BRADLEY ARANT BOULT CUMMINGS LLP **First Quarter 2011**

CONSTRUCTION AND PROCUREMENT LAW NEWS

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

F. Wendell Allen
James F. Archibald, III
David H. Bashford (c)
Axel Bolvig, III
Joel E. Brown
Stanley D. Bynum
Robert J. Campbell
Rhonda Caviedes
Jonathan Cobb
F. Keith Covington
Rob Dodson (j)
Joel Eckert (n)
Edward J. Everitt
Eric A. Frechtel (d.c.)
Ralph Germany (j)
Daniel Golden (d.c.)
John Mark Goodman
John W. Hargrove
Jonathan B. Head
Michael P. Huff (h)
Rick Humbracht (n)
David G. Hymer
Josh D. Johnson
Aman Kahlon
Michael W. Knapp (c)
Michael S. Koplan (d.c.)
Arlan D. Lewis
Tom Lynch (d.c.)
Luke D. Martin
Michael D. McKibben
David W. Owen
Douglas L. Patin (d.c.)
Vesco Petrov
Steven A. Pozefsky (d.c.)
J. David Pugh
Bill Purdy (j)
Alex Purvis (j)
Gregory H. Revera (h)
Lewis Rhodes (d.c.)
E. Mabry Rogers
Walter J. Sears, III
Avery Simmons (c)
Eric W. Smith (n)
James C. Smith (c)
H. Harold Stephens (h)
Robert J. Symon (d.c.)
David K. Taylor (n)
Darrell Clay Tucker, II
D. Bryan Thomas
Nicholas J. Voelker (c)
James Warmoth (c)

No Immunity Under FHA and ADA

Under Federal Law, developers and owners are charged with designing and constructing housing projects that comply with the Fair Housing Act ("FHA") and the Americans with Disabilities Act ("ADA"). Owners, developers, contractors, subcontractors, and designers must all recognize that each bears a duty to comply with these laws. Construction contracts often include carefully negotiated provisions to apportion risk between these parties and to insure against the consequences of the risks accordingly. Industry participants and their lawyers should be aware that certain federal requirements may preempt state laws and contract provisions dependent on state law for enforcement.

The Fourth Circuit Court of Appeals (the federal court overseeing trial courts in Maryland, West Virginia, Virginia, North and South Carolina) recently ruled that a developer could not recover damages from an architect based on express indemnity, implied indemnity, breach of contract, or professional negligence, where the architect allegedly failed to design a project in compliance with FHA and ADA requirements. The Court reasoned that compliance with FHA and ADA requirements cannot be delegated to designers and contractors by owners and developers – all parties are responsible for meeting FHA and ADA standards.

In *Equal Rights Center v. Niles Bolton Associates*, the developer was sued by disability advocacy groups, charging that the design of its housing project failed to meet FHA and ADA requirements for accessibility to persons with disabilities. The developer ultimately entered into a consent decree under which the developer spent approximately $2.5 million dollars to retrofit its development and bring it into compliance with the FHA and ADA. The original architect for the project was not a party to the settlement but later entered into a separate settlement with the same plaintiffs that sued the developer.

The developer sought indemnity from the architect for the cost it incurred to retrofit the units designed by the architect. The district court granted the architect's motion for summary judgment and the Fourth Circuit affirmed. Both courts concluded that the FHA and ADA contained no right to indemnification. The courts further reasoned that allowing indemnification under state law would be antithetical to the purposes of the FHA and ADA. Thus,

Inside:

the developer could not recover the costs incurred to retrofit its housing project from the architect.

According to the Fourth Circuit, the doctrine of "obstacle preemption" enables Federal Courts to find state-law claims preempted where the state law claim might interfere with the accomplishment and execution of a federal statute. If owners could insulate themselves from ADA or FHA liability through contractual indemnity clauses, the Fourth Circuit reasoned, then FHA and ADA goals would be undermined. Hence, the state law claims asserted by the developer against the architect were pre-empted.

