Bradley

Bradley Arant Boult Cummings LLP

Third Quarter 2016

CONSTRUCTION AND PROCUREMENT LAW NEWS

Recent federal, state, and local developments of interest, prepared by Bradley's Construction and Procurement Group:

Thinking of Walking Off the Job? Always Think Twice

A recent case from the federal district court for the Eastern District of Pennsylvania demonstrates the potential perils of walking off a job due to non-payment. In *William C. Cox, Inc. v. Total Site Improvements, LLC*, a general contractor and a subcontractor entered into two subcontract agreements totaling over $790,000. The subcontractor agreed to supply sufficient materials, workers, and equipment to maintain the progress of the work and to refrain from damaging, delaying, or otherwise interfering with the general contractor's work. In return, the general contractor agreed to pay the subcontractor within 45 days from receiving an invoice, as long as the owner had paid the general contractor for the invoiced work. The contract explicitly stated that time was of the essence.

At the beginning of the project, the general contractor advanced two large payments to the subcontractor for work that was yet to be completed. Thereafter, the general contractor paid the majority of the subcontractor's February invoice and March's entire invoice. By June, however, there were overdue invoices and the delay in payment allegedly hindered the subcontractor from buying materials. The subcontractor requested payment for four overdue invoices. The general contractor told the subcontractor that it was expecting a payment from the owner in two weeks, and that the subcontractor would be paid at that time. Just four days later, however, the subcontractor stopped work, left the project site, and refused to explain its absence to the general contractor. At the time the subcontractor walked off, it had completed just over $191,000 worth of work, and the general contractor had paid it just over $187,000 for the work completed. As such, the subcontractor was out roughly $4,000 at the time it ceased work (without regard to the payment provisions of the subcontract).

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After the general contractor received payment from the owner, the general contractor contacted the subcontractor in an attempt to set up a meeting. The subcontractor declined the invitation. In response, the general contractor sent the subcontractor a notice of termination, followed by a letter of cancellation of the subcontracts.

The Court was unimpressed by both parties' behavior and efforts to resolve the matter. Specifically, the Court believed that the general contractor could have paid the subcontractor the money it was owed when the general contractor received payment from the owner. This payment might have encouraged the subcontractor to return to the project. The Court also disliked the subcontractor's lack of responsiveness to the general contractor's attempts to resolve the payment dispute.

Ultimately, the Court found that the contract did not allow the subcontractor to abandon the job due to delayed payments and that the subcontractor could not expect to be compensated for past due invoices when it was refusing to respond to the general contractor's communication attempts. The Court held that the subcontractor breached the contract first, by walking off the job when only a "nominal amount [was] owed." The subcontractor's subsequent refusal to communicate with the general contractor further justified the general contractor's failure to pay the subcontractor for amounts owed. Although the Court found that the general contractor owed the subcontractor right around $134,000 for work completed, this amount was offset by the $307,000 the subcontractor owed the general contractor for excess costs, overhead and profit markup, delay costs, and attorney's fees.

This case demonstrates the importance of knowing your contractual remedies and rights when delays occur, and demonstrates how choosing to abandon a project for non-payment can have negative consequences under certain circumstances. Contact legal counsel prior to stopping work to consider thoroughly the basis for and the potential consequences of abandonment.

By Jasmine Gardner

Potential liability under flow down liquidated damages provision

Some of the most overlooked (and important) provisions in construction contracts are "incorporation by reference" and "flow-down" clauses, whereby a party potentially assumes responsibility for liability and obligations outlined in ancillary documents, such as contracts between other parties. While these risk-shifting provisions are often separately spelled-out in the headings of the agreement, they can also be embedded within other contractual terms. They can have long-reaching implications for project profitability. The recent Massachusetts state court case of *Tutor Perini Corp. v. Montgomery Kone, Inc.*, confirms that these crucial risk-shifting provisions may be strictly enforced by courts and may subject a party to significant liability even many years after the work is accepted.

