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News&Notes
A periodic report to members of the South Carolina Bar's Construction Law Section

"Buy American" Primer

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As you review the requirements in the latest federal or federally funded request for proposals and begin to formulate your bidding strategy, you pause and think, "what is the requirement of the Buy America Act, again?", "is it the Buy American Act?", "can I use foreign construction materials or do they have to be domestic?", or "how do I determine if something is a domestic product, anyway?" These and dozens of other questions relating to the complicated and confusing nature of the restrictions for using foreign steel, iron and manufactured products cause you consternation leading up to your bid submission. Rest assured that you are not the only one tossing and turning; these statutes and regulations are very confusing with common issues overlapping different rules and varying definitions for identical terms. It takes a lot of effort to make sense out of these issues. Yet, while "the rules of the Buy American game" are hard to discern, they also provide "an opportunity for the clever contractor." 2 No. 7 Nash & Cibinic Rep. ¶ 39. This article is designed to help put you on the path to being a "clever contractor."

The first and most significant area of confusion is that there are four different statutory schemes that require the use of domestic items and materials in federally funded procurements. These are the two Buy America Acts that apply to Department of Transportation procurements: the American Recovery and Reinvestment Act's Buy American provision which applies to all contracts funded by that Act; and the Buy American Act which applies to all other federal procurements. Understanding which Act applies to which procurement is the first step in deciphering this puzzle. There are exceptions where a contracting officer can exempt a procurement from the requirements of these laws. *See, e.g.*, FAR 25.202 (exceptions to Buy American Act). The scope and impact of these exceptions are outside the scope of this article.

I. THE TWO BUY AMERICA ACTS

If the procurement opportunity is funded by the Department of Transportation then one of the two Buy America Acts will apply, depending on which sub-agency is funding the project.

A. Federal Transit Administration Projects

The most restrictive requirement is the Buy America Act from the Federal Transportation Law (49 U.S.C. Chap. 53). The Buy America Act has its genesis in the Surface Transportation Improvement Act of 1982 and is codified at 49 U.S.C. § 5323(j). This statute states that the Secretary of Transportation can fund a transportation "project only if the steel, iron, and manufactured goods used in the project are produced in the United States." 49 U.S.C. § 5323(j). Thus, the restrictions of the Buy America Act only apply to transit related procurements funded by the Federal Transit Administration ("FTA").

The Department of Transportation has provided further clarification on the Buy America Act in the implementing regulations in 49 C.F.R. §§ 661, *et seq*. The

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regulations' general requirement is that "no funds may be obligated by FTA for a ... project unless all iron, steel, and manufactured products used in the project are produced in the United States." 49 C.F.R. § 661.5(a). All steel and iron used must be manufactured in the United States. 49 C.F.R. § 661.5(b). The steel and iron requirements apply to "all construction materials" used in the project, such as steel or iron beams, rail lines, etc. 49 C.F.R. § 661.5(c). The requirement to use domestic steel and iron does not apply to metals "used as components or subcomponents of other manufactured products." *Id*. In other words, for a light pole with a steel component, the steel component does not have to be made from domestic steel.

Generally, under this Buy America Act all manufactured products must be produced in the United States. A manufactured product is considered "produced" in the United States if it is manufactured in the United States **and** "all components of the product must be of U.S. origin." 49 C.F.R. § 661.5(d). Components are considered to be U.S. origin if they are "manufactured in the United States." *Id*. The regulations define a component as "any article, material, or supply, whether manufactured or unmanufactured" that is used in an end product. 49 C.F.R. § 661.3. However, while the components must be manufactured in the United States, there is no requirement that the subcomponents or raw materials be domestic. 49 C.F.R. § 661.5(d)(2) (stating that a component is domestic if it is manufactured in the United States "regardless of the origin of its subcomponents.").