The decision potentially leaves open one avenue by which an owner might obtain relief from a contactor or designer. The owner initially failed to assert a common law claim for contribution. (While an indemnification claim seeks to transfer all of the liability from one party to another, a contribution claim seeks to apportion liability between parties based on their respective fault.) Ultimately, on the eve of trial, the owner attempted to add a claim for contribution. The District Court rejected the claim as untimely. The Fourth Circuit agreed. Both courts indicated, however, that the outcome of the case probably would not have been different even if the contribution claim were allowed.

Owners and developers expecting to protect their rights through indemnity clauses must recognize that not all risks can be transferred to other parties by contract. Many states interpret indemnity clauses narrowly. Moreover, certain federal statutes, including the ADA and FHA, may preempt state law claims for breach of contract and indemnity. Hence, owners and developers, at least in the states included in the Fourth Circuit, have an independent and non-delegable duty to evaluate whether their projects comply with these requirements.

By Jim Archibald

Implied Warranties: Does Your Contract Contain Terms in Addition to the Express Terms?

The Armed Services Board of Contractor Appeals recently ruled in the case of *Appeals of J.E. McAmis, Inc.*, that a contract warranty need not be expressly stated in the contract but, instead, may be implied from contract language and surrounding circumstances. For such a warranty to be valid, the contractor must prove that (1) the owner assured contractor of the existence of a fact; (2) the owner intended to relieve the contractor of the duty to ascertain the existence of the fact; and (3) the owner's assurance turned out to be untrue. The decision demonstrates that, by understanding both the letter and intent of contract documents, a contractor may be able to find relief from unanticipated changes and costs.

J.E. McAmis, Inc. contracted with the Army Corps of Engineers on a riverbed gradient facility project. The federal government provided contract drawings and specifications, which laid out the available routes for hauling rock and other materials to the site. Additionally, a note on these drawings stated that the construction site "SHALL BE ACCESSED ONLY BY ROADS DESIGNATED ON THE DRAWING." The contractor relied on the drawings in preparing an estimate for the hauling rates for the project. Also, in compliance with the terms of the contract, the contractor properly investigated the designated haul routes to ensure that they were indeed available for use under applicable county, local and state laws.

Subsequent to the signing of the contract, the local county government implemented an Urgency Ordinance that limited the weight of vehicles on the designated hauling routes and effectively eliminated the contractor's ability to deliver rock to a large portion of the project. Eventually, the federal government reached an agreement with the local county to reopen the hauling route to the contractor's use, but not before the contractor incurred substantial delay and disruption costs associated with having to re-sequence its work and re-route its hauling operations at an increased rate.

Ruling in favor of the contractor, the Board explained that the contractor validly demonstrated the existence of an implied warranty. According to the Board, the contractor established (1) that the government assured the contractor of the existence of specific unrestricted haul routes in the contract drawings; (2) by specifying haul routes, the government intended the contractor to be able to proceed with the project without establishing or negotiating its own haul routes; and (3) the government's assurance of the availability of the haul routes proved untrue. The Board concluded by awarding the contractor all of its claimed damages.

Injured parties should always consider whether the contract and the surrounding circumstances create an "implied" term in the contract. One that is well established in all jurisdictions is the implied duty not to hinder performance by the other party to a contract.

By Aman Kahlon

Clear Pay-If-Paid Clauses Enforced in Alabama

Contractors and subcontractors expect to be paid; and "Pay-if-Paid" and "Pay-when-Paid" clauses play a critical role in determining payment when an entity in the contracting chain either becomes insolvent or simply disputes payment. A recent case, *Lemoine Company of Alabama v. HLH Constructors*, confirms that careful review of payment terms is key. Slight differences in the wording of a payment clause can be the difference between no payment and payment in full.

