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Construction Law

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The *Todd Construction* Trilogy: A potential remedy for contractors on federal projects receiving unfair performance evaluations

As any experienced federal contractor will tell you, the performance evaluation at the end of a government project can be the lifeblood of a contractor's business. When a federal agency is deciding whether to award a contract, many times the award is made not on the basis of price, but rather on a "best value" basis. Best value contracting takes into account a host of factors, including the technical proficiency of the bid, innovations in the proposal and, significantly, the contractor's performance in prior government contracts. Because of this best value system, at the conclusion of most government projects, a contractor will find himself facing an assessment of his work. If the contractor receives a "poor" or "unsatisfactory" rating, that scarlet letter may result in a loss of future projects.

In the past, a contractor who unfairly received a negative evaluation had little recourse. The governing Board of Contract Appeals for several federal agencies had held that a contractor could not appeal the decision because a negative review did not fit within the definition of a "claim" under the applicable Contract Disputes Act. A contractor could always ask the

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The use of pre-project agreements: "The ties that bind" or perhaps do not

We often get calls from clients—be they contractors, subcontractors or equipment suppliers—asking us to help them enter into a joint venture with another party. This joint venture may be for a single project, where the combined human, financial and technical resources of the parties will enable them to collectively better compete to win the project. Other times, the joint venture will be to cooperate with another company to pursue, together, on a broader scale, multiple opportunities where the parties seek to capitalize on one another's market strength or technical expertise.

Invariably, we are asked to prepare a Joint Venture Agreement. At this point, we often say "time out," and then discuss with the client the possibility of a simpler form of agreement that is short of a Joint Venture Agreement but still accomplishes the expressed intent of the client to venture or partner with another company. We do this because, typically, a Joint Venture Agreement is a complex and multifaceted agreement that requires a much more significant expenditure of time and resources in negotiating concepts for a business arrangement that may not come to fruition or that, by the

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The *Todd Construction* Trilogy: A potential remedy for contractors on federal projects receiving unfair performance evaluations
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agency responsible for the project to reconsider, but the result was up to the whims of the contracting officer who issued the decision in the first place.

Beginning in 2008, however, the United States Court of Claims took up the question of whether a contractor could appeal a wrongful evaluation. In the three *Todd Construction* cases, a roofing contractor alleged that the U.S. Army Corps of Engineers failed to follow designated procedures in evaluating the contractor's performance and, as a result, had bestowed a wrongful "unsatisfactory" rating. The contractor's rating stemmed from a troubled project at an Air Force base. The work performed was of poor quality (the government asserted the structural integrity of one of the roofs was compromised), the contractor failed to adhere to the project schedule and one of the subcontractors was accused of falsifying the engineers' stamp on certain drawings. These problems led to an "unsatisfactory" rating for the contractor's performance. The contractor, for its part, claimed that it was never informed of the government's dissatisfaction with the work, that the government failed to follow applicable regulations in reaching its decision and that any problems were not the contractor's fault. As a result, the contractor challenged the award in an appeal to the Court of Claims.

In *Todd I*, the Court of Claims departed from prior precedent and concluded that an allegation that the performance evaluation was improperly issued could constitute a "claim" under the Contract Disputes Act. The court required a contractor to make a written demand of the agency regarding the evaluation, and the agency must issue a final decision on that written demand. The court held that once these initial hurdles were met, a contractor's challenge to the fairness or the accuracy of the evaluation could proceed.

In *Todd II*, the Court addressed the type of relief that was potentially available to a contractor. The court held that it lacked authority to provide injunctive relief regarding the decision. It did have authority, however, to issue a declaratory judgment, and the judgment could remand the decision with "proper and just" instructions. The court, therefore, could issue directions that would assist the agency, on remand, to address identified concerns or deficiencies in the evaluation. *Todd I* and *Todd II*, therefore, afforded significant hope to aggrieved contractors.

