ECKERT SEAMANS
ATTORNEYS AT LAW

Spring 2025

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CONSTRUCTION LAW

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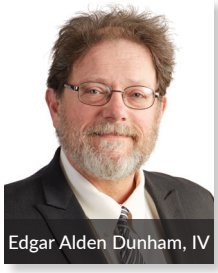
Contractor's remedy for rising costs, delays, and unavailability arising from tariffs and trade wars


Edgar Alden Dunham, IV

The tariffs recently enacted by the federal government, along with the threat of trade wars as a result, mean these are difficult times for contractors to estimate and hold a price for a stipulated sum contract. Almost every project will include either raw materials or supplies that include those raw materials that are imported, all of which will be affected. The result will likely be rising costs, scarcity, and in some cases unavailability of critical materials. Contractors need to be able to adjust their contracts to reflect those additional costs and to deal with what may become the scarcity or unavailability of certain materials.

Rising supply costs due to government tariffs do not typically form the basis for a change order under most standard form stipulated sum contracts. Nor, to date, have most courts granted relief to contractors seeking to rewrite their contracts to reflect their higher costs when rising prices have lowered or eliminated their profit margins.

Previously, the rising cost of certain raw materials, oil primarily, resulted in large price increases in certain construction materials. Asphalt and roofing materials, in particular, were affected. Escalation clauses became

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Raids at construction sites: Legal rights and responsibilities for immigration enforcement actions

President Trump has declared his intention to conduct one of "the largest domestic deportation operation[s] in American history" and has directed federal agencies to perform enforcement activity in connection with the same. In furtherance of this directive, the United States Immigration and Customs Enforcement (ICE) is conducting raids across the country and is targeting employers in particular industries that historically have been alleged to have engaged employees without work authorization. One of the industries that is likely to be a target of such raids is the construction industry. Consequently, it is imperative that businesses in this field to understand their rights and responsibilities and to take proactive action to comply with the law.

As a preliminary matter, businesses in the construction industry need to know what is a raid. In essence, a raid is an enforcement action that ICE conducts to detain foreign citizens that lack authorization to be present and to

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Contractor's remedy for rising costs, delays, and unavailability arising from tariffs and trade wars

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popular. The clauses typically provided a basis for contractors to submit change orders if the cost of those materials rose. The escalation clauses were usually triggered when the cost of the material rose by more than 5% (contractor's preference) or 10% (owner's preference). Depending on the clause, the increase might be the actual increase in cost to the contractor or it might be tied to some index. The actual cost method simply used the actual invoices received and paid by the contractor. It did not reflect whether the contractor was actually paying market price or higher. The index method would theoretically reflect actual market price, although that can be difficult to calculate when the index is only for a component, or something required in the manufacturing process, of the article being purchased. Another issue that was often raised with escalation clauses is whether there should be a cap, or limitation on the dollar value, of any escalation change order. It is obviously not in the contractor's interest to include a cap in an escalation change order clause. Despite their relative popularity at the time, escalation clauses are not typically included in standard form stipulated sum construction contract forms.

The present tariffs and threatened trade wars raise other issues besides increased price—namely, possible delays in delivery and unavailability. As a result, the escalation clauses of the past may not be enough. We have drafted the following pair of clauses to be inserted in standard form stipulated sum construction contracts to protect our contractor clients from the higher costs, delays, and unavailability, both in general and as a result of the tariffs:

> **Escalation Costs.** As a result of price uncertainty in the marketplace, **(CONTRACTOR)** cannot guarantee its prices of goods or supplies for more than 30 days from the date of any estimate or contract pursuant to which **(CONTRACTOR)** is obligated to provide said goods or supplies directly or indirectly. If the cost to **(CONTRACTOR)** of any such goods or supplies rises by more than 5% during the tenure of this Contract, **(CONTRACTOR)** shall be entitled to a change order for all such additional costs actually incurred by **(CONTRACTOR)** beyond the initial 30 day period noted above.

> **Imported Supply Costs and Availability.** Due to the recent imposition of certain tariffs by the federal government, the likelihood of additional measures on imported goods and supplies and the uncertainty in costs and availability resulting therefrom, **(CONTRACTOR)** cannot guarantee its prices of imported goods or supplies affected by said tariffs or additional measures for more than 30 days from the date of any estimate or contract pursuant to which **(CONTRACTOR)** is obligated to provide said goods or supplies, directly or indirectly. If the cost to **(CONTRACTOR)** of any such goods rises by more than 5% during the tenure of this Contract, **(CONTRACTOR)** shall be entitled to a change order for all such additional costs actually incurred by **(CONTRACTOR)** beyond the initial 30 day period noted above. **(CONTRACTOR)** shall not be responsible if affected supplies or products specifically specified for this Project become unavailable as a result of said tariffs or additional measures. If there are delays in the supply of affected goods and supplies as a result of the imposition of said tariffs or additional measures that affect the progress or schedule of the Project, **(CONTRACTOR)** shall not be responsible and, if necessary, shall be entitled to an extension of time.

