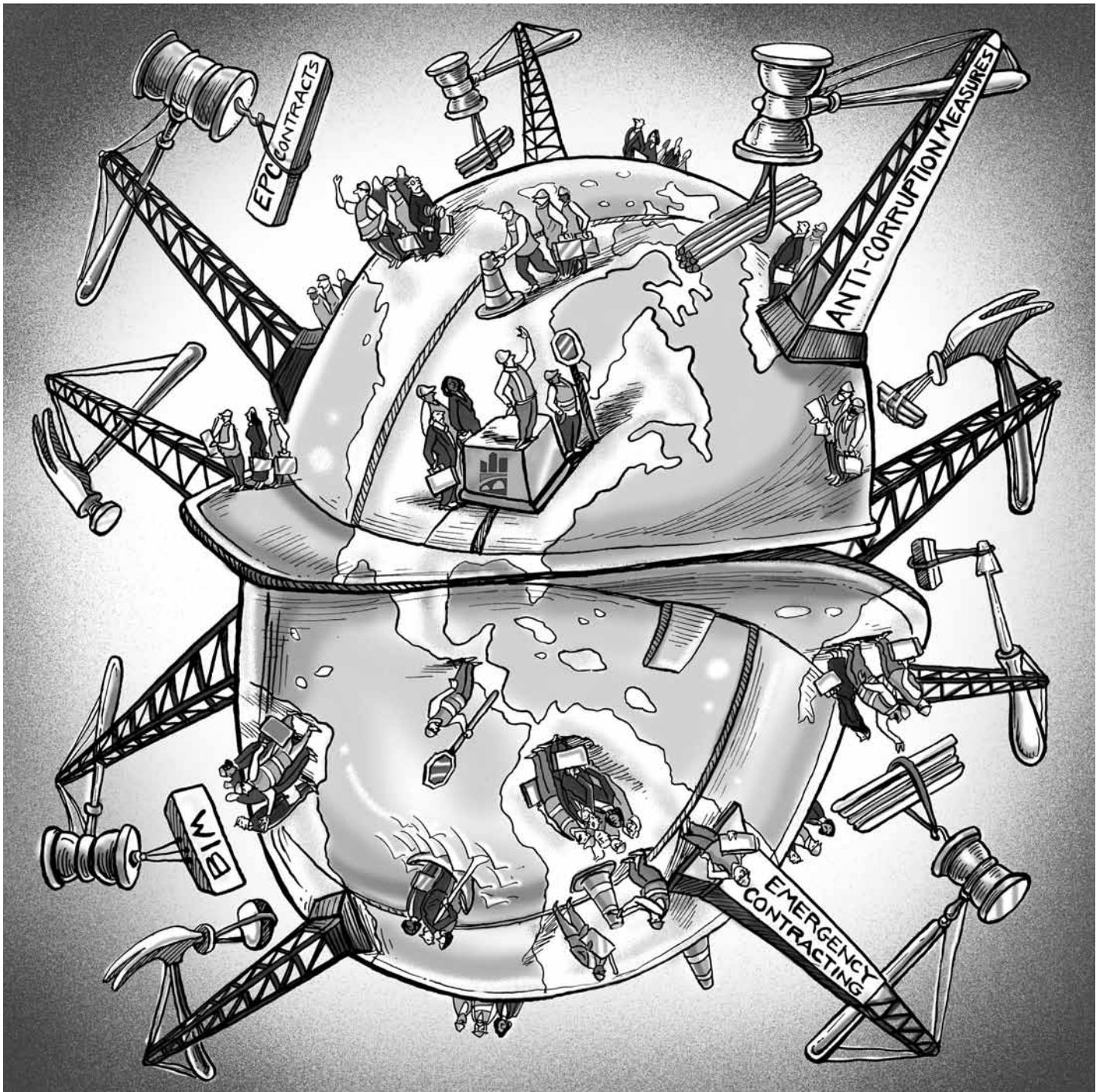




Construction Lawyer

Journal of the ABA Forum on Construction Law Volume 36, Number 4, Fall 2016



International Construction

Illustration: Chad Crowe

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Please send change of address information to the ABA Service Center, 321 North Clark St., Chicago, IL 60654-7598.