Tutor Perini arose from the well-publicized Central Artery/Tunnel ("Big Dig") project in Boston, Massachusetts. General contractor Perini-Kiewit-Cashman (a joint venture among Tutor Perini Corporation, Kiewit Construction Co., Inc. and Jay Cashman, Inc.) ("PKC") entered into a $377,933,000 prime contract with the Massachusetts Highway Department. PKC thereafter entered into a subcontract with Montgomery Kone, Inc. for $3,400,000 for the installation of elevators and escalators in the South Station of the tunnel. The subcontract between PKC and Kone expressly provided that in the event the MHD assessed liquidated damages against PWC for delays to the project, that Kone "shall be proportionately liable for those damages pursuant to the terms and conditions under the owner's contract, provided that the delays are proven proportionately to be the responsibility of [Kone]." The liquidated damages amount in the prime contract was $14,000 per day.

During the course of work, MHD changed the sequencing of the planned events along the critical path, and the project ran into significant delays. The project schedule required Kone's work to be complete by September 2002, but the MHD did not accept it until January 2004. During this time, PKC advised Kone in writing that Kone's work was behind schedule and that PKC would begin assessing $14,000 per day in liquidated damages as provided by the subcontract. Because of the repeated delays to the project, disputes also arose between PKC and the MHD as to compensation owed. MHD's chief engineer later issued a decision in 2009 finding that PKC had "abandoned" the project schedule, that PKC was not entitled to any delay damages from MHD, and that liquidated damages should be assessed against PKC in "accordance with the Contract requirements." MHD assessed $13,046,000 in

liquidated damages via a contract modification in December 2010.

Following the assessment of the liquidated damages, PKC filed suit against Kone and its performance bond surety in 2013. While PKC's performance bond claim against the surety was dismissed due to the expiration of the applicable two-year statute of limitations on the face of the bond, the presiding Massachusetts Superior Court judge ruled that PKC and Kone expressly allocated the risk of the assessed liquidated damages between themselves in the subcontract through the flow-down clause. Therefore, PKC's claim for Kone's proportionate share of the liquidated damages could move forward to trial - more than twelve years after Kone completed its work on the project!

While PKC must still affirmatively prove Kone's proportionate liability for the assessed liquidated damages at trial, the potential liability to Kone far exceeds its original subcontract price. As such, *Tutor Perini* is a stark reminder that 1) each provision of the contract must be closely scrutinized in order to assess both the present *and* future liability on a project, 2) courts will generally enforce the parties' agreement in its entirety, including all incorporated and flow-down obligations, and 3) liability on a contract can continue long after the completion of the work, even many years after a party has (supposedly) closed the book on a project.

By Brian Rowlson

SBA Expands Mentor-Protégé Program and Eliminates Populated JVs

On July 22, 2016, the U.S. Small Business Administration ("SBA") published its much-anticipated final rule establishing a mentor-protégé program available to all small businesses, not just certain SBA-approved 8(a) contractors as is the case under the current program. The SBA's new "universal" mentor-protégé program will be separate from, but very similar to, the SBA's current 8(a) mentor-protégé program.

The principal benefit of the new "universal" mentor-protégé program is that "[a] protégé and mentor may joint venture as a small business for any government prime contract or subcontract, provided the protégé qualifies as small for the procurement." Additionally, the new regulations state that "[s]uch a joint venture may seek any type of small business contract (*i.e.*, small business set-aside, 8(a), HUBZone, SDVO, or WOSB) for which the protégé firm qualifies (*e.g.*, a protégé firm that qualifies as a WOSB could seek a WOSB set-aside as a joint venture with its SBA-approved mentor)."

In addition to implementing the new "universal" mentor-protégé program, the SBA's final rule eliminates populated joint ventures – both in the mentor-protégé context, specifically, and in the small business context in general. Under the current regulations, a joint venture can be either populated or unpopulated. A populated joint venture is a joint venture that employs its own workers and performs a contract using its own employees, whereas, in an unpopulated joint venture, the venturing members provide employees as subcontractors to the joint venture. While the new regulations eliminate populated joint ventures, the regulations state that a joint venture "may be in the form of a formal or informal partnership or exist as a separate limited liability company or other separate legal entity..."

