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Criminalizing Safety Violations: The New Norm?

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In the past year, federal, state and local authorities have dramatically changed how they investigate and prosecute general contractors and subcontractors for safety violations and work site injuries. Traditionally, in the event of a workplace injury or safety violation, legal consequences for contractors or subcontractors were limited to civil claims for damages. However, recent state and federal initiatives and criminal prosecutions against individuals and companies signify that future safety violations, particularly those involving fraud, may trigger unprecedentedly harsh criminal penalties for construction firms and their managers.

According to the U.S. Department of Commerce, nationwide spending on construction projects has generally been increasing overall since mid-2012. During the first six months of 2016, construction spending reached $539.8 billion, at 6.2 percent increase from the same period for 2015. Construction project growth has become more extreme in certain regional markets. For example, in 2011, New York City experienced 19 million square feet of new construction; by 2015, that number increased to 92 million.

Unfortunately, during this period of growth in the construction industry, work-related fatalities have also increased. In 2014, there were 4,821 fatal work injuries overall — the first year since 2010 that saw an increase in the national fatal injury rate. Within the private construction industry, fatal work injuries in 2014 increased by 9 percent — 899 total — marking the largest number of fatal work injuries for private construction since 2008. In addition to the human cost, the spike in serious construction accidents has prompted greater government scrutiny of workplace safety. The New York City Department of Buildings, for instance, issued more than 4,500 stop-work orders for safety violations in the first six months of 2016, compared to 2,700 for the entirety of 2012.

While a corresponding increase in construction projects, worker injuries and stop-work orders may seem intuitive, what was difficult to predict was that state and federal authorities would respond by launching initiatives designed to bring criminal charges against industry members for serious safety violations. The first salvo in the criminalization of safety violations came in August 2015, when the Manhattan District Attorney announced the formation of a citywide task force to investigate fraud and misconduct in the construction industry. In addition to the District Attorney, the task force includes the New York City Department of Investigation, the Port Authority of New York and New Jersey Office of the Inspector General, the Metropolitan Transportation Authority Office of the Inspector General, and the Business Integrity Commission for the City of New York. The task force meets monthly to cooperate in investigations of not only safety violations, but also "fraud, bribery, extortion, money laundering, bid rigging, [and] larceny."

The New York trend to criminalization of safety violations is not unique. Similar initiatives are arising at the federal and state levels throughout the United States. In December 2015, the U.S. Department of Labor (DOL) and the U.S. Department of Justice (DOJ) announced a joint initiative "to provide for coordination of matters pertaining to worker safety that could lead to

criminal prosecution by the DOJ." Under the program, the DOL operates "points of contact" with solicitors at various federal agencies, including the Occupational Safety and Health Administration ("OSHA"), the Mine Safety and Health Division, and the Wage and Hour Division, in order to coordinate criminal enforcement referrals to the DOJ. Should a recommendation be made, the DOL will support the DOJ's criminal investigation and/or prosecution through data gathering and information sharing. Unlike the New York City task force, the DOL-DOJ program operates nationally.

With the DOL-DOJ initiative and New York City task force in place, the legal landscape of the construction industry will now feature a stronger investigation presence, one that is specifically designed to root out and criminally punish fraud and safety violations. While the two programs are fairly new, several recent charges brought by state and federal authorities provide insight into the future of criminal prosecution within construction industry.

On December 9, 2015, just days before the DOJ and DOL announced their cooperative program, the DOJ entered into a plea agreement with James McCullagh, owner of a Pennsylvania-based roofing company, involving four counts of making false statements, one count of obstruction of justice, and one count of willfully violating an OSHA regulation. According to the indictment, McCullagh failed to provide an employee with any form of fall protection in connection with roof repair work, resulting in the employee falling to his death. As the incident was being investigated, McCullagh personally made false statements, and encouraged other employees to make false statements, to the OSHA investigating officer concerning the fall protection equipment made available to his employees. In March 2016, McCullagh was sentenced to 10 months in prison and one year of supervised release.

