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Construction In Brief

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The Buy American Act: Are You Compliant?

By Lori Wisniewski Azzara

The federal government has a long-standing preference for incorporating domestic materials and products into public construction projects. While a number of statutes and regulations promote this policy, the Buy American Act of 1933 (BAA) is the oldest and arguably most well-known. The essence of the BAA's construction provisions sounds simple: the use of foreign-produced materials and products on public construction projects is prohibited. However, a dense web of regulations and statutes interact to create exceptions and exemptions to the BAA's application, making the BAA one of the most complex bodies of law to comprehend. Those contractors who fail to comply with the BAA's requirements can face costly legal issues, debarment or, in some situations, criminal investigation and prosecution. With the new administration, now is the time to get familiar with the BAA, and the following primer is a good place to start.

1. Does the BAA Apply to Your Project?

The first step is to look at the overall dollar value of the project: contracts for the construction, alteration or repair of any public work valued between $3,000 and $7,358,000 are subject to the BAA. Construction contracts with values of $3,000 or below are exempt from the BAA and are viewed as "micro-purchases." Construction contracts that exceed $7,358,000 may be subject to certain foreign trade agreements.

2. What Constitutes Domestic Construction Materials?

The BAA requires the use of only "domestic construction materials" on public projects. So what are domestic construction materials? To answer this question, various definitions must be collectively considered. Start with the definition of "construction materials," which are any article, material or supply brought to the construction site by a contractor or subcontractor to be incorporated into the project.

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What's New

Brief Note:

The Firm continues to expand and we are excited to introduce you to Christopher Galusha, our new Partner in New Jersey. In the Q&A on page 7, you will learn more about Chris and his practice. In this issue, he has written an important update for employers on employee break time compensation. We also cover the complex drone regulations contractors face and invite you to learn more about the Buy American Act and how it affects your construction projects.

Wishing you a happy and healthy New Year!

Ashling
Co-Editor-in-Chief

Jennifer
Co-Editor-in-Chief

Allie
Associate Editor

By Kerstin Isaacs

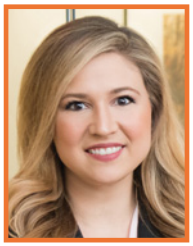
New Faces

Please join us in welcoming four new attorneys.

Christopher M. Galusha has joined the Firm as a Partner in the Labor & Employment Group in the Newark, New Jersey office. He is an experienced litigator with a diverse practice, including employment law, commercial litigation, insurance matters, shareholder disputes, municipal law, and sports law. Chris represents companies of various sizes across many industries such as financial services, insurance, healthcare, and construction. Chris litigates matters at the administrative, federal, and state court levels and handles matters before arbitral forums across the country. In his employment practice, he handles wrongful discharge, discrimination, sexual harassment, and hostile work environment claims. Chris also drafts employment policies and procedures, negotiates and drafts employment contracts, and conducts internal investigations involving employee misconduct.

Casey J. McKinnon has joined the Federal Contracting Group in Washington, DC as an Associate. He supports the Firm's clients in all aspects of government contracts and litigation including solicitation review, proposal preparation, and bid protests. Casey also assists with contracting issues such as drafting, reviewing, and negotiating contracts. Casey received his J.D. from The George Washington University Law School.

Christopher C. Reese has joined as an Associate in the Firm's Construction Group in Philadelphia. He focuses his practice on construction litigation, representing contractors, subcontractors, design professionals, owners, and other parties related to private and public construction projects. Prior to joining Cohen Seglias, Chris was a Summer Associate with the Firm. He received his J.D. from Villanova University School of Law.



Alissandra D. Young joined the Firm as an Associate in the Federal Contracting Group in Washington, DC and focuses her practice on government contracts and litigation. She assists the Firm's clients in matters involving federal contracts, bid protests, and all stages of litigation in the federal courts. Alissandra graduated with honors from The George Washington University Law School, where she received the Patricia A. Tobin Government Procurement Law Award for being at the top of her class in government contracts courses.

2018 Five Star Wealth Manager

Wayne Buckwalter, Chair of the Firm's Wealth Preservation Group, has been named a 2018 Five Star Financial Services Professional. Each year, Five Star Professional partners with Philadelphia Magazine to recognize a select group of Philadelphia-area wealth managers that are outstanding in their field. The evaluation included a multifaceted research methodology, which incorporates input from peers and firm leaders along with client retention rates, industry experience, and client service.

Special Events

The Philadelphia office participated in the American Heart Association's Heart Walk at Citizens Bank Park on November 4.