B. Federal Highway Administration Projects

A Buy America statute was later enacted to apply to the Federal Highway Administration ("FHWA") construction projects which is codified at 23 U.S.C. § 635.410. This requirement is similar too, but not as broad as the FTA's Buy America Act. The FHWA restriction only applies to "steel or iron materials," not "manufactured products." Under the FHWA's Buy America provision, all of the steel or iron materials used in federally subsidized highway projects must be manufactured in the United States. 23 C.F.R. § 635.410. This Buy America provision does not apply to non-steel or iron manufactured products. *Id*.

C. Summary

Under procurements subject to these two Buy America Acts, only domestic steel and iron can be used. All construction materials made of iron or steel must be made in the United States. Lastly, for FTA procurements, all manufactured products must be produced in the United States with components – excluding steel and iron – of U.S. origin.

II. AMERICAN RECOVERY AND REINVESTMENT ACT BUY AMERICAN PROVISION

The next major statute in this area is the American Recovery and Reinvestment Act ("ARRA") which has its own provision requiring the use of domestic iron, steel, and manufactured goods. In some ways, this requirement is broader than the Buy America Act; in others it is less expansive. Unlike the Buy America Acts which are limited to transportation projects, the ARRA's Buy American provision applies to all projects funded by the ARRA "for the construction, alteration, maintenance, or repair of a public building" or other public works and requires that "all of the iron, steel, and manufactured goods used in the project are produced in the United States." ARRA § 1605(a). For these procurements, the ARRA requires that all iron, steel, and other manufactured goods used as construction materials must be produced or manufactured in the United States. FAR 25.602(a). Similar to the Buy America Acts, the ARRA's provision does not require a domestic origin for the components of manufactured construction materials. *Id*. This Act also requires that all non-manufactured construction materials be domestic. FAR 25.602(b).

However, unlike the Buy America Act, the ARRA's Buy American provision states that "this section shall be applied in a manner consistent with the United States [sic] obligations under international agreements." ARRA § 1605(d). Pursuant to the Trade Agreements Act, the ARRA's Buy American requirements are waived for countries that are parties to an international trade agreement with the United States. *See* 2 C.F.R. § 176.90(2) for a complete list of these trade agreements and designated countries from. The ARRA's Buy American obligations only apply to "projects with an estimated value of [up to] $7,443,000." 2 C.F.R. § 176.90(a). For all ARRA procurements estimated to be above this amount, goods and services from a designated country shall be considered "the same as domestic goods and services." *Id*. These designated countries are all countries subject to the World Trade Organization Government Procurement Agreement ("WTO GPA") and various other Free Trade Agreements.

For all ARRA procurements under $7,443,000, the Buy American restrictions are expansive. All

steel, iron, non-manufactured and manufactured construction materials must come from domestic sources. However, once the procurement's estimated value exceeds this threshold, the Buy American restrictions are significantly broadened to include materials and products from dozens of trade agreement countries. It is worth mentioning specifically that China is not a designated country under any of these trade agreements. So even for procurements above the $7,443,000 threshold, a contractor cannot use materials from China.

III. BUY AMERICAN ACT (emphasis added)

The fourth statutory requirement for the use of domestic products in federal contracting is the Buy American Act. While this Act is expansive and applies to all public procurements in the United States, it is limited by other "agency regulations." FAR 25.000. Thus, for procurements funded by the FTA or FHWA, the Buy America Act will apply and the Buy American Act will not. If the Buy American Act applies, the contracting officer will insert either FAR Clause 52.225-9 or 52.255-11 in the contract. If the contract does not contain these clauses, then the Buy American Act does not apply. For procurements under the ARRA, that statute's Buy American provisions will apply.

For all other federal procurements, the Buy American Act (41 U.S.C. §§ 10a – 10d) is expansive and applies to both supplies and construction materials. FAR Subpart 25.1. First, the Buy American Act "restricts the purchase of supplies that are not domestic end products." FAR 25.101 (a). An article is a "domestic end product" if it is manufactured in the United States **and** the cost of domestic components exceeds 50 percent of the cost of all components. FAR 25.104 has an extensive list of articles that are exempt from the Buy America Act because they have been determined to be unavailable domestically. *Id.* Second, the Buy American Act applies to construction materials and allows contractors to "use only domestic materials in construction contracts performed in the United States." FAR 25.201. "Domestic construction materials" is defined as unmanufactured construction materials mined or produced in the United States or construction material manufactured in the United States, if the "cost of the domestic components exceeds 50 percent of the cost of all components." FAR 25.003.

