



UPDATE Education Law

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Dear Readers,

Robinson & Cole's Education Practice is pleased to offer the latest edition of its Education Law Update. In this edition, we have two articles regarding recent developments in construction law and its impact on educational institutions, one involving a public university and the other involving private construction in Massachusetts. Our other article discusses recent developments in immigration law and, in particular, export control attestation for nonimmigrant petitions. We want this update to be a source of value to our friends in the education field. We encourage our readers to contact us with any topics of interest or any questions or comments on what you read below.

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Coeditors*

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A BOND LOOPHOLE?

By [Keane E. Aures](#)

Ohio State University (OSU) is constructing a \$1 billion state-of-the-art medical facility to enhance its Medical Center's central campus. To manage the construction of the medical facility, OSU has selected Turner Construction Company (Turner) to operate as its Construction Manager (CM). Unlike the traditional general contractor method of project delivery, on which the general contractor provides a "hard bid" for a fixed price to do the construction, a CM typically is retained on a qualifications basis, before a construction budget is finalized. The CM's services are normally provided for a reimbursable cost of the work plus a

fee that is often a percentage of the cost. Eventually, the CM provides a proposal to the owner that the cost of the work, plus the fee, will not exceed a guaranteed maximum price. On projects in which a public owner retains a CM, the trade work, but not the CM services, is usually procured through lowest responsible bids.

Controversy has arisen on the medical facility project, because OSU has determined that certain state public works bonding laws that require the principal contractor to post a payment and performance bond do not apply to Turner. OSU determined that it is permissible to waive the bonding requirement and instead require only a letter of credit to secure the CM's performance obligations. Under Ohio law, a public entity may require a CM to post a letter of credit to indemnify the state for performance obligations; however, this letter of credit does not provide any protection for subcontractors and suppliers who claim to have not been paid for services performed. A separate statute, however, provides that a "bidder" must provide a bond to secure payment obligations of its subcontractors. Thus, subcontractors and suppliers, along with the surety industry, are arguing that posting a letter of credit to secure performance obligations is insufficient. OSU argues that because Turner is a CM and not a GC the requirement to post a payment bond is not applicable. OSU's reasoning is based on the language in the Ohio statute that requires a "bidder" entering into a contract with a state entity to file a bond to indemnify the state and secure subcontractors and suppliers. Because there was no bidding process for CM services on this project (Turner was selected through a qualifications-based process), OSU has determined that the requirement for Turner to post the bond does not apply.

The American Subcontractors Association and other industry organizations have filed a lawsuit against OSU seeking to compel the university to comply with statutory bonding obligations, in particular, that Turner be required to post a payment bond to guarantee the payment of its subcontractors. These plaintiffs are arguing that OSU's waiver of the bond requirement is based on a circumstantial technicality that the legislature did not foresee in drafting the statutory language.

Subcontractors are generally protected from nonpayment on private projects by their right to file a mechanic's lien on property where work is being performed. Public property, however, is generally exempt from mechanic's liens because it cannot be sold to satisfy a lienor's rights. Thus, states usually require contractors to post a payment bond to protect subcontractors that supply labor and materials to public projects. In this case, the letter of credit does not provide the same protections as a payment and performance bond nor did the legislature intend it to. The letter of credit only protects the state as to performance of the work and provides no protection for subcontractors or material suppliers. OSU has, therefore, effectively eliminated the project's subcontractors and supplier's standard form of security.

In addition to OSU waiving Turner's bonding requirement, the contracts being entered into by some of the subcontractors require the waiver of lien rights. The subcontractors argue that these two actions all but eliminate a subcontractor's available recourse should they not receive payment for their work on the project.

While the lawsuit is still in its early stages, this action could have wide-ranging effects on public projects throughout the country. Much will depend upon the applicable statutory language requiring the posting of payment bonds for public projects in each jurisdiction. With the advent of the construction manager system of project delivery in lieu of a general contractor, public owners, including public higher education institutions, should monitor this matter closely, as it may ultimately affect the type of security they may require, if any, for their construction projects.

DEALING WITH THE NEW EXPORT CONTROL ATTESTATION FOR NONIMMIGRANT PETITIONS, INCLUDING H-1BS

By [Megan R. Naughton](#)

Starting February 20, 2011, the U.S. Citizenship and Immigration Services (USCIS) requires employers sponsoring foreign national employees to certify one of the following when completing the Form I-129: (1) that an export license is not required from the Department of Commerce or the Department of State for the work to be performed by the foreign national or (2) that a license is required but the employer will restrict the foreign national's access to the protected technology. The exact questions from the form are included below.