Cohen Seglias co-hosted the 2017 Construction Executive Boot Camp on October 26 with Madison Risk Group, McCarthy & Company, and The Shepherd Agency. Attendees enjoyed a presentation by *New York Times* best-selling author Steve McClatchy.

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Next, consider the domestic requirement for construction materials. The BAA requires that every public contract include a provision requiring contractors, subcontractors and suppliers to use only:

- unmanufactured materials that have been mined or produced in the United States; and
- manufactured materials that have been manufactured in the United States "substantially" from materials mined, produced or manufactured in the United States.

While unmanufactured materials will be considered domestic if they are mined or produced in the United States, manufactured materials will only be considered domestic if (1) they are manufactured in the United States and (2) the cost of the components produced or manufactured in the United States exceeds 50% of the cost of all its components.

A component is any article, material, or supply incorporated directly into a construction material. The method for calculating the cost of components depends on whether the component is purchased or manufactured by the contractor. If the contractor is purchasing the component, the acquisition cost will include transportation costs and any applicable tax. If the contractor is manufacturing the component, the manufacturing costs will include transportation and overhead. Bottom line: in order for a manufactured construction material to be considered domestic, the cost of the components produced in the United States has to be more than half of all of the component's total cost. This is in addition to the requirement that the construction material be manufactured in the United States, a requirement that contractors often overlook.

Construction materials may also be considered domestic if the material is a "commercially available off-the-shelf" (COTS) item. To qualify as COTS, an item must be customarily used by the general public for non-governmental purposes and must be sold in substantial quantities in the commercial marketplace.

If the construction material does not meet one of these requirements, it may not be incorporated into the project unless an exception to the BAA applies.

3. What Are the BAA's Exceptions and How Do You Apply For Them?

There are a number of exceptions to the BAA that may allow a contractor to acquire foreign construction materials. In order for an exception to apply, the contracting agency must determine that:

- application of the BAA would be impracticable or inconsistent with public interest. Often times, this occurs when the contracting agency has an agreement with a foreign government that the BAA will not apply;
- a particular construction material is not sufficiently available in commercial quantities or not of sufficient quality; or
- the cost of domestic construction material is unreasonable, i.e., the cost exceeds the cost of foreign construction material by more than 6%.

In addition, the passage of the Trade Agreement Act authorized the government to waive the BAA for eligible foreign products acquired through various trade agreements, such as certain free trade agreements and for World Trade Organization countries.

The onus is on the contractor to request the exception, but when does it need to do so? According to the Court of Appeals for the Federal Circuit Court, a contractor should make the request "in the first instance before contract award and surely before the contract has been performed." Prior to submitting a price, contractors should determine whether the project will require the use of any foreign construction materials and include the BAA exception request with their offer. To avoid rejection of an offer that includes such a request, it is a best practice to submit an alternate offer based on the use of domestic construction material. Once an agency makes a determination that an exception applies, the foreign materials that have been accepted will be listed in the contract.

Exceptions can be granted after a contract is awarded, but this is a dangerous and risky road to go down, particularly if the foreign construction materials are already incorporated into the project. If requesting an exception post-award, a contractor should be prepared to explain why the request was not made pre-award or why it was otherwise not reasonably foreseeable. In the event the exception is granted post-award, adequate consideration must be negotiated and the contract

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must be modified to allow the use of the foreign construction material. If the request is denied post-installation, the cost of removing and replacing the foreign construction material falls on the contractor's shoulders. Keep in mind that in addition to the removal and replacement costs, there may be delay and schedule impact costs assessed to the contractor.

4. What About Your Subcontractors and Suppliers?

The BAA applies to all construction materials used on public projects, including those provided by subcontractors and suppliers. In fact, contractors can be held liable for noncompliant construction materials incorporated into projects by their subcontractors or suppliers. It is, therefore, extremely important for contractors to be mindful of the BAA when entering into subcontracts and purchasing construction materials from suppliers. It is critical that a contractor confirm with its sub-contractors and/or suppliers that all construction materials comply with the BAA. In addition to the required contract provision relating to manufactured and unmanufactured materials previously discussed, it is highly recommended that contractors include a flowdown provision in their subcontract that requires subcontractors to comply with the BAA.

5. What Happens If You Fail to Comply?

If the contracting agency determines that a contractor or subcontractor has used foreign construction materials without authorization, the agency can require that the materials be removed and replaced. If removal and replacement would be impracticable or cause undue delay to the project, the agency can decide to leave the unauthorized foreign construction material in place. However, the contractor is not out of the woods. If the agency finds the BAA violation to be "sufficiently serious," the government can terminate the contract for default or suspend or debar the contractor, subcontractor or supplier. If the noncompliance with the BAA appears to be fraudulent, the agency can refer the matter for criminal investigation.

