



SIBONEY CONTRACTING CO. v. BERKLEY INSURANCE CO.

Civil Action No. 17-9681.

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SIBONEY CONTRACTING CO., v. BERKLEY INSURANCE CO., ET. AL., SECTION "B" (4).

United States District Court, E.D. Louisiana.

February 28, 2018.

Editors Note

Applicable Law: 40 U.S.C. § 3131

Cause: 40 U.S.C. § 3131 Miller Act

Nature of Suit: 130 Miller Act

Source: PACER

Attorney(s) appearing for the Case

United States of America, for the use and benefit of Siboney Contracting Co., Plaintiff, represented by [Stephen O. Scandurro](#), Scandurro & Layriss, L.L.C., [Jean-Paul Layriss](#), Scandurro & Layriss, L.L.C. & [Timothy D. Scandurro](#), Scandurro & Layriss, L.L.C.

Berkley Insurance Company & Tikiqag Construction, LLC, Defendants, represented by [Lloyd Noble Shields](#), Shields Mott LLP, [Adrian A. D'Arcy](#), Shields Mott LLP & [Ashley Brooke Robinson](#), Shields Mott LLP.

Tikiqag Construction, LLC & Berkley Insurance Company, Counter Claimants, represented by [Lloyd Noble Shields](#), Shields Mott LLP, [Adrian A. D'Arcy](#), Shields Mott LLP & [Ashley Brooke Robinson](#), Shields Mott LLP.

United States of America, for the use and benefit of Siboney Contracting Co., Counter Defendant, represented by [Stephen O. Scandurro](#), Scandurro & Layriss, L.L.C., [Jean-Paul Layriss](#), Scandurro & Layriss, L.L.C. & [Timothy D. Scandurro](#), Scandurro & Layriss, L.L.C.

ORDER AND REASONS

IVAN L.R. LEMELLE, District Judge.

Before the Court is Defendant Berkley Insurance Company's ("Berkley") Motion to Dismiss Plaintiff Siboney Contracting Company's ("Plaintiff") Miller Act, Federal Prompt Payment Act, and declaratory judgment claims pursuant to F.R.C.P. 12(b)(6) (Rec. Doc. 7), Plaintiff's Response in Opposition (Rec. Doc. 13), and Berkley's Motion for Leave to File Reply (Rec. Doc. 14). For the reasons discussed below,

IT IS ORDERED that the Motion to Dismiss (Rec. Doc. 7) is GRANTED in Part and DISMISSED in Part;

IT IS FURTHER ORDERED that Berkley's Motion for Leave to File Reply (Rec. Doc. 14) is hereby GRANTED and all proposed pleadings are hereby filed into the record.

On September 23, 2016, Plaintiff (as subcontractor) entered into a contract with Defendant Tikiqag Construction, L.L.C. (as contractor), in which Plaintiff agreed to haul sand to the United States Army Corps of Engineers project referred to as the WBV-EVM-78. Rec. Doc. 1 at 3. Pursuant to the requirements of 40 U.S.C. § 3131(b)(2), Tikiqag received a payment bond issued by Berkeley to secure Tikiqag's payment of its obligations to its subcontractors.

Plaintiff alleges that after months of performing in accordance with this arrangement Tikiqag attempted to negotiate a lower rate for the past rendered performance. Rec. Doc. 1 at 4. While Plaintiff responded that it would not negotiate the price of the sand it had already hauled, it would apply a discounted rate to work performed in the future. Rec. Doc. 1 at 4. Plaintiff alleges that Tikiqag stopped its payments to Plaintiff immediately following this discussion, resulting in two unpaid invoices—one for \$29,356.90 billed by the ton and another for \$2,287.50 billed at a rate of \$75.00 per hour—totaling \$31,644.40. Rec. Doc. 1 at 4.

On May 15, 2017, Plaintiff demanded payment of the outstanding debt to the U.S. Army Corps of Engineers, Tikiqag, and Berkeley through a Miller Act Notice. Plaintiff states that it received no response to this notice. Rec. Doc. 1 at 5. Plaintiff then sent a demand letter to Berkeley on the payment bond on June 23, 2017, which Berkeley acknowledged on June 26, 2017, stating that it would investigate the claim. Rec. Doc. 1 at 5. On July 17, 2017, Tikiqag sent a letter alleging that Plaintiff owed it \$131,883.60 as a result of overbilling and that it would retain the disputed \$31,644.41 allegedly owed to Plaintiff as an offset. Rec. Doc. 1 at 5. Berkeley adopted Tikiqag's position on the matter in August 2017.

On September 27, 2017, Plaintiff filed suit against Berkeley and Tikiqag, seeking recovery of the \$31,644.41 as well as attorney's fees under the Miller Act, the federal Prompt Payment Act, La. R.S. § 9:2781 (Louisiana's Open Account Statute), La. R.S. § 9:2784 (Louisiana's Late Payment by Contractor Law), breach of contract, and quasi-contract claims. Rec. Doc. 1 at 6–9. Plaintiff also seeks a declaratory judgment that Tikiqag was not overbilled by Plaintiff, and that Plaintiff owes Tikiqag no obligations, including reimbursement of money already paid. Rec. Doc. 1 at 10. Berkeley filed an answer to this complaint on December 20, 2017; Tikiqag has yet to respond.

In conjunction with its answer, Berkeley filed the instant motion to dismiss Plaintiff's Miller Act, federal Prompt Payment Act, and declaratory judgment claims pursuant to R.C.P. 12(b)(6) on the grounds that Plaintiff has stated no cause of action for which relief can be granted. Rec. Doc. 7–1.

LAW AND ANALYSIS

A. Standard for 12(b)(6) Motion

A defendant may move to dismiss a complaint for failure to state a claim upon which relief can be granted pursuant to rule 12(b)(6) of the Federal Rules of Civil Procedure. "The court will grant a 12(b)(6) motion if the plaintiff 'has not set forth a factual allegation in support of his claim that would entitle him to relief.'" *Masonry Sols. Int'l, Inc. v. DWG & Assocs, Inc.*, 2016 WL 1170149, at *2 (E.D. La. Mar. 25, 2016) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). In order to survive a 12(b)(6) motion, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570).

B. Failure to Bring Miller Act Claim in the Name of the United States

In its Motion to Dismiss, Berkeley alleged that Plaintiff's failure to bring its Miller Act claim in the name of the United States warranted dismissal. Rec. Doc. 7–1 at 3–4. However, as Berkeley recognized in its Reply Memorandum in Support of its Motion to Dismiss, Plaintiff remedied this issue in its First Amended Complaint, rendering this issue MOOT. Rec. Doc. 14–2 at 2.

C. Federal Prompt Payment Act Claim

Paragraph 24 of Plaintiff's Original Complaint alleges that Plaintiff is entitled to further recovery from Berkeley due to Tikiqag's failure to make timely payments under the federal Prompt Payment Act, 31 U.S.C. § 3901, *et seq.* Rec. Doc. 1 at 6. Berkeley contends that the federal Prompt Payment Act does not create a private right of action and therefore the claims contained in paragraph 24 should be dismissed for failure to state a claim. Rec. Doc. 7–1 at 4.

Working in conjunction with the Miller Act, 40 U.S.C. § 3131 *et seq.*, the federal Prompt Payment Act "confers additional rights and duties on federal contractors and subcontractors." *U.S. ex rel. Cal's A/C & Elec. v. Famous Const. Corp.*, 220 F.3d 326, 328 (5th Cir. 2000). However, courts have consistently held that the Act does not create a private right of action in addition to Miller Act or breach of contract claims. *See Masonry Sols. Int'l, Inc. v. DWG & Assocs, Inc.*, 2016 WL 1170149, at *4 (E.D. La. Mar. 25, 2016) ("DVA cites several cases expressly holding that [the Federal Prompt Payment Act] does not create an independent cause of action . . . The Court's own research buttresses that legal conclusion."). *See also C&H Contracting of MS, LLC v. Lakeshore Eng'g Servs., Inc.*, 2007 WL 2461017, at *1 (S.D. Miss. Aug. 24, 2007) ("The few courts addressing the matter have found that there is no private right of action between contractors under the Prompt Payment Act.").

In its Opposition to Berkeley's Motion to Dismiss, Plaintiff cites the district court ruling in *U.S. ex rel. Cal's A/C & Elec. v. Famous Const. Corp.* in support of the proposition that the federal Prompt Payment Act provides subcontractors a private right of action. Rec. Doc. 13 at 3 (citing *34 F.Supp.2d 1042*, 1044 (W.D. La. 1999)). The district court found that the Act "expressly allows for subcontractors on federal projects to sue for the awarding of attorney's fees and penalties for late payment or nonpayment on the payment bond held by the surety" so long as state law allows such actions. *Cal's A/C & Elec.*, 34 F. Supp. 2d at 1044. The court ruled that La. R.S. 9:2784, Louisiana's Late Payment by Contractor Law, expressly provides for those actions. *Id.*

plaintiff's reliance on this decision is misplaced. The district court's reasoning that the 1988 amendments to the Federal Prompt Payment Act as an addendum to the Miller Act—providing a separate avenue for recovery by subcontractors—was rejected by the Fifth Circuit in its review of the district court's decision. *Cal's A/C & Elec.*, 220 F.3d at 328. The Fifth Circuit found that, while the Miller Act does not expressly incorporate state law remedies such as attorney's fees, it did not, as the district court reasoned, preclude the pursuit of such state law remedies in addition to Miller Act claims. *Id.* at 327. The Court therefore vacated the district court's decision and allowed the plaintiff to pursue attorney's fees under Louisiana law. *Id.* at 328.

