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The Site Report

Construction Law Insights

March 28, 2022

Welcome to the third issue of 2022 of *The Site Report*.

If you or your counsel are looking for more labor and employment law information, please join us at the DRI Employment and Labor Law Seminar in Denver, May 11-13. We are a sponsor of the event and our own Eric Kinder and Kevin Carr will be speaking. You can click [here](#) to learn more and register.

As always, thank you for reading.

[Stephanie U. Eaton](#) - Co-Chair, [Construction Group](#); Vice Chair of Southern Offices, Litigation Department; Editor, *The Site Report*

and

[Julian E. Neiser](#) - Co-Chair, [Construction Group](#); Vice Chair of Northern Offices, Litigation Department

[Change in "Pay When Paid" Provisions for VA Public Contracts](#)

"An Act to amend and reenact §§ 2.2-4354 and 11-4.6 of the Code of Virginia, relating to contracts; payment clauses to be included; right to payment of subcontractors."

Why this is important: There are currently bills before the Virginia Legislature to amend VA ST §§ 2.2-4354 and 11-4.6. The proposed amendments to VA ST § 2.2-4354 address the issue of who is liable for prompt payment of subcontractors on government construction projects. The proposed amendments to

VA ST § 11-4.6 include new contract terms that must be included in all non-public sector construction contracts. Below are summaries of these proposed amendments.

VA ST § 2.2-4354 addresses the prompt payment of any contract awarded by any state or local public agency, including construction contracts. The proposed amendments to VA ST § 2.2-4354 state that a contractor who has a construction contract with a public entity will be individually liable for all amounts owed to its subcontractors. However, the contractor will not be liable to the subcontractor if the subcontractor is not in compliance with the subcontract. If the contractor intends to withhold funds due to the subcontractor's noncompliance with the subcontract, then the contractor must provide the subcontractor with written notice of that fact along with providing the reason for nonpayment. Additionally, the subcontractor cannot condition payment to lower-tier subcontractors on payment by the general contractor. If any provision of the contractor's subcontract contradicts any this statute, then the amendment states that those provisions are unenforceable.

VA ST § 11-4.6 addresses payment of contractors and subcontractors on private sector construction projects. One proposed amendment is an addition to the definition section of the statute to include the term "Owner." An "Owner" is to mean any person or entity, other than a public entity, who contracts with a general contractor for construction services. Another proposed amendment would require that all contracts between an owner and a general contractor include a provision that full payment on satisfactory work be made within 45 days of receipt of an invoice. If the owner intends to withhold payment, then the owner must provide the general contractor with written notice of the reason why payment is being withheld. An additional proposed amendment states that any construction contract in which there is at least one general contractor and one subcontractor is deemed to include a provision that any higher-tier contractor is liable for its direct subcontractor's satisfactory performance. Subcontracts are also required to include a prompt payment provision wherein the higher-tier contractor will pay its direct subcontractor within 45 days of satisfactory completion of the invoiced subcontract work, or within 7 days after receipt of payment from the owner. However, the higher-tier contractor is not liable to its direct subcontractor for amounts that is reducible due to the subcontractor's noncompliance with the subcontract. If payment is being withheld, the contractor must provide the subcontractor with written notice that it is withholding payment and the basis for why it is withholding payment. Upon amendment, any contract provision that is not in compliance with this statute will be unenforceable. Additionally, failure to comply with prompt payment of contractors and subcontractors will result in interest penalties at the prime rate. --- [Alexander L. Turner](#)

Transportation Secretary Says Infrastructure Bill to Accelerate Work on Roads & Bridges

"Secretary Pete Buttigieg told correspondent Anderson Cooper that 'we've gotta take care of what we've got,' with the \$110 billion dedicated to roads, bridges and major transportation projects in the Infrastructure Bill."