The first clause is an escalation clause. It only addresses increased cost. The second clause is expressly for increased costs, delays, or unavailability as a result of the tariffs, trade wars, or the like.

As with all projects, contract language needs to be specifically tailored to each particular situation. The above clauses are examples only. If you require assistance drafting this type of contract language or any other contract language for your project, we invite you to reach out to our construction lawyers directly and we would be happy to assist.

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Raids at construction sites: Legal rights and responsibilities for immigration enforcement actions

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work in the country and to deport them from the country. The agency usually conducts raids with knowledge of the foreign citizens that it wants to detain and to put into removal proceedings. Agents select a worksite for a raid based on reports or complaints that they receive from the public, investigations that ICE is performing, or other targeted intelligence gathering. ICE rarely, if ever, notifies employers before it conducts a raid. While ICE is the primary agency that performs raids, it, nonetheless, may solicit and may receive assistance from other law enforcement agencies to carry out its enforcement activities.

> *Construction businesses must understand that **ICE agents cannot legally enter non-public areas of a worksite without a judicial warrant or explicit consent**. Administrative documents like deportation orders or subpoenas do not count. Always request and inspect the warrant carefully.*

In light of the potentiality for a raid, the construction industry should be aware of the following:

- **Warrants are necessary.** ICE cannot enter a company's private property and non-public spaces without a judicial warrant or consent. A judicial warrant is an order that a federal judicial officer issues to search for a person or an item or to seize a person or an item. An administrative warrant, an order for deportation or removal, a notice of appearance, and a subpoena are not a judicial warrant. A company should request a physical copy of the judicial warrant from the ICE agents and should inspect it due to the fact that ICE agents may represent that an administrative warrant or an order for removal/deportation are judicial warrants, which is not the case.
- **Designation of a point person and a response plan is critical.** A business should take the position that only a member of leadership or that person's delegate has authority to grant consent for ICE to conduct any searches or seizures. It, furthermore, should indicate that only the point person has authority to communicate with ICE agents on behalf of the company and should inform staff politely to decline to answer any questions or to provide any information absent authorization from that person. In addition, a company should adopt a protocol regarding what steps it should take if ICE agents appear on its premises to conduct enforcement activity.
- **Never act on an employee's behalf.** A company should not accept a Notice to Appear on behalf of any employees.
- **Never interfere with law enforcement.** A company should inform its staff not to obstruct enforcement activity, not to give any false or misleading information or documents, and not to hide individuals or to encourage them to flee, which could result in criminal action. This is particularly important because the Attorney General recently has issued guidance to prosecute anyone that interferes with such enforcement activity.
- **Document interactions with ICE.** A business should document and should record all interactions with ICE agents and should provide this summarization to the company's counsel for review. This information will include: the name of the agent, his/her badge number, his/her contact information, and what transpired with the agent.
- **Remind foreign employees to have documentation.** A company should remind all foreign employees to carry appropriate identification and documentation of their status with them; e.g., I-797s, Visas, etc. This is particularly important in light of the fact that the United States Citizenship and Immigration Services (USCIS) and ICE are separate federal entities, and they automatically and consistently do not share information with each other, which can lead to improper detainers; e.g., a person may have had a warrant issued for him/her, but USICS may have approved another application for that same person.
- **There may be resources for your employees.** A business should remind its staff of the resources that may be available to them after an enforcement action, including counseling services, an employee assistance program, pro bono legal support, etc.

While the possibility of raids looms over the construction industry, employers in this section can take appropriate action to be prepared for the same and to ensure their compliance with the law.

If you have any further questions about these issues, please feel free to reach out to the Eckert Seamans lawyers directly.

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The cost of deception: DBE fraud and the legal consequences for contractors


David Meredith

Contractors attempting to use a sham disadvantaged business enterprise (DBE) as a mere pass-through do so with the risk of a criminal prosecution for wire fraud.