The requirement is based on the concern that foreign nationals who are in the U.S. in nonimmigrant status may have access to certain technologies that have been protected by the U.S. government from disclosure to nationals of certain countries. The government considers any kind of access by certain foreign nationals to such protected technology as a "deemed export," including when the foreign national either directly works on a technology that is protected or merely has any type of access to it. Failure to comply could result in significant fines for export control violations, and special care may be necessary to ensure coordination between those who coordinate export control and those who coordinate immigration issues.

- **Research-oriented schools** probably already have in place an export control office or official responsible for ensuring compliance with export control laws. These schools should be able to utilize the expertise and knowledge of these offices to establish compliance practices to respond to this question on the Form I-129.
- **Schools that do not generally conduct scientific research** and previously have not been concerned with export control compliance must still respond to this question regarding export control. As these schools may not have a stand-alone export control office, either the expertise will have to be developed in-house or outside counsel will have to be consulted regarding compliance practices. If the school decides to keep the process in-house, a discussion involving general counsel and the preparing entity could help determine who will review the necessary regulations, document the process, and execute the certification.

You may want to consider taking some or all of the following steps for your school:

1. Identify the person best suited to make the determination regarding the export control licensing requirement at your school or agree to employ the services of outside counsel.
2. Provide this export control compliance professional with access to the specific USCIS questions and instructions, which are included below.
3. Develop a process with a form and/or system of certification that will be followed at the initiation of each H-1B, H-1B1, L-1, and O-1 case. For instance, when completing questionnaires to initiate a new case, forward the information, along with the questions and instructions below, to the export control compliance professional to review. You may want to provide a specific tailored form for this process that contains the information this professional will need to review to advise you about which box to check below and to document the certification for your file.
4. Require a written response from the export control compliance professional regarding the

determination for the file so the immigration compliance professional has the necessary information and documentation.

USCIS QUESTIONS AND INSTRUCTIONS

Check Box 1 or Box 2 as Appropriate:

With respect to the technology or technical data the petitioner will release or otherwise provide access to the beneficiary, the petitioner certifies that it has reviewed the Export Administration Regulations (EAR) and the International Traffic in Arms Regulations (ITAR) and has determined that:

Box 1

A license is not required from either U.S. Department of Commerce or the U.S. Department of State to release such technology or technical data to the foreign person; or

Box 2

A license is required from the U.S. Department of Commerce and/or the U.S. Department of State to release such technology or technical data to the beneficiary and the petitioner will prevent access to the controlled technology or technical data by the beneficiary until and unless the petitioner has received the required license or other authorization to release it to the beneficiary.

CERTIFICATION PERTAINING TO THE RELEASE OF CONTROLLED TECHNOLOGY OR TECHNICAL DATA TO FOREIGN PERSONS IN THE UNITED STATES

U.S. Export Controls on Release of Controlled Technology or Technical Data to Foreign Persons. The Export Administration Regulations (EAR) (15 CFR Parts 770-774) and the International Traffic in Arms Regulations (ITAR) (22 CFR Parts 120-130) require U.S. persons to seek and receive authorization from the U.S. Government before releasing to foreign persons in the United States controlled technology or technical data. Under both the EAR and the ITAR, release of controlled technology or technical data to foreign persons in the United States—even by an employer—is deemed to be an export to that person's country or countries of nationality. One implication of this rule is that a U.S. company must seek and receive a license from the U.S. Government before it releases controlled technology or technical data to its nonimmigrant workers employed as H-1B, L-1 or O-1A beneficiaries.

Requirement to Certify Compliance with U.S. Export Control Regulations. The U.S. Government requires each company or other entity to certify that it has reviewed the EAR and ITAR and determined whether it will require a U.S. Government export license to release controlled technology or technical data to the beneficiary. If an export license is required, then the company or other entity must further certify that it will not release or otherwise provide access to controlled technology or technical data to the beneficiary until it has received from the U.S. Government the required authorization to do so. The petitioner must indicate whether or not a license is required on Page 6, Part 7 of Form I-129.

Controlled Technology and Technical Data. The licensing requirements described above will affect only a small percentage of petitioners because most types of technology are not controlled for export or release to foreign persons. The technology and technical data that are, however, controlled for release to foreign persons are identified on the EAR's Commerce Control List (CCL) and the ITAR's U.S. Munitions List (USML). The CCL is found at 15 CFF Part 774, Supp. 1. See http://www.access.gpo.gov/bis/ear/ear_data.html#ccl. The USML is at 22 CFR 121.1. See http://www.pmdtc.state.gov/regulations_laws/itar.html. The EAR-controlled technology on the CCL generally pertains to that which is for the production,

development, or use of what are generally known as "dual-use" items. The ITAR-controlled technical data on the USML generally pertains to that which is directly related to defense articles.