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Construction Lawyer

The *Construction Lawyer* is published by ABA Publishing for the American Bar Association's Forum on Construction Law. Annual dues for the Forum are \$50 or \$25 for lawyers with fewer than three years of practice or full-time government lawyers. Membership in the ABA and a Section thereof are prerequisites for membership in the Forum. The views expressed herein are not necessarily those of the ABA or its Forum on Construction Law. Requests for permission to reprint articles should be sent to the Manager of Copyrights and Licensing at the ABA, copyright@americanbar.org. Copyright © 2016, American Bar Association.

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NOTES FROM THE EDITOR

By Michael A. Branca



Michael A. Branca

The Spring 2016 edition of *The Construction Lawyer* was published complements of Division 13, Government Construction, whose members provided the authors and ideas for all four feature articles. At the time, I noted that other Divisions would be following in Division 13's footsteps. The Fall 2016 *Construction Lawyer* is complements of Division 8, International Construction.

Jim Butler, Division 8 Chair, contacted me immediately upon hearing of the opportunity to showcase his Division in *The Construction Lawyer* and has been instrumental in working with his fellow members to develop ideas for articles and identify authors. Jim did a great job as I know you will agree after reading the four offerings from Division 8. An introduction to these feature articles follows shortly below.

We also have a bonus article in this edition. Kim Hurtado has done us all a great favor by dissecting the recent changes to the ConsensusDocs BIM Addendum in *BIM Comes of Age: The New ConsensusDOCs BIM Addendum (2015) for Lifecycle Building Information Modeling*. BIM has matured into a powerful tool that can be used throughout the lifecycle of a structure, including at the project concept phase, design development, construction, commissioning, operation and maintenance, and even decommissioning. ConsensusDOCs has made very significant modifications to its *BIM Addendum*. The new Addendum covers the same six main topics but has significantly revised each area: (1) impact of Addendum terms on related project contract documents, (2) definitions unique to the BIM process, (3) duties of the BIM Manager who coordinates all BIM operations, (4) development of a lifecycle BIM Execution Plan, (5) insurance coverage and related risk allocation, and (6) intellectual property rights, including restrictions on Model data reuse. Kim walks us through each of these topics.

Now back to Division 8. In *Issues and Solutions in International Construction Contracting*, Angus McFadden and Gregory Smith examine trends in construction disputes globally, including the apparent leading causes of those disputes. Angus and Greg consider ways in which parties to engineer, procure, and construct (EPC) contracts can work to avoid disputes when drafting and negotiating their agreements, and when actually performing the project. Detecting an increase

in disputes on international projects, Angus and Greg examine these disputes, the cause of the increase, and what can be done to attempt to curb the increase of these disputes. Similar to large domestic construction projects, Angus and Greg identify the leading causes of disputes in international construction as follows: failure to properly administer the contract; poorly drafted claims; failure to make interim awards of time or money; incomplete design information or owner requirements (for design/build or EPC); disagreements over the required scope of work; not following the procedures for managing changes; quality, quantity, and turnover of skilled labor; site conditions; disagreements over warranty obligations; process or performance guarantees not being met; and late completion.

An unfortunate feature of construction, both domestic and international, is corruption. Domestically, a litany of federal laws is aimed at stamping out corruption: the Foreign Corrupt Practices Act, the False Claims Act, the Bribery and Gratuity Statutes, etc. Division 8 has provided us with companion articles on anti-corruption measures in two of the world's most rapidly developing economies, Brazil and Mexico. Júlio César Bueno and Felipe Gutierrez shine the spotlight on anti-corruption measures in Brazil in *Lessons Learned from Brazil on Anti-Corruption Matters: The Construction Industry Leading the Need for Change and the Way to Go*. Júlio and Felipe provide a comprehensive discussion of the problems with corruption in Brazil, and the steps Brazil has taken recently to address corruption, including the enactment of the Brazilian Clean Company Act. **Roberto Hernandez Garcia shines a similar spotlight on anti-corruption measures in Mexico in *A New Anti-Corruption System in Mexico: What Should Foreign Contractors Know and Why?* Roberto provides the history of the recently enacted National Anticorruption System (NAS), the content of the NAS, and useful guidance for contractors doing business or which wish to do business in Mexico.**