The SBA's new regulations have an effective date of August 24, 2016. Additionally, it recently was reported that the SBA would start accepting applications for the new "universal" mentor-protégé program on October 1, 2016. Bradley will continue to monitor this noteworthy development, which has potential implications and opportunities for our clients.

By Aron C. Beezley

Broad "Assumption of Liability" Clause in Subcontract Likely Trumps "Waiver of Subrogation" Clause in Prime Contract

The federal district court for the District of Maryland recently issued a decision in a case involving a burst sprinkler pipe on a construction project. At the heart of *Turner Construction Company v. BFPE International, Inc.* was a clash of inconsistent contract provisions.

The general contractor maintained that its fire sprinkler subcontractor was responsible for the property damage based on the "Assumption of Liability" provision in the subcontract. It stated in part that the subcontractor "assumes the entire responsibility for any and all actual or potential damage …" and "agrees to indemnify and save harmless [the general contractor] … from and against any and all loss…" The subcontractor, on the other hand, contended that the general contractor waived its right to hold the subcontractor responsible based on a provision in the form contract between the general contractor and the project owner. Under the boilerplate "Waiver of Subrogation" in the American

Institute of Architects (AIA) Document A201-2007 (General Conditions for Construction), the owner and general contractor "waive all rights against … each other *and any of their subcontractors*" for "causes of loss to the extent covered by property insurance obtained pursuant to … Section 11.3 or other property insurance applicable to the Work."

Ultimately, the Court deferred a ruling. Finding "sufficient ambiguity for consideration of extrinsic evidence" as to whether the parties actually intended the Waiver of Subrogation clause to control, the Court denied the parties' cross-motions for summary judgment. The Court's analysis of the issues, however, is instructive.

As an initial matter, the Court determined that the subcontractor could invoke the Waiver of Subrogation provision even though that clause resided in a contract to which it was not a party. After all, the subcontract incorporated the general contract by reference, and the phrase "and any of their subcontractors" in the subrogation waiver clause supported the subcontractor's contention that it was an intended third-party beneficiary of that provision. Moreover, the Court observed that while Maryland's appellate courts have not stated so conclusively, courts in other jurisdictions have permitted subcontractors to invoke prime-contract subrogation waivers.

Next, the Court took up the conflict between the subrogation waiver provision and the Assumption of Liability clause in the subcontract. Citing three points, the Court determined that the general contractor had the better argument. First, the Court invoked the "well-established canon of contract interpretation" that a "specific" provision takes precedence over a "general" provision. Here, the specific Assumption of Liability provision in the subcontract should prevail over the Waiver of Subrogation clause in the general contract, which was merely incorporated into the subcontract by reference.

Second, the Court identified another subcontract provision that favored the general contractor's interpretation. The subcontract required the subcontractor to maintain commercial general liability insurance and to list both the project owner and the general contractor as additional insureds; and the subcontract stated further: "It is expressly agreed … that all insurance … afforded the additional insureds shall be primary insurance … and that any other insurance carried by the additional insureds shall be excess of all other insurance carried by the Subcontractor and shall not contribute with Subcontractor's insurance." The Court found it "difficult to square" that provision with a Waiver of Subrogation clause that purported to make the project owner's property insurance primary.

Third, the Court found yet another subcontract provision in support of the general contractor's interpretation. The subcontract provided that "[i]f … any provision … irreconcilably conflicts with a provision of the General Contract … the provision imposing the greater duty or obligation on the Subcontractor shall govern." Here, the Assumption of Liability provision imposed the greater obligation on the subcontractor.

Characterizing the Assumption of Liability clause as "breathtaking in scope," the Court favored the general contractor's interpretation that that clause should prevail over the Waiver of Subrogation provision. But it did so begrudgingly as follows: "The Court thus suspects that this case may be an outlier – a rare case in which the obvious public-policy benefit of orderly and predictable insurance planning at the outset of a venture must yield to the explicit arrangements between a general contractor and the subcontractors with which it chooses to transact."