> *"Most significantly, the court distinguished between procedurally erroneous evaluations and substantively "unfair" evaluations."*

Lest a contractor think that these decisions open the floodgates to unlimited judicial review every time a contractor believes he has been wronged, the final decision, *Todd III,* established significant limits on the court's ability to review performance evaluations. Most significantly, the court distinguished between procedurally erroneous evaluations and substantively "unfair" evaluations. Regarding the former, the contractor alleged that the Corps of Engineers had failed to follow mandatory regulations and internal guidelines in issuing its evaluation. The court held that it possessed authority to scrutinize the procedural improprieties. It concluded, however, that even if the Corps failed to follow correct procedures, the contractor had failed to demonstrate how these shortcomings caused any damages. The contractor did not show, for example, that if the procedures had been followed, the contractor could have taken corrective action or that the outcome of the project would have been different in any way. In the end, the government's failure to perfectly comply with the procedural regulations did not appreciably harm the contractor.

In contrast to the close examination given to the procedural violations, the court held that the substantive fairness of the evaluation was subject to a deferential "abuse of discretion" standard. Unless the Corps had reached its decision in an "arbitrary or capricious" manner, its decision would be upheld. The court went on to note that there were numerous problems with the project, and while the contractor claimed that they were not its fault, bare assertions of non-responsibility were insufficient to demonstrate that the Corps had abused its discretion. The plaintiff's claim that the evaluation was substantively unfair, therefore, could not stand.

Ultimately, the *Todd* decisions are a double-edged sword for contractors. On the one hand, they have established that a contractor who receives an unfair evaluation from a federal agency may seek redress by an appeal to the Court of Claims. On the other, the substance of the agency's decision will be reviewed under a highly deferential standard, and any procedural improprieties will only give rise to a claim if a causal link to damages may be demonstrated. Federal contractors, therefore, should not expect that the Court of Claims will overturn every negative review. But in cases where a contractor is truly harmed by an unfair evaluation, the Court of Claims has provided a potential avenue to redress that wrong and to preserve the contractor's good name for future contracting opportunities.

Matthew J. Whipple
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The use of pre-project agreements: "The ties that bind" or perhaps do not (continued)

time it does, will be a much different arrangement than when the parties started and as was provided for in the Joint Venture Agreement. Two such types of simpler, pre-Joint Venture Agreements are Teaming Agreements and Memorandums of Cooperation.

Teaming Agreements—as the name indicates—are intended to permit parties to "team" together for purposes of jointly bidding a project. If, and only if, the joint bid is successful do the parties proceed to a more detailed and involved agreement. Notwithstanding the comparative simplicity of a Teaming Agreement, however, there are a number of issues that should be addressed in a considered Teaming Agreement.

First, the parties must agree on whether they will work exclusively with one another to bid the project. This issue most often arises when there is a large general contractor working with a specialty subcontractor and the general contractor wants the benefit of locking up the exclusive commitment of a specialty subcontractor to bid that part of the scope of work, but wants to still shop the price to other specialty subcontractors in the market.

Second, and if the parties are working together exclusively, they should agree on the consequences if, after the preparatory bid investigation has been done or is near done, one party elects not to proceed. For example, can the party that did not opt out find a replacement bidding partner and, if it does, what use may it make of the pre-bid information provided to it by the party that opted out of the joint effort? Should the party that opted out be responsible, if the decision was not for good cause, for the bid preparation costs of the other party? In any event, it is always prudent to include a date for the decision to be made to proceed or not to proceed to bid—"go or no go"—by each party.

Third, the parties should include terms to protect the confidentiality of information exchanged by and between them to protect their respective intellectual property and to prevent solicitation of one another's employees or customers, depending on the circumstances.

Fourth, the Teaming Agreement should address the allocation of the bid preparation costs of each party and of any joint costs, such as for consultants or for pre-bid investigation work.

Fifth, a sound Teaming Agreement lays the groundwork for the parties to work together in the future if they win the bid by denoting the form of entity that will hold the contract, whether as joint venturers or with one party as general contractor and the other as a subcontractor or some other form of alliance. And, if one party is to be a subcontractor, we find it to be highly advantageous to address and agree upon the general terms of the subcontract at the time of the Teaming Agreement, if at all possible, and to attach those general terms as an exhibit to the Teaming Agreement. This helps greatly to avoid differences between the parties at the outset of the project, if awarded the job, and permits the parties to assess their rights, roles, responsibilities and risks prior to bid.