Our fourth article from Division 8 is provided by Karl F. Dix and Karl A. Dix. In *Emergency Contracting: Avoiding a Disaster After the Disaster*, Karl and Karl discuss the pitfalls of failing to comply with the regulatory strings attached to emergency relief funding. Financial assistance is closely regulated to ensure that only reasonable costs for proper scopes of work are reimbursed. Failing to comply with basic funding requirements shifts the burden of the recovery from federal and state governments to the communities that have already suffered the financial losses from the disaster. Communities that lose funding due to noncompliance suffer the proverbial disaster after a disaster that all communities seek to avoid.

Finally, the Editorial Staff again invites each and every one of you to contribute to *The Construction Lawyer*. No idea is too big or too small—to borrow a phrase from Chair Will Hill, become a thought leader of the Forum. 🏗️

Michael A. Branca is editor of The Construction Lawyer and the managing partner of Peckar & Abramson's Washington, D.C., office.

A New Anticorruption System in Mexico: What Should Foreign Contractors Know and Why?

By Roberto Hernandez Garcia



Roberto Hernandez
Garcia

I. Mexico in the International Anticorruption Arena

Mexico has not been known for being a champion with regards to anticorruption efforts, and companies (local and foreign) have done their part to become an active part of this terrible situation. For many years, corruption scandals have been part of the Mexican daily life with the active participation of American, Spanish, German, and, of course, Mexican compa-

nies that do business in this country.

With an approximate population of 120 million people, 31 states and Mexico City, and a complex administrative, legislative, and judicial system supported by civil and traditional administrative law, Mexico was ranked in position 95 out of 168 in the Transparency International 2015 Perception Index.¹ But at the same time, Mexico is considered among the ten most competitive countries in the world, sharing the same list with Germany, the United States, Australia, Japan, Italy, France, the United Kingdom, Netherlands, and Canada.²

The problem is complex since for more than 70 years after its independence, Mexico was governed by the famous Revolutionary Institutional Party (PRI), which had its good and bad faces. On the good side, the PRI allowed Mexico to grow after an 11-year revolutionary war that left the country full of uncertainties, but at the same time, this firmness created a series of families and networks in power that felt that they could do anything they could without respect of the law, creating an environment and perception of unlimited corruption and impunity.

In 2000, a change in the executive power with the take-over of the National Action Party (PAN, Partido de Acción Nacional), with its famous candidate Vicente Fox, eliminated the epic 75-year-old PRI regime, as well as another presidency of another PAN president, showing to the Mexican citizens that the problem was beyond the

PRI. Disappointed after 12 years of PAN governments, the PRI came back with a charismatic and apparently unstoppable candidate: Mr. Enrique Peña Nieto, who promised during his campaign a frontal fight against corruption. This promise was realized in July 2016 with the enactment of the National Anticorruption System (NSA) thanks to the pressure of Mexican civil society and NGOs.

Two key issues are addressed below: The first is how did Mexico get to the NSA without an apparent conflict like the cases of Guatemala or Brazil, but with a very strong and strategic participation of civil society. The second is what must foreign contractors take into consideration from now on when operating in Mexico considering the new NSA.

II. Campaign Promises and First Actions in the Middle of Scandals

On May 25, 2012, as a candidate, Enrique Peña Nieto gave a strong speech against corruption and impunity.³ The need for a president that took a serious position on this matter was taken as a hope of a long historical claim from the Mexican society. On December 1, 2012, after a criticized election, President Peña Nieto took office, with a speech that ironically did not use the word “corruption” or “anticorruption.”⁴

Nevertheless, on December 12, 2012, he presented to the Congress an initiative for the elimination of the Ministry of Public Administration (Secretaría de la Función Pública), which, besides being in charge of the punishment of public officials for irregular actions, was the authority in charge among other matters of public procurement and government careers of public officials. The idea was to eliminate the Ministry and then create an Anticorruption Commission, a governmental body in charge of fighting and punishing corruption actions.⁵

This was the start of a debate and long process without precedent in which the different political forces, parties, and governmental organizations presented positions, and struggled and fought for spaces as never seen before in Mexico.