The Court's decision offers important lessons regarding the intersection of insurance and indemnification provisions and reinforces familiar rules of contract interpretation. It also serves as a reminder that well-established AIA prime contract language may be defeated by carelessly drawn broad subcontract language. The result is that the owner's insurance carrier got a windfall by subrogating against the subcontractor when the industry expectation is that the AIA waiver is both crystal clear and prevents litigation among the contractor, owner, and the subcontractors.

By Eric Frechtel

Contract Drafting Best Practices: Strive for Consistent Contract Documents

Most successful construction projects require the watchful eye of a design professional or construction manager who orchestrates all phases of the design and construction, including all seemingly minor pieces. Similarly, an owner is more likely to have success in developing a project that is on time, within budget, and without disputes if it engages a contract drafter at the time of project conception who is responsible for

drafting and negotiating all of the contract terms and attachments, no matter how technical or minor. Without such an orchestrator, the project may suffer from disputes (including litigation like that in the preceding article), disagreements, and loopholes due to an unnecessarily complex web of inconsistent and contradictory contractual obligations, forms, and scopes of work among the several different professionals and contractors on the project.

Alignment of contract forms

It is not uncommon for owners to use different contract forms to draft their several agreements with their contractors, architects, and managers. This often occurs when the owner is not in control of the contract documents. For instance, the owner may use an AIA agreement with the architect, different custom form agreements with the separate contractors, and a ConsensusDocs agreement with the construction manager. Obviously, this can create gaps in liability and disparate obligations among the many parties. The indemnity obligations may not be aligned, the dispute resolution procedures may be different, liability for soils conditions may not be appropriately allocated, and coordination may not be properly addressed.

Accordingly, it is imperative that an owner employ a contract drafter who can oversee the negotiations for all of the contracts and choose a suite of construction documents that are closely aligned, that properly account for the level of owner's involvement, and that accurately contemplate the presence of other contractors and design professionals on the project. It is also advisable that the owner use contract documents that are consistent in substance and form, if possible.

Legal review of scope of work and other technical attachments

Some owners are surprised when the legal team that is drafting the terms and conditions also wants to review and revise the scope of work, performance guarantees, and other technical attachments. But, a lack of legal input in reviewing such contract documents can result in significant risk to the owner, as the legal team may not know or understand what the commercial team is doing and vice versa.

For instance, the team that drafts the scope of work may not be involved in contract negotiations and may never review the terms and conditions of the construction contract. As a result, the scope of work may contain owner obligations, change order rights, and defined terms that are inconsistent with the terms and conditions.

Furthermore, contractors sometimes use scopes of work from other projects to draft the scope of work for the current project. If the contractor is not careful or not privy to the pertinent contract negotiations, the draft scope of work may not align with the overall design of the project, may create gaps in construction of the facility, or may insufficiently define the contractor's obligations. Therefore, legal review, or review by someone at least familiar with the contract negotiations and the overall project design, of both the terms and conditions and all attachments to the contract, especially the scope of work, is advisable. This review should eliminate additional or inconsistent rights and obligations and tailor the scope of work to the specific needs of the project.

Using the correct form

Too often, the parties to a construction agreement never attach the various construction forms – such as the completion certificate, payment applications, change orders, and lien waivers – to the various contracts. As a result, when it is time to use one of these typical construction forms, the project managers grab an "off the shelf" form that may not be applicable to the contract at issue. The change order form and payment application may not correspond with the price mechanism in the applicable contract, the concept of completion may not the consistent with the contract document, or the lien and claim waivers may either be invalid or fail to waive the same rights and obligations as contemplated in the controlling contract. This can cause confusion and disputes for all involved.

A good contract drafter will attach the appropriate forms necessary to administer the project as attachments to the contract, even so-called short form contracts. The parties should then ensure that the project managers are required to use those particular forms. The owner should also endeavor, to the extent possible, to attach and use the same type of forms, with similar terms and conditions, to every agreement for the project to ensure consistency.

The owner may enjoy many other benefits by hiring a singular contract drafter to review, draft, and negotiate all contract terms and attachments for a project, such as substantial savings on time and costs. Regardless, it is advisable that an owner consult an experienced contract drafter at the outset of any project to consider the full

benefits of having an "orchestrator" of the construction documents.

