



GARRY R. BOEHLERT

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SERVICES

Commercial Litigation
Cybersecurity and Privacy in
the Construction Industry

INDUSTRIES

Construction
Government Contracts
Insurance

Garry Boehlert focuses his practice on resolving claims and disputes arising from significant infrastructure projects. He regularly assists owners, contractors, sureties, specialty subcontractors and engineering/design firms with the drafting, review and negotiation of contracts and the evaluation, negotiation and litigation of claims.

Garry is experienced in the resolution of issues that frequently arise on large construction projects, such as claims for delay, defective work, extra work, incomplete or defective design, acceleration, loss of labor productivity, equipment pricing, differing site conditions and lost profits. In addition, Garry has represented owners who have issued default terminations and contractors and sureties by converting wrongful default terminations to terminations for convenience. He has handled a myriad of accounting issues, including cost and pricing principles and standards, and has defended entities against government investigations involving alleged false claims, defective pricing and audit issues.

Garry has litigated cases in the federal and state trial and appellate courts located in more than 20 states and in several international forums. He regularly practices before Agency Boards of Contract Appeals, is familiar with various forms of alternative dispute resolution (ADR) and has successfully conducted mediations and arbitrations. He has worked with local, state, regional and federal government agencies and has successfully prosecuted and defended GAO, GSBCA, EPA and DOT protests; Small Business Administration Size Appeals; and a variety of labor matters.

Prior to entering law, Garry worked on significant infrastructure projects such as the Trans-Alaska Pipeline and bridge construction on an interstate highway, gaining hands-on construction experience.

EXPERIENCE

Public and private owners

- **Taiwan Power Company** - Assisted Taiwan Power Company (TPC) in obtaining a replacement contractor for the architectural/engineering work on TPC's \$4 billion

Fourth Nuclear Power Project in Lungmen, Taiwan. The bankruptcy of the incumbent a/e firm presented complex termination issues. Negotiated a replacement contract under the auspices of the Delaware Bankruptcy Court. TPC was under intense political scrutiny by a newly elected Taiwanese government, so an orderly termination and negotiation of a favorable replacement contract were of critical importance.

Trial against the Project Designer, General Contractor, Concrete Subcontractor and Special Inspector for delays and defective work on the Silver Spring Transit Center

- Montgomery County, Maryland selected Garry as lead outside counsel to pursue the project designer, general contractor, concrete subcontractor and special inspection company for delays and millions of dollars of cost overruns on the Silver Spring Transit Center project. The defendants responded with more than \$11 million dollars of counter-claims for alleged delay and extra work. After evaluating more than 10 million pages of documents, taking and defending more than 55 fact and expert depositions, presenting and defending more than 40 separate motions for summary judgment and motions in limine, a trial team led by Garry started a six-week jury trial in the Circuit Court for Montgomery County, Maryland. Toward the close of the County's affirmative case, the defendants approached the County about settlement and thereafter paid the County \$25 million in resolution of all claims and counter-claims. The County Executive was quoted in The Washington Post stating: "This is very much in the public interest. The \$25 million payment to the County will cover 90 percent of the hard costs we incurred to deliver a safe and durable Silver Spring Transit Center."

Bid protest derailed - When the Virginia Railway Express (VRE) announced award of the biggest contract in its history - a \$50 million contract for maintenance of its locomotives and passenger railcars - a disappointed bidder sued VRE, challenging both award of the contract and the integrity of VRE's senior management. VRE turned to Garry to defend its interests. After more than of a year of in-the-trenches litigation, what was left of the Plaintiff's case went to trial and faced strategic cross-examination from Garry. At the close of the Plaintiff's evidence, the Court derailed the Plaintiff's hopes by granting a motion to strike the Plaintiff's evidence and entered judgment for VRE allowing award of this critical contract.

Default terminations in Arlington County, Virginia - In a series of five separate lawsuits, represented a public owner with respect to default terminations of a general contractor retained to construct a fire station and a separate arts center for the county, negotiated separate take-over completion agreements with the performance bond sureties for each project and successfully defeated litigation by the general contractor and bonding company challenging the propriety of the defaults and seeking more than \$5.7 million from the county. The litigation took place in the Circuit Court of Arlington County, Virginia and in the Virginia Supreme Court.

Defective design and construction causing a seriously cracked pile-supported floor slab - Obtained a favorable multi-million dollar mediated settlement of litigation filed in the U.S. District Court in Atlanta, Georgia on behalf of a major retailer on disputes arising out of a seriously cracked floor slab in one of their stores in Brooklyn, New York. The floor was a pile-supported suspended slab which presented complex engineering issues and divergent expert opinion as to the cause of the cracking. Took and defended a multitude of fact and expert depositions leading to a mediated settlement against the project architect (defective design for reinforcing steel) and the general contractor (defective construction).