Finally, this initiative was approved by the Senate on December 13, 2013, in order to be sent to the Congress for its approval and final enactment.⁶ Nevertheless, the Anticorruption Commission initiative went to the “refrigerator” (a common slang used in Mexico when a law at the Congress fails to advance).

But the worst was yet to come. In November of 2014,

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President Peña Nieto faced a scandal linking him, his wife, and the Finance Minister to a huge house custom-built for the president and his wife that was owned by a company linked to a consortium that had been awarded a multibillion-dollar contract to build the most important bullet train in central Mexico. The scandal was—and is still—called the “Casa Blanca” (ironic translation for Americans: the “White House”).⁷

This situation created a rough environment not only for the president but in general for the public administration, which even led to a sudden and scandalous cancellation of the bullet train project, and led to a serious discussion about conflict of interests, rules, and effective ways to combat such irregularity at all levels.

We can highlight two situations that emerged from this “scandal”: one positive and the second negative.

III. The Civil Society and Its Historical Participation in This Process

While all this happened, a semi silent but aggressive movement was taking place within the society led by the Mexican Institute of Competitiveness (Instituto Mexicano de la Competitividad), the Mexican Chapter of Transparency International (Transparencia Mexicana), NGOs, and education institutions that pushed for the relevant discussion of the new way to approach anticorruption in Mexico.

Initially, the first target of these organizations was to push as much as possible in different ways the need for the anticorruption system to be a reality. This became a success when the Congress invited several of these organizations to discuss the future of the “frozen” Anti-corruption Commission initiative.

This was an important step since historically problems in Mexico were solved by the creation of “Commissions,” “Institutes,” or specific government agencies that had a learning curve and lack of expertise and increased the government expenditure unnecessarily, so the discussion in the Congress started to center on a combined, structured, and effective way to strengthen the fight against corruption.

IV. Finally: The National Anticorruption System

On May 27, 2015, after a long and complicated debate, the Mexican Federal Constitution was amended to include the NAS.⁸

As said before, this was not the creation of a new anticorruption commission, but several actions on the structure of the existing governmental institutions, with the following basic principles:

1. *The National Anticorruption System was created and established in the Mexican Federal Constitution:* This means that a formal, legal link and organized way to act between existing authorities and procedures were formed and established in the most important legal document in the country.
2. *New auditing powers:* The auditing powers of the

Auditoría Superior de la Federación (the entity that audits the economic resources of the federal budget) were strengthened and widened.

3. *A new tribunal:* The existing Tribunal of Fiscal and Administrative Justice was transformed into the Tribunal of Administrative Justice in order to have specific powers for the effective trial and punishment of corruption actions at an administrative level.
4. *A more powerful Ministry of Public Function:* This was done to have a more institutional position in the administrative area.
5. *A national system:* The NAS established that the thirty-one states and Mexico City shall be part of the system. Therefore, the system will govern the entire country.
6. *Active citizen participation:* The NAS will have an executive committee and a citizen participation committee.
7. *A special state attorney for corruption actions:* Although this was part of another initiative and amendment, it is a relevant part of the NAS.
8. *Specific responsibility of private companies and individuals:* For the first time, the Constitution established the direct responsibility and effects on private companies and individuals for corruption actions.

In order for the constitutional provisions to be effective in Mexico, specific laws that explain in detail how to implement the new principles of the Constitution were enacted in July 2016.

Significantly, in order for the constitutional provisions to be effective in Mexico, specific laws that explain in detail how to implement the new principles of the Constitution were enacted in July 2016. Accordingly, the NAS established a year for these regulations to be created and approved by the Congress.

V. The “Ley 3 de 3” (Law 3 out of 3) and the Participation of Society

One of the laws to be issued in accordance with the NAS was the “Public Officers Responsibility Law.” Usually, the Mexican society waited for the Congress or the parties to issue their drafts, have discussions, and give comments. But this did not happen this time.