By Daniel Murdock

Supreme Court Confirms, but Limits, FCA Implied Certification Theory

Recently, the United States Supreme Court, in *Universal Health Services Inc. v. United States, ex rel. Escobar*, affirmed the viability of the "implied certification theory" of False Claims Act (FCA) liability and clarified how the FCA's "materiality requirement should be enforced." This case is an important case for federal government contractors

The alleged FCA violations at issue arose within the Medicaid program. For approximately five years, Yarushka Rivera, a teenage beneficiary of Massachusetts' Medicaid program, received counseling services at Arbour Counseling Services, a "satellite mental health facility" in Lawrence, Massachusetts, owned and operated by a subsidiary of Universal Health Services. Beginning in about 2004, when Yarushka started having certain behavioral problems, five medical professionals at Arbour "intermittently treated her." In May 2009, Yarushka had "an adverse reaction" to a medication that "a purported doctor" at Arbour prescribed after diagnosing her with bipolar disorder. In 2009, Yarushka, then seventeen years old, suffered a seizure and died.

Subsequently, an Arbour counselor revealed to Yarushka's mother and stepfather that "few Arbour employees were actually licensed to provide mental health counseling and that supervision of them was minimal." Of the five professionals who had treated Yarushka, only one was "properly licensed." Additionally, approximately twenty-three Arbour employees "lacked licenses to provide mental health services, yet – despite regulatory requirements to the contrary – they counseled patients and prescribed drugs without supervision."

In 2011, her mother and stepfather filed a *qui tam* action in federal court, alleging that Universal Health had violated the FCA under an "implied false certification" theory of liability. They asserted that Universal Health (acting through Arbour) submitted reimbursement claims that made representations about the specific services provided by specific types of professionals, "but that failed to disclose serious violations of regulations pertaining to staff qualifications and licensing requirements for these services." More specifically, the Massachusetts Medicaid program requires "satellite facilities" – such as Arbour – to have specific types of clinicians on staff, outlines licensing requirements for particular positions, and sets forth supervision requirements for other staff. Universal Health allegedly "flouted" these regulations because Arbour employed unlicensed, unqualified and unsupervised staff. Apparently unaware of these "deficiencies," the Massachusetts Medicaid program paid the claims. "Universal Health thus allegedly defrauded the program, which would not have reimbursed the claims had it known that it was billed for mental health services that were performed by unlicensed and unsupervised staff."

Universal Health filed a motion to dismiss the complaint, which the District Court granted. The trial court held that the plaintiffs had failed to state a claim under the false certification theory because, with one exception not relevant here, none of the regulations that Arbour violated was a condition of payment.

Subsequently, the appeals court over Massachusetts federal trial courts reversed the trial court's decision. The appeals court noted that, each time a billing party submits a claim, it "implicitly communicate[s] that it conformed to the relevant program requirements, such that it was entitled to payment." It went on to explain that, to determine whether a claim is "false or fraudulent" based on such communications, it "asks simply whether the defendant, in submitting a claim for reimbursement, knowingly misrepresented compliance with a material precondition of payment." In the court's view, a contractual, statutory or regulatory requirement can be a condition of payment "either by expressly identifying itself as such or by implication." It then held that Universal Health had violated Massachusetts Medicaid regulations, which "clearly impose conditions of payment." It also held that the regulations, themselves, "constitute[d] dispositive evidence of materiality," because they identified "adequate supervision" as an "express and absolute" condition of payment.

The Supreme Court agreed to review the case to resolve a conflict among the federal appeals courts regarding "implied" certification under the False Claims Act. In its unanimous decision, the Supreme Court first held that "the implied false certification theory can, at least in some circumstances, provide a basis for liability." The Supreme Court reasoned that the term "fraudulent," as used in the FCA, is "a paradigmatic

example of a statutory term that incorporates the common-law meaning of fraud." And, because common-law fraud has "long encompassed certain misrepresentations by omission, 'false or fraudulent claims' include more than just claims containing express falsehoods."