Because it is well established that the federal Prompt Payment Act does not confer an independent cause of action to subcontractors, Tikiqag's motion to dismiss this claim is GRANTED.

D. Declaratory Judgment

Berkley additionally seeks to dismiss Plaintiff's claims for declaratory judgments as redundant because they are duplicative of the Miller Act and breach of contract claims. Rec. Doc. 7-1 at 5. In response, Plaintiff contends that, assuming the resolution of its Miller Act claim will require resolution of the accusations of overcharging Tikiqag, the declaratory judgment will determine whether it owes any other obligations that may fall outside the scope of the Miller Act claim. Rec. Doc. 13 at 6.

The Declaratory judgment Act, 28 U.S.C. § 2201, "[confers] on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants." *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286 (1995). A declaratory judgment is not a substantive cause of action, but rather "a remedy available to a litigant who can point to an existing right that the Court has jurisdiction to enforce." *Fisher v. Beers*, 2014 WL 3497572, at *4 (E.D. La. July 14, 2014). In *Landscape Design & Const., Inc. v. Transp. Leasing/Contract*, the court held that, because the parties asserted substantive claims that placed at issue the same determinations for which they sought declaratory judgments, separate declaratory judgments were not necessary and therefore dismissed them. 2002 WL 257573, at *10 (N.D. Tex. Feb. 19, 2002).

Adjudication of Plaintiff's Miller Act claim will resolve the issue of the amount owed pursuant to the sand-hauling contract. In order to determine whether Plaintiff is entitled to payment under the contract, the Court will necessarily have to determine whether Plaintiff owes Tikiqag for the amount it alleges Plaintiff overcharged in its execution of the contract. Therefore, Plaintiff's request for a declaration that it does not owe any obligation to Tikiqag is duplicative of the determinations to be made in resolving the Miller Act claim. Because the substantive claims at issue require resolution of the same issues that Plaintiff seeks to establish through a declaratory judgment, a separate declaration is not necessary. Therefore, Defendant's motion to dismiss this claim is GRANTED. For the foregoing reasons,

IT IS ORDERED that the Motion to Dismiss is GRANTED in Part, and DENIED as Moot relative to Miller Act claims.

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U.S. Court of Claims Denies Contractor's "Superior Knowledge" Claim Against Owner Despite Owner's Withholding of Reports That Would Have Revealed Deterioration of the Wharf to be Reconstructed

RDA Constr. Corp. v. United States, No. 11-555 C, 2017 U.S. Claims LEXIS 875 (Fed. Cl. July 27, 2017)

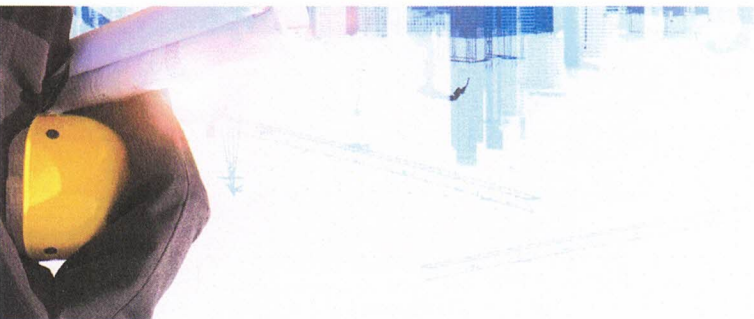
This case arises out of a public construction project at the Newport Naval Station. The Naval Facilities Engineering Command ("NAVFAC") contracted with RDA Construction ("RDA") for the demolition, removal and reconstruction of a fifty-year-old deteriorating wharf and bulkhead. The wharf was supported by 248 steel H-pile beams, encased in concrete and driven into the sea floor. In 2005, NAVFAC commissioned the Appledore Report which found that these structures exhibited advanced deterioration, much of which could only be observed during underwater inspection and could not support any vehicular loads. A second report, commissioned in 2008, recommended that the structure not be used during its reconstruction.

In May 2009, NAVFAC issued its project solicitation but did not disclose these reports or their findings. Instead, NAVFAC invited bidders to the site and encouraged them to investigate it carefully. Hazardous site conditions were

SUPERIOR KNOWLEDGE

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ked with sawhorses, barriers and fencing. After visiting the site, RDA submitted its bid and was identified as the apparent low bidder. Two days later, NAVFAC notified RDA that its bid was "substantially lower" than NAVFAC's estimate and requested that it review and confirm its bid and the scope of work. RDA assured NAVFAC that it had made no mistakes and would honor its bid. RDA then provided its technical and management plans to NAVFAC, noting that it planned to perform demolition work from the wharf using land-based equipment. After receipt of these plans, NAVFAC awarded the contract to RDA; RDA signed the contract on October 13, 2009 and received its Notice to Proceed two days later. In November, at a pre-construction meeting, RDA again explained its plan to use the wharf during construction as a staging area for its excavators and demolition equipment. NAVFAC personnel were "shocked" by this plan because the wharf was "condemned" and subsequently provided RDA with the Appledore report.

In light of the report, RDA concluded that its work would have to be performed from the water on barge-mounted equipment, rather than on the wharf and filed a claim requesting that NAVFAC adjust the contract price to reflect this more costly method. NAVFAC denied the claim and RDA filed a complaint in the U.S. Court of Claims, claiming, *inter alia*, that NAVFAC violated its duty to disclose "superior knowledge" regarding the wharf's deterioration. The court ultimately rejected this and RDA's other claims for differing site conditions and misrepresentation.

The court first held that RDA's "superior knowledge" claim failed. While RDA may have undertaken to perform the contract unaware of the wharf's load restrictions, and NAVFAC failed to provide such information, RDA was on notice indicating that vehicles could not drive on the wharf, along with sinkholes running along the edge of the wharf, suggested that the structure and its surrounding area were unstable. The court concluded that from these facts, a reasonable contractor would have reason to obtain additional knowledge about the project's conditions.

The court also used this same evidence to reject RDA's differing site conditions and misrepresentation claims. RDA had argued that the structure's deterioration constituted a latent condition which differed materially from that indicated in the contract. But the court found that the contract made RDA responsible for determining what type of equipment the wharf could withstand and here, a reasonable contractor could see that the wharf could not support vehicular traffic, much less heavy equipment. Also, the court held that a reasonable contractor would not have interpreted a solicitation to reconstruct a wharf to suggest that the same wharf could support demolition equipment. Thus, the court held, NAVFAC had made no misrepresentations.

As such, the court rejected RDA's claims and denied it any adjustment to the contract price.

To view the full text of the court's decision, courtesy of Lexis[®], [click here](#).

—John J. Gazzola

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**Bosco v. US Army Corps of
Engineers, 611 F. Supp. 449 (N.D.
Tex. 1985)**

US District Court for the Northern District of Texas - 611 F. Supp. 449
(N.D. Tex. 1985)
April 9, 1985

611 F. Supp. 449 (1985)

Paul A. BOSCO, Individually and Paul A. Bosco & Sons Contracting Corporation,
Plaintiffs,
v.
U.S. ARMY CORPS OF ENGINEERS, FORT WORTH DISTRICT, et al., Defendants.
Civ. A. No. 3-84-1459-H.

United States District Court, N.D. Texas, Dallas Division.

April 9, 1985.

*450 Lee C. Davis, Griffin Cochran & Marshall, Atlanta, Ga., Marc R. Stanley,
Strasburger & Price, Dallas, Tex., for plaintiffs.

Charles Ory, Asst. U.S. Atty., Dallas, Tex., Rupert M. Mitsch, Trial Atty., Torts
Branch, Civ. Div., U.S. Dept. of Justice, Washington, D.C., for defendants.

MEMORANDUM OPINION AND ORDER

SANDERS, District Judge.

Before the Court are the following pleadings:

Defendants' Motion to Dismiss and Memorandum in Support, filed December 11, 1984;

Plaintiffs' Memorandum in Opposition, filed January 22, 1985;

Defendants' Reply to Plaintiffs' Opposition, filed February 12, 1985;

Plaintiffs' Response to Defendants' Reply, filed March 4, 1985; *451
Defendants' Supplement to Motion to Dismiss, filed March 13, 1985;

Defendants' Motion to Dismiss, and Memorandum in Support
(Amended Complaint), filed February 12, 1985;

Plaintiffs' Memorandum in Opposition (Amended Complaint), filed March 4, 1985.