That same month, the manager of Avanti Building Consultants, Richard Marini, was sentenced to one to three years in jail and ordered to pay $610,000 in restitution for fraud and safety violation charges brought by the Manhattan District Attorney and the New York City Department of Investigation. A report issued by the Department of Investigation claimed Marini recruited individuals from Craigslist and other websites to pose as licensed site safety managers to conduct inspections for building projects. The fraud, which spanned from 2012 to 2014, was uncovered when a New York City Department of Buildings officer discovered that one of the faux inspectors signed a log using the name of a recently deceased safety manager. Both Marini and Avanti Building Consultants were found guilty of second-degree larceny.[1]

What began as a localized task force to address safety violations in the New York City construction market has quickly evolved into a nationwide initiative by federal authorities to bring criminal charges for safety violations. While the full impact of the recent state and federal initiatives to bring criminal charges against construction firms and individuals who mix fraud and safety violations has not yet been felt, it is clear from recent investigations and plea agreements that the industry will be held to a higher standard of safety and candor by government authorities going forward. As these programs develop and more emerge, contractors and

[1] A separate company, NYCB Engineering Group, was also indicted for its part in the Avanti Building Consultants scheme. NYCB, through its vice president, Kishowar Pervez, subcontracted with Avanti to offer its client' comprehensive site safety plans, while also hiring Pervez's personal friends to impersonate safety inspectors. Pervez pleaded guilty and was sentenced to six months' house arrest in June 2016.

subcontractors operating in the United States must respond by not only ensuring safety regulations are rigorously followed, but also by fully cooperating with any investigation handled by federal, state or local authorities. Under the new norm, the consequences for failing to do so could be years in prison.

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Arbitrator Powers – What's Allowable, What's Not

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The construction industry has long been a leader in the use of arbitration. An arbitration clause was first included in the AIA standard form contract in 1915. The Federal Arbitration Act (FAA) was first enacted in 1925 and the American Arbitration Association was created in 1926. Although initially hostile, courts throughout the United States and the world have come to generally favor arbitration and the enforcement of arbitration agreements. But not all arbitration clauses are equally enforceable. As arbitration provisions have become more widely used, contracting parties have continued to test the limits of enforceability. This article discusses a generally permissible practice—incorporating by reference arbitration rules granting the arbitrator the power to determine the arbitrability of a dispute—and a potentially impermissible provision—prohibiting the parties from challenging the validity of the arbitration award.

By way of background, the FAA applies broadly to all contracts that evidence a transaction involving interstate commerce. The validity of an arbitration agreement is governed generally by the FAA. For more than 50 years, federal courts treated the FAA as a procedural rule applicable only to federal cases. This limited the enforceability of construction arbitration agreements. In a 1983 decision, *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983), the United States Supreme Court precedent established a federal policy favoring arbitration and of resolving any doubts as to the scope of arbitrable issues in favor of arbitration. Since the *Moses Cone* decision the FAA is recognized to preempt state laws that would otherwise prevent enforcement of a construction arbitration agreement.

Incorporating Arbitration Provisions By Reference

Many construction contracts contain incorporated references to other party and third-party documents, such as industry form documents and arbitration rules. Incorporation by reference is

universally recognized as a valid time and paper saving method of expressing the parties' intent. Based on this general principle, many courts also recognize that arbitration agreements can be incorporated by reference. For example, the Texas Court of Appeals recently confirmed that the incorporation by reference of an unsigned document containing an arbitration clause evidences a valid agreement to arbitrate. *LDF Construction, Inc. v. Texas Friends of Chabad Lubavitch, Inc.*, 459 S.W.3d 720 (2015). The court found that the main contract document did not need to specifically mention arbitration. The Court went on to hold that "there is no requirement that the incorporated document containing the arbitration clause must necessarily be attached to the contract for the clause to be enforceable." It was enough that the document referred to was a standard industry AIA form "readily identifiable from the contract and available from the AIA." This result is not surprising given the presumption in favor of arbitration and the presumption that a party signing a contract knows and accepts the terms of that contract.

Arbitration agreements sometimes explicitly state that the arbitrator will determine arbitrability, that is the arbitrator will decide whether the dispute is subject to arbitration in the first place. The Supreme Court has rules that the question of arbitrability is a question for the court—unless the parties clearly and unmistakably agree for the arbitrator to decide arbitrability. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995). This then raises the question whether an agreement to arbitrate arbitrability must be explicitly stated in the agreement or whether it can be incorporated by reference.