Engineering and design firms

Steel mill plant constructed on the Columbia River in Washington State-

Conducted the successful multi-day mediation of a \$45 million dispute involving the design builder, the owner, and five major vendors supplying process equipment for construction of a \$250 million steel mill. Prior to instituting legal proceedings, Garry spent several months living and working at the project preparing claims on behalf of the design builder and defenses against the owner's counter demands and offsets.

Major claims arising out of the Athabasca Oil Sands project in Alberta, Canada

- Assisted resolving 21 separate lawsuits filed in the Court of Queens Bench Alberta Judicial District of Calgary involving approximately \$120 million (CAN) in claims asserted against a joint venture of five international EPCM firms. The cases arose from the design and construction of a multibillion dollar addition to the Athabasca Oil Sands Refinery in Western Canada. The cases were resolved after substantial discovery and a week-long mediation. The litigation presented complex design, construction and product liability issues.

Construction contractors

Connecting structures on deep tunnel project in Chicago - Obtained jury verdict for a tunneling contractor against the general contractor for the Metropolitan Sanitary District of Greater Chicago in the Circuit Court for Cook County, Illinois. The contractor's claims arose during construction of drop shafts for the Chicago Deep Tunnel Project. The recovery consisted primarily of extended and unabsorbed field and home office overhead costs caused by the MSD and adjacent contractor delays to the project.

Multi-million dollar recovery on delay claim for Highway Contractor - A long-time client of Garry's experienced more than two years of costly delay as the result of a public owner's failure to provide unrestricted access to necessary right-of-way to build a highway project. A significant component of the contractor's cost was for idle equipment the contractor needed to keep committed to the project because of the owner's refusal to grant a time extension that would have stopped the threat of liquidated damages. After a failed mediation and responding to more than \$3 million of counter-claims asserted by the owner, Garry filed suit against the owner (a Virginia County). Less than a month after suing the County, the County dropped all of its demands and paid the contractor \$1.95 million, because of the owner-caused delay

Default termination: Lake Bluff Elementary School District 65 - Successfully represented the general contractor and its bonding company after a school district default terminated the contractor and called on the performance bond on a \$21 million school project in Illinois. Through AAA arbitration and a related AAA mediation, secured rescission of the default termination, release of the school district's performance bond claim and successfully resolved approximately a dozen payment bond claims - many of which had been filed in the Lake County, Illinois Circuit Court.

Data center project for Department of Homeland Security - Served as counsel for a defendant in a multi-party case in the Loudoun County, Virginia Circuit Court seeking more than \$60 million in damages. The case arose out of construction of a data center for the U.S. Department of Homeland Security and involved multiple breach, tort, and conspiracy counts. With trial approaching, filed motions to exclude the plaintiff's experts and for summary judgment. The day before oral argument on those motions, plaintiff non-suited all claims against the client and proceeded to trial against the other defendants.

Disputes arising from air defense system in Iceland - Represented the prime contractor in a lawsuit against its subcontractor because of delays and defects in the software delivered for a radar facility constructed for the U.S. Air Force in Iceland.

After a month long jury trial in the Fairfax County, Virginia Circuit Court, the jury awarded the client a multi-million dollar verdict - which the trial judge struck based on his misapplication of the doctrine of apportionment of damages. The Virginia Supreme Court accepted a petition for cert, reversed the trial judge, reinstated the jury's verdict, and struck a smaller counterclaim recovery that the jury had allowed the subcontractor. The Supreme Court agreed with a trial court objection that the subcontractor's "recovery" had been predicated on inadmissible hearsay. The Supreme Court's decision, *TechDyn Sys. Corp. v. Whittaker Corp.*, 245 Va. 291, 427 S.E. 2d 334 (1993) continues to stand as a benchmark case in Virginia on the proof and recoverability of damages in complex construction cases.

Government Contractors

Air defense system in Alaska - Served as counsel for the prime contractor defending \$35 million of subcontractor Miller Act claims arising out of construction of a radar facility for the U.S. Air Force in Clear, Alaska. Represented the client in lawsuits in Massachusetts and Alaska federal courts and in an interlocutory appeal to the Ninth Circuit Court of Appeals. After obtaining the dismissal or transfer of most of the subcontractor's claims to Massachusetts under a venue selection clause, the cases settled on favorable terms.