Factual Background

The current dispute between the parties has its roots in the solicitation and award of the Lakeview Lake Embankment Project in Mountain Creek, Texas.

When bids were opened by the United States Army Corps of Engineers ("Corps") on August 12, 1981, John Carlo, Inc. ("Carlo") was determined to be the low bidder. During the pre-award survey, the Corps discovered that Carlo anticipated using Paul A. Bosco & Sons Contracting Corporation as a subcontractor on the project. Based on information gathered in the survey, the contracting officer concluded that the subcontractor lacked a satisfactory record of integrity.^[1] The contracting officer considered Carlo's association with Bosco and Paul A. Bosco & Sons Contracting Corporation (hereinafter collectively referred to as "Bosco") and decided he could not make an affirmative determination of contractor responsibility, as required by law.^[2] As a result, the contract for the project was awarded to the second low bidder.

Bosco filed a Complaint against the Corps, claiming *de facto* debarment, tortious interference with business relations and violations of procedural due process. *Paul A. Bosco & Sons Contracting Corporation and Paul A. Bosco v. The United States Army Corps of Engineers, Fort Worth Division and the Secretary of the United States Army*, No. 3-82-0457-H (N.D. Tex. filed March 24, 1982) (hereinafter "Bosco I"). By Memorandum Opinion and Order, filed April 27, 1983, this Court dismissed, without prejudice, Bosco's contract and tort claims, leaving only the claims seeking declaratory and injunctive relief for the alleged due process violations.

Bosco pursued its tort claims by filing an administrative claim with the Corps on September 15, 1983. *See Amended Complaint*, Exhibit A. The claim was denied on February 29, 1984. On May 22, 1984, the parties settled Bosco I. The settlement agreement included assurances that Bosco would be permitted to bid on government construction projects. *See Defendants' Memorandum in Support*, Exhibit 3.

On August 29, 1984, Bosco filed this action based on its administrative claim. The Original Complaint alleged damages resulting from

(1) denial of due process under the Fifth Amendment of the United States Constitution (Counts I and II);

(2) *de facto* debarment (Count III);

(3) libel and slander (Count IV);

(4) tortious interference with business relations (Count V).

In response to Defendants' Motion to Dismiss, Plaintiffs amended their Complaint to add the tort of false light invasion of privacy (Count VI). Plaintiffs claim two million dollars of damages relating to the Carlo contract and an additional five million dollars relating to other government and private contracts lost "as a result of Defendants' determination that Bosco 'lacked integrity'". Amended Complaint, at 9, 10.

In their Motions to Dismiss, Defendants urge dismissal of Plaintiffs' Complaint pursuant *452 to Fed.R.Civ.P. 12(b) (1) and 12(b) (6). Defendants argue that the waiver of sovereign immunity in the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.* (hereinafter "FTCA"), is limited by the express provisions of the statute. Defendants maintain that Plaintiffs' Complaint must fail because it contains claims expressly excluded by the statute or which are not cognizable under the law of the state of Texas.

The Section 2680(h) Exceptions

The United States District Court is given jurisdiction of tort claims for money damages against the federal government in 28 U.S.C. § 1346(b), which provides:

... the district courts ... shall have exclusive jurisdiction of civil actions on claims against the United States for money damages ... for

The FTCA defines the tort liability of the United States as follows:

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

28 U.S.C. § 2674.

While this waiver of sovereign immunity is couched in broad terms, Congress explicitly preserved the immunity of the United States in several areas. Defendants focus on the exception appearing in 28 U.S.C. § 2680(h) which precludes recovery against the United States for various intentional torts, including "[a]ny claim arising out of ... libel, slander, ... or interference with contract rights." Defendants argue that Plaintiffs' claims for libel, slander, false light invasion of privacy and tortious interference with business relations are barred by section 2680(h).

Certainly Plaintiffs' libel and slander claims fall squarely within the exceptions in subsection (h) and must be dismissed.^[3] The question upon which the Court must focus is whether the language of 2680(h) encompasses the claims of false light invasion of privacy and tortious interference with business relations.

In construing the provisions of the FTCA, the Court is guided by the general principle that the United States may be liable for the torts of its employees only where there has been a "clear relinquishment of sovereign immunity". *Dalehite v. United States*, 346 U.S. 15, 73 S. Ct. 956, 97 L. Ed. 1427 (1953). As stated more

recently by the United States Supreme Court, "the proper objective of a court attempting to construe one of the subsections of 2680 is to identify those circumstances which are within the words and reason of the exception no less and no more". *Kosak v. United States*, 465 U.S. 848, 104 S. Ct. 1519, 1523 n. 9, 79 L. Ed. 2d 860 (1984) (*quoting Dalehite*, 346 U.S. at 31, 73 S.Ct. at 965). Clearly, the Court's inquiry must extend beyond a superficial review of the pleadings before the Court. *United States v. Neustadt*, 366 U.S. 696, 703, 81 S. Ct. 1294, 1298, 6 L. Ed. 2d 614 (1961).

In their Amended Complaint, Plaintiffs allege that they were determined by Defendants to lack integrity on the basis of a report that is "derogatory" because of its allegations which "tend to stigmatize both *453 Bosco and Bosco Corp." Amended Complaint, at 5. Plaintiffs assert that Defendants informed the news media of their determination, and that, as a result, Plaintiffs "have been saddled with the stigma of a contractor who 'lacks integrity' in the construction industry" *Id.* at 7, 8. The Administrative Claim filed by Bosco Corporation states that "[t]he Corps has thus used the report to besmirch Bosco's reputation" and concludes that "the Corps' actions have ruined Bosco's reputation" *Id.*, Exhibit A, at 3, 5. It is clear from such allegations that the gravamen of Plaintiffs' complaint is injury to reputation which is the interest protected by the law of defamation. *See* Restatement (Second) of Torts § 558 (1979).

While it is true that false light invasion of privacy is a distinct tort from libel or slander, the Court notes that Plaintiffs' Complaint was amended to add the theory only after Defendants' Motion to Dismiss the libel and slander claims.^[4] Indeed, Plaintiffs' Memorandum in Support of Motion for Leave to File Amended Complaint states that "plaintiffs believe that the amended complaint will more adequately respond to Defendants' Motion to Dismiss and will more accurately present to the Court the controversy between the parties." Memorandum, at 1. While Plaintiffs maintained that their "original complaint does not accurately reflect Plaintiffs' claims", the general allegations in Paragraphs 7 through 39, which provide the basis for the claims, are identical in both the Original and Amended Complaints.

The Court cannot permit the obvious attempt by Plaintiffs to circumvent the bar of 2680(h) by merely relabeling the theory upon which they seek recovery. *Hernandez v. United States*, 465 F. Supp. 1071 (D.C.Kan.1979). As stated by one court, "[i]n determining the applicability of the § 2680(h) exception a court must look not to the theory upon which the plaintiff elects to proceed, but rather to the substance of the claim which he asserts". *Lambertson v. United States*, 528 F.2d 441, 443 (2d Cir. 1976). See also *Johnson v. United States*, 547 F.2d 688, 691 (D.C.Cir. 1976); *Blitz v. Boog*, 328 F.2d 596, 598 (2d Cir.1964), cert. denied, 379 U.S. 855, 85 S. Ct. 106, 13 L. Ed. 2d 58 (1964). The substance of Plaintiffs' complaint here is defamation which is barred under the FTCA.^[5]

Defendants also argue that the claim of tortious interference with business relations is barred, since it arises from an alleged interference with contract rights. Plaintiffs respond that, under Texas law, they have alleged a tort distinct from that barred by the FTCA. It is true that Texas law recognizes a cause of action for tortious interference with business relations even in the absence of a contract. *Martin v. Phillips Petroleum Co.*, 455 S.W.2d 429, 435 (Tex.Civ.App.Houston [14th Dist.] 1970, no writ). The distinction is one "without a difference", however, for purposes of the FTCA exceptions.^[6]

Plaintiffs allege that Defendants have interfered with their business relations with third parties. Such an alleged breach of duty is the same as that resulting from an interference with contract rights. As described in the Restatement, "[t]here is a general duty not to interfere intentionally with another's reasonable business expectations of trade with third persons, whether *454 or not they are secured by contract, unless the interference is not improper under the circumstances". Restatement (Second) of Torts § 766 comment 6.

The construction proposed by Plaintiffs subjects the United States to liability for the speculative claim of interference with potential contracts while precluding recovery for the more tangible claim of interference with existing contracts. The Court declines to adopt such an illogical construction. See *Art-Metal U.S.A., Inc. v. United States of America*, 753 F.2d 1151, 1154, 1155 (D.C.Cir.1985) (courts have consistently held that claims for interference with prospective advantage barred as claims arising out of interference with contract rights) and cases cited

at n. 5 of the slip opinion. Count V of Plaintiffs' Complaint must therefore be dismissed.