As with the ARRA, the Buy American Act is limited by trade treaties. However, unlike the ARRA, under the Buy American Act this issue can be slightly confusing because the FAR has different dollar thresholds for different trade agreements. Specifically, the Buy American Act applies in full to every federal construction contract up to $7,443,000, the same level as the ARRA. However, unlike the ARRA, the Buy American Act restrictions are not lifted for all designated countries at this threshold. At $7,443,000, several free trade agreements such as the WTO GPA – are implemented and goods from these countries are exempt from the Buy American Act. For several other free trade agreements, most notably the North American Free Trade Agreement, foreign goods are excluded until the construction contract is valued at $8,817,449. These thresholds are changed periodically. These numbers are current through November 2010.

The Buy American Act is similar to the ARRA's Buy American requirements. The Buy American Act is very expansive and requires that all supplies and construction materials used in all federal procurements come from domestic sources. However, like the ARRA's restrictions, the Buy American Act is not restrictive for higher value construction contracts and gives contractors significant latitude to purchase materials from numerous foreign sources for larger procurements.

IV. DOMESTIC END PRODUCTS

In addition to the general discussion above, we need to further address what is a "domestic end product," a term used throughout the regulations and legal opinions. In its universal definition under each of these regulations, a "domestic end product" must be manufactured in the United States. *See* 2 No. 7 Nash & Cibinic Rep. ¶ 39 (citing FAR 25.101). *See also* 49 C.F.R. § 661.5(d). This, however, is where the similarity ends.

Under the Buy America Act, a product is a "domestic end product" if it is manufactured in the United States **and** "all components of the product must be of U.S. origin." 49 C.F.R. § 661.5(d). Under this regulation, the components are of U.S. origin as long as they are manufactured in the United States, regardless of where the raw materials or subcomponents come from. *Id.* The Buy America Act does not look past the source location of the components. Thus, under the Buy America Act, if you are supplying a light pole that has three components, the light pole will be a domestic end product if the pole and each of the components are manufactured in the United States--even if the raw materials or subcomponents are from foreign sources.

The American Recovery and Reinvestment Act's ("ARRA") Buy American provision is similar but slightly less restrictive. The ARRA requires that all steel, iron and manufactured goods be produced or manufactured in the United States, which means that all manufacturing processes must take place in the United States. FAR 26.602(a)(2). The ARRA is slightly less restrictive than

the Buy America Act in that "there is no requirement with regard to the origin of components or subcomponents" in the manufactured construction material. FAR 26.602(a)(2)(ii). Continuing with the light pole example from above, the light pole will be a domestic end product as long as it is manufactured in the United States, no matter where the components, subcomponents or raw materials come from.

The Buy American Act is where this determination becomes onerous and confusing. Under this Act, an item is a "domestic end product" if it is manufactured in the United States **and** the cost of domestic components exceeds 50 percent of the cost of all components. FAR 25.101(a). Determining the cost of the "domestic components" is confusing, and, in some circumstances, can make the domestic content of the product unimportant. 2 No. 7 Nash & Cibinic Rep. ¶ 39. First, the cost of the components does not include any manufacturing, processing or other costs – just the costs of the components themselves. *Id.* (citing *Comp. Gen. Dec.*, B-166405, July 8, 1969, *and Ampex Corp.*, Comp. Gen. Dec. B-203021, 82-1 CPD ¶163). Second, the only issue is the cost and source of the component, not the subcomponents. In one well known case, *Yohar Supply Co.*, B-225480, 87-1 BCA ¶ 152, the Government Accountability Office held that lock components manufactured in Korea were completely foreign components, even though these parts were made from U.S. steel. Thus, the agency was correct in not counting the cost of the subcomponent, the U.S. steel, to determine the value of the domestic components. Third, and the opposite of the *Yohar* case, under the Buy American Act, if the component is manufactured in the United States, it is domestic, even if all of its subcomponents and raw materials come from foreign sources. 2 No. 7 Nash & Cibinic Rep. ¶ 39 (citing cases). The key issue for determining if an item is a "domestic end product" under the Buy American Act is to focus on where the component was manufactured and to ignore the source of the raw materials or subcomponents.