Why this is important: The \$1.2 trillion Infrastructure Investment & Jobs Act ("IIJA") includes \$560 billion over five years for the U.S. Department of Transportation. As federal construction projects begin bidding across the country for improvements to tunnels, bridges, roads, ports, and mass transit systems, more contractors will have opportunities to secure steady, longer-term work on these sorts of projects. That means that contractors need to monitor bidding timelines for these projects, including more than 90 projects anticipated to start this year in the greater Pittsburgh area. Contractors need to evaluate needs that are likely to arise on these projects, such as increased and/or particularly skilled labor and heavy equipment -- including lower emission equipment -- needs that contractors may not currently have available. Further, contractors need to evaluate materials that may be in short supply and make arrangements to procure that material before the project, and in sufficient quantities to avoid material price escalations that may occur during the life of these projects. Finally, contractors who succeed in securing this work need to carefully evaluate Force Majeure provisions to ensure that any supply chain disruptions causing material shortages, further COVID-19 impacts on labor and contract durations, and cost escalations that cut into profit margins are addressed sufficiently. Our construction practice group is available to evaluate and assist with negotiations of your company's infrastructure contracts. --- [Stephanie U. \(Roberts\) Eaton](#)

Wolf Administration Previews 2022 Pittsburgh Region Construction Season and Impact of Bipartisan Infrastructure Law Funding

"Governor Tom Wolf highlighted more than 90 projects anticipated to start and continue this year in the three-county Pittsburgh region and discussed the benefits coming to regional roads and bridges due to the federal Bipartisan Infrastructure Law (BIL)."

Why this is important: COVID-19 restrictions caused an extended shutdown of nearly all construction activity in Pennsylvania. The "re-opening" of construction work in Pennsylvania after the most severe restrictions were lifted created new opportunities for Pennsylvania companies and workers, and the federal funding contribution will hopefully keep that trend alive for the foreseeable future. As a result, the outlook for Pennsylvania construction companies and its workers continues to improve, at least with respect to Commonwealth and federal projects. --- [Julian E. Neiser](#)

Legal Ramifications of Construction Supply Chain Disruption

"Desperate times require desperate measures, making the prospect of widespread lawsuits a reality."

Why this is important: COVID-19-related supply chain disruptions affected nearly every industry in the world over the last two years. Shipping disruptions, labor shortages, regulatory schemes, and other factors have rendered construction-materials providers largely unable to keep up with burgeoning demand. Many participants in the construction industry are caught in the middle, particularly where their contracts require them to deliver materials by a certain time. As companies that are starting to feel the squeeze run out of commercial solutions to maintain their bottom lines, they may begin to resort to litigation to attempt to smooth over some of the losses they have incurred. Materials suppliers and other highly supply-chain dependent companies should evaluate their supply contracts and courses of dealing with upstream and downstream business partners to ensure they remain on solid footing to either (a) defend against potential litigation or (b) recover losses from upstream suppliers. Given the inevitable bankruptcy filings that will continue as the pandemic continues to ripple through the economy, companies should also diligently review any bankruptcy notices that they receive to ensure their rights will be protected in the bankruptcy. --- [Lee D. Denton](#)

Construction Climate Change Adaption: Is It Too Late to Decarbonise Buildings?

"Although the construction industry does have a reputation for being resistant to change, the Covid-19 pandemic did show it was not completely against using new methodologies when it has to."

Why this is important: Taking the politics out of the discussion, climate change is an existential threat or at least will be highly influential in future building code changes throughout the world. Indeed, New Jersey is already moving to implement changes to the building code in regards to sea level rise. This article explores the role that the construction industry has to play in combating climate change in the future. The article is primarily based upon the United Kingdom, but some of the issues that face the UK hold true for the United States as well. Further, the construction industry must anticipate that green buildings will continue to be sought after by owners, if for no other reason than the positive profile they provide for the owners' public relations and overhead costs. --- [Matthew W. Georgitis](#)

New Tech Helps Construction Battle Extreme Weather and Labor Disruptions

"These technologies will help catapult the construction sector, which accounts for 12% of global gross domestic product, to greater digitization that will increase the industry's agility, which will pay off no matter what challenge arises in the future."

Why this is important: Weather and labor disruptions cause huge impacts on construction projects, and finding new and creative ways to minimize the impacts of those disruptions is crucial -- not only for productivity -- but to support claims and defenses in the event a project ends up in litigation or arbitration. This article lays out five avenues through which technology is mitigating weather and labor disruption risk on projects, all of which are becoming more common and affordable. Not only will these technologies assist project efficiency, but better project documentation will allow project participants to better support their claims and defenses in litigation and arbitration. Also, as technological tools become

more commonplace and affordable, project participants should be wary of not engaging these new resources, as failure to do so could negatively impact a party's ability to make a claim for certain damages or delays. --- [Steven C. Hemric](#)

Untangling the Supply Chain Crisis: The Dealer Perspective

"While Covid is certainly a precipitating factor, a lot of the problems contractors are facing today stem from the easy availability of rental equipment in the past."