De facto Debarment

Defendants argue that Plaintiffs' debarment claim must also be dismissed for failure to state a claim for relief. Fed.R.Civ.P. 12(b) (6). Defendants support their argument on the basis of the limitation in the FTCA that the liability of the United States exists only "in the same manner and to the same extent as a private individual under like circumstances". 28 U.S.C. § 2674. The "manner and extent" of liability is to be determined "in accordance with the law of the place where the act or omission occurred". 28 U.S.C. § 1346(b). It is undisputed that Texas law governs.

Plaintiffs propose that "[t]he fact that Texas courts have not ruled, in a published opinion, on debarment as a tort under state law is not fatal to plaintiffs' cause of action under the FTCA, based on the Corps' debarment of plaintiffs in violation of applicable regulations." Memorandum in Opposition, at 8. Plaintiffs argue that it is sufficient to identify an analogous form of liability which is recognized under state law. Since Texas law permits tort recovery under a negligence per se theory where a statutory or regulatory provision is violated, Plaintiffs reason that Defendants' failure to follow regulations constitute a cause of action under the FTCA.^[7]

The Court is not persuaded by Plaintiffs' reasoning. It is clear that the violation of a federal statute or regulation by a federal employee does not in and of itself create a cause of action under the FTCA. See *United States v. Smith*, 324 F.2d 622, 624, 625 (5th Cir.1963) (FTCA not applicable where claimed negligence arises out of failure of United States to carry out a statutory duty in the conduct of its own affairs, in view of section 1346(b) language). As explained by the *Smith* court, "[t]his is so because it is impossible to equate the relationship of the parties in such a situation to any state law relationship where the person sought to be bound is a 'private person' who would be liable to the claimant in accordance with the law of the state". *Id.* at 625. Since Plaintiffs have failed to

demonstrate that Texas law recognizes a tort action for *de facto* debarment, Plaintiffs' allegations fail to state a cause of action cognizable under the FTCA. *See Dugan v. United States*, No. 81-1635, slip op. (E.D. Pa. Nov. 19, 1982), *aff'd without opinion*, 722 F.2d 731 (3d Cir.1983) (where no cause of action recognized for debarment without opportunity to be heard under Pennsylvania law, United States immune under FTCA).^[8]

Plaintiffs assert that "[e]ven if the Government has not waived immunity for claims of libel, slander, and interference with contract, it is plain that the corps, by depriving plaintiffs of process, has injured a recognized liberty interest." Memorandum *455 in Opposition, at 11. Such an argument is of no avail, since constitutional torts are outside the purview of the FTCA. *Brown v. United States*, 653 F.2d 196, 201 (5th Cir.1981), *cert. denied*, 456 U.S. 925, 102 S. Ct. 1970, 72 L. Ed. 2d 440 (1982) citing *Birnbaum v. United States*, 588 F.2d 319, 327 (2d. Cir.1978) ("We do not believe that the Federal Tort Claims Act comprehends federal constitutional torts in its reference to the 'law of the place' under § 1346(b)."). Since the Fifth Amendment rights asserted by Plaintiffs are guaranteed under federal law, not local law, the violations alleged are not remedial under the FTCA. *See ArtMetal*, at 1160 ("FTCA's local law requirement may not be circumvented merely by casting alleged constitutional wrong as negligence".)

The Discretionary Function Exception

Finally the Court also finds merit in Defendants' argument that the actions of which Plaintiffs complain fall within the scope of the discretionary function exception. The exception appears in section 2680(a) and preserves the sovereign immunity of the federal government with respect to "any claim ... based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). The purpose of the exception is to shield essential governmental decisionmaking from disruptive and unreasonable challenges in the courts.

Dalehite v. United States, 346 U.S. 15, 73 S. Ct. 956, 97 L. Ed. 1427 (1953). As elaborated upon by the *Dalehite* court, the exception encompasses "more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications, or schedules of operations. Where there is room for policy judgment and decision there is discretion". *Id.* at 35, 36, 73 S. Ct. at 968.

The Supreme Court's most recent effort to delineate the reach of the

discretionary function exception focuses on the conduct being challenged. *United States v. S.A. Empresa de Viacao Aerea Rio Grandense ("VARIG")*, — U.S. —, 104 S. Ct. 2755, 81 L. Ed. 2d 660 (1984). In *VARIG*, the Court stated that "the basic inquiry ... is whether the challenged acts of a Government employee whatever his or her rank are of the nature and quality that Congress intended to shield from tort liability ... [to avoid] judicial 'second guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Id.* at 2675. This Court is persuaded that Plaintiffs' complaint regarding Defendants' contract

procurement process involves the type of activity shielded by section 2680(a). *See Scanwell Laboratories v. Thomas*, 521 F.2d 941, 948 (D.C.Cir. 1975) (discretionary function applies where contracting officer's obligation not purely ministerial, notwithstanding possible abuse of discretion in ignoring bidding regulations).

As stated earlier, the Corps was required to make a determination whether or not Carlo was a responsible contractor. *See* DAR 1-904.1.^[9] In making his determination * 456 of responsibility, the contracting officer must consider the records of any concerns who may influence the bidder's performance, including subcontractors. *See* DAR 1-906.^[10] Based on the information gathered in the pre-award survey, the contracting officer determined Bosco lacked a satisfactory record of integrity which was imputed to Carlo. *See* Memorandum Opinion and Order, filed April 27, 1983, in *Bosco I*.

Certainly the federal actions challenged by Plaintiffs required the exercise of judgment and discretion. *Lipka v. United States*, 249 F. Supp. 213, 216, 217 (N.D.N.Y. 1965), *aff'd on other grounds*, 396 F.2d 288 (2d Cir.1966), *cert.*

denied, 388 U.S. 925, 87 S. Ct. 2129, 18 L. Ed. 2d 1381 (1967) ("[T]he picking and choosing involved in the selection process is the very essence of a discretionary function"). The Court must conclude, then, that section 2680(a) bars the claims raised by Plaintiffs in this case.^[11] *See Dugan v. United States*, No. 81-1635, slip op. (E.D. Pa. Nov. 19, 1982), *aff'd without opinion*, 722 F.2d 731 (3d Cir.1983) (since agency responsible for choosing training programs based on standards requiring exercise of reasonable inquiry into various areas, award of outside contracts to provide training necessarily discretionary).

Conclusion

Based on the foregoing, the Court is of the opinion that Plaintiffs' Complaint should be, and it is hereby, DISMISSED.

SO ORDERED.

NOTES

[1] The determination by the Corps that Bosco lacked integrity was based primarily upon a report authored by the Nashville Division of the Corps. The report was a summary of an internal agency investigation and contained details of a criminal investigation against Bosco. The report also included an evaluation of Bosco's performance on the Tennessee-Tombigee Waterway project. Defendants' Memorandum in Support, at 3.

[2] The Defense Acquisition Regulations ("DAR") require that "[p]urchases shall be made from, and contracts shall be awarded to, responsible prospective contractors only.... The contracting officer shall make a determination of nonresponsibility if, after compliance with 1-905 and 1-906, the information thus obtained does not indicate clearly that the prospective contractor is responsible." DAR 1-902 (1976 ed.). For full text of DAR 1-902, *see infra* note 9.

[3] Even a cursory reading of the statute should have made it equally clear to the Plaintiffs that this Court is without jurisdiction to hear any claims against the United States arising from libel or slander. Indeed, in their Memorandum in

Opposition to Defendants' Motion to Dismiss, filed simultaneously with a Motion to Amend, Plaintiffs conclude that "aside from libel and slander, Plaintiffs' causes are not excepted by § 2680(h)." Memorandum, at 20. Having noted the exclusion, Plaintiffs persisted in maintaining libel and slander claims in their Amended Complaint. See Amended Complaint, Count IV.

[4] See, e.g., *Wood v. Hustler Magazine*, 736 F.2d 1084, 1087 (5th Cir.1984) (Texas law recognizes cause of action for invasion of privacy). The Wood court also noted, however, that the principal element of injury in a defamation action is damage to reputation while a privacy action is founded on mental anguish. *Id.* [5] The Court notes the holdings in other cases that 2680(h) does not preclude a cause of action against the United States for invasion of privacy. See *Birnbaum v. United States*, 588 F.2d 319, 328 (2d Cir.1978); *Black v. Sheraton Corp.*, 564 F.2d 531, 539-41 (D.C.Cir.1977). The Court does not take issue with those cases, but merely concludes that the specific allegations raised by Plaintiffs here arise from libel and slander rather than an invasion of privacy.

[6] See, e.g., *C.F. & I. Steel Corp. v. Peter Sublett and Co.*, 623 S.W.2d 709, 715 (Tex.Civ.App. Houston [1st Dist.] 1981, writ ref'd n.r.e.) (recognizing the similarities between interference with a business relationship and contract interference).

[7] The regulation allegedly breached by the Corps is DAR 1-605.3 which requires notice and an opportunity to be heard prior to debarment.

[8] *Myers & Myers, Inc. v. United States Postal Service*, 527 F.2d 1252 (2d Cir.1975) lacks the precedential value proposed by Plaintiffs. In remanding the case for further proceedings, the *Myers* court merely suggested that "[i]t is also possible that the failure of the Postal Service to comply with its own regulations, or with constitutional requirements, to provide a hearing before taking action constituting debarment may be treated under state law as negligence per se."