The Supreme Court went on to explain that, by submitting payment claims using codes that corresponded to specific counseling services, Universal Health represented that it had provided family and individual therapy, "preventative medication counseling," and other types of treatment. Furthermore, Arbour staff allegedly made additional representations in submitting Medicaid reimbursement claims by using National Provider Identification numbers that correspond to specific job titles. These claims were "clearly misleading in context," according to the Supreme Court. The Supreme Court stated that, "[b]y using payment and other codes that conveyed this information without disclosing Arbour's many violations of basic staff and licensing requirements for mental health facilities, Universal Health's claims constituted misrepresentations."

The Supreme Court concluded on the first issue that the implied certification theory can be a basis for liability where (1) the claim does not merely request payment, but also makes specific representations about the goods or services provided, and (2) the defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths.

As to the second issue about a violation of a contractual, statutory, or regulatory provision that the Government expressly designated a condition of payment," the Court concluded that the FCA "does not impose this limit on liability." It also concluded, however, that "not every undisclosed violation of an express condition of payment automatically triggers liability." Instead, "a misrepresentation about compliance with a statutory, regulatory, or contractual requirement must be material to the Government's payment decision in order to be actionable under the [FCA]."

Importantly, the Supreme Court elaborated on what kind of nondisclosure gives rise to a "material" falsehood. In particular, the Supreme Court explained that "[t]he materiality standard is demanding," and "[a] misrepresentation cannot be deemed material merely because the Government designates compliance with a particular statutory, regulatory, or contractual requirement as a condition of payment." It also is "insufficient for a finding of materiality that the Government would have the option to decline to pay if it knew of the defendant's noncompliance." Moreover, materiality "cannot be found where noncompliance is minor or insubstantial."

Because neither the appeals nor trial court assessed the government's complaint under the Supreme Court's interpretations of the FCA, the Supreme Court vacated the First Circuit's judgment and remanded the case for reconsideration.

From the perspective of the plaintiffs' bar, the Supreme Court's decision is generally viewed as a "win" because the decision makes clear that the implied certification theory of FCA liability is viable and here to stay. From the defense bar's point of view, the Supreme Court's holding with respect to the "materiality" component of FCA liability generally is viewed as a welcome development. The case is a stark reminder of how important monthly pay applications or invoices can be for government contractors.

By Aron C. Beezley

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Safety Moments for the Construction Industry

Approximately 65% of construction workers perform work on scaffolds, which can expose workers to falls, electrocutions, and falling object hazards, especially if not properly designed, erected, and disassembled. As a reminder to contractors, owners and other employers, erect scaffolding on solid footing, fully planked, and at a safe distance from power lines.

Workers should always wear the appropriate fall arrest systems, hard hats and appropriate work boots, use tool lanyards, and should never exceed the maximum loads.

Bradley Arant Lawyer Activities

Announcing our new Texas offices:

On October 4, 2016, our firm opened an office in **Houston, Texas**, with a small office in Dallas, bringing with it a host of dynamic, experienced and committed construction lawyers. We are delighted to welcome **Ian Faria**, **James Collura**, **Jared Caplan**, **Jon Paul Hoelscher**, **Nathan Graham**, **Christian Dewhurst**, **Ryan Kinder**, **Justin Scott**, and **Andrew Stubblefield** to our firm

A press release and announcement with further details about our expansion into Texas can be found here: http://www.bradley.com/insights/news/2016/10/bradley

In U.S. News' "Best Law Firms" rankings, **Bradley's Construction and Procurement Practice Group** received a Tier One National ranking, the highest awarded, in Construction Law and a Tier Two ranking in Construction Litigation. The Birmingham, Nashville, Jackson, and Washington, D.C. offices received similar recognition in the metropolitan rankings.

Doug Patin, **Bill Purdy**, **Mabry Rogers**, **David Pugh**, **Bob Symon**, and **Arlan Lewis** were recently listed in the *Who's Who Legal: Construction 2016* legal referral guide. **Mabry Rogers** has been listed in Who's Who for 21 consecutive years.

