



Project In(Site)

Legal Developments Impacting Construction & Government Contract Industries

Welcome to the inaugural issue of *Project In(Site)*, Seyfarth's Construction and Government Contracts practice groups' publication focusing on decisions or other items of interest for construction and government contract solutions. Each summary below is followed by key practice takeaways.

Contractors Facing Government Claims Need To Be Aware of the Potential Need To Submit A Contractor Claim to Perfect Defenses Against the Government's Claim

By Donald G. Featherstun

Contractors that face government claims need to be aware of the potential need to submit a contractor claim to perfect defenses against the government's claim.

A government claim can come in the form of a demand for liquidated damages, a termination for default, a demand for excess re-procurement costs, and/or a demand to recoup indirect costs for a violation of the cost accounting standards. In *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323 (Fed. Cir. 2010), the Federal Circuit ruled that a contractor's defense to a government claim for liquidated damages that alleged government caused delay had to be dismissed for lack of subject matter jurisdiction because the contractor had never submitted the defense as an affirmative claim properly certified under the Contract Disputes Act, 41 U.S.C. Section 7103 *et. seq.* In *Sikorsky v. United States*, 102 Fed. Cl. 38 (2011) the Court of Federal Claims held that this rule did not apply to common law defenses such as satisfaction, waiver, laches or the statute of limitations. However, in 2014, in *TPL, Inc. v. U.S.*, 2014 WL 4628311 (Fed. Cl. Sept. 16, 2014) the Court of Federal Claims held that the *Maropakis* rule applied to defenses of impracticability, mutual mistake, unconscionability, and defective specifications. At the same time, in *Total Engineering, Inc. v. U.S.*, 120 Fed. Cl. 10 (2015) the Court of Federal Claims held that a defense of defective specifications did not need to be separately filed as an affirmative claim. This confusing and evolving area is full of risk for the unwary government contractor. A detailed review of all defenses to a government claim should be made as soon as possible to determine if the contractor needs to file separate affirmative claim to protect existing defenses against a government claim.

The District of Columbia and Georgia Join the Growing Number of States to Enact P3 Legislation

By Alison Ashford, Eric Barton and Stephanie A. Stewart

Funding the maintenance or expansion of existing infrastructure and the development of new infrastructure is one of the key bottlenecks to global infrastructure development and has resulted in governments and the private sector turning to alternative project procurement methods. One such alternative is the public-private partnership.

Public-private partnerships, or P3s, are gradually becoming a mainstream form of large project procurement in the United States.

P3s enable governments to take advantage of and leverage, among other things, private sector financing in the development of public assets and overcome various shortfalls that are preventing the much needed redevelopment of critical United States infrastructure.

The District of Columbia and Georgia have recently joined in the momentum of support for P3 legislation. The DC P3 Act took effect as of March 11, 2015 and the Georgia P3 Act took effect on May 5, 2015.

DC P3 Act

The DC P3 Act establishes the Office of Public-Private Partnerships (*P3 Office*) which will be responsible for “facilitating the development, solicitation, evaluation, award, delivery and oversight of public-private partnerships that involve a public entity in the District”. The P3 Office, which is headed up by an Executive Director, is entitled to retain consultants and enter into contracts to provide financial, legal or other technical expertise necessary to assist in such administrative role. The P3 Office will essentially be the main point of contact for parties involved, or looking to become involved, in a public-private partnership.

Public-private partnerships are defined in the DC P3 Act as “a long-term, performance-based agreement between a public entity and a private entity or entities where appropriate risks and benefits can be allocated in a cost-effective manner between the public and private entities in which (A) a private entity performs functions normally undertaken by the government, but the public entity remains ultimately accountable for the qualified project and its public function, and (B) the District of Columbia may retain ownership or control in the project asset and the private entity may be given additional decision-making rights in determining how the asset is financed, developed, constructed, operated and maintained over its life-cycle.”