The civil society led by the IMCO and Transparencia Mexicana had an ace up their sleeve: With the help of several organizations and experts, they prepared a draft for this law, which was called “Iniciativa 3 de 3,” which

was the full law with a specific request: that public officers have to make public their economic, tax, and non-conflict-of-interest statements.

The leaders of civil society pushed the NAS and on June 16, 2016, the Congress passed the new laws of the Anticorruption System.⁹ However, in a last-minute absolutely “crazy” decision, the Congress decided to include the principles of the Law 3 out of 3 to apply not to the public officials, but to the private companies! This “emotional retaliation” of the Congress as a consequence of the strong push of the civil society had a strong response from the private sector industry leaders, who met the president and convinced him to issue a veto on the NAS enactment, requesting a new congressional session in order to take away the requirement for companies, which was held on July 5 and 6, 2016. The NAS was formally and finally enacted on July 18, 2016.¹⁰

VI. The Content of NAS Regulations and the Express Responsibility of Private Individuals and Companies

The NAS created a new series of constitutional changes and laws that have, for the purpose of this article, two focal points: (1) more and stronger ways to punish public officials, but also (2) the recognition of private parties (individuals and companies) as part of the corruption and subjects of responsibility and sanction.

Therefore, while the target of the NAS is corrupt public officials, it is also focused on private individuals, including, of course, engineering and construction companies.

What should these companies take into consideration:

1. *Administrative and criminal actions:* Companies can incur administrative and criminal sanctions.
2. *Auditing:* Companies can be audited to identify irregularities during the course of contracts, licenses, concessions, etc.
3. *A specific tribunal:* On a very positive side, individuals and companies will have a specific tribunal that will be competent for procedures and sanctions, instead of the Ministry of Public Function.
4. *Joint responsibility for irregular conduct of public officials:* Irregular actions of public officials may lead to sanctions against involved private companies.
5. *Critical consequences:* Companies that engage in corruption action may have very strong and complicated sanctions, including the liquidation of the company.

There is thus an urgent need for foreign contractors to conduct their business in accordance with the highest integrity rules to avoid these serious consequences.

VII. Mexico's Environment and Private Foreign Contractors

The construction industry in Mexico is complex. Mexico is experiencing a growth in the construction industry from major private industrial plants in the north of the country with an estimated cost of \$2 billion, up to the

\$6 billion approximate amount of the first stages of the new Mexico City Airport. Therefore, opportunities are all over the place and everybody wants some part of it.

So the conflict is this: to come into and look for opportunities and expand as a contractor or just not to come. And in this dilemma, what role will the NAS play?

American companies subject to the FCPA have helped to improve the environment. While some years ago there were no contractual provisions regarding corruption, the participation of U.S.-based companies and interests has increased the inclusion of anticorruption clauses in almost every contract.

In addition to this, the 2015 constitutional amendment that created the NAS generated an increasing presence of companies and advisers that focus on anticorruption matters, from training to due diligence by third parties.

Thus, the foreign contractors, if really they are interested in playing according to the rules, will have more than ever in Mexico a full range of options to increase their safety in operations by taking specific steps towards transparency.

VIII. Red Flags for Foreign Contractors and How to Face Them

As a consequence of our experience, the following are some essential “red flags” when thinking of working in the Mexican market:

1. *Client assessment:* If the client is a public client, an assessment of the unit that is in charge of the project and the people who are in charge of it is a relevant matter to consider. While there are good people working in contracting entities, some units are specially affected by public officials that have a nonreliable background. Recommendation: Not only check the contracting entity but the background of the people in charge of the operation.
2. *Competitors:* While there are serious companies devoted to integrity in certain sectors, there are others where the participants have no similar devotion. If they do not have a serious anticorruption program and/or are known for being corrupt and they are working with specific clients on more than two projects, a background check should be done.
3. *Government contracts:* Public procurement procedures in Mexico are highly regulated by law. Deviation from these laws is evident in most of the cases by being involved in reading and understanding the public procurement procedures. Therefore, it is important to understand the law and how it is applied.
4. *Intermediaries, representatives, agents, and consultants:* In Mexico, the “promisers” (as they are sometimes called) are all those Mexican companies and individuals that offer help to foreign companies by offering the closeness to specific public officers who are decision makers. Never rely on this kind of “help.”

