A Good Start for a Form P3 Agreement

By Jason C. Tomasulo

In today’s economy, it is increasingly difficult for public entities to obtain sufficient funding to undertake infrastructure projects. As a result, where enabling legislation is in place, public entities in the United States have, in recent years, turned to the public private partnership (“P3”) model. One of the challenges that can sometimes prevent the use of a P3 arrangement for a particular project is the significant transaction costs involved in such endeavors. With federal, state, and local governments using their own form agreements, a contractor often encounters an entirely new P3 agreement for each P3 project in which it is involved, resulting in significant expense reviewing and negotiating such agreements. As a result, the Engineers Joint Contract Documents Committee (“EJCDC”) recently prepared a standard form P3 agreement (EJCDC P3-508), which is the first one we have seen, to address this need in the marketplace.

The P3-508

The P3-508 was developed as a resource to assist public entities and private companies (referred to as concessionaires in the context of P3 agreements) interested in entering into a P3 agreement. It has flexibility to allow the public entity to select specific construction, financing, operations and maintenance, and funding terms. It also allows for differences in enabling legislation and regulations. Consistent with many P3 agreements used by public entities over the years, it contemplates the utilization of numerous exhibits to support the main agreement. The P3-508 works with any type of design-build document, which is important because most P3 agreements are premised on a design-build arrangement. As a result, the P3-508 can be adapted to many different P3 arrangements.

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Brief Note:
Greetings from the Editorial Team at Construction In Brief. Warmer weather has finally arrived! In this issue, in addition to spotlighting our Harrisburg Office, we have important news on Pennsylvania’s Contractor and Subcontractor Payment Act and new whistleblower law, as well as estate planning tips. You won’t want to miss this edition of Construction in Brief.

By Kerstin Isaacs

Habitat for Humanity
Once again Cohen Seglias is supporting Habitat for Humanity with an annual commitment of funding and volunteer days. The Firm shares Habitat’s commitment to building safe, sustainable and affordable homes that help families in need help themselves. This year, the Firm is donating $10,000 as well as two volunteer build days when Cohen Seglias attorneys, staff and clients work together to help families achieve the dream of homeownership. Our first volunteer build day was May 6th! We are excited about our volunteer efforts and we are looking forward to helping Habitat for Humanity Build-to-Succeed throughout the year. If you are interested in supporting our efforts, please consider donating construction materials or gently used furniture and appliances to your local ReStore, Habitat’s nonprofit home improvement store.

Save the Date for the American Cancer Society Bike-A-Thon!
Cohen Seglias supports the American Cancer Society though its annual participation in the Philadelphia to Atlantic City bike-a-thon. This year’s June 14, 2015 ride features four different start-points. Whether you’re a casual rider or an avid cyclist, this is a fully supported ride perfect for a variety of abilities. Support includes volunteer mechanics from local bike shops, SAG wagons, fully stocked rest stops, repair & first aid patrols and safe return transportation if needed. Marc Furman and Marian Kornilowicz will be acting as our team co-captains.

It’s been a BIG year already!
Our Construction Litigation Group had an extraordinarily busy and successful first quarter. The Group has successfully mediated eleven major claims, including a water treatment project in Colorado; a public high school in New Jersey; a hospital tower in Delaware; a high rise condominium project in Philadelphia; a pharmaceutical project in suburban Philadelphia; a Veterans Hospital project in Philadelphia; and a Pennsylvania Turnpike project and a waste water project in York County, PA. The Firm received a very favorable ruling in a construction company shareholder dispute in Kentucky which lowered our client’s potential exposure from $4,000,000 + to a loss totaling $350,000.

Our Labor & Employment Group also has good news to report. The Group won a major victory in a hotly contested non-compete jury trial; settled numerous EEOC charges without any agency action and settled numerous discrimination cases for nominal sums; reached very favorable settlements on two collective bargaining negotiations without any strike or work stoppage and prevailed in a union decertification proceeding. We’re excited to see what the rest of the year has in store!

New Faces
Please join us in welcoming Partner Christopher Carusone! Chris is Chair of the new Government Law & Regulatory Affairs and Energy & Utilities Practice Groups. Bringing twenty years of public sector experience to the Firm, Chris played an instrumental role in developing energy and transportation policy during the Corbett administration and went on to serve as liaison to the Marcellus Shale Coalition, Pennsylvania Independent Oil and Gas Association and Pennsylvania Chamber of Business and Industry.

