

Construction In Brief

A quarterly publication brought to you by COHEN SEGLIAS PALLAS GREENHALL & FURMAN PC

A Construction Nightmare: Snow, Ice and Extreme Weather

By Lane F. Kelman and Jennifer R. Budd

Last winter was a historic winter for the Northeast and many other parts of the country, with unprecedented snowfall and cold temperatures. The country's gross domestic product (GDP) contracted at an annual rate of 2.9 percent from January through March 2014, which represented the fastest rate of decline since the recession started in 2008. The tough winter impacted the construction industry even harder, causing a 9 percent decline in non-residential construction in the first three months of the year.

The extreme weather last year demonstrated that even one snow storm or cold spell can disrupt a construction project, causing serious cost implications for all involved. Many in the construction industry were harmed not only by the weather, but also by not understanding the legal rights and remedies available to them. Whether you are a supplier, contractor, or developer, here is a synopsis of what you need to know to protect yourself from another cold, snowy winter:

You may be able to get compensation and time.

Under most construction contracts, the general rule is that unusual weather only entitles a contractor to additional time to complete work and not additional compensation. However, there are significant exceptions to the general rule:

- If the project is already delayed for a non-weather related reason and that delay pushed your construction schedule into an adverse weather event, you may be able to receive compensation in addition to time.
- If the jobsite conditions result in extra work such as snow removal or multiple mobilizations, you should request a change order.
- A time extension that is insufficient and results in acceleration, compression or labor inefficiencies can be a compensable claim.

Continued on Page 3...



IN THIS ISSUE

2

What's New

4

Fraud in Federal Government Contract Claims

5

Is it Really Off the Clock?

7

Q&A with Our Pittsburgh Team

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What's New

Brief Note:

Happy New Year! With so much to look forward to this year, we are excited to start 2015. In this issue we take an inside look into our fantastic Pittsburgh Office. We also share some important information to start your year right – from fraud prevention and time keeping tips, to advice on how to get paid when bad weather strikes. You won't want to miss this year's first edition of Construction in Brief.



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By Kerstin Isaacs



Annual Holiday Toy Drive

Thank you to clients, staff and friends of the Firm who donated to our annual toy drive! Each year the Firm brings holiday joy to less fortunate children locally and nationally through toy donations and monetary contributions to Toys for Tots, the Support Center for Child Advocates, and the Allegheny County Department of Human Services Holiday Project. The Firm matched all contributions.

New Faces

Please join us in welcoming **William L. Todd** as our new Controller. Bill is responsible for the Accounting, Finance, Treasury and Accounting Information Systems for the Firm. He has over twenty-five years of experience in financial analysis and reporting, planning, budgeting and law firm management. Born and raised in Philadelphia, Bill graduated from Saint Joseph's University.



Special Honor!



Cohen Seglias is pleased to announce that **George Pallas** and **Shawn Farrell** have been appointed Special Counsel to the Utility & Transportation Contractors Association of New Jersey (UTCA). George and Shawn recently accepted the prestigious 2014 Larry Gardner Memorial Award on behalf of Cohen Seglias in recognition of the Firm's exemplary service to UTCA and the construction industry.

Save the Date: Labor & Employment Seminar

Stay current on the cutting edge labor and employment issues impacting your business. Join us for the 7th Annual Labor & Employment Law Seminar.

- Philadelphia:** Tuesday, April 28th at the Union League
- Hershey:** Tuesday, May 5th at the Hershey Country Club
- Pittsburgh:** Tuesday, May 12th at the Omni Hotel

Kerstin is the Firm's Marketing Director. She can be reached at (215) 564-1700 or kisaacs@cohenseglias.com.



A Construction Nightmare: Snow, Ice and Extreme Weather

Continued from Page 1...

By Lane F. Kelman and Jennifer R. Budd



You may be entitled to a time extension even when you planned to work through the winter.

Many construction contracts involving outdoor work that is planned to occur during the winter assume lost weather days. The inclusion of bad weather days does not necessarily limit relief.