Memorandums of Cooperation, by contrast, are generally used not for specific projects, but to set a framework for parties to work together to jointly identify and land a broader array of yet-to-be-identified projects or work. Here, it is important to specify with some care the object of the joint effort, by way of the type of endeavor or project the parties are looking to work on together, and also a geographic area that the joint effort will cover. It is also important to identify the financial resources, technical know-how and/or market access each party is contributing to the joint effort.

A solid Memorandum of Cooperation will also address many of the same concepts as a solid Teaming Agreement: exclusivity, sharing of marketing costs of the joint effort, confidentiality, solicitation of employees, protection of intellectual property and, if possible, some consideration of the rights, roles, risks and responsibilities of the parties if and when the parties successfully land the work.

Importantly, a Memorandum of Cooperation should not be indefinite, but should set forth a term or period in which the parties will cooperate, with rights to extend the term. At the same time, the Memorandum of Cooperation should also provide for a right by a party to terminate the Memorandum of Cooperation, with an appropriate notice period.

Both Teaming Agreements and Memorandums of Cooperation should also include dispute resolution terms, whether mediation, arbitration or litigation, with an identification of the choice of law and the venue for any actions.

The great American poet Robert Frost wrote in his famous poem, "Mending Wall," that "good fences make good neighbors." We say that "good contracts made good partners." Teaming Agreements and Memorandums of Cooperation provide excellent contract vehicles for parties to work jointly to pursue opportunities with some degree of protection and a minimization of risk. We recommend their consideration for use.

Scott D. Cessar
Construction Law Group

Possible price volatility in 2011

In 2010, steel prices rose 14 percent and crude energy prices rose 8.2 percent. Due to growing instability in the Middle East, oil prices have again sharply risen. With the Federal Reserve focusing on deflationary pressures and the dollar being weak, some economists are predicting even greater price volatility. In view of these circumstances, this could be the time that contractors and owners again consider the use of cost escalation clauses in their construction contracts in order to protect both sides. This subject was discussed in the Spring 2009 issue of the Eckert Seamans Construction Law Newsletter, which may be accessed at www.eckertseamans.com. Select "Publications" then "Newsletters."

Sales tax savings upon registering motor vehicles in PA

Are you considering establishing a construction business in Pennsylvania? Are you transferring your fleet of motor vehicles in connection with natural gas exploration in the Marcellus Shale Formation? If so, this article is for you, as you might be eligible for some sales tax savings upon registering motor vehicles in the Commonwealth of Pennsylvania. The Pennsylvania Department of Transportation (PennDOT) and the Pennsylvania Department of Revenue (Revenue) are working together to incentivize out-of-state businesses that are considering establishing a permanent place of business in PA through tax savings.

Specifically, transfers of motor vehicle registration into Pennsylvania are not subject to PA sales tax in connection with the establishment of a place of business, provided the motor vehicle was purchased more than six (6) months prior to entering the Commonwealth. The typical rule for titling and registering out-of-state motor vehicles is that all new residents, including businesses moving to PA, are required to make application for Pennsylvania title and registration of their vehicle(s) within 20 days of establishing residency in Pennsylvania.

Pennsylvania title procedures require that your out-of-state title be surrendered to PennDOT when applying for a Pennsylvania title. In addition, PA sales tax is assessed on all vehicles that are required to be registered in PA upon the purchase price of any new motor vehicle or upon the fair market value for vehicles purchased six (6) months or more prior to their first taxable use in PA. However, there is a Revenue sales tax regulation that provides if you hold a valid title issued in another state and have owned the vehicle at least six (6) months before moving to PA and establishing a permanent place of business, then you will not be required to pay sales tax when registering your vehicle in Pennsylvania.

On the other hand, if it has been less than six (6) months before moving to PA and establishing a permanent place of business, you will need to provide your sales tax receipt, or remit PA sales tax upon registration. Applicants who are exempt from Pennsylvania sales tax will list the appropriate Sales Tax Exemption reason code in Sections 1A and/or 1B on Pennsylvania Form MV-1, "Application for Certificate of Title." Note that Form MV-1 is not available online. The form must be obtained from a registered Pennsylvania motor vehicle agency (such as the American Automobile Association) that can assist with the PA registration and titling paperwork.