Projects that qualify as a potential public-private partnership include education facilities, transportation (e.g. roads, highways, public transit systems and airports), cultural or recreational facilities (e.g. libraries, museums and athletic facilities), buildings that are of beneficial interest to the public and are developed or operated by a public entity, utilities (e.g. water treatment, telecommunications, information technology), improvements to District-owned real estate or any other facility, the construction of which would, in the P3 Office’s opinion, be beneficial to the public interest.

A public-private partnership may be procured by process of a request for proposals or as a result of an unsolicited proposal. Via the process of requested proposals, a proposal will be evaluated against, among other criteria, the proposed cost and delivery time for the project, the financial commitment required of public entities, the capabilities and related experience of the proposer, a value-for-money and public sector comparator analysis, the inclusion of novel methods, approaches or concepts in the proposal, the scientific, technical or socioeconomic merits of the proposal, how the proposal benefits the public and other factors the P3 Office deems appropriate to obtain the best value for the District.

The District may consider, evaluate and accept unsolicited proposals from a private entity if the proposal addresses a need of the District, is independently developed and drafted by the proposer without District supervision, demonstrates the benefit of the proposed project to the District, includes a financing plan to allow the proposed project to move forward pursuant to the District’s budget and finance requirements and includes sufficient detail and information to allow the P3 Office to evaluate the proposal and make a worthwhile determination.

The DC P3 Act also sets out various terms required in any public-private partnership agreement, including the legal rights of the District with respect to the takeover or termination of a public-private partnership agreement.

Georgia P3 Act

On May 5, 2015, Georgia Governor Nathan Deal signed into law Senate Bill 59, known as the “Partnership for Public Facilities and Infrastructure Act” (the “P3 Act”). In simplest terms, the P3 Act amends the public works bidding portion of the existing Georgia Code to allow private companies to propose projects to the local and state governments. The local governments that may participate in the P3 Act partnerships are any county, municipality, consolidated government, or board of education. The state governments that may participate in the P3 Act partnerships are any department, agency, board, bureau, commission, authority, or instrumentality of the State of Georgia, including the Board of Regents of the University System of Georgia.

The projects proposed by the private entity must be “qualifying projects” meaning they must meet a public purpose or public need, as determined by the local or state government. The P3 Act does not apply to projects for generation of electric energy for sale, communication services, cable and video services, and water reservoir projects.

Guidelines and oversight for P3 Act projects take different approaches depending whether the partnership is with a local or state government. For partnerships with local governments, the P3 Act provides that a P3 Act Committee will be created to prepare model guidelines for local governments to use in implementing P3 Act projects. The P3 Act Committee is composed of 10 persons with varying backgrounds and qualifications as provided in the P3 Act. The appointments to the P3 Act Committee will be made by August 1, 2015, and the P3 Act Committee has until July 1, 2016, to issue model guidelines to local governments. With respect to partnerships with state governments, for qualifying projects undertaken by the State Properties Commission, the Georgia State Financing and Investment Commission will be solely authorized to develop guidelines, and for qualifying projects undertaken by Board of Regents, the Board of Regents will be solely authorized to develop guidelines for those projects.

For a project to become a reality under the P3 Act, it must proceed through the following series of steps outlined in the P3 Act:

1. For a local government, it must adopt the model guidelines or create its own guidelines including the required contents outlined in the P3 Act. A state government must use the guidelines established by the State Properties Commission or the Board of Regents.
2. To participate, a local government must adopt a rule, regulation or ordinance affirming its participation in the P3 Act process.
3. A private entity may submit an unsolicited proposal for a project to the applicable local or state government for review and determination as a qualifying project in accordance with its respective guidelines and the submittal requirements outlined in the P3 Act. For state government P3 Act projects, the unsolicited proposal must be submitted between May 1, and June 30, of each year.
4. A private entity submitting an unsolicited proposal to a state government must also notify each local jurisdiction and allow 45 days for the local government to comment on whether the proposed project is compatible with local plans and budgets.
5. The local or state government approves or rejects the unsolicited proposal. A local or state government may reject any proposal at any time and is not required to give reasons for its denial. If an unsolicited proposal is accepted as a qualifying project, the local or state government must seek competing proposals by issuing a request for proposals for not less than 90 days.
6. The local or state government will rank the proposals received by utilizing a variety of factors outlined in the P3 Act, such as cost, reputation and experience of the private entity, and the private entity’s plan to employ local contractors and residents.

