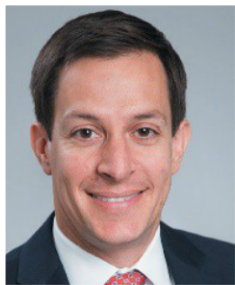


Practical Insights: What You Need to Know Key Takeaways from the **NASBP Federal Construction Contracting Seminar**

Presented by Peckar & Abramson, P.C.

ON JUNE 11, 2015, Adrian Bastianelli, Paul Monte, Michael Zisa, Lori Lange, and Michael Cox of the law firm of Peckar & Abramson, P.C. had the opportunity to meet with members, affiliates, associates, and guests of NASBP at NASBP's Federal Construction Contracting Seminar in Washington, DC. The group spent the day participating in an interactive discussion of recent trends and developments in the federal contracting world—including fraud, the False Claims Act (FCA) and joint



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venture arrangements—and how these topics impact the surety industry. In addition, Kenneth Dodds of the U.S. Small Business Administration (SBA) spoke about SBA's proposed rule changes affecting contractors, and Jason Powers of the SBA's Inspector General's Office discussed fraud investigations.

For those of you who were unable to attend, below is a summary of some of the highlights of the event:

Fraud: The new mantra of federal contracting

The federal government's prosecution of fraud claims under the FCA continues to increase with total fraud



NASBP President Susan Hecker welcomed the Federal Construction Contracting Seminar participants, who participated in an intensive and valuable exploration of the hottest issues in federal contracting.



The seminar speakers included attorneys from the law firm of Peckar & Abramson, from left, Michael Cox (at podium), Mike Zisa, Adrian Bastianelli, Paul Monte, and Lori Ann Lange.

collections in 2014 reaching \$5.69 *billion*—several hundred millions of which involved federal procurement fraud. In light of this, the panel discussed what constitutes fraud under the FCA and how contractors, bond producers, and sureties can stay out of trouble.

- The FCA prohibits, among other things, a person or company from:
 - (1) Knowingly presenting a false or fraudulent claim for payment or approval;
 - (2) Knowingly making, using, or causing to be made or used a false record or statement material to a false claim;
 - (3) Conspiring to commit a violation; or
 - (4) Knowingly delivering or causing to be delivered less than all of the money or property due the government.
- Penalties for violations of the FCA include: (1) civil damages up to three times the government's actual damages, fines of \$5,500 to \$11,000 per false claim; (2) criminal penalties of up to five years in prison and fines; and (3) administrative penalties including suspension, debarment and contract termination.
- Common triggers to FCA claims against general contractors include submission of payment applications, certified payrolls, claims, and subcontractor "pass-through" claims that contain false information or certifications.
 - Payment applications are considered a claim under the FCA and are one of the most common sources of FCA claims because they contain several

certifications. Specifically, they require the submitting party to certify that (1) the amounts requested are only for work performed in accordance with the contract; (2) all subcontractors and suppliers have been paid from previous payment received and will be paid timely from the current payment requested; (3) the current application does not include any amount that the submitting party intends to withhold from subcontractors and suppliers. Thus, the submitting party must ensure that the certifications are accurate or that any qualifications (that is, withholdings) are disclosed.

- Certified payrolls also give rise to FCA claims because the contractor is required to certify that: (1) the payroll is correct and complete; (2) prevailing wage rates are being met; and (3) employees are properly classified for work performed.
- Subcontractor pass-through claims also implicate the FCA because the contractor is required to certify that: (1) the subcontractor's claim is made in good faith; (2) the supporting data is accurate and complete; (3) the contractor believes that the government is liable for the amount or adjustment sought. To avoid FCA issues, the submitting party must take reasonable measures to obtain support and justification for the claim and make a minimal examination of the records. It is not necessary for the submitting party to believe the subcontractor's claim to be certain or a winner, but just that there are good grounds.
- The FCA can also implicate sureties and sureties' employees. As an initial matter, a surety is not responsible for a contractor's FCA violations unless the surety participated in the fraud or conspired with the contractor. However, a performing surety, as well as the individual making the certification, can be liable under the FCA when submitting requests for payment, certified payroll or claims of a defaulted principal, a completing contractor, or a subcontractor.
- In a takeover situation, performing sureties can be in a particularly vulnerable position because of the acrimonious relationship between the parties, the learning curve, competing interests, and indirect knowledge of the information supporting the claims.
- To mitigate the risks associated with the FCA, it is essential for all of the participants in the federal contracting arena to understand the potential pitfalls of the FCA and be mindful of those pitfalls and the resultant implications in conducting business.

Billing for bond premiums and the FCA

To the surprise of bond producers in attendance, Federal Acquisition Rule 52.232-5 (g) prohibits a contractor from billing the government for bond premiums until the full premium has been paid and the contractor furnishes proof of payment to the government. Therefore, supplying an invoice marked "paid" or otherwise indicating payment



A member of the SBA Senior Executive Service and Director of Policy, Planning and Liaison Kenneth Dodds, second from left, also was a speaker. He is pictured with, from left, Adrian Bastianelli, Lori Ann Lange, and Matt Cashion.

has been made in full to the contractor before payment has actually been made in full could give rise to liability for a bond producer under the FCA.

