Thalle/Nicholson challenged a determination by USACE that its proposal was ineligible for award due to the joint venture's failure to register in the System for Award Management (SAM).

On August 19, 2021, USACE issued a solicitation for the repair and modification of a spillway at the Lewisville Dam in Denton County, Texas. The solicitation expressly informed offerors that failure to meet solicitation requirements could result in an offer being ineligible for award.

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## How not to prove a delay claim

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spent, because this was the "most equitable approach." The contractor also submitted an affidavit by a principal of the company essentially reiterating the same facts set forth in the claims consultant's affidavit.

The contracting officer found merit in $241,257 of the contractor's claim, but denied $455,693 of the claim.

The contractor appealed the contracting officer's decision to the ASCBA.

On appeal, the contractor argued that its entitlement was "not disputed" because the "Government accepted responsibility in Contract amendments" for the delays due to events such as failure to allow access to the site and failure to timely respond to requests for information, approve contract submittals, and submit requests for proposal.

Adopting the government's arguments in opposition to the contractor's claim, the ASCBA denied the claim. The reason was simple: Notwithstanding that the contract amendments extending the completion date noted government responsibility for delays, the contractor failed to submit a critical path schedule analysis, or other analysis, which demonstrated that delay was due exclusively to the contract modifications issued by the government.

According to the ASCBA, "an extension of time granted by the contracting officer does not equate to an administrative determination that the delay was not due to the fault or negligence of the [contractor]." To the contrary, "the mere grant of a contract extension does not indicate that the government is at fault; rather one of a number of other events external to the government could be responsible. In such a situation, the presumption that the government is responsible is unwarranted…."

For the same reason—the failure to provide a critical path analysis—the ASCBA denied the contractor's alternate claims for recovery based on a cardinal change and/or a constructive change because the project went from a one-year job to a four-year job. The ASCBA opined that, in order to succeed under either of those theories, the contractor must establish that none of the delays experienced were either concurrent or its fault, something that the contractor "failed to do."

The lessons for contractors from *Appeal of Wright* are straightforward. First, when preparing a claim, be sure to consider your burden of proof. What are the elements of the claim you need to prove and what evidence, expert or otherwise, is required to establish the claim and avoid the situation set forth in *Appeal of Wright*? Second, do not take liability for granted when it comes to proving up a delay on a project, even if you believe that the owner has admitted to responsibility for the delay in contract modifications. Instead, have a claims consultant prepare a critical path analysis. If the owner's admissions of responsibility in contract modifications are as self-evident as you believe, such an analysis should neither be complicated or expensive to prepare.

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## Joint ventures must be registered in SAM

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The solicitation incorporated by reference FAR 52.204-7, which provides:

"An Offeror is required to be registered in SAM *when submitting an offer or quotation*, and shall continue to be registered until time of award, during performance, and through final payment of any contract, basic agreement, basic ordering agreement, or blanket purchasing agreement resulting from this solicitation."

> *"An Offeror is required to be registered in SAM* when submitting an offer or quotation, *and shall continue to be registered until time of award, during performance, and through final payment of any contract, basic agreement, basic ordering agreement, or blanket purchasing agreement resulting from this solicitation."*

Although Thalle/Nicholson had not registered in SAM as a joint venture, each member of the joint venture had registered individually in SAM.

Thalle/Nicholson submitted its proposal on November 3, 2021. In evaluation notices provided to Thalle/Nicholson, USACE informed Thalle/Nicholson of deficiencies identified and provided Thalle/Nicholson with an opportunity to revise its proposal. None of the deficiencies identified by USACE concerned SAM registration. After Thalle/Nicholson submitted its final proposal revision, USACE informed Thalle/Nicholson that its proposal was not eligible for award due to its failure to register in SAM.