The majority of federal appellate courts that have considered the issue have held that incorporation of the AAA Rules on Arbitration, which provide that the arbitrator has the power to rule on his own jurisdiction, is a clear and unmistakable agreement for the arbitrator to decide arbitrability. The 10th Circuit, the only appellate court to conclude otherwise, found no clear and unmistakable intent to arbitrate arbitrability because the arbitration agreement and subsequent settlement agreement were ambiguous as to whether there was even a valid arbitration clause applicable to the dispute. *Riley Mfg. Co. v. Anchor Glass Container Corp.*, 157 F.3d 775 (1998).

A recent Florida appellate decision recognized that the majority of federal courts considering the incorporation by reference of AAA arbitration rules is sufficient evidence of the parties' intent to have arbitrators and not a court hear and decide issues of arbitration. *Glasswall, LLC v. Monadnock Const., Inc.*, 2016 WL 314177 (2016).

Courts Might Not Enforce A "No-Challenges" Clause

If parties can agree that the arbitrator will have the first say with respect to arbitrability of the dispute, can parties also agree that the arbitrator will have the final say? Can the parties agree in advance not to challenge the validity of the arbitration or arbitration award? A 2015 Georgia Court of Appeals decision agreed with the Ninth Circuit and said no.

In *Atlanta Flooring Design Centers, Inc. v. R.G. Williams Const., Inc.*, the parties expressly agreed "not to challenge the validity of the arbitration or the award." The Court found that provision to be void and unenforceable because it conflicts with and frustrates Georgia public policy as expressed in the Georgia Arbitration Code which expressly permits the court to vacate or modify an arbitration award in certain specified circumstances, including corruption, fraud, misconduct, partiality.

The Court aligned itself with cases interpreting the Federal Arbitration Act, including *In re Wal-Mart Wage & Hour Employment Practices Litigation*, 737 F.3d 1262 (2013). Section 10(a) of the FAA provides for a limited review of an arbitration award if it falls within four categories: corruption, fraud, partiality or misconduct causing prejudice, or if the arbitrators exceeded their powers. The Supreme Court has held that the statutory grounds for judicial review in the FAA are exclusive and may not be expanded by contract. *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576 (2008). By the same token, the Ninth Circuit reasoned, because the statutory grounds are mandatory and exclusive, they are not waivable or subject to elimination by contract.

The Ninth Circuit held that parties cannot waive or eliminate the FAA's statutory grounds for reviewing an arbitration award. The FAA's provisions allowing a court to review and vacate an arbitration award "demonstrate Congressional intent to provide a minimum level of due process for parties to an arbitration . . . ." Permitting parties to bypass judicial review of awards would contradict the text of the FAA, frustrate the intent of the FAA, and leave parties "without any safeguards against arbitral abuse."

Practical Pointer

On the front-end of arbitration, some courts have demonstrated willingness to enforce arbitration agreements incorporated by reference. This includes agreements to allow the arbitrator to decide whether the dispute can be arbitrated. But on the back-end of arbitration, attempts to prohibit judicial review of an arbitration award are limited by the review procedures of the FAA and state arbitration acts. Parties developing arbitration agreements should consult their lawyer to ensure that the agreement and its provisions are enforceable in the contract's jurisdiction.

Smith, Currie & Hancock LLP is a national boutique law firm that has provided sophisticated legal advice and strategic counsel to our construction industry and government contractor clients for fifty years. We pride ourselves on staying current with the most recent trends in the law, whether it be recent court opinions, board decisions, agency regulations, current legislation, or other topics of interest. Smith Currie publishes a newsletter for the industry "Common Sense Contract Law" that is available on our website: www.SmithCurrie.com.