The Buy American Act basically establishes a three part test to determine if a product is a "domestic end product:" 1) the end product must be manufactured in the United States; 2) more than 50 percent of the cost of components must be domestic components; and 3) domestic components must be manufactured (or if raw materials mined or produced) in the United States, regardless of where the component's parts or materials come from. This test has led the highly regarded government contract law commentators Nash and Cibinic to state that the Buy American Act test permits:

> offerors to manipulate the manufacturing process to meet the domestic end product requirement without regard to content of the product. For example, a company can create a domestic end product by importing foreign materials and parts worth $46, manufacturing them into domestic components at a cost of $5 (resulting in components costing $51) and adding them to $49 worth of foreign components in the final manufacturing process. By contrast, an unknowing contractor can find that a high domestic content product is a foreign end product. For example, a product would not be a domestic end product if a company took domestic materials and parts worth $46, manufactured them *abroad* into foreign components for $5, and added them to $49 worth of domestic components in the final manufacturing process.

2 No. 7 Nash & Cibinic Rep. ¶ 39.

In summarizing their interpretation and application of the Buy American Act, Nash and Cibinic state:

> A few things are clear. First, it makes little sense to "manufacture" an end product outside of the United States because such an end product can never be a domestic end product whatever its content. See 52 Comp. Gen. 13 (1972), where a product assembled in Mexico failed to qualify as a domestic end product although 97 percent of its cost was domestic (domestic components were shipped across the border for final assembly). Second, components must be carefully identified to ensure that the cost of components manufactured in the United States exceeds 50% of the cost of all components. For example, in the *Orlite* case, once manufacture of a major component was found to have occurred outside of the United States, the contractor failed to meet the 50 percent test. Finally, all costs not related to making the *components themselves* (i.e., costs involved in manufacturing them into the end product) must be disregarded in applying the 50 percent test. If these rules are followed, contractors have the best chance of prevailing in this sea of uncertainty.

2 No. 7 Nash & Cibinic Rep. ¶ 39

CONCLUSION

As this article shows, there are numerous regulations and statutes governing the requirement to buy "American" products to perform work under federal procurements. The goal of this article is to lay out the basics of the various regulations and provides a road map to figure out which Act and which regulation applies to certain procurements. Hopefully, this article can put you on the first step to becoming the "clever contractor" who can use these regulations to his advantage.

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When is a Building Product Not Integrated into a Building for Purposes of the Economic Loss Rule?

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While the South Carolina Supreme Court has not formally adopted the integrated product doctrine as a component of the economic loss rule, the United States Court of Appeals, Fourth Circuit, predicted the Supreme Court's adoption of the doctrine in *Laurens Elec. Coop., Inc. v. Altec Indus., Inc.*, 880 F.2d 1323, 1324-25 (4th Cir. 1989). The economic loss rule bars tort remedies in strict liability or negligence when the only claim is for damage to the product itself. South Carolina has extended the economic loss rule to apply to manufacturers of building products used in commercial construction. *See Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 384 S.E.2d 730 (1989).

The integrated product doctrine extends the economic loss rule to bar tort remedies when an allegedly defective product is incorporated into another product which the allegedly defective product then damages. The Supreme Court may have informally adopted the integrated product doctrine in *Sapp v. Ford Motor Company*, 386 S.C. 143 (2009), where the Court found the Fourth Circuit's analysis of the economic loss rule in *Laurens Elec.* to be correct.