In *United States v. Kousisis*, 82 F.4th 230 (3d Cir. 2023), affirmed by the Supreme Court on May 22, 2025, the defendants, Alpha Painting & Construction Co., Inc., and its owner Stamatios Kousisis (collectively, Alpha), were convicted of wire fraud and conspiracy to commit wire fraud for using a DBE to pass through funds to the government even though Alpha ultimately completed all required work, and the quality of the workmanship and materials was not contested.

More specifically, Alpha was retained as the general contractor for the Pennsylvania Department of Transportation to perform work on two government contracts for projects in Philadelphia, Pennsylvania. The contracts for the projects required Alpha to contract with a DBE for six to seven percent of the contract amounts. In order to satisfy those requirements, Alpha certified in its bids that it would obtain supplies for the two projects from Markias, Inc. (Markias), a pre-qualified DBE in Pennsylvania. Throughout the projects, Alpha certified that Markias acted as a regular dealer in supplying paint products. Those representations were false.

In actuality, Markias did not do any work on or supply any materials for the projects. Instead, in an effort to defraud the government, Alpha entered into purchase agreements with non-DBE suppliers. Alpha arranged for those suppliers to send their invoices to Markias. Markias then issued its own invoices to Alpha, adding a 2.25% fee. Alpha in turn submitted the invoices from Markias to the government for payment.

Following a jury trial, Alpha was convicted of wire fraud in violation of 18 U.S.C. § 1343, which criminalizes any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises using wires. Alpha appealed the conviction, asserting in relevant part, that the government failed to prove it was defrauded because its violations of the statutory DBE requirements did not constitute loss of property or pecuniary loss where Alpha's work was timely completed and there were not any issues with Alpha's workmanship.

On appeal, the Court of Appeals for the Third Circuit affirmed the conviction, concluding that the government contracts as well as the funds that Alpha obtained based on false DBE representations constituted property loss. The Court further observed that Alpha's ill-gotten profits diverted from a legitimate DBE constituted pecuniary harm. Thus, Alpha's otherwise exemplary completion of the contracted work was not a defense to Alpha's criminal prosecution for fraud.

In so holding, the court reiterated that DBE participation is an essential component of government contracts. Federal regulations require states that receive federal funds for construction to set participation goals of disadvantaged business enterprises. When a DBE participates in a contract, it must perform a commercially useful function, meaning it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved.

In short, it is not enough to use a DBE whose role is limited to that of an extra participant through which funds are distributed. Contractors that do so risk the prospect of criminal prosecution for wire fraud, which is punishable by up to 20 years in prison, a fine, or both for just one act of wire fraud.

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Owners beware: The attorney-client privilege may not shield your communications


Christopher S. Winkler

Owners, imagine this scenario: You are consulting with a professional you hired for your construction project—an architect, engineer, etc.—related to issues or claims that have arisen or may arise in connection with the project. Your attorney is also present and/or involved in this discussion. Given the presence of your attorney, are the contents of your discussion protected by the attorney-client privilege? The answer is not as simple as you might think.

> *Including project participants in legal discussions—even with your attorney present—**may void the attorney-client privilege**. Unless their involvement is indispensable to facilitating legal advice, those communications could be discoverable in court.*

The Commonwealth Court of Pennsylvania recently addressed this exact question. *Liokareas Construction Company, Inc. v. West Greene School District*, 282 A.3d 393 (Pa. Commw. Ct. 2022) involved a dispute between the owner and general contractor of a project and arose from the collapse of a retaining wall constructed near a school. Liokareas (the General Contractor) demanded the production of certain communications between West Greene School District (the Owner) and its attorneys, claiming that West Greene waived the attorney-client privilege by including other project participants—such as the construction manager, engineer, and architect—in those discussions. West Greene argued that its contracts with the project participants created agency relationships and that the project participants provided necessary communications for West Greene and its counsel to address legal disputes that arose. In other words, West Greene argued that the project participants' involvement in these conversations was indispensable and helped counsel to provide legal advice.

The Commonwealth Court disagreed with West Greene for numerous reasons. First, none of the project participants retained West Greene's counsel and, instead, West Greene asserted claims or crossclaims against some of the project participants arising from the collapse of the retaining wall, such that their interests were adverse.

Second, the Court found no evidence that West Greene's counsel requested that the project participants assist in providing legal services or hired the project participants as experts, such that their communications would be shielded under the Pennsylvania Rules of Civil Procedure. Rather, it was clear that the project participants were simply fulfilling their duties under their respective contracts during these communications.