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for Unmanned Vehicle Systems International, of the first 3,136 exemptions, 1,781 were related to the infrastructure and construction industry; this amounts to 56% of all requests across all industries.⁶

According to industry estimates cited by the FAA, over the next ten years, Part 107 could generate as much as \$82 billion for the U.S. economy and create more than 100,000 new jobs.⁷ “With this new rule, we are taking a careful and deliberate approach that balances the need to deploy this new technology with the FAA’s mission to protect public safety,” said FAA Administrator Michael Huerta.⁸ “But this is just our first step. We’re already working on additional rules that will expand the range of operations.”⁹

In the past few years, it appears that the bigger the construction company, the greater interest in drone use. According to the National Association of Home Builders/Wells Fargo Housing Market Index Survey, in 2015, only 12% of builders with fewer than six unit starts had used a drone in the course of business, while 43% of builders with 100 starts or more had utilized drones in their work.¹⁰ Overall, 22% of all builders had utilized a drone.¹¹ The lessened restrictions under Part 107 will undoubtedly result in the certification of thousands of more commercial drones.

Given the expected increase in interest, the construction industry is well ahead of the expected boom, working with the insurance industry to create a self-regulating safety standard. The Property Drone Consortium (PDC), which includes Allstate and other insurers, is not only developing standards and specifications for safe UAS operations but is also moving toward use of drones in claims analysis.¹²

Though many in the industry welcome Part 107, they hope that the FAA takes additional steps to lessen the restrictions on drone operations, including the

establishment of rules governing operation beyond visual line-of-sight.

For more on the legal issues raised by these Rules and drone operations, please see the paper *Lucy in the Sky with Diamonds: Is Your Head in the Cloud?* by Nick Siegfried and Jeremy Brummond, presented at and included in the materials for the 2016 Fall Meeting in Chicago, Illinois. 📖

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5. *Subcontractors, suppliers, and transportation companies*: Usually these companies are so small that they do not have any minimum idea of what is good and what is bad, so many contractors have decided to train them to avoid the risk of noncompliance.

IX. Conclusion

Mexico may not be a champion of anticorruption yet, but the NAS showed two very important things: The first is that society as a whole will not tolerate corruption anymore and has demonstrated in concrete actions that the course of action has to change. The second is that now there are specific rules that regulate and will punish the illegal actions in the whole country.

This shows that Mexico is headed in the right direction and must continue the fight. 📖

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33. See United States *ex rel.* Blumenthal-Kahn Elec. Ltd. P’ship v. Am. Home Assur. Co., 219 F. Supp. 2d 710, 714 (E.D. Va. 2002) (“the [Miller] Act applies only to construction or alteration of a ‘public building or public work of the United States,’” quoting Miller Act, 40 U.S.C. § 270a); Acro-Tek Commc’ns, 2007 WL 4162873, at *2 (holding payment bond at issue was a discretionary common law bond rather than a mandatory Miller Act bond because services contracted for by the federal agency involved cleaning up debris rather than construction of a public building or public work of the United States). See also 48 C.F.R. § 28.103-1(a) (general provision pertaining to bonding states that “agencies shall not require performance and payment bonds for other than construction contracts. . . .”) (emphasis added).

34. See generally FEMA, *Debris Management Guide*, FEMA-325, at 96–104 (July 2007).

35. See 44 C.F.R. § 13.43(a)(2) (allowing disallowance of part of the costs for noncompliance); see also FEMA-325, at 19 (limiting FEMA reimbursement for piggyback contract costs to reasonable costs).

36. 2 C.F.R. § 200.323(b).

37. *Id.*

38. See, e.g., U.S. Dep’t of Transp. Memorandum on Applicability of Wage Rate Requirements to Federal-Aid Construction Projects (June 26, 2008) (“emergency contract work . . . only for the removal of debris and related cleanup, which is not considered to be a ‘construction activity’ for purposes of application of the Davis Bacon Act”).