Several states have extended the integrated product doctrine to tort actions involving allegedly defective building products. These courts reason that the building is the product and it cannot be divided into its component parts for purposes of the economic loss rule. As such, any damage the allegedly defective building product causes to the structure of the building is treated as damage to the "product" itself, and a building owner's remedies are found in contract and not in tort.

The New Jersey Supreme Court recently issued a noteworthy opinion focused on the application of the economic loss rule and the integrated product doctrine to an Exterior Insulation and Finish System (EIFS). In *Dean v. Barrett Homes, Inc.* (available online at http://www.judiciary.state.nj.us/opinions/supreme/A1509DeanvBarrettHomes.pdf), the New Jersey Supreme Court held that the exterior wall cladding product was not so fully integrated into the structure of the house to be considered the product for purposes of the economic loss rule, and the plaintiffs retain a tort remedy against the product's manufacturer.

In *Dean*, the plaintiffs purchased a home from its original owners. The home was built by defendant Barrett Homes and clad with an EIFS manufactured by defendant Sto Corporation. After noticing black lines on the exterior of the home, the plaintiffs hired an industrial hygienist who found toxic mold, and plaintiffs eventually had all the EIFS removed and replaced. Plaintiffs filed suit against many defendants alleging negligence, breach of warranty, Consumer Fraud Act violations, and strict products liability claims. They settled their claims against all defendants except Sto, which moved for summary judgment. The trial court granted Sto's motion on the basis that the plaintiffs' tort claims were barred by the economic loss doctrine.
The New Jersey Appellate Division affirmed, concluding that the economic loss rule precluded recovery because the damages claim was focused on the cost of replacing the product itself. The panel also found that the integrated product doctrine barred plaintiffs' tort claims for recovery for damages to other parts of the home's structure.
After a detailed analysis of the development of the economic loss rule and the integrated product doctrine, the New Jersey Supreme Court focused its analysis on whether the EIFS was sufficiently integrated into the home for purposes of applying the economic loss rule. Without a detailed explanation of the basis of its decision, the Court held that EIFS was not an integral part of the structure of home, and was at all times distinct from the house. Therefore, the Court deemed the EIFS a separate product for purposes of the economic loss rule analysis.

Accordingly, the Court held that the economic loss rule bars plaintiffs from recovery for damage to the EIFS itself. However, the

plaintiffs may pursue their tort-based claims for recovery of damages the "EIFS caused to the house's structure or to its environs."

Justice Rivera-Soto filed a strong partial dissent, describing the majority's conclusion as one that "defies basic common sense." Noting that the EIFS was permanently integrated into the structure of the home and that EIFS can only be removed by extensive demolition work, Justice Rivera-Soto stated the notion that EIFS is not integrated into the home is "so fanciful, so nonsensical, that it beggars the imagination."

The *Dean* decision is disturbing on two fronts. First, as detailed in footnote two of Justice Rivera-Soto's dissent, the Court ignored both the physical reality of construction and the extensive legal authority supporting the proposition that EIFS is integrated into a building, and hence, is subject to the economic loss rule. Second, the Court provided absolutely no guidance for determining whether a product is "sufficiently integrated" into a building for purposes of applying the economic loss rule. The decision leaves open more questions than it answered, and many of the questions are likely to arise again in the future.

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Dispute Resolution Through Management Negotiations, Mediation and Arbitration

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The following is an abbreviated discussion of dispute resolution through executive negotiations, mediation and arbitration, including sample contract clauses and the administration thereof. Incorporation of appropriate language within the principle contract between the Parties should be carefully established during the initial stages of contract formation. Language for particular alternative consideration is written in [*italics*].