Id. at 1261.

[9] DAR 1-902, General Policy, elaborates on the meaning of "responsible":

Purchases shall be made from, and contracts shall be awarded to, responsible prospective contractors only. A responsible prospective contractor is one which meets the standards set forth in 1-903.1 and 1-903.2, and such special standards as may be prescribed in accordance with 1-903.3 and by overseas commanders. The award of a contract to a supplier based on lowest evaluated price alone can be false economy if there is subsequent default, late deliveries, or other unsatisfactory performance resulting in additional procurement or administrative costs. While it is important that Government purchases be made at the lowest price, this does not require an award to a supplier solely because he submits the lowest bid or offer. A prospective contractor must demonstrate affirmatively his responsibility, including, when necessary, that of his proposed subcontractors. The contracting officer shall make a determination of nonresponsibility if, after compliance with 1-905 and 1-906, the information thus obtained does not indicate clearly that the prospective contractor is responsible.

[10] DAR 1-906, Subcontractor Responsibility, provides:

(b) Notwithstanding the general responsibility of a prospective contractor to demonstrate the responsibility of his prospective subcontractors, it may be in the Government's best interest to make a direct determination of the responsibility of one or more prospective subcontractors prior to award of the prime contract.

[11] Section 2680(a) provides immunity to the federal government even where the discretion exercised has been abused. 28 U.S.C. § 2680(a). *See also Scanwell*, 521 F.2d at 948 (even though regulations ignored by contracting officer, possible abuse of discretion did not render 2680(a) inapplicable). *Cf. Myers*, 527 F.2d at 1261 (the discretionary function exception does not apply where government acts unconstitutionally or in contravention of own regulations).

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Court Determines USACE Design Defective

By [Marcus Larson](#) • January 20, 2012



Coffor Dams have been designed and used for centuries. In fact, nearly every structure that crosses water or building that is designed where water intrusion would impede construction utilizes coffor dams for safety and security.

On December 20, 2011 the United States Court of Federal Claims, case [Martin Construction Co. v. United States](#), found the USACE liable for defective design and found that the Corps' designer had grossly underestimated the amount of water that would flow through the coffordam.

his raises concern for the construction of the Fargo Moorhead Dam and Diversion. In part, due to 5 rivers being crossed and the control structures that will be constructed to make the entire system functional.

The USACE has openly admitted the Fargo Moorhead Dam and Diversion is one of the largest and complex systems of it's kind in American. Aside from the competent design of temporary dams and routing of water around the dams and aqueducts, the competent design of the permanent structure is of great importance to every living soul and structure in the wake of the construction areas.

The recent United States Court of Federal Claims offers a stark truth that the USACE are not infallible.

Excerpt from Martin Construction Co. v. United States court document:

The most troubling aspect of this case is the Corps' adamant refusal to accept any responsibility for its defective design, even while Martin made every effort to comply with it. – Judge Thomas Wheeler

[<< Download Martin Construction Co. v. United States Court Decision >>](#)

It does raise the question on who, how and where construction design deficiencies can be reported to ensure the safety and well being of the populace that would be directly in harms way.

Here is a related article and commentary:

Court Reverses Termination for Default and Criticizes the Army Corps of Engineers for Failing to Acknowledge Its Defective Design

Author: Michael H. Payne

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A decision was issued by the United States Court of Federal Claims on December 20, 2011, in Martin Construction Co. v. United States, a case involving a Corps of Engineers construction project in North Dakota. Martin was represented by Michael Payne and Joseph Hackenbrach, of Cohen Seglias Pallas Greenhall & Furman, and the case involved a termination for default by the Omaha District of the Corps on a multi-million dollar project involving the construction of a marina. The termination occurred because the Contracting Officer concluded that Martin was at fault for failing to complete the project by the required contract completion date. Martin had argued that the Corps' design of the cofferdam (temporary dam), which was critical to the construction of the marina, was defective and that the contractor was effectively prevented from completing the marina according to the original schedule. The Court agreed that there was a defective design and found that the Corps' designer had grossly underestimated the amount of water that would flow through the cofferdam.

COMMENTARY: How can the residents in the Red River Valley ensure that design flaws during construction of the Fargo Moorhead Dam and Diversion won't have negative impacts and cause losses or casualties?

The decision is extremely critical of the Corps of Engineers and amounts to a complete vindication of Martin. The Court ruled that the termination for default was wrongful and ordered a conversion to a termination for convenience. This, of course, now exposes the Corps to the payment of damages amounting to millions of dollars to compensate Martin for the costs incurred in attempting to deal with the defective design. The Court aptly noted that "The most troubling aspect of this case is the Corps' adamant refusal to accept any responsibility for the defective design, even while Martin made every effort to comply with it." The Court was also very critical of the Contracting Officer and stated that "Competent procurement officials

would have acknowledged the agency's obvious design mistake, made the necessary corrections, and afforded the contractor the additional time and money to complete performance."

COMMENTARY: "...Corps adamant refusal to accept any responsibility for the defective design..." is the precise reason why the Fargo Moorhead Dam and Diversion procedural milestones should not be rubber stamped. The United States District court of Louisiana found the USACE liable for knowledge of problems relating to hurricane Katrina, yet took no corrective action to prevent losses. The stonewalling for pertinent information from the USACE and accusations of misinformation fall very short of a valid defense in light of the lack of competence and due diligence in matters of such great importance.

One has to remember, it's the people **WITH** the engineering degrees, that summarily dismiss public concerns, that design failures.

The Court concluded that the "evidence is overwhelming" that Martin was entitled to a time extension and that the termination for default was improper. Judge Thomas Wheeler quoted Martin's geotechnical and scheduling experts, and he also quoted the Plaintiff's brief by stating that "As Plaintiff's counsel aptly pointed out, the Defendant 'ignored the elephant standing amongst the teacups in the living room.' The decision is an important verification to the federal contracting community that a termination for default is a "drastic action" that will not be sustained unless the government can meet its burden of proof that the termination was justified. It was unfortunate, however, that Martin was forced to suffer the consequences of the "black mark" associated with a default termination until, as in this case, justice was ultimately served.

COMMENTARY: The Defendant (USACE) "...ignored the elephant standing amongst the teacups in the living room..."

This sounds far too familiar to the mounting opposition to the Fargo Moorhead Dam and Diversion. Various public meetings were held where the USACE served as cheerleader for the Fargo Moorhead Dam and Diversion. Despite substantial valid concerns being voiced by property owners and agencies, no formal action plan was disseminated so that the public could ensure that raised concerns were being addressed. The USACE produced multi-page documents that are riddle with disparities and contradictions, yet the project moves blindly forward with rubber stamp approval at the taxpayers expense.

Currently, there is a 3' to 3.95' contradiction in the 500 year flood level in the current FEIS. The matter has been brought to the attention of the USACE and the standard response was to stand by their findings in the existing documents.

So..., which data is correct? Is the 500yr flood level 904.55', 905.5' or 908.5' ?

It would seem to reason that if 2 billion plus dollars are going to spent on a project that is riddled with contradictions, at least the elevation that the entire project is based upon would be a more firm elevation. Is 3' - 3.95' (feet) an acceptable amount of variance to justify the Fargo Moorhead Dam and Diversion?

The citizens of Fargo Moorhead may find themselves as a Plaintiff vs Fargo, Moorhead and the USACE for future property losses and/or loss of life.

Michael H. Payne is the Chairman of the firm's Federal Practice Group and, together with other experienced members of the group, frequently advises contractors on federal contracting matters, including teaming arrangements, negotiated procurements, bid protests, claims, and appeals.

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"Buy American" (Again): New Executive Order Requires Changes (By 2020)

By David Gallacher on July 31, 2019



Posted in BAA and TAA, Country of Origin, Domestic Preferences, Executive Orders

On July 15, 2019, President Trump signed an Executive Order requiring regulations implementing the Buy American Act, 41 U.S.C. §§ 8301-8305, to be changed. While President Trump has previously issued two other policy-based "Buy American" Executive Orders, this new Order directs that specific changes be made, reversing government policies that have been in place for 65 years. These changes have the potential to significantly disrupt many government contractors' supply chains and internal compliance programs. As such, companies should start planning now for the final regulations that are expected sometime in 2020.

The Buy American Act (BAA)

Subject to multiple exceptions (some of which are discussed below), the BAA requires the government to purchase products "manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured in the United States." 41 U.S.C. § 8302(a)(1). The Federal Acquisition Regulation ("FAR") has interpreted this statutory requirement by requiring a "domestic end product" to meet a two part test: (i) the end product must be manufactured in the United States; and (ii) at least 50% of the cost of the components must also be of U.S. origin. FAR 25.003. This second part is commonly referred to as the "component test." The 50% threshold for the "component test" dates back to the Eisenhower administration and a 1954 Executive Order (E.O. 10582), which interpreted the phrase "substantially all" to mean at least 50%. But, of course, the phrase is open to interpretation.