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Subcontractor Reporting Requirements Under Fair Pay and Safe Workplaces

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Introduction

On August 25, 2016, the U.S. Department of Labor (DOL) published guidance implementing the Obama administration's "Fair Pay and Safe Workplaces" Executive Order (E.O. 13673), and the Federal Acquisition Regulatory (FAR) Council issued the final rule (the "Rule") implementing the Executive Order. The stated purpose of the Rule

is to ensure that federal agencies contract with only 'responsible' contractors who are in compliance with labor laws found in 14 statutes and executive orders, including the Americans with Disabilities Act; the Age Discrimination in Employment Act; the Davis-Bacon Act; the Fair Labor Standards Act; the Family and Medical Leave Act; the Migrant and Seasonal Agricultural Worker Protection Act; the National Labor Relations Act; the Occupational Safety and Health Act; Section 503 of the Rehabilitation Act; the Service Contract Act; title VII of the Civil Rights Act; the Vietnam Era Veterans' Readjustment Assistance Act; and Executive Orders 11246 (Equal Employment Opportunity) and 13658 (Contractor Minimum Wage).

Under the Rule, contractors and subcontractors seeking the award of federal government contracts will have to disclose labor law violations running afoul of the above-referenced statutes and executive orders to the DOL - information which can then be used by the government in deciding whether or not to do business with them. Not only can a negative determination under the Rule impact or even prevent a contractor or subcontractor from being awarded federal government contracts, the Rule leaves the ultimate determination of subcontractor compliance up to the prime contractor, raising questions as to a prime contractor's level of responsibility to 'vet' subcontractors for labor law discrepancies, their liability for doing so, and whether and how either party might seek to address the issue in bid solicitations and subcontracts.

Timeline For Implementation of The Rule

On October 25, 2016, the final Rule takes effect, requiring all prime contractors being considered for federal government contracts with a total value greater than or equal to $50 million to become subject to mandatory disclosure of their compliance with the above-referenced labor laws. On October 25, 2017, subcontractors being considered for subcontracts with a total value greater than or equal to $500,000 also become subject to the Rule, and must disclose their labor law violations to the DOL.

Starting September 12, 2016 and continuing on an ongoing basis, current or prospective government contractors may contact the DOL to request an assessment of their record labor law compliance.

A contractor's violations may be deemed serious, repetitive, willful, or pervasive, and a labor compliance agreement may be deemed warranted. The assessment is voluntary and will be considered in future acquisitions as a mitigating factor when submitted by the contractor.

On January 1, 2017, the Rule's Paycheck Transparency clauses takes effect, requiring contractors performing work on relevant contracts to provide employees for whom they maintain wage records with information regarding the individual's hours worked, overtime hours, pay and additions or deductions thereto. Contractors must require their subcontractors to do the same regarding their own employees. Further, contractors

must provide independent contractors with documentation informing them of their status as independent contractors.
Finally, on April 25, 2017, prime contractors being considered for contracts totaling greater than or equal to $500,000 become subject to the Rule's disclosure and compliance regulations.

The Contracting Officer's Determination

Prior to awarding a federal contract, government Contracting Officers (COs) must address a contractor's labor law compliance pursuant to the Rule. Central to the Rule is the DOL's "administrative merits determination," mandating that contractors and their subcontractors disclose letters, notices or other documents noting labor law violations from entities such as the DOL's Wage and Hour Division, the National Labor Relations Board (NLRB), the Occupational Safety and Health Administration (OSHA) and the Equal Employment Opportunity Commission (EEOC), among others. The CO may recommend remedial measures be taken, or may make a determination of non-compliance or exclusion action against the contractor.

After a contract is awarded, the contractor's disclosure obligations under the Rule continue on a semi-annual basis during performance of the contract, requiring contractors to provide updated information for themselves and their subcontractors. If labor law violations are discovered, the CO may take action including requiring labor law compliance agreements, declining to exercise contract options, contract termination, or referral to the DOL's suspending and debarring official.

Subcontractor Reporting Under The Rule

The Rule provides some guidance on the topic and timing of subcontractor reporting. First, prospective subcontractors make an initial representation to the contractor as to whether any labor law decisions have been rendered against it between October 25, 2015 to the date of the subcontractor’s offer, or within three (3) years preceding the date of the subcontractor’s offer, whichever period is shorter.