Jim Archibald, Axel Bolvig, Rick Humbracht, Russ Morgan, David Pugh, and **Mabry Rogers** were recognized by *Best Lawyers in America* in the category of Litigation - Construction for 2016.

Axel Bolvig, **Ralph Germany**, **David Owen**, **Doug Patin**, **David Pugh**, **Bill Purdy**, **Mabry Rogers, Wally Sears, Bob Symon**, **David Taylor**, **Jim Archibald** and **Eric Frechtel** were recently recognized by *Best Lawyers in America* in the area of Construction Law for 2017.

Mabry Rogers and **David Taylor** were recognized by *Best Lawyers in America* in the areas of Arbitration and Mediation for 2017. **Keith Covington** and **John Hargrove** were recognized in the area of Employment Law – Management. **Frederic Smith** was recognized in the area of Corporate Law.

Jim Archibald, Ryan Beaver, Ralph Germany, Bill Purdy, Mabry Rogers, Wally Sears, Bob Symon, David Taylor, and **Darrell Tucker** were named *Super Lawyers* in the area of Construction Litigation. **Arlan Lewis** and **Doug Patin** were similarly recognized in the area of Construction/Surety. **Frederic Smith** was also recognized in the area of Securities & Corporate. **Aron Beezley** was named a 2016 *Super Lawyers* "Rising Star" in the area of Government Contracts. In addition, **Monica Wilson** was listed as a "Rising Star" in Construction Litigation, **Amy Garber** was listed as a "Rising Star" in Construction Law, and **Tom Lynch** was listed as a "Rising Star" in both Construction Litigation and Construction Law. **Bryan Thomas** was selected as a 2016 Mid-South Rising Star in the area of Construction Law.

Wally Sears was recently named Birmingham's *Best Lawyers* 2017 Lawyer of the Year in the area of Construction Law.

David Taylor was recently named Nashville's *Best Lawyers* 2016 Lawyer of the Year in the area of Arbitration.

Bill Purdy was recently named Jackson's *Best Lawyers* 2016 Lawyer of the Year in the area of Construction Law.

Jim Archibald, **Axel Bolvig**, **Keith Covington**, **Arlan Lewis**, **Doug Patin**, **David Pugh**, **Bill Purdy**, **Mabry Rogers**, **Wally Sears**, **Bob Symon**, and **David Taylor** were recently rated AV Preeminent attorneys in Martindale-Hubbell.

Mabry Rogers was recognized by *Law360*, in February, as one of 50 lawyers named by General Counsel as a top service provider.

Aron Beezley was recently named by *Law360* as one of the top 168 attorneys under the age of 40 nationwide.

Axel Bolvig, **Stanley Bynum**, **Keith Covington**, and **Arlan Lewis** were recently recognized by *Birmingham's Legal Leaders* as "Top Rated Lawyers."

This list, a partnership between Martindale-Hubbell® and ALM, recognizes attorneys based on their AV-Preeminent® Ratings.

Keith Covington was honored by *Birmingham Magazine* as a 2016 Top Attorney for Immigration. The magazine's annual Top Attorneys list recognizes attorneys in 35 practice areas and is selected through a peer review survey of approximately 4,000 local attorneys registered with the Birmingham Bar Association.

On October 26, 2016, **David Taylor** will be speaking in Miami, FL to the International Council of Shopping Center's Legal Conference on "Creative Ways to Resolve Construction Disputes."

David Pugh will again serve as the Chair of the Hospital and Health Care Construction Track at the Associated Builders & Contractors' Fourth Annual User's Summit in New Orleans on October 12-13, 2016. The Summit is intended to bring owners, developers and contractors together to share "best practices" and to discuss candidly and openly ways to improve safety, efficiency, productivity and quality in the design and construction process.

Bob Symon, **Beth Ferrell**, **Kyle Hankey**, **Aron Beezley**, **George Smith**, **Kim Martin**, **Harold Stephens**, **David Lucas**, **Warne Heath**, **Mike Huff**, and **Jennifer Brinkley** will be conducting a Government Contracts Seminar in Huntsville on November 2, 2016.