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do to improve efforts to "Buy American," this new Order largely revokes the Eisenhower Executive Order and directs the FAR Council to change the regulations in at least two key ways:

1. The "Component Test." The Order directs the thresholds under the "component test" to be increased, splitting out separate requirements for "iron and steel end products" and "all other end products."

	Current Test: U.S. Origin	Future Test: U.S. Origin Parts or Materials
Iron and Steel end products	≥ 50%	≥ 95%
Other end products	≥ 50%	≥ 55%

A few key points are worth highlighting about this new rubric:

- Components vs. Products. The terms used in the Order do not line up precisely with the definitions used in the FAR. The FAR speaks in terms of "components" and "cost of components" (FAR 25.003), while the Order speaks in terms of "products used in" an end product and the associated costs. These are not necessarily the same thing – a "component" is different from a subcomponent, and many U.S. manufacturers have been able to meet the BAA requirements by converting foreign-origin materials and subcomponents into a U.S. origin "component" by performing intermediate manufacturing steps in the U.S. The FAR Council may ultimately reconcile the various terms and apply the commonly understood "component" definition already in place. But, then again, maybe they won't.
- Another Love Letter to Domestic Iron & Steel. The radical increase in the iron and steel threshold now puts the Buy American Act on par with the Buy America (no "n") Act, 49 U.S.C. § 5323(j); 23 U.S.C. § 313, which requires iron and steel of completely U.S. origin on transportation, highway, and infrastructure projects. Why the difference? Well, remember that the BAA requires only that the iron or steel be "substantially all" of U.S. origin, leaving a *little* daylight for some foreign content. As has been seen with the President's tariffs on steel and aluminum (discussed here), the President loves domestic metals. And, much like Spinal Tap, the President seems committed to "turning it up to 11."
- Up, Up and Away? The Order asks the FAR Council to consider whether the thresholds should be raised even further, potentially as high as 75% for "other end products." (As noted above, the 95% threshold for iron and steel is probably as high as it can get). The Order suggests that the threshold might be raised, even incrementally, "based on the feasibility and desirability" of any such changes. We can take some small comfort that changes greater than 55% won't happen immediately; but industry will live under the specter of an increasingly tougher standard that might incrementally slide over the course of several years. Such a result would not lead to the regulatory predictability that industry prefers.

2. The "Evaluation Factor." One of the most widely used exceptions to the BAA is when the domestic end product is unreasonably expensive compared to a foreign product. FAR 25.103(c); 25.202(a)(3). As such, the BAA does not – strictly speaking – *require* the government to "Buy American." It merely *encourages* the government to "Buy American." When comparing offers that propose delivering domestic and foreign end products, the FAR directs the government to apply an evaluation factor in favor of domestic end products.

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Large Business Offerors (FAR 25.105(b)(1))	6%	20%
Small Business Offerors (FAR 25.105(b)(2))	12%	30%
DOD Contractors (DFARS 225.105(b))	50%	50%

The process by which these evaluation factors are applied is set forth in FAR Subpart 25.5. It is not simple, but (in a nutshell) it works something like this:

- Assume that the government calls for proposals for the delivery of 1,000 widgets; the RFP calls for a lowest price/technically acceptable procurement.
- Assume that Company A offers \$100 per widget for a total proposed price of \$100,000. These widgets were all manufactured in China.
- Assume that Company B offers \$110 per widget for a total proposed price of \$110,000. These widgets were all manufactured in the United States.
- Using the current evaluation factors (assuming Company B is a *large* business), Company A's proposed price would be inflated by 6%. Company A's evaluated price would be \$106,000; Company B's evaluated price would be \$110,000. Company A, as the lowest evaluated price offeror, would receive the \$100,000 award, notwithstanding the fact that Company A is delivering foreign-made products.
- Using the current evaluation factors (and assuming that Company B is a *small* business), then Company A's proposed price would be inflated by 12%. Company A's evaluated price would be \$112,000; Company B's evaluated price would be \$110,000. Company B, as the lowest evaluated price offeror, would receive the \$110,000 award, notwithstanding the fact that it's actual proposed price was higher.
- Using the Order's new evaluation factors, Company B would win in practically every scenario. In fact, Company B's price could be as high as nearly \$120-\$130 per widget (compared to the foreign alternatives priced at \$100), and Company B could still be considered the lowest price offer. What this means practically is that foreign-made products will now need to be *significantly* cheaper than the domestic alternatives in order for the government to be able to buy under the BAA.

3. "To The Maximum Lawful Extent." The Order encourages the FAR Council to update the BAA

regulations "to most effectively carry out the goals of the Buy American Act and [the] Administration's policy of enforcing the Buy American Act to its maximum lawful extent." It also calls for government agencies to make recommendations by January 2020 for other ways that the regulations may be changed. One area that the FAR Council is directed to look into (as discussed above) is incremental increases to the costs of components under the "component test." But other issues may also be considered by the FAR Council, even though they are not expressly spelled out in the Order. For example:

- Will the exception to the "component test" for commercial off-the-shelf ("COTS") products continue? Currently, COTS products need only meet the first prong of the BAA – the end product must be manufactured in the United States. FAR 25.100(a)(3), 41 U.S.C. § 1907 authorizes the FAR Council to streamline federal procurements, determining that certain requirements will not

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- Will the exception for commercial information technology continue? Currently, the government can purchase "information technology" (a broad term defined under FAR 2.101) that is a

"commercial item" (another broad term) without regard to the BAA. FAR 25.103(c) and 25.202(a) (4). This is a statutory requirement (Section 535, Pub. L. No. 108-199), so the FAR Council may

have less latitude in limiting this exception. Nonetheless, where the commercial IT exception allows the government to buy massive amounts of foreign-made products, and where the Order's priorities are clear, the FAR Council may narrow the scope of this commonly used exception.

- Will the processes be tightened for obtaining "public interest" or "nonavailability" waivers? The FAR sets forth the process by which these two types of exceptions can be invoked. FAR 25.103(a) and (b); 25.202(a)(1) and (2). The process is already: (i) involved; (ii) invoked at high levels; and (iii) subject to extra scrutiny. The FAR Council could easily add other hurdles to these processes, requiring more public notice and more public comment, all of which tamp down on a contracting officer's willingness to purchase products that are not domestically manufactured. Moreover, the FAR Council could also require agencies to reassess previously issued nonavailability determinations, applying the new standards. While unlikely, this could introduce a whole new level of confusion and uncertainty that industry would prefer to avoid.

- Will the BAA be applied below the micro-purchase threshold? Currently, the BAA does not apply to micro-purchases – individual purchases by the government valued at \$10,000 or less. FAR

25.100(b). But what if the FAR Council determines it is necessary to cover these kinds of micro-purchases? While this too seems unlikely, the Order makes clear that everything is on the table.

- Will the FAR Council define the term "manufactured" to require increased manufacturing in the U.S.? The BAA requires items to be "manufactured," which is not a defined term in the FAR. Case law has interpreted this term to require some sort of a mechanical operation on an end product whereby the identity and character of the end item is established and fixed as to its current and future use. *A&D Mach. Co.*, B-242546, May 16, 1991, 91-1 CPD ¶ 473; *Marbex, Inc.*, B-225799, May 4, 1987, 87-1 CPD ¶ 468. While the "assembly of components necessary to transform an imported machine into a machine which meets the specifications can constitute manufacture" (*General Kinetics, Inc.*, B-242052.2, May 7, 1991, 91-1 CPD ¶ 445), processes such as refurbishing, packaging, and testing do not generally rise to the level of domestic "manufacture." *TRS Research*, B-285514, Aug. 7, 2000, 2000 CPD ¶ 128. This legal test for "manufacturing" is considered a relatively modest threshold. The FAR Council might choose to expressly define "manufactured" for the first time, setting a higher standard than currently exists. Such an action would, of course, upset more than 85 years of settled law and would (to say the least) upset nearly every contractor that has to comply with BAA on a regular basis.

Timeline for Changes

The Order instructs the FAR Council to issue a proposed rule for public comment within 180 days, which corresponds roughly with January 11, 2020. Once public comments have been received and evaluated, the FAR Council is required to "promptly" issue a final rule.

Those familiar with the rulemaking process may scoff at the idea that anything can (or even will) happen "promptly." Nonetheless, this timeline seems to indicate that new, final rules may be in effect as early as Spring 2020. And, of course, this timeline could be accelerated even further if the FAR Council decides to issue an interim rule instead of a proposed rule. Such an interim step is unlikely, to be sure, but the language of the Order does not necessarily rule this out.