- Review your contract now so you know if and how many days are assumed lost due to poor weather.
- When liquidated damages exist, it is imperative to know how many "lost" days are assumed in your contract. An extension of time could be dependent on proof that the winter weather caused more lost days than anticipated.



There are no snow days if you don't ask.

Prompt written notice is critical to protecting your rights on every construction project for any reason. At a minimum, written notice should provide:

- A description of the extreme weather;
- A description of how the weather is affecting the performance of the work;
- The number of days impacted by the weather (if known);
- A reservation of all contractual rights due to the weather; and
- If you are a contractor, a statement that the work will not be accelerated unless it is authorized in writing and paid.

In rare instances, unusual weather may excuse performance.

If you are a supplier and cannot procure material due to shortages, unusual weather may constitute an "act of God" that will excuse performance under a contract.

Understand your insurance policies and provide notice to your carrier.

Notice should be given of:

- Damage to your property;
- Claims for business interruption; and
- Any suspected liability for damage to others.

Document unusual conditions and damage.

- These days, everyone carries a phone with a camera. Take pictures of conditions and damaged work before proceeding.
- It is critical to contemporaneously document impacts such as material or labor shortages, extra or repair work, or re-sequencing.

You have a duty to mitigate your damages.

If a party you contracted with is unable to perform due to the unusual weather, you are under an obligation to reasonably mitigate your damages. For example, you may be obligated to:

- Find another supplier or contractor to reduce liquidated or delay damages;
- Request an extension from the party with whom you contracted; and/or
- Accept alternative materials.

No one contract or storm event is the same. It is important to understand and abide by each contract's terms in order to best protect yourself. If you have any questions about the impacts of weather on your project, you should speak with our experienced construction attorneys so that we can help you minimize or recover your losses incurred due to weather-related events.

Lane is a Partner and Jennifer is an Associate in the Firm's Construction and Green Building Groups. They can be reached at (215) 564-1700, lkelman@cohenseglias.com and jbudd@cohenseglias.com.



Fraud in Federal Government Contract Claims

By Michael H. Payne and Amy M. Kirby



All too often you hear stories about contractors accused of defrauding the federal government either in obtaining or performing government contracts. From procurement fraud, to receiving kickbacks, to making fraudulent claims against the government, fraud is an issue of concern in government contracting. As more and more contractors decide to work with the federal government, it is important to avoid fraud or even the appearance of fraud.



One area where contractors need to exercise caution is in presenting claims to the federal government. Just as in the private sector, a contractor working with the government can present claims to the government related to its

performance on the project. Conversely, if the government believes any portion of that claim is fraudulent, it can bring a counterclaim for fraud against the contractor. The federal government has several options in bringing such a counterclaim. Four common types are discussed below as well as guidelines to avoid these counterclaims when bringing claims against the federal government.

The False Claims Act (FCA) generally creates liability for any person who defrauds the government by presenting a false claim. The penalty for violating the FCA is a civil fine not less than \$5,000 but not more than \$10,000, plus treble damages. Due to the fact that the penalties for filing false claims can be steep, the burden is relatively high. The FCA requires the government to prove that a contractor knowingly presented a false claim, meaning it must be more than merely a mistake by the contractor.

The Contract Disputes Act (CDA) fraud provision is another avenue for the government to recover for false claims brought by a contractor. Under the CDA, a contractor is required to certify all claims over \$100,000 by asserting that the claims are made in good faith and that the claims are accurate and complete to the best of its knowledge. Under the CDA, a contractor is required to provide support for all of its claims. If it is found that even a portion of a claim is unsupported, a contractor is liable for damages equal to the amount of the unsupported claim plus all costs to the federal government related to reviewing that unsupported

portion of the claim. The CDA is unique in that only the fraudulent portion of the claim is removed and any non-fraudulent portions of the claim can still be brought.