Third, the mere presence of counsel did not automatically shield the disclosure of the discussions' underlying facts. The Court acknowledged that from the start of the project it was understood that the project participants would provide information to West Greene and its agents (including attorneys), such as information to resolve issues or disputes. But the inclusion of West Greene's counsel, by itself, did not render the project participants' communications privileged.

Finally, even if the project participants' communications incidentally helped counsel to provide legal advice to West Greene, the Court held that the communications were nevertheless discoverable. To that end, there was no evidence that the project participants' presence was *indispensable* to counsel's ability to provide legal advice or was *intended to facilitate counsel's ability to provide legal advice*. As the Court stated:

"[T]he Project Participants were independent contractors with written contracts describing their scope of work on the Project, which they were required to perform regardless of any anticipated litigation. To the extent that any communication incidentally facilitated the attorney's ability to provide legal advice . . . such incidental assistance did not render the communication privileged."

Thus, the Commonwealth Court affirmed the decision that West Greene's discussions between itself, counsel, and the project participants were not privileged.

So, what can project owners take away from the *Liokareas* decision? Perhaps most importantly, never assume that your communications with your architect, engineer, or construction manager—even when an attorney is involved—are privileged.

In fact, *Liokareas* establishes significant hurdles an owner must surmount before protecting such communications under the attorney-client privilege. For example, an owner would have to prove that project participants' inclusion in discussions with counsel was "indispensable" or "intended to facilitate counsel's ability to provide legal advice." In most circumstances, though, this will not be the case. Rather, project participants such as architects and engineers will be engaged in communications because it is simply their contractual obligation to address issues arising in the construction project. As such, an adverse party will likely be able to discover the contents of those discussions.

The bottom line: Owners must be careful not to communicate information to non-attorneys that they would want to protect under the attorney-client privilege, particularly strategy and mental impressions regarding claims. Exercising increased vigilance in this area could ensure that legal discussions, strategies, and analyses are not shared with opposing parties.

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New OSHA rule on construction PPE


William S. Myers

OSHA published a final rule in December on Personal Protective Equipment (PPE) in the construction industry. The rule took effect on **January 11, 2025**. OSHA State Plans that did not already have a similar rule must implement their own rule within six months of the publication date. It is a small rule change with potentially significant practical effect, being described by some industry commenters as imposing a "monumental task" on employers.

The rule amends the Construction PPE Standard to require that all PPE "properly fits each affected employee." The driving force for this amendment is the notion that PPE designed for smaller bodies, particularly for women, is not readily available for workers. One example mentioned in the official comments is the size of work gloves, especially gloves used in dangerous work that requires dexterity. The official comments also indicate that "properly fits each affected employee" includes PPE that takes into account "workers' body changes during pregnancy."

The likely significant impact derives from multiple factors, including the ambiguity of the term "properly fits," the requirement that PPE must fit "each affected employee," the difficulty of proving that a particular item of PPE actually fits a particular employee, and the potential for disagreement between employee and employer over whether PPE properly fits that particular employee—an inherently subjective determination in which the employer is at a distinct disadvantage when it comes to proof.

OSHA rejected calls from experts and stakeholders to define the phrase "properly fits," including a suggestion from NIOSH, OSHA's own research arm. To put that in context, OSHA spent 26 pages of three-column, single-spaced, fine print in the Federal Register to explain a rule that results in a net change of 19 additional words in the standard, but it refused to explain what is meant by what is now the core phrase, "properly fits," or how employers might go about determining the difference between "properly fits" and "comfortably fits" or "perfectly fits."

OSHA also refused to make any other suggested revisions to its initial proposed language, opting to finalize the rule in the form first published in July 2023.

An additional ambiguity lies in the core requirement of the amended rule, which is framed by the phrase "selected to ensure." Does that mean "ensures" that the PPE "properly fits," or does the inclusion of "selected to" allow some room for more standardized decisions by employers about PPE? OSHA ignored this question in the official comments, but its language throughout suggests it will interpret that phrase to mean "ensures." When combined with the phrase "properly fits each employee," it could be construed to mean "tailor made."

There will be secondary effects of the rule as well. They include the impact on unrelated **enforcement action** by OSHA, especially following accidents involving employees who were using PPE at the time (compliance officers will be sorely tempted to tack that on as an almost automatic additional violation), as well as **employee relations** (an enhanced vehicle for alleging employer retaliation), and **labor relations** (another ambiguity that can become a point of contention with union representatives). All three of those areas have the potential to loom large as tools that can be misused by different players for strategic reasons that have little to do with workplace safety.