The U.S. Department of Commerce's Bureau of Industry and Security administers the CCL and is responsible for issuing licenses for the release to foreign persons of technology controlled under the EAR. The U.S. Department of State's Directorate of Defense Trade Controls (DDTC) administers the USML and is responsible for issuing licenses for the release to foreign persons of technical data controlled under the ITAR. Information about the EAR and how to apply for a license from BIS are at <http://www.bis.doc.gov>. Specific information about EAR's requirements pertaining to the release of controlled technology to foreign persons is at <http://www.bis.doc.gov/deemedexports>. Information about the ITAR and how to apply for a license from DDTC are at <http://www.pmddtc.state.gov>. Specific information about the ITAR's requirements pertaining to the release of controlled technical data is at http://www.pmddtc.state.gov/faqs/license_foreignpersons.html.

ARE YOU READY FOR THE NEW MASSACHUSETTS PROMPT PAY ACT?

By [Joseph A. Barra](#)

The new Massachusetts Prompt Pay Act, sometimes referred to among the local construction bar as the "Construction Lawyers' Annuity Act," affects private construction projects where the general contract is executed on or after November 8, 2011, and whose primary value is \$3 million or more (except residential projects with less than five units). Many contracting and payment practices that were once commonplace and even expected on large Massachusetts projects are now forbidden by law. At the very least, the act will require more communication up and down the construction food chain as industry professionals reevaluate the way they process payment applications, negotiate change orders, and pay for goods and services.

How the Act has Changed the Current Landscape

By its title, the act intends to promote fairness in private construction contracts. While the jury is still out as to whether its self-executing remedies actually achieve that goal, the statute affects five important tenets:

1. It sets specific time limits for the preparation, submission, and approval of applications for payment. A failure to comply with the statute's time standards renders the proposed change order approved as a matter of law. The act also requires that any rejection (in whole or in part) of a payment application be specific as to the factual and legal basis for nonpayment.
2. It defines specific time frames for processing, approving, and rejecting proposed change orders. Similar to the remedy for failing to timely reject an invoice, a failure to comply with the statute's deadlines renders the proposed change order approved as a matter of law. Any such rejection (in whole or in part) of a proposed change order must be specific as to the factual and legal basis for such rejection.
3. It effectively invalidates the commonly used pay-if paid or pay-when-paid provisions frequently used by contractors, construction managers, and upper-tier subcontractors; however, the statute allows such provisions under two limited exceptions that must be expressly provided for in the contract. The first exception is if the work performed by the party owed money is defective. The second exception allows the clause to be enforced if the upstream payer is insolvent. This last exception, however, also requires the party to whom money is owed to have recorded previously a Notice of Contract before submitting its first payment application.

4. It renders unenforceable any contract provision that requires a party to continue working when an approved payment is more than 30 days late; however, as with any rule, there are exceptions. For example, such clauses are considered enforceable when the creditor is in default of its contract obligations or if there is a legitimate dispute regarding the quality or quantity of the creditor's work. Notably, these exceptions apply only if the creditor has received prior written notice of the controversy and has been paid all amounts not in dispute.

5. It limits the reach of a contract provision that restricts an aggrieved party's ability to trigger the contract's dispute resolution remedies. No longer can one party require a creditor to wait until the end of the project to resolve a dispute regarding payment or contract changes.

The Act's Impact on Private Educational Owners:

- Owners will need to modify their current contract forms to comply with the act.
- Owners must now have very detailed discussions with the contractors regarding the payment and change order process.
- CM agents and design professionals retained by educational owners will have increased exposure for failing to timely review and process applications for payment and proposed change orders as part of their construction administration responsibilities. Owners will need to be mindful that any added costs as a result of this exposures are not passed on to owners.
- Lenders will need to accelerate their disbursement approval process.
- Any party who rejects any or part of an application for payment and/or proposed change order will now need to read their contracts and understand their contract defenses, as such defenses must be specifically identified in any such rejection.
- Rejections to payment applications and proposed change orders will need to be certified as made in good faith.
- The time-honored payment response of "I don't have to pay you because I haven't been paid" is virtually a thing of the past.
- Any previous contract practice that relied upon performance milestone payments must be carefully tailored to ensure that it doesn't run afoul of the statute's invoicing requirements.

These are only a sampling of the impacts that the act has upon the landscape of new, large-scale private construction projects in Massachusetts after November 8, 2010. Because this note is only intended to touch on the highlights, we recommend that all educational owners engaged in construction in Massachusetts take the time to review the act with their favorite construction attorney.