If the contracting agency determines that a contractor or subcontractor has used foreign construction materials without authorization, the agency can require that the materials be removed and replaced.

In addition, if an agency finds that a contractor has failed to comply with the BAA, those findings become a public record. Most importantly, the contractor, and any subcontractor or supplier associated or affiliated with the contractor, cannot be awarded another public contract for 3 years. Because all parties to a contract can be implicated in a single violation, it is in each party's best interest to ensure that all construction materials incorporated into a project are BAA compliant or that an appropriate waiver has been timely requested and granted.

6. Isn't All of This Going to Change?

On April 18, 2017, President Trump signed an Executive Order — Buy American and Hire American. The Order confirms the executive branch's policy of maximizing the use of domestic goods and materials. Consistent with this policy, the Order directs agencies to "scrupulously" enforce the BAA and to minimize the use of waivers granted under the BAA.

While the Order itself does not substantively change the application of the BAA, it signals that significant changes to government contracting may be on the horizon. Now is the time to gain a better understanding of the BAA and its requirements. This article only scratches the surface of the BAA — a more in-depth analysis is necessary to ensure full compliance and prevent an unwary contractor from inadvertently jeopardizing its ability to perform on future federal construction projects.

[1] *This article focuses on the BAA's application to construction materials. The BAA also contains provisions that apply to supplies and products purchased by the government or contractors that are incorporated into public projects. These provisions present an additional set of complicated questions that require a separate in-depth analysis as to their applicability.*

This article was published in the July/August 2017 edition of the Master Builders' Association of Western Pennsylvania publication, *Breaking Ground*.

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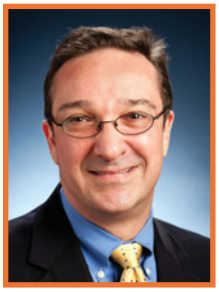
NJ Supreme Court Redefines When Construction Defect Claims Accrue

By Jonathan A. Cass and Joseph L. Sine



In light of a recent decision by the New Jersey Supreme Court, individuals and entities owning recently constructed or renovated properties should take extra caution to ensure that they pursue any construction defect claims within the six-year statute of limitations. Otherwise, they may be left without any recourse.

On September 14, 2017, in *The Palisades at Fort Lee Condominium Association, Inc. v. 100 Old Palisade, LLC*, the New Jersey Supreme Court held that the statute of limitations for a construction defect begins to run when any person or entity "in the chain of ownership" first knows or should know about the defect.

Before *Palisades*, a plaintiff could rely on the "discovery rule" to avoid a statute of limitations defense. Under the discovery rule, a cause of action does not accrue until the plaintiff discovers, or by an exercise of reasonable diligence, should have discovered that he may have a basis for an actionable claim. Thus, in construction defect cases, the focus was on when the plaintiff (or current owner) knew or should have known that he had a claim. However, in *Palisades*, the Court reined in the scope of the discovery rule by placing the focus on when any owner of the property knew or should have known about the potential claim.

By way of brief background, in *Palisades*, the plaintiff, a Condominium Association, sued a general contractor and three subcontractors for construction defects at a building complex. At the time construction was substantially completed in May 2002, the building was owned by a different entity, Palisades A/V Acquisitions Co., LLC. Two years later, the building was sold to 100 Old Palisade, LLC, which converted the building into condominium units pursuant to the NJ Condominium Act. In July 2006, 100 Old Palisade, LLC turned control of the building over to the Condominium Association. In June 2007, an engineering and architectural firm hired by the Condominium Association to inspect the building issued a report, identifying several construction defects. Thereafter, the Condominium Association commenced actions against the contractors. The contractors moved for summary judgment on the grounds that the actions were barred by the six-year statute of limitations applicable to construction defect claims.

The trial court initially granted summary judgment for the contractors on the grounds that plaintiff's claim accrued on the date the building complex was substantially complete. The Appellate Division reversed and, relying on the discovery rule, held that the claim did not accrue until the Condominium Association discovered the defects when its expert issued the report. The Supreme Court rejected both approaches, and remanded the case to the trial court for a "Lopez hearing" to determine whether either of the previous owners knew or should have known about the construction defects.