39. 40 U.S.C. § 3145; 29 C.F.R. §§ 3.3(b), 5.5(a)(3).

40. 29 C.F.R. § 4.185.

41. See 29 C.F.R. § 4.187 (the Department of Labor’s right to request withholding of funds from the general contractor) for the Service Contract Act, as well as 29 C.F.R. § 5.5(a)(2) for the Davis-Bacon Act. If contract funds have been fully paid out, the contracting agency can withhold funds on other federal direct or grant-funded contracts subject to the Davis-Bacon Act or Service Contract Act.

42. 29 C.F.R. § 4.187-190 (Service Contract Act Enforcement Sanctions); 29 C.F.R. § 5.6 (Davis-Bacon Act Enforcement Sanctions); 29 C.F.R. § 5.10 (Criminal Action Referral for Willful Davis-Bacon Violations).

43. See, e.g., N.Y. LAB. LAWS § 220 (McKinney 2011).

44. RI, Inc. d/b/a Seating Solutions et al v. Gardner, 889 F. Supp. 2d 408, 416 (E.D. N.Y. 2012) *aff’d*, 523 F. App’x 40 (2d Cir. 2013) (preemption does not apply to the payment of wages under the New York Prevailing Wage Law).

45. N.Y. LAB. LAWS § 220(3)(d).

46. 2 C.F.R. § 200.318(h).

47. *Id.* § 200.318(i).

48. *Id.* § 200.319(a).

49. See *id.* § 200.319(b).

50. *Id.* § 200.320(f).

51. *Id.* § 200.320(d)(3).

52. *Id.* § 200.321.

53. *Id.* § 200.319(d).

54. *Id.* § 200.323(a).

55. *Id.* § 200.324(b)(5).

56. 44 C.F.R. § 206.14.

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(Continued from page 45)

A. Larson & Kate A. Golden, *Entering the Brave, New World: An Introduction to Contracting for Building Information Modeling*, 34 WM. MITCHELL L. REV. 8–26 (2007).

11. The number of public and private entities in the United States that mandate use of BIM for their projects is growing very rapidly. A sampling of some of the more well-developed government and institutional BIM users’ modeling requirements includes the following:

Alabama: UNIV. OF ALA., BUILDING INFORMATION MODELING (B.I.M) (2012), <http://bis.ua.Edu/Building%20Information%20Modeling.pdf>. **California:** UNIV. OF S. CAL., BUILDING INFORMATION MODELING (BIM) GUIDELINES VERSION 1.6 (2012), http://facilities.usc.edu/uploads/documents/cas/BIMGuidelines_VS1_6_2012.pdf; LOS ANGELES CMTY. COLL.

DIST., LACCD BUILDING INFORMATION MODELING STANDARDS (LACCD BIM) VERSION 3.0 (2010), <http://az776130.vo.msecnd.net/media/docs/default-source/contractors-and-bidders-library/standards-guidelines/bim-design-build-standards.pdf?sfvrsn=2>; LOS ANGELES CMTY. COLL. DIST., LACCD BUILDING INFORMATION MODELING STANDARDS (LACCD BIM) VERSION 4.0 LEASE LEASE-BACK AND DESIGN-BID-BUILD (2015), <http://az776130.vo.msecnd.net/media/docs/default-source/contractors-and-bidders-library/standards-guidelines/bim/bim-design-bid-build-standards.pdf?sfvrsn=2>; SAN DIEGO CMTY. COLL. DIST., BIM STANDARDS FOR ARCHITECTS, ENGINEERS AND CONTRACTORS VERSION 2.0 (2012), <http://public.sdccdprospn.com/CR/Forms/SDCCD%20Building%20Design%20Standards/02.%20BIM%20Standards/SDCCD%20BIM%20Standards%20Version%202.pdf>. **Colorado:** Colo. St. Univ., https://www.fm.colostate.edu/construction/constr_standards.cfm (last visited Feb. 14, 2014); DENVER INT’L AIRPORT, DESIGN STANDARDS MANUAL 12: CHAPTER 1—ELECTRONIC DATA COLLECTION & INTERCHANGE PROCEDURES