

NEW PIPELINES, NEW CONTRACTS, AND DIFFERENT RULES FOR EVERY PROJECT

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How do you learn a new game? Do you dive in, play, and learn as you go? Do you blend these two extremes? Do you read or listen to and learn all the rules before ever playing? Understanding the rules helps you play a better game.

Every contract/project is a new game. . .The rules governing construction contracts are often different for each project and for each contract, even if you're using a standard form contract. Understanding the rules of your contract/project will improve your bottom line by:

- Helping to predict outcomes of your actions (or inactions);
- Reducing doubt over how and when to act or respond; and
- Understanding what's at risk vs. what's safe.

For example, a pipeline contractor lost payment leverage when it sought protection under certain laws of Pennsylvania, but it had already agreed in its Contract that such laws would not apply.¹ The Contract/Project was for the construction of a new 55-mile stretch of natural gas pipeline through Pennsylvania and West Virginia. In the Contract, Owner and Contractor agreed that Virginia law controlled the parties' agreement and that any disputes arising therefrom would be resolved in Virginia state or federal courts (despite that no part of the pipeline touched Virginia soil).

When the Owner withheld payment, the Contractor sued for breach of contract and unjust enrichment in a Pennsylvania Court. Upon the Owner's request, the Pennsylvania Court enforced the parties' Contract, which provided that all litigation shall be held in a Virginia court. The Pennsylvania Court transferred the litigation to a Virginia Court and the Contractor lost its home court advantage.

After the transfer, the Virginia Court found the parties unequivocally chose Virginia law by their language that "this Contract shall be governed by the laws of the Commonwealth of Virginia, without giving effect to the choice of laws principles thereof. . ." Because of this agreement and the finding of the Virginia Court, the contractor lost the leverage of two Pennsylvania statutes designed to protect payments due to a contractor. Such statutes require that when construction work is performed on or under Pennsylvania soil, then Pennsylvania law applies and any disputes must be resolved in a Pennsylvania state or federal court. . . ([73 Pa. Stat. §§ 176, 180](#), and [514.](#))

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In what seems like a circular argument, the Virginia Court reasoned it was not bound by the Pennsylvania statutes, so the parties' contract language governed. Conversely, either the Pennsylvania or the Virginia Court could have found the Pennsylvania statutes invalidated the parties' contract language, so the lawsuit should stay in a Pennsylvania Court and be governed by Pennsylvania Law.²

Understanding the rules of your contract/project will help protect your bottom line. The bottom lines of pipeline contractors are likely to grow in 2018. On December 21, 2017, FERC announced it would examine its 18-year-old policy on pipeline certification. This announcement suggested certification may become easier as construction methods and safety have improved since the current policy was born in 1999. FERC's announcement came on the heels of a surge during 2017 in approvals for new natural gas pipeline construction. More details on this are available in a recent article by ENR entitled [Pipeline Construction to Surge in 2018](#).

¹ [Precision Pipeline, LLC v. Dominion Transmission, Inc., U.S. Dist. Ct., E.D. Va. No. 3:16-CV-00180 \(March 23, 2017\)](#).

² Interestingly, Virginia has a similar statute requiring that disputes arising from construction projects located in Virginia shall be resolved in Virginia. ([Va. Code § 8.01-262.1](#).)

Additional Reading:

[TransCanada To Begin Construction of Neb. Segment of Keystone XL Pipeline Next Year](#)