Major computer procurement by the Department of Veterans Affairs - Successfully represented a government contractor in litigation filed against the U.S. Department of Veterans Affairs in the U.S. Court of Federal Claims. Obtained a multi-million dollar recovery because of the government's wrongful attempt to terminate a contract after the contractor swapped out millions of dollars of new for existing computer equipment in reliance on an indefinite quantities contract for computer maintenance.

Appeal of mechanical contractor at Armed Services Board of Contract Appeals - Litigated a mechanical contractor's equitable adjustment and loss of labor productivity claims against the US Navy in the Armed Services Board of Contract Appeals (ASBCA) arising from a mechanical piping and insulation project at the Marine Air Station in Cherry Point, North Carolina. Gained reversal of the ASBCA's denial of a loss of productivity claim in the US Court of Appeals for the Federal Circuit - leading to a lucrative settlement for the client.

Appeal of general contractor to the U.S. Army Corp of Engineers Board of Contract Appeals - Assisted a government contractor in converting the U.S. Army Corps of Engineers' default termination of a breakwater project off Point Judith, Rhode Island into a termination for convenience of the government. Obtained a multi-million dollar termination for convenience cost recovery for client and then successfully recovered interest on those proceeds by prevailing in an appeal at the U.S. Army Corps of Engineers Board of Contract Appeals (ENGBCA), based upon a novel interpretation of the Contract Disputes Act of 1978. Previously, it was commonly held that termination proposals - even if certified - were not CDA claims and, therefore, could not accrue interest. The ENGBCA agreed, ruling that certified termination for convenience proposals can be CDA claims, and awarded interest.

Manufacturers and product liability

Tunnel ceiling collapse on Big Dig Project in Boston, Massachusetts - Successfully defended a product manufacturer against separate cost recovery and wrongful death lawsuits for hundreds of millions of dollars as the result of the

collapse of a portion of the ceiling in the I-90 tunnel on the Big Dig project in Boston. In a web of competing claims, the case presented complex design, construction, product liability and construction management issues. There were more than 10 defendants. The cases were defended and resolved after extensive mediation proceedings and within the context of ongoing criminal investigations by state and federal agencies.

Product liability issues - As part of a legal team, represented one of the principal defendants in more than 20 wrongful death and personal injury cases consolidated in the U.S. District Court for the District of Columbia arising from the June 2009 collision of two Washington Metropolitan Area Transit Authority Red-Line trains. The engagement presented complex contract as well as engineering and product substitution issues alleged to have caused the accident.

Virginia Railway Express - Successfully defended a foreign rail car manufacturer and its U.S. subsidiary against millions of dollars of claims and offsets asserted by a public owner because of alleged out-of-spec and out-of-tolerance rail cars.

Insurance and bonding companies

Earthquake damage in Guam - Represented a performance bond surety in defense against a \$200 million dispute litigated in the U.S. Territory of Guam involving the respective liability of the contractor, architect/engineer and construction manager for alleged defective work that caused the collapse of a high-rise condominium building during an earthquake. The client completely avoided liability based on a number of discrete surety defenses.

Federal prison project in Southern Florida - Successfully prosecuted a lawsuit on behalf of a surety company in the U.S. District Court in Miami, Florida against the general contractor and completing surety arising from the construction of the Federal Detention Center in Miami. The case involved a two-week trial seeking recovery of the contractor's/surety's pro rata share of proceeds from the general contractor's termination for convenience settlement with the U.S. government. The case presented complex accounting and equipment pricing issues. After obtaining a multi-million dollar judgment for our client in the trial court, the client was also awarded and recovered more than \$2 million of its attorneys fees.

Defense of Legionnaires' disease cases

Summary judgment on Legionnaires disease case - Successfully defended a commercial property manager for a high-rise condominium building in a \$20 million wrongful death case arising from Legionnaires' disease. Disqualified plaintiff's standard of care expert on a Daubert challenge and then obtained summary judgment on all of the plaintiff's claims, which sounded in negligence, strict liability and intentional tort. The trial court's dismissal of the case was affirmed by the Fourth Circuit Court of Appeals' denial of the plaintiff's appeal.

Favorable resolution of lawsuit arising from cooling towers - Successfully defended a water treatment company in a Philadelphia-based Legionnaires disease lawsuit involving the cooling towers at a government facility. The case settled for nominal value after establishing that an earlier adverse workers' compensation decision would act as a bar to the plaintiff's negligence claims.

EDUCATION

J.D., William & Mary Law School, 1981

B.A., University of Virginia, 1978, with distinction

BAR ADMISSION

District of Columbia

Virginia

CLERKSHIPS

Law Clerk, Armed Services Board of Contract Appeals