Thalle/Nicholson argued that USACE failed to conduct meaningful discussions by not raising Thalle/Nicholson's SAM registration as a deficiency and allowing Thalle/Nicholson to correct it. The Court noted that even if USACE was obligated by FAR to bring Thalle/Nicholson's SAM registration status to its attention during discussions, Thalle/Nicholson still would not be able to demonstrate that it was prejudiced by USACE's failure. This is because Thalle/Nicholson would not be able to remedy the noncompliance since it was not registered in SAM at the time it submitted its offer.

The Court was further unpersuaded by Thalle/Nicholson's argument that USACE did not have a rational basis for its determination that Thalle/Nicholson was ineligible for award. In its analysis, the Court reasoned that the plain language of FAR required Thalle/Nicholson to be registered in SAM "when submitting an offer" and that an offeror "continue to be registered until the time of award." The Court found that USACE had a rational basis for its determination that Thalle/Nicholson's proposal was ineligible for award because Thalle/Nicholson was not registered in SAM as required by FAR 52.204-7.

A key takeaway from *Thalle/Nicholson* is that it is inadequate for joint venture members to register in SAM individually. Joint ventures must register in SAM and should register as soon as possible to ensure they are active in SAM at the time of submitting their proposals.

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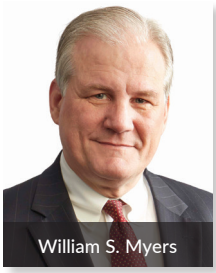
## Long-term lease or public construction?


William S. Myers

The Pennsylvania Commonwealth Court issued a decision at the end of March that offers guidance on when private parties must pay prevailing wages under state law when engaged in construction projects that have some relation to a public agency. In *PSP NE, LLC v. Pa. Prevailing Wage Appeals Board*, the Court *reversed* a decision by the Prevailing Wage Appeals Board that said a predevelopment lease was really a "disguised construction contract" and the construction of the leased building was covered by the Pennsylvania Prevailing Wage Act.

### The long-term lease

The private Developer in this case owned undeveloped land in Luzerne County. The State Police signed a predevelopment lease with the Developer for barracks to be built on the land in accordance with State Police specifications. The lease was for 20 years with two five-year extension options. The construction was financed by a private loan secured by the land, an assignment of the lease, the barracks building to be constructed, and the Developer's personal guarantee.

The lease provided that the State Police would take occupancy and begin lease payments upon completion of construction. Under the terms of the lease, the Developer would recoup all construction costs within the first six years of the lease, and if the State Police terminated the lease before the end of the initial 20-year term, the Commonwealth would reimburse the Developer for all unamortized construction costs.

### Recovery of construction costs

The Board argued that the anticipated recovery of all construction costs from lease payments within the first six years turned the lease into a public construction contract, but the provision for reimbursement of unamortized construction costs made it abundantly clear. The Court rejected this argument on four grounds.

**First**, the Court pointed out that recovery of construction costs through lease payments often is the whole point of developing land, and the fact that it was contemplated here is not, by itself, a basis for converting this to a construction contract. **Second**, the Board offered no evidence that the period for recovery of construction costs was "substantially shorter than the industry norm," which could have suggested a different outcome. **Third**, the Developer retained a reversionary interest in the land and the barracks building, and the Board did not show that the useful life of the building would be expended during the lease. **Fourth**, the Developer in this case retained some financial risk even if the State Police terminated the lease early.

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## Long-term lease or public construction?

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### Constructive real estate transfer

The Court also rejected the Board's argument that the building lease should be deemed a "real estate transfer" for state law tax purposes because of the potential 30-year term, that should turn it into a public construction contract. The Court held the two five-year extensions, coming 20 or more years down the road, were too speculative to call this a 30-year lease. More important, even if it were a constructive real estate transfer for tax purposes, the Court held that "is not a factor to be used to determine whether the lease is a construction contract for a public work."