1. Executive Negotiations and Mediation. Prior to commencement of formal Dispute resolution procedures, the Parties should consider management negotiations by top executives having full authority to resolve the Dispute at hand. For example, the Parties may elect to the following Executive Level Dispute resolution procedure:

> "A meeting shall be held promptly between the Parties, attended by a company executive with decision-making authority regarding the Dispute, to attempt in good faith to negotiate a resolution to the Dispute. The Parties shall confirm in writing to each other that the executive representative has full authority to settle the Dispute, including any insurance coverage issues if required. If within [*ten (10) days*] after such meeting or within such time-period as the Parties may otherwise agree, the Parties have not succeeded in negotiating a resolution of the Dispute, they agree to submit the Dispute to non-binding mediation in accordance with the Commercial Mediation Rules of the American Arbitration Association and to bear their respective costs of the mediation.
>
> The Parties will jointly appoint a mutually acceptable mediator, seeking assistance in such regard from the American Arbitration Association if they have been unable to agree upon such appointment within [*ten (10) days*] from the conclusion of the initial negotiation period. The Parties agree to participate in good faith in the mediation before a mutually acceptable mediator and the negotiations related thereto for a period of at least [*thirty (30) days*]. In the event either Party feels the negotiations are not successful after participating in the negotiations for a [*thirty (30) day*] period, then either Party may initiate arbitration upon [*ten (10) days'*] written notice to the other Party."

The Parties should be cognizant of potential extended delay caused by unsuccessful mediation and to adjust the above time limits according to the nature and magnitude of the Dispute.

2. Limits of Authority Given to the Arbitrator(s). Discovery and time limits should be considered, along with the requirements of an award so that it can be enforceable in the jurisdiction(s) where the Parties reside or where the owing Party maintains its assets for seizure in order to satisfy an award.

The Parties may wish to place limits of authority on the Arbitration Panel. However, such provisions may create appeal avenues for a disappointed Party and frustrate the swift conclusion of the Dispute. Many believe that the contract in its entirety speaks for itself, that specific limits of authority are not required, and that specific limits in the Arbitration clause hinder finality to the Arbitration process.

Statutory rights of appeal of an Arbitration decision are normally strictly limited to specific reasons, such as failure to consider evidence properly proffered, fraud, or bias. Nevertheless, should the Parties desire to place limits of authority on the Panel, such limitation should be expressly stated. For example:

> "The Arbitrators have no authority to award consequential damages or damages in excess of any of the limitations on a Party's liability as provided for in the contract."

In any such limit of authority on the Arbitration Panel, clear definition of terms is required. For example, the term "consequential damages" may be subject to varied interpretation in different forums, and thus can set up the final Arbitration Decision to attack and extended appeals. Limits on authority of the Panel must be artfully drafted, and the abbreviated limitation language above may need to be expanded.

3. Domestic Arbitration (Abbreviated Domestic Language). Failing a resolution among the Executive Managers, the Parties may elect to resolve differences through Domestic Arbitration Procedures. There are dozens of suggested formats by various organizations. Consider the following:

> "Upon written notice by either Party to the other in accordance with Section ___ of this Contract, the Dispute shall be submitted to final and binding Arbitration. The Arbitration shall be before one neutral Arbitrator to be selected in accordance with the [*Construction*] [*Commercial*] Industry Arbitration Rules of the American Arbitration Association (three Arbitrators if the amount in Dispute exceeds $1,000,000 in the aggregate) The Parties acknowledge that this Contract involves interstate commerce, and the Arbitrator(s) will apply the rules of the United States, including the Federal Arbitration Act, 9 USC § 1 et seq., and to the extent not inconsistent therewith, the laws of the State of _____. The decision of the Arbitrator(s) shall be final and binding upon the Parties, and judgment may be entered in any court having proper jurisdiction. Arbitration proceedings shall be held in _____, unless some other place is selected by mutual agreement."

AAA Expedited Rules have little or no discovery and may be viewed by some as trial by ambush. As such, in any significant commercial endeavor the Parties should carefully evaluate this form of Arbitration before implementation of an Expedited Arbitration process.

4. International Arbitration. The United Nations Commission on International Trade Law (UNICITRAL) provides well understood and accepted rules for the resolution of International Disputes through Arbitration. With the UNICITRAL rules of Arbitration established, the Parties may still consider the use of a third party administrator in order to facilitate the process, to act as escrow agent for deposits, and to give additional credence to any award so as to assist in its enforcement. The London Court of International Arbitration is a good candidate for the administrative agent. The International Chamber of Commerce is yet another option to consider as an administrative agent.