The Firm also welcomes Associate Allie Hallmark to our Construction Practice Group. Allie will focus her practice on construction and employment litigation. She is a graduate of the Texas Tech University School of Law and is a volunteer judge for the Drexel University Thomas R. Kline School of Law moot court program.

Kerstin is the Firm’s Marketing Director. She can be reached at (215) 564-1700 or kisaacs@cohenseglias.com.
Another key issue involves the financial security required of the concessionaire by the public entity. The P3-508 includes a provision for the concessionaire to provide payment and performance bonds, which the design-builder or lower-tier trades may be required to furnish. However, because many concessionaires are single-purpose entities, many public entities often require parent-company guarantees and/or letters of credit to secure the concessionaire’s obligations in the event of default, which may flow-down to the design-builder. Such provisions must be carefully reviewed, given the significant remedies that the guarantee and letter of credit provide.

In larger P3 agreements, concessionaires also should consider adding the use of dispute resolution boards (DRBs) to the P3-508. Given the importance of completing on time to obtain access to a revenue stream, the parties need at least interim decisions on claims/disputes during the course of performance. DRBs have been a successful approach to timely address disputes. DRBs typically are comprised of a panel of three people involved from the start of the project, who are available to assist in the resolution of claims on an expedited basis to keep the project moving. Although such panels can be costly, their worth can be justified by the overall money at stake in the P3 and the alternative cost of litigation.

Conclusion

P3 agreements are typically complex, lengthy agreements with many exhibits. If you are contracting with a public entity that does not have a history of P3 agreements and you have any input in the form of agreement, the P3-508 may be a good place to start and may reduce your transactional costs. However, even with the P3-508, you will still need counsel to assist with modifications that are tailored to your specific concession and will protect your rights. We can assist you with these important tasks.

By Jason C. Tomasulo

Unlike most form agreements, the P3-508 does not contain fully developed clauses in all of its articles. Nevertheless, the P3-508 is helpful because it serves as a checklist, identifying many issues that the public entity and concessionaire should consider addressing in their particular P3 agreement.

For example, in Article 9, Revenue, Financing, and Taxes, the form provides a list of possible revenues that could serve as the concessionaire’s revenue stream. The form suggests identifying any limits to the revenue or sharing of fees, and identifying when the revenue stream begins. It also prompts the user to identify whether there are any revenue guarantees by the public entity.

Similarly, in Article 17, Changes, the form identifies a number of possible “Relief Events,” entitling one party to seek adjustment to the financial terms of the agreement, milestones, or even the concession term. The form also proposes that users consider developing a risk allocation matrix as an exhibit, which allocates risk to the public entity, the concessionaire, or provides for shared risks.

The P3-508 also covers other traditional provisions such as the public entity’s grant of concession and concession term; the concessionaire’s responsibilities; design and construction; operations and maintenance; safety and security; representations and warranties; insurance and indemnity; and disputes.

There’s Still Work to Do

Despite providing a good starting point, the P3-508 does not (and cannot) address every situation. Further drafting will be required to fit your unique P3 project. For example, one important issue for both the contractor and its design-builder is the public entity’s level of involvement in the review of the design. Public entities with engineering departments that have traditionally been heavily involved in the preparation of designs as part of design-bid-build procurement may have a difficult time relinquishing control of the design process. However, unreasonable oversight of the design can delay the design and construction process. Such delays must be avoided given the concessionaire’s need to complete construction on time so that they can begin to receive the applicable revenues (tolls, availability payments, etc.) to repay loans, bond holders, and/or investors. Although the P3-508 contains some language, additional language is needed to minimize the potential of the public entity to delay the design. Specifically, language could be included to identify the person(s) involved in the public entity’s design review, the time allotted for such review, and the extent of such review.

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CASPA’s Reach Challenged
By John A. Greenhall and Ashling A. Ehrhardt

The Contractor and Subcontractor Payment Act (“CASPA”) provides rules and deadlines to ensure prompt payments under construction contracts and discourage unreasonable withholding of payments in the Commonwealth of Pennsylvania. CASPA is designed to protect contractors and subcontractors and encourage fair dealing among parties to a construction contract. The question of whether the legislature intended to expand CASPA’s obligations toward fair dealing to non-contracting parties recently arose in a Pennsylvania Superior Court case. The court addressed the question of whether a shareholder in a Pennsylvania real estate development company could be personally liable under CASPA when the company failed to pay $1.5 million to its general contractor. Just how wide is CASPA’s net? Does it include a developer’s shareholder that personally directs work? No – not yet, anyway.