The Forfeiture or Fraudulent Claims Act (FFCA) allows for exactly what its name implies: forfeiture of any claim that is found to be fraudulent. Under the FFCA, also known as a Special Plea in Fraud, the government is required to prove by clear and convincing evidence that a claim is fraudulent. If the government meets this high standard to prove that any portion of a claim is fraudulent, then a contractor forfeits its entire claim. The FFCA, unlike the CDA, only requires a portion of a claim to be fraudulent in order for the entire claim to be forfeited.

Common law fraud is another counterclaim that the government can bring against a contractor for fraudulent claims. In order to prevail under this counterclaim, the government must prove that a contractor misrepresented a material fact with the intent to deceive the government, that the government relied on the misrepresentation or deception, and that the government was injured.

To avoid these types of counterclaims, a contractor doing business with the government must ensure that everything is in order before submitting a claim to the government. That requires the formulation of accurate claims and the keeping of meticulous documents to support every aspect of a claim. If the documents in a contractor's project file support the entitlement to damages sought in a claim, then it will be more difficult for the government to prove that the contractor had knowledge of a misrepresentation, or intended to deceive the government. Every prime contractor should ensure that each of its employees and subcontractors also follows these guidelines.

Keeping and providing accurate records to verify your claim can be the difference between the government bringing a counterclaim like the ones asserted above and obtaining payment for your claim filed against the government. A contractor that follows these guidelines can combat a fraud allegation. The lawyers in the Federal Contracting Practice Group at Cohen Seglias are able to further discuss how you can best avoid counterclaims of fraud asserted by the government against your company.

Michael is the Chair and Amy is an Associate in the Firm's Federal Contracting Practice Group. They can be reached at (215) 564-1700, mhp@cohenseglias.com and akirby@cohenseglias.com.



Is it Really Off the Clock?

By Marc Furman and Mark J. Leavy



Employers that pay attention to their workforce generally know whether their employees are productively engaged and really working when they are on the clock. While the issue may seem clear cut, not all employers have a solid grasp on what is and isn't compensable work time. How wage and hour laws apply to your business is not always a matter of common sense. Many employers fail to put the right wage and hour policies in place based on how the laws apply to their particular business and their employees' duties and routines.



For employers who may think that a few lost minutes here or there are no big deal, think again.

More and more lawsuits are being brought under wage and hour laws challenging payroll practices across industry lines. As it turns out, a little bit of time can go a long way in wage and hour lawsuits. Even if you take just fifteen minutes of daily work time not properly accounted for, it adds up to a lot when one starts counting all the days in the work weeks going back three years (and in some states like New Jersey – going back six years multiplied by the number of employees involved). For just one employee, the liability for such a fifteen minute error can range from one to two full months' of compensation. For multiple employees, the problem can easily grow from the equivalent of months of unpaid wages to years of unpaid wages.

But wait, it gets worse! State and federal wage and hour laws have fee-shifting provisions that require an employer to pay an employee's attorneys' fees and costs in a lawsuit where an employee is awarded back wages. These laws also have penalty provisions requiring payment of liquidated damages – the doubling or tripling of all damages awarded for unpaid wages due.

When you put these ingredients together, it makes a perfect recipe for an ever-increasing number of wage claims, as well as a greater chance that your company will be faced with a wage and hour lawsuit. The following discusses what you can start doing to protect your company.

Be certain that you are properly classifying different types of employees

Some employees must be paid on an hourly basis and at an overtime rate of one and one-half times their regular rate for all hours worked over 40 in a workweek. Other employees may be paid on a salary basis depending upon their duties and rate of compensation. Hourly employees are referred to as "non-exempt" and salaried employees are "exempt" – as in exempt or not exempt from overtime pay.