7. The local or state government will negotiate with the first-ranked private entity and will continue to negotiate with subsequent-ranked private entities until an agreement is reached. Prior to entering into an agreement, the local or state government may cancel the requests for proposals or reject all proposals for any reason whatsoever.
8. The local or state government and the private entity enter into a comprehensive agreement. The terms of the comprehensive agreement include, but are not limited to, description of duties, timeline for completion, financing, and plans and specifications and the project begins.

Conclusion

By allowing partnerships between the private and public sector, P3 Acts create opportunities for governments to engage in new projects that would previously have been cost prohibitive. Under this new law, the private entities can take on design and construction costs previously borne by the government. Beyond that, P3 Acts will encourage investment in infrastructure and aid urban renewal.

Personal Jurisdiction Over Foreign Subcontractors Under the False Claims Act

By *Anthony J. LaPlaca*

Two recent federal decisions highlight the prevailing standard for whether, under the False Claims Act, 31 U.S.C. § 3729 – 3733 (“FCA”), federal tribunals have personal jurisdiction over foreign subcontractors who exclusively do work abroad. In both cases, the subcontractor escaped FCA liability due to a lack of evidence that the defendant “purposefully availed” itself of the geographic (as opposed to governmental) United States.

Background

First Kuwaiti Trading Company (“FKT”) was a Kuwaiti corporation and federal subcontractor to Kellogg, Brown & Root, Inc. (“KBR”) in the Iraqi military theater. KBR submitted certified claims to the Government seeking equitable adjustment of over \$48 million, part of which related to delays experienced by FKT in performing its work. After the Government paid KBR, the Defense Contract Audit Agency denounced the claims as unsupported, and the Government sued both KBR and FKT for violations of the FCA.

***United States v. Kellogg, Brown & Root Servs., Inc.*, 2014 WL 4948136 (C.D. Ill. 2014)**

The Court granted FKT’s motion to dismiss the FCA claim for lack of personal jurisdiction. The Court analyzed jurisdiction under the “purposeful direction” test.¹ According to the Court, the salient inquiry was whether FKT engaged in conduct that was: (1) intentional, (2) expressly aimed at the forum, and (3) performed with knowledge that its effects would be felt there. The Court held that it had no jurisdiction to decide FCA claims against a foreign subcontractor whose only tie to the judicial forum is a subcontract for services abroad:

As a foreign company conducting projects in foreign territory, First Kuwaiti is connected to the United States Government in this case only through a handful of correspondence, a single action by counsel retained for a specific unrelated purpose, and the independent actions of KBR—and then only to the Government itself and not the jurisdictional United States. Because the Government has additionally failed to plead the existence of a conspiracy between First Kuwaiti and KBR that would make First Kuwaiti derivatively subject to jurisdiction through KBR’s American presence, the Court finds that it lacks specific personal jurisdiction over First Kuwaiti.

The Court rejected the Government’s theory that the FCA creates a special jurisdictional connection between the United States and foreign subcontractors.

¹ Personal jurisdiction requires the plaintiff to show the defendant “purposefully availed itself of the privilege of conducting business in the forum state or purposefully directed his activities at the state.” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985).