Lemoine was the general contractor for a condominium project in Baldwin County, Alabama. It subcontracted with HLH to perform the plumbing work. The project progressed as expected, and the owner paid Lemoine each of its payment applications. Lemoine, in turn, paid each of HLH's payment applications. A dispute arose when the owner failed to pay Lemoine its final payment application (retainage), and Lemoine contended that it did not have to pay HLH's final payment application (retainage) because of the owner's failure to pay. HLH disagreed and sued Lemoine for payment. The dispute ultimately made it to the Alabama Supreme Court which focused on the wording of two very important payment terms contained in the subcontract.

First, the court analyzed a clause which stated that the HLH would be paid by Lemoine *when* Lemoine received payment from the owner. Such a provision is known as a Pay-when-Paid clause. Alabama and many other state courts have construed such Pay-when-Paid clauses to mean that payment is not due to the subcontractor until the general contractor receives payment from the owner, *but if the general contractor is not paid by the owner within a reasonable time, the general contractor is still obligated to pay the subcontractor*.

Second, the court considered a clause stating that retainage would be withheld from each of HLH's progress payments, that payment of Lemoine's retainage by the owner was a condition precedent to the payment of HLH's retainage, and that HLH expressly assumed the risk of nonpayment by the Owner. Such clauses are known as Pay-if-Paid clauses and differ from Pay-when-Paid clauses in that the general contractor's obligation to pay a subcontractor never arises unless the general contractor is paid by the owner.

Considering these two payment terms in the subcontract, the Alabama Supreme Court reversed a lower Court and held that the Pay-if-Paid clause was enforceable with regard to the retainage; thus, Lemoine did not owe HLH its retainage. The court reached this conclusion even though it observed that Pay-if-Paid clauses are strongly disfavored and will only be enforced when a payment provision is clear that payment from the owner is a condition precedent to payment to the subcontractor and that the subcontractor assumes the risk of an owner's failure to pay.

States differ on the enforcement of Pay-when-Paid and Pay-if-Paid Clauses. Those states that recognize the two clauses and enforce the theoretical distinction focus heavily on the language included in the relevant contract. Considering the differing state law and risk of nonpayment from a defaulting contract party in the current economy, it is wise to consult a lawyer to draft or review payment terms before executing a construction contract.

By Bryan Thomas

Claim for Additional Work Barred for Failing to Provide Timely Written Notice

The recent case of *Weigland Construction Co. v. Stephens Fabrication, Inc.* underscores the importance of complying with notice requirements in construction contracts, even when those requirements are incorporated into the contract via a flow down provision. In *Weigland*, an intermediate appellate court in Indiana barred a subcontractor's claim seeking payment for additional work beause the subcontractor failed to provide timely written notice of the claim in accordance with the notice provisions incorporated into the subcontract by reference to the prime contract.

Weigland, the general contractor, subcontracted with Stephens, a structural steel fabricator, on a building project at Ball State University. The subcontract was in the form of a purchase order, which apparently contained no claim provisions of its own, but did include a flow down provision that incorporated the terms and conditions of the prime contract into the purchase order. The prime contract contained a claim provision providing that written notice of a claim must be provided within 21 days after "occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognized the condition giving rise to the Claim, whichever is later." The claim provision also provided that notice of a claim for an increase in the contract value must be given before the party proceeds with executing that work.

After Stephens was awarded the steel fabrication subcontract, the owner's architect made several changes to the project's steel design. Weigland passed these changes on to Stephens, who provided them to its sub-consultant de-

tailer and engineer. Stephens' detailer and engineer realized that the design changes would require substantial changes to their design; however, this concern was not immediately communicated to Weigland. It was not until 10 months after receiving the design changes that a Stephens employee orally informed a Weigland employee that the steel design changes would cause Stephens to perform extra work. Another month passed before Stephens sent Weigland written notice of its claim. The owner ultimately denied Stephens' claim at the project level for failure to provide timely notice under the contract.