The primary categories of "exempt" employees include administrative, executives and salespersons as well as "highly compensated employees." Yet, far too many employers pay their employees on an hourly or salary basis without actually knowing the rules – therefore misclassifying their employees. Just because a person is a "manager" does not make him exempt as an "executive" employee, and just because a person works in an office does not make him exempt as an "administrative" employee. For example, to classify for the administrative exemption, an employee must exercise discretion and independent

judgment with respect to matters of significance in the company – so every "administrative assistant" is not going to be exempt. The fact is that no employer can afford to misclassify even one employee.

Have some basic policies in place for hourly employees

The law defines time spent working, or "compensable" work time, as including all time that an employee is "suffered or permitted" to work. Under this definition, an employee who claims (truthfully or not) that he routinely worked during his lunch break, and his manager knew about it, will have a cognizable claim not just for unpaid wages, but perhaps significant overtime wages.

In order to protect against such claims, every employer needs to have clear and basic policies in place. These policies must: (1) require hourly employees to record their working hours, clocking in and clocking out during their scheduled shift; (2) forbid any work when an employee is on lunch, and before or after a work shift, i.e., when not clocked in; and (3) prohibit working overtime without specific permission. Note that an employee who works without permission must still be paid – but that employee can be disciplined up to and including discharge for failure to follow company policies. When employers do not use actual time clocks or their equivalents, it is even more critical for a strict protocol to be developed and implemented to have employees report, document, and sign-off on their time.

Beyond such basics, some difficult issues can arise when dealing with employees paid on an hourly basis (non-exempt). For example:

- If employees are provided a work vehicle that they may take home, when does their workday begin and end? What about their lunch period? How do you effectively track their working time?
- If some of your employees must be "on-call," when and how do you have to compensate them?
- For construction company employees whose workday officially begins at a worksite, what if an employee first reports to the company's shop and then gets a ride in a company work truck or from a fellow employee? When should they start getting paid? What policies and practices does any employer need to protect against wages claims?

There are no "one size fits all" answers. In each instance above, more information regarding the particular facts is needed. The particular tasks that the employees are engaged in and the ground rules that the employer puts into place, or fails to put into place, will determine the answers. Significantly, it is up to you as the employer to put the right policies and practices in place and make sure they are implemented and followed.

The risks are too great for an employer not to know exactly how the wage and hour laws apply to all of their workers. Because the wage and hour laws can present both complicated legal issues and business decisions, it is essential for an employer to obtain legal guidance to classify all of their employees properly, and establish the right employment policies to prevent lawsuits from arising in the first place.

Marc is the Chair and Mark is an Associate in the Firm's Labor and Employment Practice Group. They can be reached at (215) 564-1700, mfurman@cohenseglias.com and mleavy@cohenseglias.com.

Partying with Pittsburgh

This year, to celebrate our new office space and our Pittsburgh clients, we held a holiday bash in our new Pittsburgh office. By all accounts it was a smashing success!



■ David Ventura of Engineered Products, Inc., Roy Cohen, Ross Fazio of Fazio Mechanical Services, and Jan Cohen



■ Lisa Wampler, Ken Marino of Wayne Crouse, Inc., and Roy Cohen



■ Roy Cohen, Bob Bruce of Bruce & Merrilees Electric, Ed Seglias, and Jim Gleckler of Franklin Electric, LP



■ Todd Mikec of Lighthouse Electric Co., Inc. and Roy Cohen



■ Bill Miller and Simon Richbaum of Miller Electric Construction, Inc.



■ Dan Walsh of United Electric and Ed Seglias



Q&A with Our Pittsburgh Team



Roy S. Cohen



John A. Greenhall



Lane F. Kelman



Lisa M. Wampler



Lori Wisniewski Azzara

Our marketing department recently sat down with the members of our Pittsburgh Office.

Q: Can you talk a little about the growth of the office in Pittsburgh?

A: Roy — Pittsburgh is the Firm's gateway to the west. We now have clients and matters in West Virginia, Ohio, Indiana, Kentucky, Utah, Nevada, Colorado, Wyoming and Texas. We are working with clients in all these states and we see countless opportunities to expand our brand and attract contractors who appreciate our focus on the construction industry. Our experience over the last 26 years representing contractors every day has built a body of work that sells itself. Cohen Seglias is excited about our expansion throughout the west and the new opportunities it brings to the Firm.