If you are considering moving your business to Pennsylvania, be sure to give ample consideration to sales tax savings upon the registration of your out-of-state motor vehicles with PennDOT. Currently, the PA state sales tax rate is 6 percent and certain counties assess an additional 1 percent (Allegheny County) or 2 percent (Philadelphia County). In today's ultra-competitive and tight economic market conditions, we would rather see those extra tax dollars in your pocket as opposed to the Commonwealth's. Please consult with one of our tax attorneys in connection with any PA sales tax matter you may have.

Michael J. Herzog, CPA
Tax Group

PA Supreme Court rejects township's attempt to exceed requirements of the Uniform Construction Code

The Pennsylvania Supreme Court's recent decision in *Schuylkill Township v. Pennsylvania Builders Association* sheds some light on when a township may enact construction ordinances that exceed the requirements of Pennsylvania's Uniform Construction Code (UCC). The UCC was enacted in 1999 to ensure modern and uniform construction regulations throughout Pennsylvania. A township may enact ordinances that exceed the UCC's requirements only if "certain clear and convincing local climatic, geologic, topographic or public health and safety circumstances justify the exception …" to the UCC. However, the Pennsylvania Department of Labor and Industry (DOL) may invalidate such ordinances only if it finds that local circumstances do not justify the heightened building requirements.

In this case, Schuylkill Township (the Township) enacted an ordinance requiring sprinklers in all new structures, including basements, additions and structural alterations. Because the UCC did not require sprinklers, the ordinance clearly exceeded UCC requirements. In response to a challenge by the Pennsylvania Builders' Association and others, the DOL found that no local circumstances or conditions in the Township justified the ordinance and, therefore, the ordinance was invalid. The DOL rejected the Township's argument that the following local conditions were sufficiently atypical to justify the sprinkler requirements: (1) population growth placed a strain on its volunteer fire department, (2) the Township's steep topography and congested traffic delayed responses to fires and (3) modern construction, which utilizes lightweight and fast-burning wood trusses, compelled the installation of sprinklers.

The Township appealed to the decision to the trial court, the Commonwealth Court, and the Pennsylvania Supreme Court, all of which upheld the DOL's decision to invalidate the ordinance. The Pennsylvania Supreme Court endorsed the lower courts' reasoning and noted that "the burden of proving local circumstances and conditions justifying a UCC exception is high." However, the Supreme Court also observed that the minimum requirements "may be exceeded where a municipality has particular needs that justify additional regulations." Ultimately, this decision teaches that the UCC's requirements cannot easily be exceeded, and that a township wishing to enact more demanding requirements bears a heavy burden of proof.

Jacob C. McCrea
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New requirements for pension plans

The Department of Labor (DOL), as part of its initiative intended to ensure greater transparency with regard to plan fees and expenses, released two regulations that will place a new burden on service providers and plan administrators to disclose information. The first regulation governs disclosures that plan service providers must make to plan fiduciaries and is effective on January 1, 2012. The second regulation requires disclosures of fee, expense and investment performance information to participants and beneficiaries in participant-directed pension plans. This regulation will be effective for plan years beginning on or after November 1, 2011 (January 1, 2012, for calendar year plans).

Plan Service Provider Disclosures

For the most part, the first regulation will require changes to practices of service providers, who will be obligated to provide certain disclosures. These disclosures vary depending on the type of service provider, but should include a description of services, a description of all direct and indirect compensation, fees and expenses (i.e., any termination fees), the method the plan pays for the services, and, if applicable, a statement that the service provider is providing services as a fiduciary or registered investment advisor. Plan fiduciaries will still be responsible for assessing whether enough information has been received about the services to be provided to determine whether the cost of the services is reasonable. Failure to comply can expose both the service provider and the plan fiduciary to liability for engaging in a prohibited transaction. The DOL sought to provide protection to a plan fiduciary who, through no fault of his or her own, may be at risk of engaging in a prohibited transaction due to failures by the service provider. The regulations provide a prohibited transaction exemption for the plan fiduciary in that situation if all the following conditions are met, if applicable:

- The plan fiduciary did not know that the service provider would fail to make the disclosures and reasonably believed that the covered provider disclosed the required information.
- The plan fiduciary, upon discovering the failure, requests in writing that the service provider provide the required information.
- If the service provider fails to comply within 90 days of the request, the plan fiduciary notifies the DOL of the failure.
- After discovering the failure to disclose the required information, the plan fiduciary must determine whether to terminate or continue the contract or arrangement for services.