Next, subcontractors must make a more detailed disclosure to the DOL via a web portal (www.dol.gov/fairpayandsafeworkplaces). Within 3 business days, the DOL issues its response (i.e., advice or assessment), which the subcontractor must give to the prime contractor. If the DOL finds that there are no persistent and/or willful violations, then the prime contractor doesn't have to do anything.

If the DOL finds that there are persistent and/or willful violations, then the prime contractor will need to make a responsibility determination under the Rule regarding the subcontractor. The prime contractor can consult with DOL regarding the seriousness of the subcontractor's labor law violations, but the ultimate responsibility determination remains with the prime contractor. If DOL doesn't respond within 3 business days, then the prime contractor makes the responsibility determination based on available information and the contractor's own business judgment. It's likely that many contractors

will find themselves making these determinations without DOL input unless the DOL obtains the necessary staff to process these disclosures and evaluations within this 3 day timeframe.

The timeline for performing subcontractor responsibility determinations provides that the contractor shall complete the assessment: (1) for subcontracts awarded within 5 days of the prime contract award or that become effective within 5 days of the prime contract award, no later than 30 days after subcontract award; or (2) for all other subcontracts, prior to subcontract award. However, in urgent circumstances, the assessment must be completed within 30 days of subcontract award. Essentially, this means that if 3 subcontractors are bidding a job to a prime contractor who was just awarded a contract from the government, all subcontractors should report labor law discrepancies to the DOL and get the DOL's response prior to submitting their bid. If a subcontractor has not done so before bidding, it will need to do so before the contractor can hire them. Alternatively, subcontractors can go to the DOL for preassessments under the Rule before they bid on a subcontract. Right now, it's unclear how long those preassessments can be used.

Safe Harbor Protection Under the Rule

While the Rule provides a safe harbor for both contractors and subcontractors against misrepresentations made by either, the extent of their liability to each other in other respects for determinations made pursuant to the Rule is murky at best. For example, it is unclear what liability a contractor faces for hiring a subcontractor against whom the DOL has issued a negative assessment under the Rule, or whether a subcontractor may sue a contractor that has decided against it given the subcontractor's labor law discrepancies. Regulatory guidance provides that the Rule is not intended to remove the prime contractor's discretion in reviewing responsibility of their subcontractors or to penalize them for exercising business discretion. Nonetheless, contractors continue to be "responsible for awarding contracts to subcontractors with a record of satisfactory integrity and business ethics," both before and after a contract award is made. As such, contractors may attempt to seek protection from liability under the Rule by inserting provisions into bid solicitation packages and/or their subcontracts requiring the bidder to attest to their continuing compliance with the Rule, or by seeking a waiver of liability should the contractor determine that a subcontractor is ineligible for the subcontract award.

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AGC's Lean Education Unit Offered at the Healthcare Design Expo + Conference

AGC is pleased to announce that AGC members can get a 15% discount on the HCD conference. This year HCD will be offer a builder's track to the conference, the Lean Construction Unit 6: Lean Design and Pre-Construction. The conference will be November 12-15, 2016 at the George R. Brown Convention Center in Houston, TX.

About the Conference:
Devoted to how the design of responsibly built environments directly impacts the safety, operation, clinical outcomes, and financial success of healthcare facilities, both now and into the future, this healthcare design show highlights best practices and top healthcare design products. With over 3,600 participants at the Healthcare Design Expo & Conference, the show is the industry's best-attended event. Attendees have the opportunity to earn continuing education credits, network with peers, discuss best practices, view innovative design products, and influence the direction of the industry as it advances into the future.

AGC Lean Design and Pre-Construction Conference will be offered Saturday, Nov 12, 2016 from 1:00 PM to 5:00 PM.

Lean Design and Pre-construction is a half-day, instructor-led course that explains the concepts of value-based management, lean in the design process and relational contracting. The course is divided into three sessions and teaches participants to:

- Distinguish between the varying definitions for design.
- Define value and commonly used methods to maximize it.
- Discuss waste and commonly used methods to minimize it.
- Differentiate between traditional project methods and lean design.
  Explain the various lean tools used in design and how to deploy them.

Don't miss your chance to attend this year's jam-packed Healthcare Design Expo & Conference - And there's still time to register before early rates expire! Please use registration code **AGC** to save 15% on registration.

Register Today!

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