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the contract requirements. With regard to the pending changes to the BAA:

- Companies can start by identifying their contracts that include the Buy American Act, as opposed to contracts that include the Trade Agreements Act ("TAA"), FAR 52.225-5. While these clauses are often lumped together by some companies in their compliance programs, the two statutes impose distinct compliance obligations. But the Order affects only the BAA – not TAA. So if your contract is not subject to the BAA, then you probably have less to worry about.
- Manufacturers can start by looking at their supply chain, assessing whether there are any end products that are "close" under the new component threshold (in the 50-55% domestic content range) and that may need to be adjusted to ensure compliance in 2020.
- Manufacturers may also begin considering whether there are changes to their manufacturing processes, where they can bring more manufacturing into the U.S. in order to better meet the various legal requirements. (But remember... even though NAFTA or the U.S.-Mexico-Canada Agreement may or may not be in place next month, these free trade agreements do not apply to the Buy American Act unless the contracts exceed certain dollar thresholds set by the U.S. Trade Representative. FAR 25.402).
- Resellers can start by reviewing their list of suppliers and products, identifying potentially problematic products that may qualify under the BAA today, but may not qualify under the new rules. If a product is a "close call," it simply might not be worth the potential risk of selling to the government in an era where "Buy American" is something that everyone is watching more closely.

Hopefully, whatever rules are ultimately proposed will follow the Order as closely as possible, will hew to the existing rubrics and definitions currently used in FAR Part 25, and will limit the erosion of other exceptions (many of which industry has come to rely on). Hopefully, the public comments will be heard and implemented in an even-handed manner. While we all support the *idea* of "Buy American," the simple fact is that in this modern, international economy, every product has *something* in it that is foreign. Forcing the government to pay astronomical prices for commercially available products simply makes no sense; let's hope that a little balance can be measured throughout the "Buy American" rally cry.

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LEGAL UPDATE Mar 23, 2020

Coronavirus Pandemic: My Construction Agreement Has a Force Majeure Clause, So Now What?

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With the exponential spread of COVID-19, owners, contractors, and design professionals are recognizing the substantial impact this pandemic will have on the construction industry. Several states issued shelter-in-place orders, resulting in the suspension of some construction work.^[1] In some states, this has resulted in work stoppages on some of our nation's largest infrastructure projects. The financial impact of these work stoppages will be significant. As a result, parties to construction agreements have looked to their *force majeure* clauses for guidance on how these issues should be addressed.

Although the scope of this pandemic is still unclear, there is already a large body of written work addressing the contours of *force majeure* clauses in commercial and government construction contracts.^[2] As many of these articles note, the Federal Acquisition Regulations (FAR) as well as numerous form construction contracts contain provisions that address how the impacts and delays from the coronavirus will be handled.^[3] While not all construction or design agreements contain *force majeure* clauses that cover the coronavirus pandemic, many do. The question for those whose contract include such clauses is: now what do I do? The answer: carefully review your agreements and understand the actions you must take now to avoid significant economic loss.

Commercial construction projects

Owners, contractors, and design professionals whose projects are impacted and delayed as a result of the coronavirus need to carefully read and fully understand the *force majeure* provision in their contracts. The inquiry, however, does not end there. Clauses addressing the possible relief afforded to a party due to impacts and delays from the coronavirus will be scattered throughout a contract, including, as noted below, in provisions addressing escalation, termination, and claims. Understanding each of these provisions, and the interplay between them, will be vital to managing risks and preserving rights.

With the exception of form contracts, every contract contains unique clauses that will directly bear on your rights. Many of these provisions contain strict notice requirements dictating how long you have to notify an upstream contractor or owner about the possible impact or delay. In addition, many require the contractor or design professional to provide the upstream contractor or owner with a detailed schedule analysis or description of the impact or delay. Understanding these requirements, and ensuring strict compliance, is the first step in protecting yourself against the likely disruptions that will result from the coronavirus. This is vitally important, as many contracts provide that the failure to provide timely notice of such a claim results in a waiver^[4]. In some states, such a waiver is enforceable.^[5]

As with bespoke contracts, form contracts contain notice provisions that must be followed. For example, A201-2017 provides the following:

§ 8.3 Delays and Extensions of Time

§ 8.3.1 If the Contractor is delayed at any time in the commencement or progress of the Work by (1) an act or neglect of the Owner or Architect, of an employee of either, or of a Separate Contractor; (2) by changes ordered in the Work; (3) by labor disputes, fire, unusual delay in deliveries, unavoidable casualties, adverse weather conditions documented in accordance with Section 15.1.6.2, or other causes beyond the Contractor's control; (4) by delay authorized by the Owner pending mediation and binding dispute resolution; or (5) by other causes that the Contractor asserts, and the Architect determines, justify delay, then the Contract Time shall be extended for such reasonable time as the Architect may determine.

§ 8.3.2 Claims relating to time shall be made in accordance with applicable provisions of Article 15.

§ 8.3.3 This Section 8.3 does not preclude recovery of damages for delay by either party under other provisions of the Contract Documents.[6]

As set forth in Section 8.3.2 of the A201-2017, a party who is delayed as a result of one of the acts set forth in Section 8.3.1 (a claim arising from impacts and delays due to coronavirus would arguably fall within the scope of Section 8.3.1(3) & (5)) must comply with the notice requirements set forth in Article 15, which states:

§ 15.1.3 Notice of Claims

§ 15.1.3.1 Claims by either the Owner or Contractor, where the condition giving rise to the Claim is first discovered prior to expiration of the period for correction of the Work set forth in Section 12.2.2, shall be initiated by notice to the other party and to the Initial Decision Maker. **Claims** by either party under this Section 15.1.3.1 shall be initiated within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later.[7]

As stated in the highlighted text, a claim for any impact or delay resulting from the coronavirus must be made in writing within 21 days that the impact is known. While the full impact of the coronavirus on many projects is still unknown, the safest course for any party making a claim as a result of this pandemic is to provide notice as soon as it is clear there will be an impact. As noted above, failure to provide timely notice in some states, particularly when contracting with a state or local government, may result in a waiver of the claim.

Once notice has been prepared and provided to the other party, it is important to commence trying to quantify the scope of the impact and delay. Upstream owners and contractors will want to see detailed schedule analyses that attempt to predict the impact and delay to the substantial and final completion milestones for the project. Likewise, if your contract provides a right to recover costs for *force majeure*, which many do not, it will be important to understand the magnitude of the financial consequences of the impacts and delays to the project. Maintaining open communication with the other party to your agreement and providing periodic updates relating to the likely costs and schedule impacts from the coronavirus will assist both parties in making the right decisions for how to proceed.

Contractors who are impacted by the coronavirus, whether through work stoppages or labor or material shortages, should also review their contracts for other provisions that may provide relief. Clauses that provide contractors with the ability to escalate material or labor costs will help to offset increased costs resulting from impacts to the global supply chain. Like the delay provisions discussed above, these clauses typically include notice requirements that the claimant must satisfy before it can escalate its costs.

Finally, in the event that delays and financial impacts become too long or costly, parties may look to the suspension or termination provisions in their contracts to find ways to mitigate the financial impact of the coronavirus pandemic. Some contracts provide parties with the ability to terminate the contract when work is stopped for a significant period of time. In addition, suspension and termination for convenience provisions may provide owners the ability to temporarily suspend a project with less financial risk than simply allowing impacts and delays to accumulate. Termination provisions should not be used lightly, and in any event, contractors and owners should begin a dialog as soon as possible about how to effectively deal with the impacts from this pandemic.

Government contractors

For entities contracting with the federal government, the requirements are not entirely dissimilar. As in commercial contracts, it is imperative that government contractors communicate with contracting officers and provide timely notice of impacts and delays. The FAR provides strict timeframes for requests for equitable adjustments relating to government-directed work stoppages, and failure to satisfy those time requirements may bar your right to recovery.^[8] Even where the contracting officer fails or refuses to issue an order bearing on the contractor's performance obligations under the contract, a contractor may still be entitled to an equitable adjustment, provided that the notice requirements were satisfied.

Understanding your obligations under the FAR and the terms of your contract with the government will prevent inadvertent waiver of your rights. It is important that you maintain ongoing communication with the contracting officer, document the government's actions or inactions, and timely submit all requests for an equitable adjustment.

[1] See, *Northwest Region Construction Projects Suspended in Response to COVID-19*, Pennsylvania Department of Transportation, March 17, 2020 (available at <https://www.pennodot.gov/regionaloffices/district-1/pages/details.aspx?newsid=1150>); *Construction Activity to be Suspended in City*, City of Boston, Mayor Martin J. Walsh, March 17, 2020 (available at <https://www.boston.gov/news/construction-activity-be-suspended-city-library-locations-bcyf-centers-close>)

[2] See e.g., *Managing Project Risk Associated with the Coronavirus Outbreak Through Force Majeure Provisions*, by Sara Beiro Farabow & Jonathan Huie, March 4, 2020 (available at <https://www.constructionseyt.com/2020/03/managing-project-risk-associated-with-the-coronavirus-outbreak-through-force-majeure-provisions/>)

[3] See e.g., FAR 52.249.-14 (Excusable Delays); FAR 52.242-14 (Suspension of Work); and American Institute of Architects, A201-2017, “General Conditions of Contract for Construction” at Section 8.3.1.

[4] In other words, it results in the inability to assert such a claim.