***United States ex rel. Conyers v. KBR*, 2015 WL 1510544 (C.D. Ill. 2015)**

In March 2015, the Court granted another motion to dismiss for lack of personal jurisdiction filed by FKT in a separate FCA action (“KBR II”). In KBR II, the Government sued FKT under the FCA for its alleged involvement in various bribery schemes relating to KBR subcontracts for trucking and fuel in Iraq. The Government emphasized that KBR was also in violation of the Contract Disputes Act, 41 U.S.C. § 7103(c) by submitting a fraudulent certified claim in breach of a Government contract. The Government further posited that “because First Kuwaiti knew it would only get paid by KBR if KBR got paid on the claims it submitted to the United States, First Kuwaiti’s actions were purposefully directed toward the United States (not just as the entity footing KBR’s bill, but as a jurisdiction).”

The Court disagreed that submitting false claims through KBR would have a “bank shot” effect inside of the judicial forum. The Government’s position relied heavily on e-mails and bids between KBR and FKT, which suggested that FKT was an active participant in a fraud against the United States Government. However, the Court dismissed the correspondence as irrelevant to the issue whether FKT expressly aimed its conduct toward the forum, holding: “the solicitations for subcontracts and allegedly inflated invoices were directed at KBR, not the United States. Because First Kuwaiti’s conduct does not connect it with this forum in any meaningful way, the Court cannot exercise personal jurisdiction over First Kuwaiti.”

Key Takeaways

The Court’s refusal to exercise jurisdiction over FKT has significant ramifications for the future of FCA suits against foreign entities who have no ties to the geographic United States other than as out-of-country subcontractors. Most notably:

- The Government must demonstrate that the foreign subcontractor “purposefully directed” its conduct toward the judicial forum where the suit is filed;
- A foreign subcontractor’s mere submission of false claims for payment and/or fraudulent statements to the general contractor do not alone constitute purposeful direction into the geographic United States;
- Under the Kellogg, Brown & Root precedents, the Government will likely have to plead that the foreign subcontractor actively conspired with the general contractor in presenting a fraudulent claim to the United States.

New Public Works Requirements in California for Public Agencies and Contractors

By Patty H. Lee and Michael T. McKeeman

SB 854, enacted in June 2014 by the California Legislature, made several significant changes to the laws pertaining to the administration and enforcement of prevailing wage requirements on public works projects by the California Department of Industrial Relations (“DIR”). This new public works monitoring scheme created a mandatory registration program for all contractors and imposes new reporting obligations on public agencies.

A. Public Agency Requirements

Public agencies are subject to the following new requirements, which are applicable to all public works projects:

1. *PWC-100 form.* Public agencies must file a PWC-100 form with the DIR within five days of the award of a public works contract. The PWC-100 form serves to notify the DIR that a public works contract has been awarded and provides general information about the project, such as awarding agency, date of award, type of work performed, amount of contract, funding sources, and contract information. The PWC-100 form may be filed online at <https://www.dir.ca.gov/pwc100ext/>.
2. *Notice.* Public agencies must include the following notice in its call for bids and in the contract documents: (1) no contractor or subcontractor may be listed on a bid proposal for a public works project unless registered with the DIR; (2) no contractor or subcontractor may be awarded a contract for public work on a public works project unless registered with the DIR; and (3) work performed on the project is subject to compliance monitoring and enforcement by the DIR.

3. *Rejection of bids submitted by unregistered contractors.* Public agencies may not accept a bid or enter into a contract for public work with an unregistered contractor.

4. *Job site notice.* Public agencies must post the following job site notice, or require the prime contractor to do so:

“This public works project is subject to monitoring and investigative activities by the Compliance Monitoring Unit (CMU) of the Division of Labor Standards Enforcement, Department of Industrial Relations, State of California. This Notice is intended to provide information to all workers employed in the execution of the contract for public work and to all contractors and other persons having access to the job site to enable the CMU to ensure compliance with and enforcement of prevailing wage laws on public works projects.