In anticipation of the January 1, 2012, effective date, plan sponsors should take the following precautions:

- *Determine which service providers are covered by the new regulation.* In general, this includes fiduciary services provided directly to the plan or its assets, investment services, recordkeeping or brokerage services and other various services where the compensation would exceed $1000.
- *Review service provider information.* Since no particular format is required for these disclosures, some existing service agreements may be sufficient for the regulations.
- *Mark calendar for October 2, 2011 (90 days prior to the effective date).* Plan fiduciaries may have an obligation to request information not required by the regulations, but needed to determine whether the fees are reasonable for the services. However, service providers are only required to disclose information required by the regulation.
- *Determine whether expenses are reasonable and take steps to adjust fees that are not reasonable.*
- *On January 1, 2012, notify the DOL of the service providers who failed to respond.*

Participant Fee Disclosures

The second regulation specifies that, in participant-directed plans, the plan administrator has an affirmative fiduciary duty to provide participants and beneficiaries with enough information to make informed decisions about their investment choices. The plan administrator satisfies this duty if it provides the information required by the regulation at the time and in the format described. Investment-related information must be provided in a manner that allows participants and beneficiaries to make a better comparison of a plan's investment options. These disclosures should provide a dollars and cents display of the actual costs associated with each plan investment choice and associated plan-related expenses.

It is important to note that the required disclosures must be made to anyone who would be eligible to direct a contribution, which could include former employees. The information must be provided to eligible participants and beneficiaries on or before the date they are first eligible to direct their investments. In addition, any subsequent changes to the information must be disclosed at least 30 days prior to the effective date of the change.

Briefly, the new requirements require annual disclosure of plan-related fee information and of investment-related fee information—and require quarterly disclosure of the dollar amount of the individual and administrative fees that are charged to the participant's or beneficiary's account. These disclosures can be made electronically if the employees have regular access to email. Further, the plan-related information can be included in the summary plan description or as part of the benefit statement as long as the items are distributed with the required frequency. The quarterly fee disclosure can also be included in the benefit statement. However, investment-related fee information must be provided in a comparative chart that complies with the DOL's specifications.

As this new regulation requires extensive new disclosures and information to participants, plan administrators need to implement a disclosure process to comply, which should include the following steps:

- *Obtain service provider commitment.* The new regulation requires a substantial amount of information, and plan administrators should secure commitments from their service providers to provide the information in a timely manner. Plan fiduciaries will be protected from any incomplete and inaccurate information if they rely reasonably and in good faith on what the service provider has communicated.
- *Prepare and timely distribute the information*. For calendar year plans, the initial disclosures will need to be made by February 29, 2012.
- *Anticipate participant response*. Plan administrators should be prepared to answer any questions that participants may have after reviewing this new information.

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Employee Benefits Group

The Surety's right to use the defaulted contractor to complete the work under the AIA-A312 Performance Bond

Owner concludes that Contractor is in default of the Contract and provides notice to the Surety of a default under the commonly used AIA-A312 Performance Bond. Owner dutifully follows all of the notice and meeting provisions with the Surety, and the Contractor's employment is terminated. The Surety then takes over the project and—much to the surprise and chagrin of the Owner—hires the Defaulted Contractor to "take over" and complete the project. Can the Owner object and refuse to let the Defaulted Contractor complete the project?

The answer depends on the language of the Performance Bond and whether it grants the Owner the right to approve the Completion Contractor selected by the Surety. In a case arising out of Puerto Rico, *St. Paul Fire and Marine Ins. Co. v. VDE Corp.*, the United States First Circuit Court of Appeals held that the AIA-A312 Performance Bond does not grant that right to the Owner. As a result, when the Owner refused the Surety's tender of the Defaulted Contractor as the Replacement Contractor, the Court found this to be a breach of the Performance Bond, which discharged the Surety from its obligations.

This case teaches two things: (1) Owners should read the Performance Bond carefully before rejecting the Surety's tender of the Defaulted Contractor as the Replacement Contractor to be sure that the Owner has the right to make the rejection; and (2) Owners should require a modified AIA-A312 Performance Bond, or a different bond form, if they want to have the right to reject the Defaulted Contractor as the Replacement Contractor.