A *Lopez* hearing (named after the Supreme Court's seminal decision, *Lopez v. Swyer*, is a pre-trial preliminary hearing held before the judge and outside of the presence of the jury to determine when the cause of action accrued. At a *Lopez* hearing, the trial court hears testimony, reviews deposition transcripts, and receives evidence before determining when the plaintiff (or, in light of *Palisades*, a prior property owner) knew or should have known about the construction defect.

Construction litigators should be prepared to adjust their strategy in cases involving statute of limitations defenses as a result of the *Palisades* decision. Because the owner bears the burden of proving that the claim was not and could not be known of until after substantial completion, contractors can assert statute of limitations defenses and require owners to prove that neither they nor the prior owners had any reason to discover the defect.

Attorneys for contractors should also pursue extensive discovery in advance of the *Lopez* hearing, including obtaining depositions and documents from prior owners relating to any inspection reports, pre-sale disclosures, and post-construction repairs. While the burden of proof is on the plaintiff, this discovery will be critical for the contractors because, with the right testimony or evidence, a contractor can more expeditiously prevail if one person in the "chain of ownership" knew or should have known of the construction defect.

The Supreme Court's decision may also have a serious impact on the real estate industry. This Court's holding emphasizes the importance of a buyer's vigorous due diligence when purchasing a property. Buyers should investigate any construction work performed on a property they intend to purchase to determine whether there is a construction defect. Further, if the buyer decides to proceed with the transaction after its due diligence, it should bring any defect claims within six years from substantial completion to avoid a potential statute of limitations defense. Additionally, the scrutiny into what the seller knew or should have known about construction-related problems involving the property, and the possibility that claims against the general contractor may be barred by the statute of limitations, may result in additional fraudulent concealment claims against sellers.

Only time will tell the full impact of this decision on buyers and sellers in a real estate transaction; however, should a statute of limitations issue arise, contractors and owners must be prepared to address whether anyone in the chain of ownership knew or should have known of the construction defect.

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Still "Up in the Air": More Drones and More Regulations

By Edward Seglias, Robert John O'Brien, and Matthew R. Skaroff

Drone use — as predicted — has grown more prevalent throughout the U.S. commercial marketplace and especially the construction industry. Last year, an estimated 2.5 million drones were sold in the United States, and approximately 670,000 drones were registered with the Federal Aviation Administration ("FAA") during the same time period.

Because drones are considered aircraft under federal law, they are subject to FAA regulations. Most recently in 2016, the FAA promulgated expansive new regs that impose a number of restrictions on the operation and use of commercial drones, including, but not limited to, the following:

- Prohibiting nighttime flying
- Prohibiting flights faster than one hundred (100) miles per hour
- Requiring drone operators to pass an aeronautical knowledge test (which involves proper drone operation and emergency procedures)
- Requiring drone operators to obtain a remote pilot certification
- Requiring all commercial drones to be registered with the FAA, and to pay a nominal fee
- Restricting airspace around certain areas

Contractors are using drones and drone technology with increasing regularity to deploy materials and collect data inexpensively, efficiently and safely.

Regarding airspace restrictions, drone pilots must be careful to avoid flying in certain protected zones, such as the five mile radius surrounding most airports or within three miles of spectator sporting events and major entertainment venues. The FAA has actually created an app that can be downloaded on a smartphone and is called "B4UFly." This app helps pilots determine where they are allowed to fly their drones.

The FAA regulations address commercial usage and safety considerations, whereas state laws tend to focus on the personal privacy interests of citizens and residents. For instance, several states have criminalized the use of drones and drone technology for "voyeuristic" purposes. In Virginia, it is a criminal misdemeanor for an individual to use a drone to enter another person's property or space and spy on that person. In the rural state of Utah, it is a misdemeanor for someone to use a drone to harass or actively disturb another person's livestock.

As the legal framework becomes more complex, drone technology is continuing to advance. For several years now, we have heard about companies like Amazon utilizing drones for delivery of packages to consumers. Last year, "Project Wing," the Google X lab drone project, test delivered Chipotle burritos via drones to students at Virginia Tech. Drones carried burritos from a taco truck, through the air, and to the hungry underclassmen waiting at a delivery kiosk hundreds of yards away.

In the commercial construction industry, management is well aware that drones are less expensive than manned aircraft and faster than human inspectors and surveyors. Contractors are using drones and drone technology with increasing regularity to deploy materials and collect data inexpensively, efficiently and safely.

Over the coming months, we will continue to track the laws and regulations affecting drone operators and users, as well as the drone industry's technological advancements. Readers interested in using drones safely and effectively as part of their business should stay tuned, and, as always, feel free to contact us with questions or issues.