The prevailing wage laws require that all workers be paid at least the minimum hourly wage as determined by the Director of Industrial Relations for the specific classification (or type of work) performed by workers on the project. These rates are listed on a separate job site posting of minimum prevailing rates required to be maintained by the public entity which awarded the public works contract. Complaints concerning nonpayment of the required minimum wage rates to workers on this project may be filed with the CMU at any office of the Division of Labor Standards Enforcement (DLSE).

Local Office Telephone Number: _____

Complaints should be filed in writing immediately upon discovery of any violations of the prevailing wage laws due to the short period of time following the completion of the project that the CMU may take legal action against those responsible.

Complaints should contain details about the violations alleged (for example, wrong rate paid, not all hours paid, overtime rate not paid for hours worked in excess of 8 per day or 40 per week, etc.) as well as the name of the employer, the public entity which awarded the public works contract, and the location and name of the project.

For general information concerning the prevailing wage laws and how to file a complaint concerning any violation of these prevailing wage laws, you may contact any DLSE office. Complaint forms are also available at the Department of Industrial Relations website found at www.dir.ca.gov/dlse/PublicWorks.html.”

B. Contractor and Subcontractor Requirements

Contractors and subcontractors working on a public works project are subject to the following requirements:

1. **Annual registration.** All contractors and subcontractors must register with the DIR annually and pay a fee of \$300 to be eligible to work on any public works project in California. To be eligible for registration, contractors and subcontractors must provide evidence of: (1) workers' compensation coverage; (2) license from the Contractors State License Board, if applicable to the trade; (3) no delinquency of unpaid wage or penalty assessments owed to any employee or enforcement agency; (4) no federal or state debarment; and (5) no prior violation of registration requirements in the 12 months preceding the application or since the effective date of the new registration requirements, whichever is earlier. Note, that the registration requirement does not apply to bids prior to March 1, 2015 or work on projects for which the public works contract was awarded prior to April 1, 2015.

2. **Electronic submission of certified payroll records.** All contractors and subcontractors must electronically submit all certified payroll records from public works projects directly to the DIR. This requirement applies to all new contracts awarded after April 1, 2015 and for work performed on any public works project after January 1, 2016 regardless of the date of award.

The intent of SB 854 is to ensure compliance with California's prevailing wage requirements. As such, we anticipate that the DIR will actively monitor and enforce compliance with the registration and notice requirements. Public agencies and contractors working on public works projects should thus immediately familiarize themselves with the new requirements.

Work Product Protection Extends To A Dual Purpose Expert

By Edward (Teddie) V. Arnold

Construction defect cases invariably require the use of experts and other third-parties with specialized knowledge who can assist attorneys and clients in numerous ways, namely in the determination of causation and damages. These third-party experts often generate written reports in which the expert uses specialized knowledge to offer conclusions and opinions on points of controversy in order to support one side's claim. When producing a final report, an expert might generate several draft reports that shed light on the expert's thought process in reaching a conclusion. In addition, the expert will likely generate notes and other documents that assist in the creation of a report.

Prior to 2010, the work product generated by third-party experts was subject to discovery by adverse litigants based on the 1993 amendment to Federal Rule 26, which required the expert to disclose all of his or her communications with the hiring attorney, including all drafts of the expert's report. As a result, attorneys and experts would go to great lengths to sidestep the disclosure rule by finding ways to avoid the creation of a draft report. One such measure was to hire two sets of experts, one for consulting and one for testifying, with only the latter expert's file being discoverable.

In response to these evasive and costly steps taken by parties to shield the disclosure of draft reports (which had resulted in a landslide of discovery disputes) the federal rule governing expert witness disclosures was amended on December 1, 2010 in order to limit the amount of information an expert witness is required to disclose. Among the changes were subparagraphs that were inserted at Rule 26(b)(4)(B) and (C) which respectively protect as work product draft reports and certain communications between the expert and counsel.