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"The Government made me do it": Government contractor immunity and limiting third-party liability for work on government projects

For government contractors, the possibility of third-party liability for work performed on a federal construction project is always a concern. However, the defense of government contractor immunity (GCI), first articulated by the U.S. Supreme Court in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1987), has, when applicable, immunized government contractors from liability against negligence claims by third parties.

For the GCI defense to be available, the contractor must show two things: (1) that the government approved the contractor's "reasonably precise" specifications (with knowledge of potential dangers) and (2) that the contractor's work conformed to those specifications. The reasoning underlying such immunity is that a contractor should not be liable to third parties for work sanctioned and, in effect, directed by the federal government. As explained by one court, "stripped to its essentials," this defense is fundamentally a claim that "the Government made me do it."

Though the defense is simple enough in theory, a recent decision from the Fifth Circuit Court of Appeals indicates that successfully invoking this immunity may be harder than it seems.

In *In re Katrina Canal Breaches Litigation*, 620 F.3d 455 (5th Cir. 2010), residents of New Orleans filed suit against the federal government contractor, Washington Group International, Inc. (WGI), that was responsible for the backfilling and compacting of areas near levees in New Orleans, work performed over a two-year period starting in 1999 for the United States Army Corps of Engineers (the Corps). These levees failed during the 2005 hurricane, resulting in the flooding of New Orleans and St. Bernard Parish, massive property damage and deaths. The residents filed suit against WGI, alleging that its work had been negligently performed. The contractor countered by claiming that it had GCI and that it could not be liable for resultant damage.

The lower court dismissed the suit before trial, reasoning that the only specifications approved by the Corps—that "the excavations will be backfilled with borrow material obtained from either the on-site borrow source or an off-site source," and that "material will be placed in lifts and compacted; however, no compaction testing will be required"—met the "reasonably precise" threshold for GCI.

The appellate court disagreed, pointing to the lack of any specification for composition of the on-site or off-site backfill material, the lack of a specific method to test the material to ensure its suitability, the lack of specification for the standards of compaction and the absence of any requirement that any compaction testing be done. Rather, the evidence indicated that the Corps' chief concern was cost, and the specifications (or lack thereof) gave WGI considerable discretion as to how to perform the work. In sum, because the Corps did not "make" WGI use the exact backfill material that was used, or "require" WGI to select the compaction method that was employed, there were no "reasonably precise" specifications and, more importantly, no immunity under the GCI defense. The appellate court remanded for a trial to determine the extent of WGI's liability.

The upshot of this decision is twofold—first, it affirms the vitality of the GCI defense in precluding contractor liability to third parties for work done on federal government projects. At the same time, and more importantly, the decision establishes that GCI is not freely bestowed on government contractors and that to invoke the defense, it is essential that government specifications be as "precise" as possible.

Just as with any defense, the availability of GCI turns on the facts of the case and the law of the relevant jurisdiction. It is prudent to seek specific legal advice to assess the risk associated with the performance of a federal project that involves third-party liability issues.

Audrey K. Kwak
Construction Law Group

PA Supreme Court upholds use of project labor agreement[1]

The Pennsylvania Supreme Court affirmed a ruling of the Commonwealth Court that granted the Department of General Services (DGS) the right to require a "project labor agreement" (PLA) for any contractor or subcontractor working at State Correctional Institution – Graterford (SCI – Graterford) to hire all tradesmen through the local unions and that the workers shall abide by the collective bargaining agreements.

In 2008, the General Assembly passed Act 41, which authorized DGS to enter into design/build contracts, rather than multi-prime contracts, for certain prison construction projects. A key reason that allowed Act 41 to pass was that DGS agreed with the Philadelphia Building Trades Council (PBTC) to retain the Keystone Research Center to study whether PLAs were necessary for the construction of a prison housing facility exceeding $15 million.

A PLA is an agreement between a government authority and a collection of unions represented by a council, often a construction trades council, which applies to parts of construction project. Under the PLA, the union is designated the collective bargaining representative for all employees on the project and agrees that no labor strikes or disputes will disrupt the project. The contractor must abide by certain union conditions, such as hiring through union hiring halls and complying with union wage rules.