Stephens filed suit against Weigland to recover the costs of the additional work, and prevailed in the trial court. On appeal, the trial court's ruling was reversed, and Stephens' claim for additional costs associated with the extra work was barred because Stephens failed to comply with the notice requirements of the prime contract. Stephens neither gave written notice within 21 days of the "occurrence" or from the moment Stephens "first recognized the condition" giving rise to its claim, nor did Stephens provide notice before it proceeded with a portion of the extra work (detailing and engineering). The court accordingly found Stephens failed to comply with the contract's notice requirements, and its claim for additional work was barred. The court's ruling also implicitly approved of the flow down provision in the purchase order, and even suggested that Stephens should have included a similar provision in its own subcontracts. Finally, the court found that Weigland had not waived the notice requirements by encouraging Stephens to submit its claim after the time had passed.

The *Weigland* case emphasizes the importance of complying with contractual notice requirements. By failing to provide timely written notice, the subcontractor in this case forfeited its right to be compensated for additional work that it performed over and above the original subcontract scope. Make sure you understand all obligations in your contracts, including those flow-down obligations in other referenced agreements.

By Ed Everitt

"Waiver of Subrogation" Means What it Says

The Appeals Court of Massachusetts recently considered the extent of the waiver of subrogation contained in the AIA standard form construction contracts. The Court concluded that the clause was not limited to either the type of policy or by when the policy was purchased.

A "waiver of subrogation" clause is a clause by which parties attempt to allocate the risks of certain types of losses which may be experienced in the performance of a contract. Subrogation is the right of an insurance company to "step into the shoes" of its insured and attempt to pursue recovery from another person or entity, any amounts it paid to its insured for a loss. Parties to a contract sometimes waive the right to make claims against each other for certain types of accidental or fortuitous losses, choosing instead to purchase insurance to cover such a loss. For example, an owner and a contractor may not want to sue each other in the event of a fire which results in a loss to a construction project in progress even if the negligence of one or both of them caused or contributed to the fire. Instead, they purchase a builders risk policy for such losses during construction and the owner purchases permanent property insurance for such risks after construction is completed. The parties then waive the rights of subrogation each has against the other and agree to look solely to the insurance company to bear the loss.

In the Massachusetts case, a fire severely damaged an apartment complex approximately two years after construction was completed. The owner's property insurer paid $4,744,150.14 to repair the damage and then sued the architect, general contractor and fire suppression subcontractor in a subrogation action to recover the money it had paid the owner. The defendants obtained summary judgment from the trial court relying on the waiver of subrogation language in the standard form AIA A201 General Conditions. The owner's insurer appealed arguing that the waiver of subrogation only applied to insurance purchased during the construction of the building and not for a loss after completion.

The intermediate appellate court concluded there was no such limitation. The waiver of subrogation applied to any subrogation claim based on the performance of the parties' duties under the construction contract whether it was during construction or after completion. Likewise, the waiver applied whether it was pursuant to a builders' risk policy purchased for losses during construction or permanent property insurance for losses after completion.

Waiving the right of subrogation can be an effective risk management tool in the construction industry. When negotiating contracts, owners, contractors, and subcontractors should all be aware of the potential long term impact of such waivers and should consult a knowledgeable risk manager to ensure that such mutual waivers will not void or limit the coverage under your respective policies.

By David Pugh

E-Discovery: The Production of Metadata

Judge Shira Scheindlin wrote the seminal *Zubulake* case that ushered in the modern era of e-discovery. She recently ruled on another significant e-discovery issue for companies who file Freedom of Information Act (FOIA) requests with the federal government. The case resolved whether the government must produce metadata — information describing how the government had kept its electronic files before producing them to the requester — in response to a FOIA request. Judge Scheindlin writes, "[C]ertain metadata is an integral or intrinsic part of an electronic record. As a result, such metadata is 'readily reproducible' in the FOIA context. . . . [M]etadata maintained by the agency as part of an electronic record is presumptively producible under the FOIA. . . ."

The government produced documents in PDF format, without any metadata. The government created unsearchable PDF files, separated attached files from emails, and combined documents into a few large files. The requester had specified the format it wanted the records produced in. (It cleverly based its request on format demands made by government agencies in other litigation.) The government never agreed or objected to the requested forms of production.