Although the 2010 amendments to Rule 26 have fostered a more open and dispute-free manner in which attorneys interact with their experts, a growing body of disputes now centers around the purpose for which that expert was retained. The mere act of retaining an expert who subsequently produces a report does not automatically entitle the draft report to protection under the 2010 amendments. Rather, the draft reports still must qualify for work-product protection; namely the document must: (1) be prepared in anticipation of litigation or for trial and (2) be prepared by or for another party or by or for that other party's representative. FED R. CIV. P. 26(b)(3). The Ninth Circuit has referred to documents prepared exclusively in anticipation of litigation as "single purpose documents." *In re Grand Jury Subpoena, Mark Torf/Torf Envtl. Mgmt.*, 357 F.3d 900, 907 (9th Cir. 2004). Single purpose documents are always afforded work product protection. On the other hand, a "dual purpose document" – one that is prepared both in anticipation of litigation and for another purpose – receives more scrutiny.

Single purpose documents are always afforded work product protection. On the other hand, a "dual purpose document" – one that is prepared both in anticipation of litigation and for another purpose – receives more scrutiny.

In order to draw a distinction between documents created in anticipation of litigation and those simply created in the ordinary course of business, Court's employ a "because of" test which examines the purpose for which the document was created. *Id.*

Under this standard, dual purpose documents are deemed prepared because of litigation if "in light of the nature of the document and the factual situation in the particular case, the document can be fairly said to have been prepared or obtained because of the prospect of litigation." *Id.* "When there is a true independent purpose for creating a document, work product protection is less likely, but when two purposes are profoundly interconnected, the analysis is more complicated." *Id.*

In the construction context, this analysis was recently performed in *Municipality of Anchorage v. ICRC, et al.*, No. 3:13-cv-00063, Docket No. 184 (D. Alaska, Feb. 24, 2015) which arises out of the defective design and construction of a major infrastructure project at the Port of Anchorage. Nearly three weeks after filing the lawsuit in March 2013, the Municipality of Anchorage retained an expert to assess the damage done to the project in connection with the litigation and to assist the Municipality in the determination of remedial measures and designs to replace the defective project. A few months later, the expert produced a preliminary report containing its findings. The Municipality repeatedly stated its intention to rely upon the expert opinions contained in the report to support its case in the pending lawsuit.

One defendant in the lawsuit, PND Engineers, Inc., filed a motion to compel seeking, among other things, all drafts of the expert report. Part of PND's argument for compelling production was that the preliminary report was a "dual purpose document" because it was used not only to assess the damage already done to the project but also to advise the Municipality in determining a new structure to be built. In other words, PND argued that there was an independent, non-litigation purpose for the preliminary report that could be separated from the litigation purpose.

Although the Court found that the preliminary report was a "dual purpose document" on the basis that it was commissioned both for purposes of the litigation and for use in further port construction, the Court also determined that the report was afforded work-product protection. The Court held that the two purposes were not independent of each other, but were "profoundly interconnected," in that the determination as to the design of future construction of the port was directly dependent on the construction that had occurred to date. Furthermore, the primary purpose of the preliminary report was for use in the litigation in that it was retrospectively focused on review and assessment of the damage already done, rather than forward looking at future construction.

Practitioners in the construction field should carefully assess the manner in which they deal and communicate with experts. Thought should be given to what type of work product an expert is expected to produce and what type of protections from disclosure that work product will receive. Merely retaining an expert, even after litigation commences, does not guarantee that the documents created by that expert are shielded from disclosure. If the document serves a dual purpose, *i.e.* a business purpose and a litigation purpose, it will be at greater risk of disclosure depending on the facts and circumstances surrounding the document's creation. The more intertwined it is with anticipated litigation, the more likely a dual purpose document is to receive work product protection.

In addition, clients in the construction industry, whether owners, contractors, insurers or sureties, should understand the consequences of creating internal documents that evaluate risk in the ordinary course of business. Such documents are potentially discoverable and could thus be used against them in litigation unless it can be proven that the document was created in anticipation of litigation and would otherwise not be created in the absence of litigation.

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