Luke Martin provided a seminar on construction subcontract management for a client in Massachusetts on October 3, 2016.

On September 16, 2016, **David Taylor** and **Bryan Thomas** presented to the Tennessee Engineers' Conference in Nashville on "Terminating a Contractor: The Nuclear Option."

Bryan Thomas and **Heather Wright** spoke in Austin, TX on September 7, 2016 at *Construct* 2016 on the topic of Post Completion Liability.

On September 2, 2016, **David Taylor** presented a client seminar on the drafting of construction contracts in Dallas, TX.

On August 19, 2016, **Aron Beezley** published in the *Bloomberg BNA Federal Contracts Report* an article titled "Universal Heath's Immediate Impact on FCA Litigation."

Jim Archibald moderated a panel and spoke at the ALFA International 2016 Construction Law Seminar, in Palos Verdes, California, on July 29, 2016. Jim's panel included former Bradley partner David Bashford, who is now in-house General Counsel-EPC to a leading global solar PV developer and contractor. Their topic was "Building Overseas: The Unique Challenges of International Construction." The 3-day Seminar was attended by lawyers and companies from all over the world, and addressed the "State of the Construction Industry." ALFA International is a global network of international law firms comprised of 150 independent member firms, including 70 firms from Canada, Mexico, Latin America, Europe, Asia, Australia, and Africa.

Aron Beezley was quoted in an article in Law360 on July 5, 2016 titled "Gov't Contracts Cases to Watch in the 2nd Half of 2016"

On June 10, 2016, **Aron Beezley** published an article titled "In Defense of the Bid Protest Process" in *Law360*'s Expert Analysis section.

Law360 published an expert analysis article by **Keith Covington** on May 17, 2016 titled "What Employers Should Know About the New 'Smart' Form I-9."

On May 13, **Carly Miller**, **Keith Covington**, **David Pugh,** and **Brian Rowlson** spoke at the annual Construction Law 101 seminar in Birmingham for various clients.

Keith Covington presented a seminar for an Economic Development Authority on avoiding liability under the Fair Labor Standards Act and the Fair Credit Reporting Act.

Doug Patin and **Amy Garber** wrote an article titled "The Miller Act and the Enforceability of Contingent Payment and Disputes Resolution Subcontract Clauses" for the summer 2016 edition of *Construction Lawyer*.

David Taylor was recently reappointed to the Executive Committee of the Tennessee Bar Association's Construction Law Committee.

Bridget Parkes recently became the President of the Associated Builders and Contractors (ABC) Middle Tennessee Chapter Emerging Leaders.

Arlan Lewis was elected to the 12-member Governing Committee of the American Bar Association's Forum on Construction Law during its Annual meeting in April in Boca Raton, Florida.

Chambers annually ranks lawyers in bands from 1-6, with 1 being best, in specific areas of law, based on in-depth client interviews. **Bill Purdy** and **Mabry Rogers** are in Band One in *Litigation: Construction*. **Doug Patin** was ranked in Band Two and **Bob Symon** in Band Three, both in the area of *Construction*.

Our Group is excited to welcome three new associates to the Birmingham office of our construction and government contract team: **Daniel Murdock**, **Abigail Harris**, and **Jackson Hill**. We look forward to their work with our clients, learning from their prior experiences, and introducing them to our construction practice.

NOTES

An electronic version of this newsletter, and of past editions, is available on our website. The electronic version contains hyperlinks to the case, statute, or administrative provision discussed.

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READER RESPONSES

If you have any comments or suggestions, please complete the appropriate part of this section of the *Construction & Procurement Law News* and return it to us by folding and stapling this page which is preaddressed.

Your Name:

☐ ..I would like to see articles on the following topics covered in future issues of the Bradley *Construction & Procurement Law News*:

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We are in the process of developing new seminar topics and would like to get input from you. What seminar topics would you be interested in?

_____

If the seminars were available on-line, would you be interested in participating? ☐ Yes ☐ No

If you did not participate on-line would you want to receive the seminar in another format? ☐ Video Tape ☐ CD ROM

Comments:

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