The court rejected the government's argument that the FOIA and the Federal Rules of Civil Procedure conflicted, since the FOIA was "silent with respect to form of production." Because "common sense dictates that parties incorporate the spirit, if not the letter, of the discovery rules" in FOIA litigation, the federal government must include metadata in its FOIA productions. Judge Scheindlin also held that "certain metadata is an integral . . . part of an electronic record."

The court did not make the government reproduce all the requested records, but the government had to meet the requester's original specification. For all electronic productions, the court required disclosure of each file's location within the government's information systems, the custodian of the file, and last date the government modified the files. For email productions, the court required additional production of all sender and recipient information, the date and time the email was sent and received, the subject of the email, and the identification of any attachments to the email.

Judge Scheindlin's reasoning springs from the principles that "metadata is generally considered to be an integral part of an electronic record" and "production of a collection of [unsearchable] static images . . . is an inappropriate downgrading" of electronically stored information. By calling this metadata production "basic," this case sets a standard for other federal courts to follow. Construction industry beware, Judge Scheindlin has likely raised the standard of e-discovery practice again.

Do you have a document retention policy in place that covers electronic data and metadata that will allow you to comply with the new elevated standard? If not and you think you might need a hand, call one of the BABC lawyers (or your own lawyer) to discuss the services that may be in order.

By Jonathan Head

Bradley Arant Lawyer Activities:

Mabry Rogers was named "Lawyer of the Year" by the Best Lawyers survey firm in the area of Construction Law for Birmingham, AL.

Mabry Rogers is one of 318 lawyers recently named to a group of highly service-oriented lawyers in the United States. The BTI Client Service All-Stars are a group of attorneys whom clients recognize for superior client service. The only path to becoming a *BTI Client Service All-Star* is for corporate counsel and corporate-level executives to single out an attorney by name in an unprompted manner as part of independent research conducted by BTI Consulting. BTI specializes in providing high-impact client service and strategic market research regarding law firms and lawyers.

Keith Covington wrote an article entitled "Military Leave Under ESERRA: Know Your Obligations" for the October/November 2010 edition of the Alabama Construction News.

David Taylor presented a seminar entitled "Legal Aspects of Construction Claims" to the Tennessee Association of CPAs on September 27, 2010.

Bob Symon provided a client seminar regarding Certified Payrolls and the Davis-Bacon Act in Rockville, Maryland on October 20, 2010.

Keith Covington attended the Defense Research Institute's Annual Meeting in San Diego, California from October 20-22.

David Pugh served as emcee at the November 4, 2010 ABC Excellence in Construction Awards Banquet in Birmingham, AL.

Rhonda Caviedes attended the 30th IRMI Construction Risk Management Conference on November 14-18 in Orlando, FL.

Jonathan Head and **David Deusner** spoke on e-discovery at a seminar on November 16, 2010.

Doug Patin and **David Owen** attended Construction SuperConference 2010 in San Francisco, California in December.

David Taylor and **Bryan Thomas** Spoke in Nashville, TN on January 14, 2011 as part of the Tennessee Bar Association Seminar "Tennessee Construction Law: A – Z: What You Do NOT Know Can Hurt You."

Stanley Bynum, Walter Sears, Arlan Lewis and **Rhonda Caviedes** attended the ABA Forum on Construction Industry's Midwinter Joint meeting with the TIPS Fidelity and Surety Law Committee entitled "Do You Think it's Alright: Pushing the ADR Envelope" in New York City on January 20-21, 2010.

Arlan Lewis has been selected to serve as one of four judges for the ABA Forum on the Construction Industry's inaugural Law Student Writing Competition. The competition is national in scope and the winning entry will be published in one of the Forum's publications. The award will be presented in April during the Forum's 2011 Annual Meeting in Scottsdale, Arizona.

Nick Voelker and **James Warmoth** published an article entitled "'Buy American' Primer" for the South Carolina Bar's Construction Law Section in its Winter 2011 Edition.