Relevant Facts
410 Shurs Lane Developers, LLC (the “Owner”) contracted with Scungio Borst & Associates (the “General Contractor”) to build a 23-unit condominium in the Manayunk section of Philadelphia. In addition to performing the contract work, the General Contractor also performed $2.6 million in additional work. The Owner’s principal and 50% shareholder personally directed the General Contractor to perform this change order work. At one point during the project, the General Contractor stopped work because it was not getting paid. The Owner’s principal orally guaranteed the General Contractor that it would get paid. The Owner again failed to pay. There was $1.5 million due and owing on change order work. The General Contractor filed suit for various causes of action, including a violation of CASPA against the Owner’s principal, alleging that he should be held personally liable for the outstanding balance.

Review of CASPA
CASPA provides that when a contractor or subcontractor performs work on a project, it is entitled “to payment from the party with whom the contractor or subcontractor has contracted.” CASPA then imposes penalties for failure of owners, contractors, and subcontractors to comply with its payment terms.

In determining whether the Owner’s principal – or an agent of the Owner – could be held personally liable under CASPA for nonpayment, it is necessary to review the relevant definitions:

- “Owner” is defined as “[a] person who has an interest in the real property that is improved and who ordered the improvement to be made. The term includes successors in interest of the owner and agents of the owner acting with their authority.”
- “Person” is defined as “[a] corporation, partnership, business trust, other association, estate, trust foundation or a natural individual.”

The court noted it was undisputed that the Owner was a “person” for purposes of the statute. In addition, the court held that the Owner was the entity that contracted for the improvements. Clearly, the developer would be obligated by CASPA but what about the principal, who was also acting as the developer’s agent? The ambiguity lies in the fact that “agent” is not defined under CASPA.

The Court’s Decision
The General Contractor asked the court to interpret the statutory language as acknowledging that authorized agents could be liable for additional interest, penalties, and attorneys’ fees when the contracting party fails to pay on time. The court rejected this approach, holding that the Owner’s principal here was not an “owner” within the meaning of CASPA. The court recognized that holding otherwise would impose statutory penalties upon an entity or person who was not a party to the contract, which is contrary to well-established agency and contract principles. If the court had adopted such a broad interpretation of “agents” of the owner, architects, project managers, and designated representatives acting on behalf of the owner could be held liable under CASPA, too.

Three of the nine judges hearing this case disagreed with the court’s holding and the General Contractor appealed to the Pennsylvania Supreme Court, which will make the ultimate decision. As such, we will wait for the Supreme Court’s decision and update you when that decision is made. Until then, know that a developer’s principal will not be considered an “owner” within the meaning of CASPA – even if that principal personally directs change order work.

John is a Partner and Ashling is an Associate in the Firm’s Construction Group. They can be reached at (215) 564-1700, jgreenhall@cohenseglias.com and aeehrhardt@cohenseglias.com.
Choosing Your Destiny: Estate Planning Tips
By Shawn R. Farrell and Wayne C. Buckwalter

Counseling our clients about strategy is a big part of our job. We work with you on drafting your company’s standard form contracts, change order requests, invoices and credit applications. We help you navigate and negotiate the complex world of construction disputes. We develop appropriate workplace procedures that protect your employees and your business. With all of the above, our clients frequently forget one of the most important aspects of their life and business — a solid strategy for succession planning and wealth preservation.

In this issue’s quiz, we’ll provide answers to some of the most common misconceptions about estate planning. Here are some quick tips on gifting, life insurance and estate taxes.

Gifting is a great way to make a difference in other people’s lives while avoiding estate taxes.
Answer: Maybe.

While gifting has the potential to reduce estate tax liability, it should be done carefully. For example, gifts made to a family member within three years of death may still be subject to estate tax. The beneficiary of a lifetime gift may also incur unforeseen and undesirable capital gains tax consequences. If you are considering giving to a charity, you should consider lifetime gifts or provisions for charities in trusts or wills. You can use a charitable trust to reduce the size of your estate while still retaining an income stream. There are many types of charitable trusts which may benefit you, your family, or other non-charitable beneficiaries.

Life insurance can be an invaluable estate planning tool if you know how to manage the asset. By creating an irrevocable life insurance trust, you can hold life insurance policies while eliminating estate taxes on the death benefit proceeds. The key is to name the trust as the beneficiary of the life insurance policy, not your spouse or child. Upon your death, the life insurance proceeds are held in the trust for the benefit of your loved ones for the remainder of their lifetime. As a result, the proceeds of your life insurance policy are not subject to estate taxes. The balance of the proceeds passes to your children or other beneficiaries upon the death of your surviving spouse or partner.