Ed is the Vice President of the Firm and a Partner in the Construction Group, Robert and Matthew are Associates in the Construction Group. They can be reached at eseglias@cohenseglias.com, robrien@cohenseglias.com and mskaroff@cohenseglias.com or 215.564.1700.

Third Circuit Determines That Employers Must Compensate Employees For Rest Breaks of 20 Minutes Or Less

By Christopher M. Galusha

In a recent decision, the Third Circuit concluded that the Fair Labor Standards Act ("FLSA") requires employers to compensate employees for all rest breaks of twenty minutes or less. By way of background, employer American Future Systems, d/b/a Progressive Business Publications, utilized a policy that allowed its employees to log off their computers at any time assuming they were logged off of their computers for less than 90 seconds. However, employees were only paid for time they were logged on. Accordingly, Progressive employees could take as many breaks as they wanted (i.e., coffee and bathroom) during the course of a working day and be paid so long as the break was for less than 90 seconds. If the break was longer, they did not receive compensable time. In other words, Progressive stopped paying employees after they were logged off for more than 90 seconds.

After suit was filed against Progressive by the United States Department of Labor alleging violations of the FLSA, the lower court determined that rest periods of short duration (up to 20 minutes) were compensable time under the FLSA and should be counted as hours worked. On appeal, the employer argued that the time spent logged off does not constitute "work" under the FLSA. The Third Circuit, however, held that Progressive's policy "forced employees to choose between such basic necessities as going to the bathroom or getting paid unless the employee could sprint from computer to bathroom, relieve him or herself while there, and then sprint back to his or her computer in less than 90 seconds." The Court continued, "If the employee can somehow manage to do that, he or she will be paid for the intervening period. If the employee requires more than 90 seconds to get to the bathroom and back, the employee will not be paid." That result, the Third Circuit held, is contrary to the FLSA. Accordingly, the Court ruled that an employer is obligated to pay its employees for breaks of 20 minutes or less under the FLSA.

Christopher is a Partner in the Labor & Employment Group. He can be reached at 973.474.5003 or cgalusha@cohenseglias.com.

Q&A with Christopher M. Galusha

The Marketing Department recently sat down with the new partner in our Newark office.

Q: Tell us a little about your practice.

A: I am a Partner in the Labor & Employment group at Cohen Seglias and focus on employment law, corporate and commercial litigation, municipal law, and sports law. I have experience in employment-related disputes at the administrative, federal, and state court levels. With my background in business, I assist companies of various sizes, and from many industries, in employment matters including discrimination, sexual harassment, hostile work environment and restrictive covenant matters. I also have experience drafting employment policies and procedures, negotiating and drafting employment contracts, and conducting internal investigations involving employee misconduct as well as litigating shareholder disputes and general and corporate matters. In addition, I have lectured on various topics including employment law, alternative dispute resolution procedures and trial advocacy to numerous groups.

Q: What type of clients do you represent? How does that tie into the Firm's current client base?

A: My practice has focused, primarily, in the financial services and municipal sectors. As to financial services, I represent and defend financial institutions against claims asserted by current or former employees pertaining to harassment or discrimination under state and federal statutory frameworks. Most of that work is in the federal or arbitral forums. As for municipalities, I often represent municipal officials in defense of failure to hire, failure to promote, harassment, discrimination or State/Federal Civil Rights claims. My practice adds another layer to the expanding Labor and Employment practice group at Cohen Seglias as it focuses on sectors where we did not already have a significant presence. I am hopeful that my expertise, coupled with the existing expertise of the firm and its many great lawyers, can bring further growth in these sectors.

Q: What made you and Cohen Seglias a good match?

A: Really, it was the people. I think we often speak in terms of platforms, business structure and development when we consider a move from one firm to another. While those areas were relevant and integral to my decision-making process, it was truly the people that led me to Cohen Seglias. From the first conversation right up until today, the people at Cohen Seglias were the primary reason I joined the Firm and why I want to be a part of its continued growth.

Q: How did you get started in your career?

A: After I received my MBA, I decided to work for a year in the financial services industry before starting law school. Taking a year off was a great decision as it gave me the opportunity to work, save money and appreciate the importance of education. After law school, I clerked for 2 years with the Delaware Court of Chancery. I had an amazing clerkship experience surrounded by great jurists, lawyers and clerks. From there, I started off practicing in securities litigation/regulatory work. Thereafter, my practice slowly evolved into labor and employment in the financial services sector of the market.

Q: What do you enjoy most about your practice?

A: Helping people and surrounding myself with great people all the while ensuring that I provide the best product in the most efficient manner possible.

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