The International Centre for Dispute Resolution (the international affiliate of the American Arbitration Association) separately provides international Arbitration support services on a "soup-to-nuts" basis. The ICDR has its own rules and provides broad spectrum administrative services not unlike the AAA, including selection of Arbitrators through Decision of the Arbitrator(s).

5. Governing Law. All contracts should have a provision stating that the contract and the Parties' performance hereunder is governed by the laws of an agreed upon jurisdiction and to the exclusion of any and all laws that would require the laws of another jurisdiction to apply. The governing law should first be considered during contract negotiations to make certain that various contract provisions can be enforced.

Frequently, the laws of the situs of a commercial venture (such as a construction project) may be invoked. However, the laws of a particular state or country warranting scrutiny would include those states or countries that may invalidate pertinent contract provisions (e.g., states with anti-indemnity provisions, statutory provisions addressing clauses violating public policy, etc.). For international Disputes, the laws of New York, England and Wales, Singapore, Alberta or Western Australia may be more acceptable. The required language should always be English.

6. International Language. Consider the following Arbitration clauses invoking the laws of England and Wales:

> "Applicable Law and Settlement of Disputes
>
> A. This Contract, the relationship of the Parties, and the Parties' performance and obligations hereunder shall be governed by, and will be construed and enforced with the laws of England and Wales, without regard to its choice of law rules or any other law that would require the laws of any other jurisdiction or country to apply.
>
> B. Any and all Disputes arising out of or related to the interpretation, performance or non-performance of this Contract ("Dispute") shall be exclusively and finally settled as set forth in this Article.
>
> C. Failing settlement of the Dispute by direct negotiations at the appropriate level of executive

management within thirty (30) days of a Dispute being raised, either Party may initiate mediation proceedings by written notice to the other Party. The other Party has the sole discretion as to whether to agree to participate in any mediation. Should mediation fail to resolve the matter within thirty (30) days of said notice or if the Parties do not mutually agree to mediation, then either Party may initiate binding Arbitration by giving notice to the other Party referring the Dispute to Arbitration.

D. The Arbitration will be administered by the London Court of International Arbitration ("LCIA") using the United Nations Commission on International Trade Law ("UNCITRAL") rules. The LCIA is hereby designated as the appointing authority. The place of Arbitration shall be London, England or other mutually agreed location, and the language to be used in the Arbitral proceedings is English. All Arbitration and administrative fees (except fees associated with the filing of any claim or counterclaim) and costs will be borne equally, notwithstanding which Party may prevail. However, each Party must bear its own fees and costs of its own lawyers and witnesses irrespective of which Party prevails.

E. If the amount at issue with respect to any Dispute (including any counterclaims) at the inception of the proceedings, is less than One Million United States Dollars (U.S. $1,000,000) (or its equivalent in any other currency) then the Arbitration will be conducted by a sole Arbitrator. If the amount at issue (including any counterclaims) is equal to or greater than One Million United States Dollars (U.S. $1,000,000) (or its equivalent in any other currency), then the Arbitration will be conducted by three Arbitrators. The procedure for selection of the specified number of Arbitrators will be in accordance with pertinent sections of the UNCITRAL rules. Subsequent amendment of the Claim increasing the amount of the Dispute shall not be grounds for increasing the number of Arbitrators.

F. The Arbitrator(s) must be fluent in the English language and must at all times remain wholly independent, fair and impartial regarding the Dispute and the Parties. The Arbitrator(s) shall be a lawyer(s) experienced in [*international engineering and construction of similar type projects*] [*specify type of commercial association*].

G. All documents considered relevant by the submitting Party must be submitted with the Party's respective statement of claim/defense, and any counterclaim or reply. The Parties may agree to the mutual exchange of documents, and the International Rules on the Taking of Evidence (excluding those provisions concerning experts) shall apply. The Arbitrator(s) have discretion, on the Arbitrator's own motion or at the request of a Party, to request the submission of additional documents for the Arbitral tribunal. The Arbitrator(s) do not have the power to retain their own expert witness(es).