FIRM NEWS & NOTES

In the News

Robinson & Cole Attorney to Present at the Annual Conference of the National Association of College and University Attorneys (NACUA) in San Francisco

[Gregory R. Faulkner](#), a partner in the Construction Practice Group and cochair of the education law practice at Robinson & Cole will present "Contracts: Indemnification and Liability Trends" during the annual NACUA conference, which will be held from June 26 through June 27 in San Francisco, California. He will go over the following points of interest:

- Enforceability of risk transfer and assignment provisions-indemnification and hold harmless clauses, limitations of liability, warranty disclaimers, waivers and releases, damage waivers, insurance, and liquidated damages-and recent case law interpreting such provisions
- Risk transfer and assignment issues specific to certain types of contracts-software license agreements, construction and design agreements, facilities use agreements, and vendor agreements
- Practical application-creative approaches to negotiating risk transfer and assignment provisions and sample clauses

Bruce Barth Presents on New Health Care Reform Laws

Employee benefits and compensation partner [Bruce B. Barth](#) presented "Health Care Reform: A Practical Look from the HR Perspective" to the Human Resource Association of Central Connecticut, an affiliate of the Society for Human Resource Management. Around 45 human resource professionals from the private employer sector attended the event at the Hartford Marriott Rocky Hill Hotel on April 26, 2011. Mr. Barth presented a timeline of when various health care reform provisions become effective for sponsors of group health plans and focused on employer responsibilities because of legal changes.

Construction Attorneys Present Webinar on Construction Management

Construction partner [Martin A. Onorato](#) and construction associate [Elizabeth K. Cunha](#) copresented the Webinar "Avoiding the Six Common Mistakes of CM Practice" with Frank White of Chubb Group on April 21, 2011. The Construction Management Association of America hosted the event.

The Webinar identified six common mistakes of construction management agency practice, examined the language in the Construction Management Association of America's standard contract forms that apply to these mistakes, and reviewed the applicable provisions of an insurance policy designed for construction managers.

Robinson & Cole Cosponsors Program at Central Connecticut State University

Robinson & Cole and St. Francis Hospital and Medical Center of Hartford were cosponsors of Women & War in Afghanistan, a program presented by the World Affairs Council's Global Women's Issues Forum at Central Connecticut State University on April 7, 2011. [Megan R. Naughton](#), immigration law partner with Robinson & Cole and cochair of the Education Law Committee, is a member of the executive committee of the World Affairs Council of Connecticut and is on the board of the Global Women's Issues Forum.

Panelists for the evening's program included the following:

- Shamin Jawad, founder and president of the Ayenda Foundation, a member of the U.S.-Afghan Women's Council (USAWC), Trustee of the American University of Afghanistan, and wife of former Ambassador to the United States, Said T. Jawadaba
- Christina Lamb, renowned journalist, and author of the highly acclaimed book of her travels through Afghanistan, *The Sewing Circles of Heart*
- Uzra Azizi, Afghan student, studying in the United States as part of the Initiative to Educate Afghan Women

The moderator for the evening program was Mary Jo Myers, humanitarian and vice president

of the board of directors of the Aschiana Foundation. She is also the wife of the former chairman of the Joint Chiefs of Staff, General Richard Myers.

Robinson & Cole Attorneys Support YWCA's Largest Annual Fundraiser

Robinson & Cole was a bronze sponsor for the YWCA Hartford Region's 16th annual "In the Company of Women Luncheon" on April 6, 2011, at the Connecticut Convention Center. The "In the Company of Women Luncheon" is the YWCA's most important annual fundraising event, which brings together nearly 1,500 diverse and successful women from the Greater Hartford area. Proceeds help fund the YWCA's many programs and services that benefit the lives of women and children in the Hartford region. Attorneys [Bruce B. Barth](#), [Nicole A. Bernabo](#), and [Megan R. Naughton](#) represented the firm.

Pamela Elkow Presents Webinar About Vapor Intrusion

Partner [Pamela K. Elkow](#) presented the webinar "How to Deal with Vapor Intrusion Issues in Real Estate Transactions - What Real Estate Lawyers Need to Know," hosted by ExecSense, on April 5, 2011. The webinar examined what real estate lawyers need to know about the potential for vapor intrusion into structures on the property, the potential for significant liability for property owners and prospective purchasers, and how to handle vapor intrusion issues in real estate transactions at the due diligence, negotiation, structuring, and drafting stages.

Labor and Employment Attorneys Address Social Media in the Workplace

Labor and employment attorneys [Alice E. DeTora](#) and [Nicole A. Bernabo](#), hosted the webinar "Social Media in the Workplace - What to Consider to Protect Your Company" on March 30, 2011. The webinar addressed the need for companies using social media to monitor the rapidly developing legal issues surrounding it to protect themselves from potential risks and liability and to craft tailored social networking policies appropriate for their business. The webinar also reviewed examples of appropriate responses to violations of social media policies or work rules related to computer use.

For more information on our [education law practice](#), please contact [Gregory R. Faulkner](#) in our Hartford office at (860) 275-8288 or [Megan R. Naughton](#) in our Hartford office at (860) 275-8263.

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