Why this is important: Before the COVID-19 pandemic, the consistent availability of rental heavy equipment allowed large-scale contractors to limit their direct ownership of heavy equipment and, when involved in larger projects, close the gap using rental equipment. However, the recent supply chain restrictions have caused dealers to reduce their inventory of rental heavy equipment. That could spell trouble for contractors that are not accustomed to allocating their heavy equipment resources with specificity. If the contractor shows up without sufficient equipment to perform the job due to the reduction in availability of rental equipment, projects will be delayed. Delays lead to unhappy clients or worse, lawsuits. Contractors should focus on forecasting their upcoming projects and, to the extent possible, scheduling those projects to coincide with the availability of in-house equipment. Equally important will be for contractors to maintain their current fleet of equipment. If a crucial piece of equipment breaks down in the middle of a job, there is less of a chance that the contractor can quickly rent a replacement to keep the job going. Lastly, contractors that lease equipment should review the terms of each lease and attempt to extend the lease periods if they anticipate that they will need that equipment on an upcoming job. --- [Lee D. Denton](#)

Electric Construction Equipment Vital to Cleaner, Greener Construction

"Global electric construction equipment market forecast to be worth \$105 billion by 2042."

Why this is important: Because construction work accounts for an estimated 1.1 percent of global carbon emissions, global, federal and local efforts to reduce carbon emissions will impact construction projects. Construction projects may require reporting and/or documentation of the types of construction equipment being used, so that reports to public owners track efforts to reduce the carbon footprint on projects, especially on larger jobs. While the health and safety benefits of electric machine usage on construction sites – such as the elimination of harmful exhaust fumes and loud engine noise – are certainly positives, construction equipment manufacturers face increased costs to electrify machines that are currently using diesel fuel. Moreover, construction companies purchasing new construction machinery must spend more for the electric equipment, especially as the cost of large battery packs remains high. This will likely increase the cost of construction projects overall until the use of electrified construction equipment becomes as “mainstream” and cost effective as the use of fossil fuels has been for so long. --- [Stephanie U. \(Roberts\) Eaton](#)

Featured Attorney Profile



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Julian Neiser is a Member based in our Pittsburgh and Harrisburg offices. In addition to serving as the Vice Chair of Northern Offices for the Litigation Department, Julian is Co-Chair of our Construction Practice Group. He is a commercial litigator and construction lawyer with extensive experience in intellectual property, contract, employment defense, insurance coverage and bankruptcy matters. He also is a mediator and serves as outside general counsel to corporations.

Julian has a wide range of experiences including: representing a large industrial contracting company in a \$30 million power plant dispute in federal court; representing a major manufacturing company in federal court injunction proceedings to enforce an employment agreement and prevent theft of trade secrets; trying to verdict a multi-million dollar construction case involving a mixed use development/golf course community; negotiating full releases on behalf of a university/owner in a complex mechanic's lien dispute among contractors; trying dozens of commercial arbitration cases to verdict in Pennsylvania state court; and obtaining a favorable jury verdict in commercial contract dispute in state court. He is a former General Counsel of The Rhodes Group.

Julian is AV® Preeminent™ Peer-Review Rated by Martindale-Hubbell, was named to the Pennsylvania Super Lawyers® list, and was nominated by his peers for inclusion in The Best Lawyers in America in the area of Construction Law.

He is Chair of the Allegheny County Bar Association Construction Section, a member of the American Bar Association, member of the American Bar Association Construction Forum, and a member of the Local Rules Committee for the Allegheny County Bar Association.

Julian received his B.A. from the University of Pittsburgh and his J.D. from Duquesne University School of Law. He is admitted to the Pennsylvania Bar, the United States District Courts for the Western and Eastern Districts of Pennsylvania, and the United States Court of Appeals for the Third Circuit.

He is a Marine Corps Veteran and former Drill Instructor, former writer and editor for the Associated Press, and an Adjunct Professor at Duquesne University School of Law Trial Advocacy Department.



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