### Ultimate source of funds

Finally, the Court rejected the Board's argument that the ultimate source of construction funds was the lease payments by the Commonwealth, and that "economic reality" turned the transaction into a public construction contract. To begin with, the Court concluded that the documents did not evince anything more than a landlord-tenant relationship and that the lease payments "merely give the State Police the right to occupy the land and the facility." Beyond that, the Court held that the money must come directly from the Commonwealth to the private entity for the purpose of paying for the construction itself. Because the documents showed nothing more than a landlord-tenant relationship, the State Police would not be paying for construction, but simply for occupying and using the land and building after it was built.[1]

### Contractual Prevailing Wage term

One other interesting aspect is that the lease explicitly required the Developer to comply with the Prevailing Wage Act in the construction of the barracks, and arguably even that he had to pay prevailing wages regardless of whether that Act applied. The Court basically said that might be an interesting contract question for a different case, but it is not pertinent for determining whether the lease should be treated as a public construction project under the Prevailing Wage Act.

[1] As an aside, the Court relied on another of its recent decisions, involving a private college using public funds to build a campus building, which turned on a similar question about the ultimate source of the construction funding: *Ursinus College v. Wage Appeals Board*. The Pennsylvania Supreme Court recently agreed to review that decision, and the case has garnered attention from a number of colleges and other organizations as *amicus curiae*, so that decision by the high court may provide further clarity on the "ultimate source" issue for prevailing wage cases.

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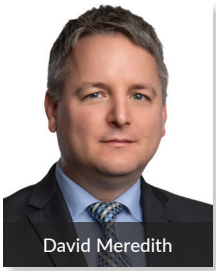
# Made in America: Domestic preferences


David Meredith

The United States District Court for the Southern District of Texas, Houston Division, recently adopted a magistrate judge's Memorandum and Recommendation in full, concluding that a dredging barge assembled in the United States with a foreign-made crane and spuds was nevertheless American-built as required by the Jones Act.

In order to qualify as American-built, a vessel must be assembled entirely in the United States and all major components of the vessel's hull and superstructure must be fabricated in the United States.

In ruling that the barge at issue was American-built, the Court thwarted the attempt of Diamond Services Corporation (Diamond) to obtain declaratory and injunctive relief preventing its competitor, Curtin Maritime Corporation (Curtin), from commencing work pursuant to a contract with the Port of Houston Authority (Port) to dredge the Houston Ship Channel (Project).

Prior to assembling its vessel, Curtin had obtained a preliminary determination from the United States Coast Guard (Coast Guard), confirming that its barge would qualify as American-built even if it included the foreign crane bolted to the hull and foreign removable spuds. For those who are wondering, spuds are retractable vertical steel shafts that are driven into soil or sand at the bottom of a waterway to provide stability.

Curtin proceeded to assemble its barge at a shipyard within the United States in accordance with the Coast Guard's determination and applicable Coast Guard regulations. After construction was completed, Curtin obtained a certificate confirming that the barge was American-built.

Around that same time, Curtin was awarded the dredging contract for the Project, which required that Curtin's barge be American-built pursuant to the Jones Act.

Diamond then filed suit against Curtin, the Coast Guard, and the Port seeking declaratory and injunctive relief intended to prevent Curtin from commencing work on the Project. Diamond asserted that Curtin's barge was not American-built because the foreign-made crane and spuds should be considered major components of the hull and superstructure or, more generally, major components required for the barge to perform dredging activities.

The District Court disagreed, observing that although the Coast Guard's regulations are not clear, it reasonably determined that the foreign crane and spuds are not major components of the hull or superstructure. In short, the Coast Guard properly held that the foreign-sourced components were removable ancillary equipment considered outfitting rather than structural parts of the hull or superstructure required for its operation.

Many state and federally funded construction projects now include Made in America requirements for iron, steel, construction materials, and manufactured products. When in doubt, obtaining a preliminary determination from the appropriate regulatory authority has obvious benefits.

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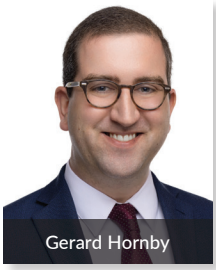
# Contractors, pay close attention to bid bond requirements on public projects


Gerard Hornby

Sometimes the hardest part of a construction project is simply getting the job. A recent case handed down by the United States Court of Federal Claims illustrates this point, especially when it comes to federal public projects and the difficulties encountered by contractors who do not fully comply with all bid requirements.