H. The Parties agree that the Dispute should be resolved as speedily as possible. Therefore, any time limits specified in the Arbitration rules must be strictly complied with and the award should be issued by the Arbitrator(s) within three (3) months of the commencement of the proceedings, or as soon thereafter as possible.

I. The Arbitrator(s) must give a [*reasoned*] [*standard*] award in writing, and any award shall be final and binding. The Parties expressly agree to exclude any right of appeal or (except for enforcement, confirmation or as provided below) reference to any court. [*The Parties hereby agree to forego any claim for, and the Arbitrator(s) shall have no authority, jurisdiction, or power to award damages contrary to the provisions of the contract including those provisions dealing with disclaimer of consequential damages and limitation of liability provisions. If a Party believes that the Arbitrator (s) have awarded damages contrary to the provisions of the contract [including those provisions dealing with disclaimer of consequential damages and limitation of liability provisions], then the agreement to exclude or otherwise waive the right to appeal shall not apply, and that portion of the award shall be deemed null and void and not subject to enforcement by any court*]. The award may [*otherwise*] be enforced by judgment in any court having jurisdiction over the award or over the person or the assets of the owing Party. Applications may be made to the court for judicial recognition of the award or an order of enforcement, as the case may be."

Fred Garrick, previously Senior V.P. and General Counsel for BE&K, Inc. and for Fluor Daniel Inc., has more than 30 years of engineering and construction experience. Fred holds J.D. and Mechanical Engineering degrees from the University of South Carolina. He is an approved neutral for the International Centre for Dispute Resolution and for the American Arbitration Association. Fred's practice is devoted to arbitration and mediation services.

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FY2011-2012 Nomination of Section Council Members

The following nominations have been made for the Construction Law Section for the 2011-2012 Bar year in accordance with Article VII, Section 2 of the Section Bylaws.

Not later than April 15, ten or more members of the Section who are in good standing may file by registered mail with the Chair a nominating petition, containing signatures and printed names and addresses, and making nominations for one or more of the offices to be elected. Such petitions must be accompanied by the written consent of any person nominated. ***Nominations will be closed on April 16.***

Officers:
Chair
A. Bright Ariail

Chair-Elect
James E. Weatherholtz

Vice Chair
Tracy T. Vann

Secretary
Kevin Kenison

Section Delegate
Wesley D. Peel

Immediate Past Chair
Calvin "Ted" Vick Jr.

Nominating petitions must be received by **April 15, 2011,** and sent to the S.C. Bar, Attn: Tara Smith, P.O. Box 608, Columbia, SC 29202, or via e-mail: tsmith@scbar.org, or faxed to (803) 799-4118. Should you have any questions, please feel free to contact Tara at (803) 799-6653, ext. 146, or toll free, (877) 797-2227.

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FY2010-2011 Section Goals

- Produce a newsletter/year-end review and distribute to members through the Section listserv and post on the Bar Website. Encourage Section members to submit articles to be published in the *SC Lawyer* and/or other Bar publications.
- Host a Construction Law Section seminar in the fall of 2010.
- Update and distribute the South Carolina Bar Construction Law Section Directory in 2010.
- Host a Section seminar in conjunction with the 2011 Bar Convention.
- Prepare and plan a joint conference with the North Carolina Construction Law Section in 2011.
- Publish a Construction Law manual to be released in 2011.

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SAVE THE DATE

Construction Law Section Conference
September 15-17, 2011
Wild Dunes Resort, Isle of Palms

September 27-29, 2013, Grove Park Inn, Asheville, NC

Update
In lieu of the quarterly newsletter, the Section will distribute an annual summary in August. If you are interested in

submitting an article, please forward your submission to Tara G. Smith at tsmith@scbar.org.

For additional information and updates related to the Construction Law Section, please visit www.scbar.org.

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