Despite all the terrible TV commercials and the hard sell I get from my broker, life insurance is a worthwhile investment.
Answer: True!

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Everyone pays high estate taxes. It is just part of life.
Answer: False.

How much you pay in estate taxes is entirely dependent on where you live and your estate planning strategy. Only nineteen states and the District of Columbia impose inheritance or estates taxes on their residents. In Pennsylvania, residents pay a flat inheritance tax rate and life insurance proceeds are not subject to the State’s inheritance tax. New York is in the process of modifying its estate tax exemption to match the much higher federal exemption. In contrast, some states like New Jersey have both an inheritance and an estate tax. As these comparisons demonstrate, since estate taxes vary greatly across the US, it is absolutely critical to know your state’s law and plan accordingly.

Estate planning is a critical component to leaving the legacy YOU choose. Strategize and map out your desired wealth outcome. Don’t wait. If planning on your own is proving to be a daunting task, reach out for help.

Shawn is a Partner in the Construction Practice Group and Wayne is Chair of the Firm’s Wealth Preservation Group. They can be reached at sfarrell@cohenseglias.com and wbuckwalter@cohenseglias.com or at (215) 564-1700.
PA’s New Whistleblower Law: New State and Local Contracting Liabilities

By Christopher D. Carusone

Businesses that contract with state or local government entities in Pennsylvania need to be aware of a new liability threat—lawsuits from employees alleging waste or wrongdoing in connection with the award of public funds. It is critical for you and your businesses to understand these recent changes and the expansion of Pennsylvania’s Whistleblower Law. If you depend on Pennsylvania public contracts, prepare now to prevent damages later.

What’s a whistleblower?

For the purposes of the Pennsylvania statute, a “whistleblower” is an employee who makes a good-faith report of wrongdoing or waste in connection with the award of public funds. The law prohibits an employer from discharging, threatening or otherwise discriminating against an employee if the employee makes a good faith report, or is about to report, an instance of wrongdoing or waste of public funds by the company. The law also prohibits an employer from retaliating against an employee for cooperating in any investigation or hearing regarding the report.

What qualifies as “wrongdoing” or “waste” under the whistleblower law?

Under the whistleblower law, the term “wrongdoing” has a specific definition. Wrongdoing is defined as a violation of a statute, regulation, ordinance or code of conduct/ethics. By contrast, the term “waste” is pretty vague. Waste is defined as a contractor’s act or omission that results in “substantial abuse, misuse, destruction or loss” of public funds.

When is an employer liable under the whistleblower law?

A whistleblower has six months to bring a civil action following a discharge or other adverse employment action. In order to establish liability, the whistleblower must show that prior to the employer’s adverse action against him or her, the employee made, or was about to make, a good faith report of an instance of wrongdoing or waste of state or local government funds by the employer. An employer can successfully defend against a whistleblower lawsuit if it can establish that the adverse employment action against the employee occurred for a separate and legitimate reason.

What are the consequences for violating the whistleblower law?

Violations of the new whistleblower law should be taken very seriously. An employee who is successful in a whistleblower lawsuit may be entitled to reinstatement of his or her employment with full benefits and seniority rights, back pay, reimbursement of the employee’s reasonable attorney and witness fees, a fine of up to $10,000 and other damages as appropriate. But that is not the worst of it. Substantiation of the employee’s complaint of waste or wrongdoing in connection with the award of public funds could also result in termination of the company’s existing public contracts and placement on a suspension/debarment list.

Best Practices to avoid whistleblower liability

1. Maintain policies and procedures to prevent waste and wrongdoing in connection with the receipt of state or local funds.

It starts with the obvious—a clear declaration that waste and wrongdoing in connection with public funds is strictly prohibited under your company policy. You should implement procedures to ensure that your company is adhering to all statutes, regulations, ordinances and codes of conduct applicable to the receipt of public funds. Employ standard checklists and regular audits during crucial phases of each project to stop waste and abuse before it starts.

2. Post notices and use other means to notify employees of the protections and obligations under the law.

These postings should include a description of an employee’s rights and obligations under the law. Most importantly, your procedure for reporting complaints should be clear and well-known to all employees. Designate a specific company official as a point of contact for all whistleblower complaints. It is wise to consider designating someone outside your employees’ immediate chain of command to short circuit claims of retaliation.