[5] See e.g., *Commonwealth v. AMEC Civil, LLC*, 699 S.E.2d 499 (Va. 2010) (granting summary judgment to Commonwealth due to contractor’s failure to strictly comply with statutory notice requirements).

[6] A201-2017 (emphasis added)

[7] *Id.* (emphasis added)

[8] See FAR 52.242-14 & 52.242-15.

Authors



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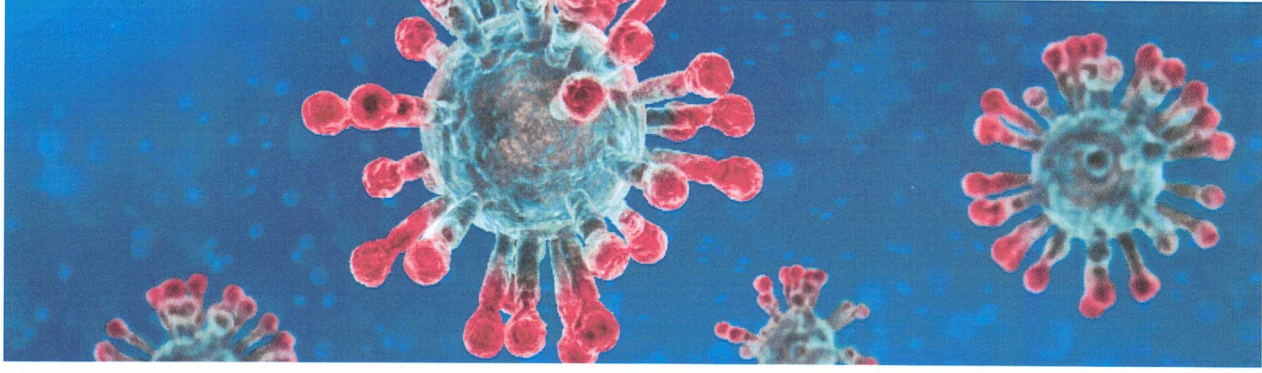
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Government Contracts

Prevailing wage requirements of various laws applicable to government contracts are enforced by the Wage and Hour Division.

The Davis-Bacon and Related Acts (DBRA) require payment of prevailing wages to laborers and mechanics employed on federal and federally-assisted construction projects.

The McNamara-O'Hara Service Contract Act requires payment of prevailing wage rates and fringe benefits to service employees employed on contracts to provide services to the federal government.

The Contract Work Hours and Safety Standards Act (CWHSSA) requires contractors and subcontractors on federal contracts to pay laborers and mechanics at least one and one-half times their basic rate of pay for all hours worked over 40 in a workweek. This Act also prohibits unsanitary, hazardous, or dangerous working conditions in the construction industry on federal and federally financed and assisted projects.

The Copeland "Anti-Kickback" Act prohibits a contractor or subcontractor from inducing an employee to give up any part of his/her compensation to which he/she is entitled under his/her contract of employment. The Act's implementing regulations requires a contractor and subcontractor to submit a weekly statement of the wages paid each employee performing covered work during the preceding payroll period.

The Walsh-Healey Public Contracts Act requires payment of minimum wage rates and overtime pay on federal contracts to manufacture or furnish materials, supplies, or equipment.

Webpages on this Topic

Compliance Assistance: Wages in Government Contracts

Davis-Bacon Wage Determinations - Current Davis-Bacon wage determinations that will apply to future contracts are available at this site.

Wage and Hour Division Home Page - This site includes direct links for accessing Wage and Hour District Office address and phone numbers, the Davis-Bacon poster (WH-1321), optional payroll form WH-347 (PDF) (with instructions), and Davis-Bacon survey data collection form WD-10, "Report of Construction Contractor's Wage Rates."

All Agency Memo Nos. 130 and 131 (PDF) - These memoranda provide guidance on determining the type of construction (building, residential, highway, or heavy).

Davis-Bacon and Related Acts (DBRA) Web Information Service - Provides public access to Davis-Bacon information and supports the user in filling out the Report of Construction Contractor's Wage Rates (WD-10) Form. Includes information about the Schedule of Surveys being conducted to make wage determinations and regional office information.

McNamara-O'Hara Service Contract Act Covers contracts entered into by federal and District of Columbia agencies where the principal purpose of the contract is to furnish services through the use of "service employees."

- Service Contract Act Frequently Asked Questions (FAQs) - These FAQs pertain to the issuance of wage determinations under the Service Contract Act.
- Service Contract Act Directory of Occupations - Provides definitions of occupations subject to the Service Contract Act.
- Service Contract Act Compliance Assistance Memo 196 - Service Contract Act Health and Welfare Fringe Benefit Changes (Memo 196).

Regulations on this Topic

29 CFR Part 1 - Procedures for Predetermination of Davis-Bacon Wage Rates

29 CFR Part 3 - Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants

29 CFR Part 4 - Labor Standards for Federal Service Contracts

29 CFR Part 5 - Davis-Bacon and Related Acts Provisions and Procedures

29 CFR Part 6 - Rules of Practice for Administrative Proceedings Enforcing Labor Standards in Federal and Federally Assisted Construction Contracts and Federal Service Contracts

29 CFR Part 7 - Practice Before the Administrative Review Board With Regard to Federal and Federally Assisted Construction Contracts

29 CFR Part 8 - Practice Before the Administrative Review Board With Regard to Federal Service Contracts

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You won the Corps of Engineers contract, now what?

February 2, 2016
Posted in: [Architecture & Interiors](#), [Building Engineering](#), [Military](#), [Municipal](#), [Water](#)



Safety – preparing to clear a permit required confined space

Working for U.S. Army Corps of Engineers can be as challenging as winning a contract. Successfully navigating the plethora of Corps' requirements will greatly influence their perception of you, which in turn will affect the number of task orders awarded and additional architecture-engineer (A-E) indefinite-delivery, indefinite quantity (IDIQ) won.

My colleagues and I spent a good deal of the past four years aggressively marketing our consulting firm for USACE work. These efforts included working with numerous teaming partners, designing a USACE design-build project with a well-positioned contractor, writing articles for *The Military Engineer*, presenting scores of presentations to numerous USACE Districts and proposing on dozens of USACE A-E IDIQ solicitations. After 4 ½ years, we were finally awarded an IDIQ contract.

However, winning an A-E IDIQ is only half the battle; now we must maintain the momentum by rigorously addressing the numerous and at times complicated requirements. Fortunately, our work on USACE task orders and other non-Corps federal projects, prepared us well. Here are a few lessons-learned for my readers:

Stringent safety programs

USACE takes safety very seriously and expects consultants to have mature safety programs that are inculcated in their workforce. Consider implementing formal safety plans for site visits, especially if visits include confined spaces, diving or over-the-water operations. Prepare an activity hazard analysis form for every aspect of site visits.

Anti-terrorism/force protection and operations security training

If your work entails visiting a project site at a Corps facility or on a military installation, your team will need to complete online AT/FP, OPSEC and [Watch](#) training. Plan on four hours per person for this training.

Small business utilization and reporting

You submitted a small business contracting plan if you have a Corps contract. USACE requires electronic subcontractor reporting (eSRs) and may evaluate you on each individual task order. Given the varied nature of these task orders and often the short time you have to respond to a task order RFP, it is worthwhile to have a large number of key small businesses on-call through the use of master services agreements.

Cyber security

In 2015, the Department of Defense published Interim Rules on Cybersecurity. The guidance directs all federal agencies to increase cybersecurity protections for "products or services that generate, collect, maintain, disseminate, store or provides access to Controlled Unclassified Information on behalf of the federal government." Much of this is still being worked-out by the government; however, at minimum you should realize that USACE cannot accept any data on USB drives.

Affirmative Action and Equal Opportunity Reporting

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My recommendation is to communicate with your designated USACE project manager frequently, document everything on a memorandum, and don't be afraid to ask if you have a question. Another technique I like to use is the "over-the-shoulder" review. Don't wait until the formal 35/60/pre-final review to show the Corps your analysis. An informal phone review can often prevent unnecessary work caused by going off on a wrong tangent. Additionally, the Corps expects consultants to carefully document requests for information and project decisions, as well as using [DRChecks](#) for the design and study submittal and review process.



USACE consulting is graduate school work. It takes extra effort to win the opportunity, and if you win then you are expected to perform at a higher level both technically and administratively. You can prepare by working as a subconsultant to a reputable AE and by attending seminars offered by the USACE Small Business Community. I love to discuss this topic with you in person. Come see me at the [Tulsa SAME "Meet the Corps"](#) event on February 10 in Owasso, Oklahoma.

ABOUT THE AUTHOR



[Miro Kurka, P.E., PMP](#), knows water is an incredible resource. "I like leading teams and managing water infrastructure projects that make our citizens safer, wealthier and happier." He is the recipient of the 2019 SAME Individual Industry Government Engineers' Award. A retired U.S. Army officer, Miro managed the Corps of Engineers' program in Tulsa, Portland and Afghanistan for 30 years. He enjoys traveling and meeting people.

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