Joint venture arrangements in construction

Joint ventures have become commonplace in the federal construction arena and present participants with exciting opportunities. However, as with most business arrangements, joint ventures also create a myriad of issues that the participants must consider at the front-end (when everyone is happy and excited) in order avoid problems down the road. In this regard, the panel discussed the key components of the joint venture agreement and issues that arise in bonding a joint venture.

- **Know your partner:** Again, the opportunities presented by entering into a joint venture are exciting; but it is essential to know your partner before taking the plunge. Both parties should reflect upon whether their goals, cultures, management styles, risk tolerance, etc. are aligned.
- **Capitalization:** Joint ventures allow the partners to pool resources. Essential to the agreement is a clear explanation of the capital contribution of the individual partners to the joint venture. This should include initial capital contributions in the form of cash but also equipment, materials, services, technology, or other resources supplied.
- **Cash flow:** Maintaining cash flow is critical for any joint venture agreement. Joint ventures are often formed for large projects in which one partner is unable or unwilling to carry the full risk. In many cases, an owner will not pay the joint venture for an extended period, requiring the joint venture to finance the project. To survive, the agreement must spell out clearly how the joint venture will meet its financial obligations, whether through scheduled capital contributions, cash calls, or third-party financing.

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AIA A312 (2010 ed.)	ConsensusDOCS 472 (2007 ed., rev. 2011)	EJCDC D-615 (2002 ed.)	DBIA 625 (2015 ed.)
"The Surety's total obligation shall not exceed the amount of this Bond, plus the amount of reasonable attorney's fees provided under Section 7.3, and the amount of this Bond shall be credited for any payments made in good faith by the Surety."	"The Surety's obligation to Claimant(s) shall not exceed the Bond Sum."	"Surety's total obligation shall not exceed the amount of this Bond, and the amount of this Bond shall be credited for any payments made in good faith by Surety."	"The Surety's total obligation shall not exceed the Bond Amount, plus the amount of reasonable attorney's fees provided for herein."

Amount." There is no added language about attorney's fees, as found in the above payment bond form.

Bankruptcy proceedings

If a design-builder declares bankruptcy and a bond claimant is compelled to sue a surety, there can be a dilemma if the state law requires a judgment against the bonded principal before the surety can be found liable. This requires seeking leave of the automatic stay in bankruptcy to sue the bonded contractor or subcontractor solely to pursue the surety bond. DBIA proposed that the surety agree that such a procedure is not required, and NASBP and SFAA agreed. Thus, we find in the DBIA bonds a provision not found in the AIA, EJCDC, or ConsensusDOCS forms, which states as follows: "In the event of bankruptcy of the Design-Builder, the Surety agrees that the Design-Builder is not a necessary or indispensable party to any legal action by any party against Surety to enforce the Surety's obligations under this Bond."

Authorization

Just above the signature lines on the DBIA bonds, you will find a statement not contained in the other organizations' bonds. It reads: "Authorization. The Surety represents that it is admitted to act as an authorized corporate surety in the state in which the Project is located. Surety and Design-Builder, intending to be legally bound hereby, subject to the terms set out above, do each cause this Payment Bond to be duly executed on its behalf by its authorized officer, agent, or representative." DBIA felt it was important to clarify the authority of the surety and the signatories. ●

G. William Quatman, Esq., DBIA, is vice chair of DBIA's 2015 National Board of Directors and past chair of DBIA's Documents Task Force and serves as General Counsel for Burns & McDonnell Engineering Co., Inc., headquartered in Kansas City, MO. For more information, contact DBIA at dbia@dbia.org or 202.682.0110.

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- **Profit and distributions:** The agreement should define profits and allowable costs and detail repayment of capital contributions and timing of distributions. Additionally, the agreement should provide for access to the books and records of the joint venture.
- **Management:** The agreement must define who will manage the joint venture and how the joint venture will be managed.
- **Default:** What happens if one of the partners fails to fulfill its obligations? The agreement must define "default" and explain the consequences of such default.
- **Bonding:** As with any bonding arrangement, the process starts with underwriting. Key to this process is reviewing the individual partners and the joint venture agreement to understand the partners' roles in the joint venture and performance of the contract. Sureties should be leery of "angel deals" where one partner effectively lends its bonding capacity to the other partner without having any real involvement in the management or performance of the bonded contract. Additionally, sureties will typically

require that all partners to the joint venture execute an indemnity agreement under which the partners will be jointly and severally liable to the surety for all losses. In other words, regardless of which partner is to "blame" for the loss, both partners are fully responsible to the surety for the loss.

In all, the seminar was a success because of the participants' interest in the topics and interaction with the panel. We hope to see you at the next NASBP Federal Construction Contracting Seminar in Washington, DC on Thursday, June 9, 2016. ●

Michael C. Zisa is a partner in the Washington, D.C. office of Peckar & Abramson, P.C. and focuses his practice on construction, surety, and government contracts law and chairs his firm's Surety practice group. Zisa was recently recognized again by Washington, DC Super Lawyers in the areas of construction litigation, surety and government contracts. He can be reached at mzisa@pecklaw.com or 202.293.8815.