3. Contemporaneous documentation isn’t just for jobsites!

Contemporaneously document employee performance deficiencies or misconduct and take timely steps to correct the behavior. Waiting to document past problems with an employee’s performance until after an employee has made a report of waste or wrongdoing makes it more difficult for you to argue that any adverse action you take is not related to the whistleblower complaint.

4. Retain outside legal counsel.

Don’t handle whistleblower complaints internally. Outside legal counsel should investigate whistleblower complaints to properly determine the facts, assess the company’s exposure to liability, and interact with the whistleblower and any government agency investigating the complaint. The last thing your company wants when faced with a whistleblower complaint is a credible allegation that the investigation was so biased and poorly conducted that it constituted a separate act of retaliation against the employee.

Chris is the Chair of the Firm’s Energy & Utilities and Government Law & Regulatory Affairs Practice Groups. He can be reached at (717) 234-5530 and ccarusone@cohenseglias.com.
Q: How does having a strong presence in Harrisburg help the Firm and its clients?

A: Steve — The firm has many clients who are based and operate in Central Pennsylvania. Having an office in Harrisburg allows us to know the market in which our clients operate and serve their needs at a local level. Harrisburg is also the bridge between our operations in Philadelphia and Pittsburgh. Based on geography alone, having an office in Central Pennsylvania brings us closer to our clients outside of the Philadelphia and Pittsburgh metropolitan areas and helps us to expand our services to more clients throughout the mid-state region. However, it is much more important than geography. Harrisburg is Pennsylvania’s capital city and home to the state legislature and state agencies whose laws, rules, regulations and policies affect our clients on a daily basis. Having boots on the ground in Harrisburg and access to government regulators and policy makers allows the Firm to serve its clients in ways other law firms cannot.

Q: What changes have taken place in the Harrisburg office?

A: Steve — We are very excited to welcome Partner Chris Carusone! Chris is Chair of our newly established Government Law & Regulatory Affairs and Energy & Utilities Practice Groups. Chris brings twenty years of experience at virtually all levels of state government, including stints as Executive Deputy General Counsel and Secretary of Legislative Affairs in the Governor’s Office.

Chris — I also work on commercial litigation and labor and employment matters. Over the course of my twenty-year career, I have helped public and private employers to successfully defend against union grievances as well as claims of unlawful employment discrimination in well over 100 cases.

Q: Are there other ways in which the Harrisburg presence can assist clients statewide?

A: Mike — From years of experience practicing in Harrisburg, I can say that there is little accomplished in business that does not in some way involve Harrisburg. Our Harrisburg office is uniquely equipped to quickly and efficiently assist our clients with administrative and regulatory filings, inquiries and hearings. With regard to real estate tax assessment issues, our office has the capability to represent clients in every county statewide. We aspire to be the access point from which all Cohen Seglias clients’ business permitting, licensing and regulatory issues are administered.

Q: What services does the Harrisburg office offer to the Firm’s clients?

A: Steve — I have been practicing law in Harrisburg for over twenty-three years. In addition to serving as Chair of the firm’s Commercial Litigation Group, I am also a member of the Labor & Employment, Construction and Energy & Utilities Practice Groups. My practice covers commercial and civil litigation, real estate, landlord and tenant law, condominium and homeowner law, employment law, business and corporate law and construction law. Many of my clients see me as their “general counsel,” and use me to handle many, if not all, of their legal needs.

Chris — Our new Government Law and Regulatory Affairs Practice Group successfully defends clients against lawsuits, investigations and regulatory enforcement actions brought by local, state and federal government agencies. With the addition of our new Energy & Utilities Practice, we are more active in the regional energy industry than ever and we’re looking forward to expanding our practice. We are dedicated to serving the legal needs of companies engaged in the energy industry in Pennsylvania, West Virginia and New York. I remain in close contact with my colleagues in government and keep my ear to the ground for any legislative and regulatory changes that affect our large construction-focused client base.

Mike — As Senior Counsel to the Firm, I concentrate my practice in the areas of real estate, administrative law, creditors’ rights, commercial transactions and corporate finance. Drawing on my experience gained as a sitting member of the Dauphin County Board of Assessment Appeals, I represent property owners in other counties in matters pertaining to real estate tax assessment. I also provide guidance and legal services in business law and estate planning and administration.

Members of our Harrisburg office can be reached at (717) 234-5530.
A quarterly publication brought to you by Cohen Seglias Pallas Greenhall & Furman PC

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