The affected standard is 29 C.F.R. Section 1926.95(c). The old and new versions are shown below:

Old rule:

Section 1926.95. Criteria for personal protective equipment. …

(c) Design. All personal protective equipment shall be of safe design and construction for the work to be performed.

New rule:

Section 1926.95. Criteria for personal protective equipment. …

(c) Design and selection. Employers must ensure that all personal protective equipment:

(1) Is of safe design and construction for the work to be performed; and
(2) Is selected to ensure that it properly fits each affected employee.

OSHA has not issued further interpretations or other guidance for the new rule since promulgating it, and neither statistical nor anecdotal data is yet available as to how OSHA is interpreting and applying the new rule. Of course, a further question is whether the change in Presidential Administration will affect the agency's interpretation of the key phrases discussed above.

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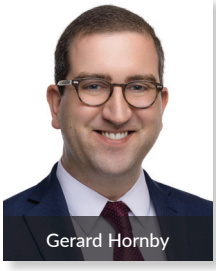
Recent PA Supreme Court case holds that trial court may award both treble damages and punitive damages in UTPCPL claim


Gerard Hornby

Although not a construction case, the Pennsylvania Supreme Court handed down a recent decision that could have some serious implications for contractors, particularly in the residential context.

In *Dwyer v. Ameriprise Financial*, 313 A.3d 969 (Pa. 2024), the plaintiffs brought suit against their life insurance company, alleging common-law claims of negligent and fraudulent misrepresentation, and were awarded punitive damages. On appeal, the Pennsylvania Supreme Court held that the trial court erred by failing to consider awarding treble damages based on the defendant's violation of Pennsylvania's Unfair Trade Practices and Consumer Protection Law (UTPCPL) in addition to punitive damages for the misrepresentation claims. In other words, a trial court's decision to award treble damages under the UTPCPL is wholly independent of the plaintiff's entitlement to punitive damages and must be considered without regard to a punitive damages award on related common-law claims.

As the *Dwyer* Court noted, the "carrot of treble damages" provided by the UTPCPL exists "to incentivize private actions for unfair and deceptive trade practices, to compensate plaintiffs, and to deter wrongful conduct." On the other hand, punitive damages are primarily penal in nature and intended to punish a tortfeasor.

But what does this mean for the world of construction litigation?

Imagine you're a contractor, and a plaintiff brings suit against you for intentionally using defective materials in the erection of a building or project. The plaintiff brings a claim for negligence, seeking punitive damages for the reckless conduct, as well as a claim under the UTPCPL, seeking treble damages for the deceptive practices. The *Dwyer* opinion holds that both of these damages are separate and potentially recoverable for the plaintiff—which means that you the contractor are exposed to some serious financial penalties. And that's not to mention the attorneys' fees, expert fees, and costs recoverable under the UTPCPL.

If you're a contractor, the *Dwyer* opinion means there are heightened risks to be mindful of when considering potential liabilities and exposure. Plaintiffs have multiple avenues of relief against contractors that have provided poor workmanship, and trial courts are not reluctant to protect consumers, particularly in the residential setting. Be sure to consult with legal counsel who specialize in construction law. Effective risk management and comprehensive statutory compliance are essential long-term strategies for good business.

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Construction Law Group NEWS

Construction Group Accolades

Eckert Seamans' **Scott Cessar** was recognized as a 2025 Pennsylvania Super Lawyer and **Gerard Hornby** and **Jacob Hanley** were recognized as 2025 Rising Stars. Additionally, **Scott Cessar** was named one of the *Stand-out Lawyers of 2025* by Thomson Reuters for his exceptional dedication to client satisfaction and advocacy. The Chambers USA 2025 guide recognized Eckert Seamans' Construction practice group with a Pennsylvania Band 2 ranking, as well as individual accolades for **Scott Cessar** (Band 1), **Christopher Opalinski** (Band 2), and **David Meredith** (Up and Coming).

Construction News

The trial team of **Tim Grieco** and **Gerard Hornby** received news of a trial win in an opinion handed down in April 2025. The case was tried as a bench trial over several days in 2024 in the Philadelphia County Court of Common Pleas and involved a breach of contract claim by an architect against a local developer. The Court ruled that the developer had breached the owner-architect agreement and awarded the architect its full contract damages, plus interest. The Court also invited the plaintiff to file a motion for attorneys' fees, interest, and penalty interest pursuant to Pennsylvania's Contractor and Subcontractor Payment Act. That motion is now pending before the Court.

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