The study by Keystone concluded that a PLA was appropriate to ensure that the project was completed in a timely and cost-effective manner in order to "maintain an expedited and uninterrupted construction schedule to ensure completion and occupancy on or before the construction deadline." It also concluded that a PLA would "ensure labor peace and harmony through a no-strike, no lockout commitment by all involved personnel in order to meet the construction deadline," should ensure access to the large pool of skilled, experienced labor the project would require and would provide all "phases of construction would be open to both union and non-union contractors."

The Court relied on two previous cases in which it approved PLAs as a valid bid specification because they provide access to skilled labor on public jobs and the work is completed in a timely manner: *A. Pickett Construction, Inc. v. Luzerne County Convention Center Authority*, 728 A.2d 20 (Pa. Cmwlth. 1999) and *Sossong v. Shaler Area School District*, 945 A.2d 788 (Pa. Cmwlth. 2008).

The court also held that the requirement that the contractor recognize the union and require employees to join the construction union does not violate provisions of the National Labor Relations Act (NLRA). The Court noted that the State was excluded from the definition of the term "employer" under NLRA, see 29 U.S.C. §152(2), and the State was acting as a purchaser rather than an employer.

Citing both *Pickett* and *Sossong*, the Court held that the inclusion of a PLA did not violate the requirement to award the contract to the lowest responsible bidder or illegally discriminate against non-union contractors because non-union contractors were allowed to bid on the contract, and those PLAs did not contain provisions on employing individuals based on union affiliation.

The non-union parties argued that DGS retained Keystone, which was "union dominated," to perform studies regarding using a PLA, and that Keystone has a largely union-affiliated board. Judge Pellegrini rejected the non-union workers' argument and stated that the findings were not fundamentally flawed because of Keystone's ties to unions, unless it could be shown the consultant who did the analysis was not credible or competent.

The Petitioners also challenged DGS's delegation of its obligations under the Separations Act by entering into a design/build subcontract. DGS maintained that Act 41 required DGS to comply with the Separations Act by entering into a design/build contract with a contractor who in turn would comply with the Act. Judge Pellegrini agreed with DGS and found that Act 41 validly altered DGS's obligations under the Separations Act and allowed DGS to delegate its duty to let separate contracts for plumbing, heating, ventilating and electric work.

Lastly, the Court cited the Keystone report's statistics regarding the urgency of the project as being critical to meeting the State's prison capacity need, as well as the testimony of the Deputy Secretary for the Department of Corrections, who stated the prison population was in an emergency situation.

There is an overriding theme throughout this 31-page opinion, and the theme is likely to flow into future design/build contracts of the Commonwealth, which will likely march forward in the future with more PLAs when they are able to show an urgent need for project completion (i.e., transportation, utility, prison, school construction and bridge repair work).

[1] The name of the case is *Hawbaker v. Commonwealth of Pennsylvania, Department of General Services*, (2011 WL 149522 (Pa.))

Frank C. Botta
Labor & Employment Group

Administrative changes to litigating construction disputes in Allegheny County, PA

As of this year, all new construction litigation instituted in Allegheny County, Pennsylvania in which more than $100,000 is at stake is now eligible for assignment to Judge Joseph James, named the "Construction Litigation Judge."

This change is designed to facilitate the management—from pleadings through discovery to trial—of construction cases, which often involve complicated issues requiring expert testimony and involved discovery. The presumed advantage of assigning such cases to a single judge is that the parties are assured of a judge who is familiar with the types of issues and disputes often confronted in construction litigation.

The process of obtaining assignment to the construction litigation judge is simple: After litigation is initiated, any party may file a notice stating that the suit is one "arising out of construction litigation in which the amount in controversy exceeds $100,000" and send copies of the notice to all parties and the construction litigation judge. Notably, assignment of a construction matter to Judge James does not preclude the parties from later pursuing alternative forms of dispute resolution, such as mediation or arbitration.

Audrey K. Kwak
Construction Law Group

ADA 2010 standards for accessible design provide short window of flexibility

Last fall, the Department of Justice updated its accessible design standards applying to state and local government facilities and public accommodations (including, but not limited to, restaurants, hotels, theaters, doctors' offices, pharmacies, retail stores, museums, libraries, parks, private schools and day care centers) under the Americans with Disabilities Act (ADA) of 1991. These new standards were implemented to modernize the technical requirements ensuring that all new construction of and alterations to such facilities are readily accessible to and usable by individuals with disabilities. The 2010 Standards for Accessible Design will phase out the 1991 Standards for Accessible Design by March 15, 2012. In the meantime, state and local government facilities and public accommodations are able to use either the 1991 Standards for Accessible Design or the 2010 Standards for Accessible Design if they meet certain deadlines. The ability to choose which standard will be applied may create opportunities for substantial cost savings depending on the existing structure. Project owners and design professionals should consult legal counsel to determine whether their project can benefit from this flexibility.