In *Leeward Constr., Inc. v. United States*, the Army Corps of Engineers issued an Invitation for Bids (IFB) for work on the General Edgar Jadwin Dam in Honesdale, Pennsylvania.

The IFB incorporated Federal Acquisition Regulation 52.228-1(e), which requires contractors to include a bid guarantee (i.e., bid bond) with their submission. Bid bonds are designed to protect the Army Corps from a contractor's default by compensating the Army Corps for costs incurred in reprocuring the contract or reissuing the award to a more expensive runner-up.

Six bidders submitted bids in response to the IFB. Of the six bidders, Leeward Construction, Inc (Leeward), a heavy and highway commercial construction contractor located in Honesdale, submitted the lowest bid.

Before submitting its bid, Leeward asked the Army Corps whether it would accept a bid bond on the American Institute of Architects Document A310 (AIA Form A310). The Army Corps responded that there was no special form for bidders to use, and they needed only to include a bid bond of the requisite amount. Leeward went on to submit its bid bond using the AIA Form A310. Every other bidder used Standard Form 24, the bid bond form provided in FAR 28.106-1.

The AIA Form A310 used by Leeward includes a provision that limits the liability of the contractor in the case of default to "the difference, not to exceed the amount of this Bond, between the amount specified in said bid and such larger amount for which the [contracting agency] may in good faith contract with another party." In contrast, SF 24 states that "in the event of failure to excuse such further contractual documents and give such bonds, [the Principal] pays the Government for any cost of procuring the work which exceeds the amount of the bid."

This difference proved a problem for the Army Corps, which interpreted the AIA Form A310's limitation as prohibiting recovery of all excess re-procurement costs—e.g., administrative costs or the costs of in-house government performance. In reaching this conclusion, the Army Corps relied upon two decisions by the Government Accountability Office (GAO) specifically governing this issue.

Leeward's bid was ultimately rejected by the Army Corps as nonresponsive, and the project was awarded to the second lowest bidder. Leeward subsequently filed a bid protest with the GAO, but the GAO summarily dismissed the protest based upon the two exact same prior GAO decisions that the Army Corps relied upon in finding Leeward's bid to be unresponsive.

Leeward then appealed to the Court of Federal Claims. The Court, however, found that the AIA Form A310 does not comply with FAR 52.228-1(e), and thus did not meet the requirements of the IFB. The AIA Form A310 limits liability to only replacement contract costs, and it did not clearly or unambiguously incorporate FAR 52.228-1(e). Furthermore, the Court held that the Army Corps acted rationally by not waiving the irregularity in the AIA Form A310 and instead rejecting Leeward's bid as nonresponsive. Because Leeward's bid bond irregularity was a material defect, the Army Corps was correct to reject it.

Leeward's experience is a lesson for contractors to pay very close attention to the bid bond requirements on public projects. Leeward's frustration can be readily understood, especially after calling the Army Corps and learning that there was no specific form for contractors to use. But at the end of the day, Leeward's bid did not include a bid bond of the requisite amount, as specified by the IFB. Contractors bidding on public projects should take heed of this ruling in preparing future responsive bids.

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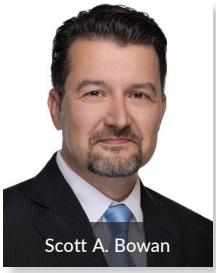
## Litigation lesson: Wrongly redacting for relevance


Scott A. Bowan

Your company has been hauled into federal court, and now your adversary is demanding that you produce a document that you insist is highly confidential and mostly irrelevant. You've taken the right first step by getting the other side to agree to a stipulated protective order, which the court has entered. But you don't think that's enough. What if the document finds its way into the public domain despite your best efforts to keep it confidential?