Q: In addition to the western expansion of the practice in Pittsburgh, what changes have taken place in the Pittsburgh office itself?

A: John — There has been some big news in the past year. Lisa Wampler was instrumental in our move into a larger space at 525 William Penn Place. Lane and I have significantly increased our presence in Western Pennsylvania. Lori continues to focus on green building and working with the Green Building Alliance in Pittsburgh. This year we brought on new hire Jason Lawrence. Overall, it has been an exciting time for the office and for the City of Pittsburgh as we both grow together.

Q: At the end of July, we learned that 2nd quarter gross domestic product (GDP) rose 4% from April to June — coincidentally, construction spending was also up. Is this a trend the Western PA construction community should be looking forward to continuing?

A: Lane — It certainly seems that way when you talk to people on the ground. From the designers to the finish trades, there is guarded optimism. The architects are drafting and projects are going out to bid, and — in a refreshing change to the recent past — these projects are actually getting built. In the last few years, during the economic downturn, projects would go out solely for pricing. Now contracts are being let and ground broken. This is particularly the case in the commercial and multi-family sectors. Educational and hospital construction remain stagnant. Industrial though, has started to pick up and heavy-highway will as well because of the state transportation bill. Margins still have not fully recovered but at least there is work to be had.

Q: Commercial real estate turned out to be one of the hottest segments of the construction market in 2014. What's it like to be in the middle of the Commercial Real Estate scene in Pittsburgh?

A: Lisa — It's so exciting to see such a resurgence of developer activity in Downtown Pittsburgh. From my office window, I get to watch live as the Tower at PNC Plaza, the world's greenest skyscraper, is constructed. Less than a block away, Millcraft Investments is erecting an 18-story office, hotel and retail complex, adding to the recent revitalization of Market Square. In the near future, we will be seeing several new hotels built to service the influx of out-of-towners seeking to visit one of the most livable cities in the continental United States. Just outside the city, to compliment Google's expansion of its Pittsburgh footprint with additional office space at Bakery Square 2.0, Walnut Capital is adding a residential component with 350 apartments and 52 town houses for sale. Hopefully, 2015 will be met with a similar flourish!

Q: Over the summer, the Pittsburgh Business Times reported that the Western PA region "has continued to be a leader in green building, as more and more large area projects seek certification for being environmentally friendly." What Pittsburgh green building trends are you seeing?

A: Lori — Pittsburgh is becoming a national leader in sustainability and green building initiatives. With both renovation and new construction projects, the trend is definitely to either seek LEED certification or incorporate as many sustainable features as possible into the project design. Good examples are the former G.C. Murphy Building, and the University of Pittsburgh and Carnegie Mellon campuses. Even hotels are getting in on the green movement. The Fairmont Pittsburgh, that achieved LEED Gold in 2010, is making great strides in waste management and energy and water conservation.

Pittsburgh also has established one of the nation's few 2030 Districts, a public-private partnership that works to create high performance building districts within the downtown area. Recently, Oakland has been added to the Pittsburgh 2030 District, making Pittsburgh the first 2030 District in the county to have two distinct boundaries.

Pittsburgh is becoming the hub of green building and is an area that many people around the country are watching to see what will come next!

Members of our Pittsburgh office can be reached at (412) 434-5530.

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IN THIS ISSUE

1 A Construction Nightmare: Snow, Ice and Extreme Weather

4 Fraud in Federal Government Contract Claims

7 Q&A with Our Pittsburgh Team

2 What's New

5 Is it Really Off the Clock?



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Cohen Seglias Pallas Greenhall & Furman PC has deep roots in the Mid-Atlantic region and a long-standing reputation for putting the interests and needs of our clients first. The Firm advises and counsels businesses and individuals in a broad range of legal services.