Timothy D. Berkebile
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PA Superior Court does not expand duties of air testing firms

The Pennsylvania Superior Court recently affirmed a trial court's dismissal of a neighboring resident's claim that an engineering firm that conducted stack testing at a beryllium plant failed to warn the community of emissions exceeding EPA limits. Citing Pennsylvania, Maryland, Kentucky, Michigan, Arizona, Texas and 6th and 7th Circuit case law, the Court found that a testing party must have undertaken a duty to protect the community to be held liable for breach of that duty. The Court ruled that an engineering firm contracting to test emissions and report the results to the owner of the plant—as opposed to performing remedial action to enhance safety—has no duty to inform neighboring residents of harmful beryllium exposures from particulates being emitted from plant. The Court reasoned that "such a rule would inhibit the owners of such a facility from hiring qualified, independent consultants to learn whether a dangerous condition exists." Among other legal concerns, firms performing such testing and finding unsafe emissions should review their scope of work carefully to ensure they have not agreed to remediate or otherwise make the facility safe. Such firms should also consult legal counsel to determine when a duty to warn the community of dangerous conditions may exist.

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Construction Law Group News

Client Wins

Cornelius "Neil" O'Brien and **Timothy Berkebile** successfully pursued a motion to strike a mechanics lien filed on a client's project in Beaver County, PA. The court accepted two distinct arguments as to the interpretation of the mechanics lien law that have yet to be addressed in the appellate courts.

Scott Cessar and **Mathew Whipple** successfully resolved three lawsuits, totalling some $1.5 million in claims, arising from the construction of a community center.

Following a bench trial in Centre County, PA, **Christopher Opalinski** and **Jacob McCrea** received a verdict of over $200,000 on behalf of our client, the general contractor. The lawsuit was against a subcontractor for defective work. The judge awarded the general contractor the full amount of its claims for breach of contract and indemnification. Significantly, the award included the full amount of the general contractor attorneys' fees, which were awarded under the indemnification claims.

Cessar and Opalinski named 2011 Pennsylvania Super Lawyers®

Scott Cessar and **Christopher Opalinski** were recently selected for inclusion in the 2011 *Pennsylvania Super Lawyers* for construction litigation. *Super Lawyers* selects attorneys using a rigorous, multiphase rating process. Peer nominations and evaluations are combined with third-party research. Each candidate is evaluated on 12 indicators of peer recognition and professional achievement.

Joining the Firm

John Hanger joins the firm's Harrisburg, Pennsylvania office. He recently left office as Secretary of the Pennsylvania Department of Environmental Protection after serving for over two years under former Governor Edward G. Rendell. John is also a former Commissioner of the Pennsylvania Public Utility Commission, making him one of the few people who have had major policy-making authority in both utility and energy as well as environmental agencies. He will support Eckert Seamans' practices in the areas of energy, utility and environment, concentrating in alternative energy, clean transportation infrastructure, energy efficiency, competitive energy markets and smartgrid. As Secretary of the Pennsylvania DEP, John managed an agency of more than 2,800 employees. He also served as the Chair of the Pennsylvania Energy Development Authority; the Chair of the Pennsylvania Mine Safety Board; the Vice-Chair of Pennsylvania's Infrastructure Investment Authority and a member of the Susquehanna River Basin Commission. John can provide strategic and legal advice about financing options, permitting issues, project design, energy alternatives, including on-site power generation, and energy supply options to Eckert Seamans Construction Law Group clients.

Speaking for the Firm

Scott Cessar has been invited to be a lecturer at the American Bar Association's Construction Law Forum Group Regional Seminar in November 2011 on "Consequential Damages in Construction Cases."

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The information in this publication is for the purpose of informing and educating our clients about various aspects of the law and is not intended to be used as legal advice. If you have questions concerning any of the topics, please contact your Eckert Seamans attorney.
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