You have an idea. "I'll simply redact all of the irrelevant portions of the document to minimize the harm if it falls into the wrong hands," you think to yourself. Well, perhaps you should think again.

Federal courts generally do not permit a litigant to redact documents, even highly confidential ones, on the basis of relevance. They rest their decisions on several considerations.

First, nothing in the Federal Rules of Civil Procedure expressly permits a party to redact portions of a responsive document based on relevance. The rule governing document requests, Rule 34, contemplates the discovery of "documents," not "relevant portions of documents." If a document contains confidential information that a party believes is irrelevant, then federal courts typically view a protective order, not redaction, as the appropriate solution.

Second, some federal courts, including the Southern District of California in *Rodriguez v. Vizio, Inc.*, have noted that Rule 34 requires parties to produce responsive documents "as they are kept in the usual course of business." Those courts have then presumed that parties keep responsive documents in unredacted form and, consequently, must produce them in that format.

Third, because most responsive documents contain at least *some* irrelevant information, permitting redactions for relevance likely would lead producing parties down the proverbial slippery slope to redacting individual words, sentences, or paragraphs that they view as irrelevant. The federal court for the District of Minnesota offered the following well-articulated explanation in *Bartholomew v. Avalon Capital Group, Inc.* for why redactions based upon relevance are impermissible:

> Redaction is an inappropriate tool for excluding alleged irrelevant information from documents that are otherwise

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## Litigation lesson: Wrongly redacting for relevance

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responsive to a discovery request. It is a rare document that contains only relevant information. And irrelevant information within a document that contains relevant information may be highly useful to providing context for the relevant information. Fed.R.Civ.P. 34 concerns the discovery of "documents"; it does not concern the discovery of individual pictures, graphics, paragraphs, sentences, or words within those documents. Thus, courts view "documents" as relevant or irrelevant; courts do not, as a matter of practice, weigh the relevance of particular pictures, graphics, paragraphs, sentences, or words, except to the extent that if one part of a document is relevant then the entire document is relevant for the purposes of Fed.R.Civ.P. 34. This is the only interpretation of Fed.R.Civ.P. 34 that yields "just, speedy, and inexpensive determination[s] of every action and proceeding." Fed.R.Civ.P. 1.

If parties were permitted to redact individual words, pictures, or graphics based upon their own unilateral determination of relevance, it is not difficult to imagine how the courts might quickly become flooded with disputes asking them to rule on each of those individual redactions. To avoid that torrent of side litigation, federal courts typically forbid redactions based on relevance.

While there may be instances rooted in the specific facts and circumstances of a case where redacting confidential information based on relevance might be appropriate, don't be surprised if your attempt to redact documents for relevance is ultimately rejected when you are in federal court.

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# Construction Law Group NEWS

**Tim Grieco** is the new chair of our Construction Practice Group. Tim has been with the firm for 21 years and has extensive experience in all aspects of construction law. He is also an experienced trial attorney. Our chair for the last 18 years, **Scott Cessar**, has been elected CEO of our Firm, and **Chris Opalinski** of our group remains as overall head of the Firm's Litigation Division.

A team of **Chris Opalinski, Dave Meredit**h, and **Jake Hanley** were victorious in a five-day jury trial held in federal court in Erie, Pennsylvania on behalf of our client, a concrete supplier, which brought claims against a general contractor on a large dam remediation project located in northwestern Pennsylvania. The jury awarded our client 100% of what it requested, $7,519,604, and awarded the general contractor just $653 for its counterclaim requesting in excess of $12,451,465.

**Jake Hanley** was successful in a bench trial tried in state court in Allegheny County, Pennsylvania for our client, a general contractor, receiving an award of damages and attorneys' fees and costs, on a claim arising out of the construction of a two-story residential property.

**Scott Cessar** was a co-presenter in April at a continuing legal education seminar sponsored by the Allegheny County Bar Association, Construction Law Section entitled "Legal Ethics in Construction Contracting and Alternative Dispute Resolution."

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