Mabry Rogers and **David Bashford** presented client seminars on risk management in the operations and maintenance, engineering, and construction management power plant environments at several locations in the southwest in February.

Mabry Rogers, Wally Sears, and **Bill Purdy**, attended the American College of Construction Lawyers annual meeting in February 2011. Bill was in charge of the programming for this event.

David Pugh participated in Associated Builders and Contractors' BizCon 2011 in Orlando, Florida on February 23-25, 2011

Joel Brown presented via teleconference a seminar entitled AID Document A401 on March 2, 2011

Michael Knapp will present a session entitled "Drafting Effective, Enforceable Consulting Agreements to Protect and Maintain Privileges at Various Stages of Project/Litigation" at the 2011 Annual Meeting for the ABA Construction Forum in Scottsdale, Arizona, which is scheduled for April 14-16, 2011.

Bill Purdy will make three national presentations to NISH (redesignation for the National Institute for the Severely Handicapped) which administers hundreds of millions in federal government set-asides under the Javits-Wagner-O'Day Act. On March 23, 2011, he will present to high ranking NISH officials and NISH-associated non-profit agency executives on "Top 10 Risks in Subcontracting on Federal Projects" at two locations in the Washington, D.C. area. On May 25, 2011, he will present a lecture entitled "Managing Relationships with Contracting Partners" at the 2011 NISH National Training and Achievement Conference in Orlando, FL. Lastly, he will present three two-day seminars and workshops in Atlanta on April 26-27, in Chicago on June 28-29, and in Los Angeles on November 2-3, all entitled "Subcontracting of Federal Projects".

David Taylor and **Bryan Thomas** will be presenting a session at the CONSTRUCT2011 Seminar in Chicago, Illinois on September 16, 2011.

Bradley Arant Boult Cummings' construction practice group was recognized as a Tier 1 national practice group by the U.S. News and World Report in its first ever ranking of law firm practice groups. This ranking was based on the comments of clients and industry participants, and was performed in conjunction with Best Lawyers, a company which performs a highly-regarded semi-annual ranking of law firms. We are grateful for this recognition, and we look forward to continued success in providing practical and quality legal services to each of our clients.

Bradley Arant attorneys have recently presented training sessions to a number of clients regarding Contract Administration and regarding Mandatory Written Ethics Compliance Programs for Federal Government Contracts. If you are interested in either of these seminars for your company, please contact one of the attorneys listed on page 8 of this newsletter.

For more information on any of these activities or speaking engagements, please contact Terri Lawson at 205-521-8210.

NOTES

Disclaimer and Copyright Information

The lawyers at Bradley Arant Boult Cummings LLP, including those who practice in the construction and procurement fields of law, monitor the law and regulations and note new developments as part of their practice. This newsletter is part of their attempt to inform their readers about significant current events, recent developments in the law and their implications. *Receipt of this newsletter is not intended to, and does not, create an attorney-client, or any other, relationship, duty or obligation.*

This newsletter is a periodic publication of Bradley Arant Boult Cummings LLP and should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult your own lawyer concerning your own situation and any specific legal questions you may have. For further information about these contents, please contact your lawyer or any of the lawyers in our group whose names, telephone numbers and E-mail addresses are listed below; or visit our web site at www.babc.com.

F. Wendell Allen.....(205) 521-8282.....wallen@babc.com
James F. Archibald, III .....(205) 521-8520.....jarchibald@babc.com
David H. Bashford (Charlotte).....(704) 338-6001.....dbashford@babc.com
Axel Bolvig, III.....(205) 521-8337.....abolvig@babc.com
Joel E. Brown .....(205) 521-8416.....jbrown@babc.com
Stanley D. Bynum.....(205) 521-8000.....sbynum@babc.com
Robert J. Campbell .....(205) 521-8975.....rjcampbell@babc.com
Rhonda Caviedes .....(205) 521-8683.....rcaviedes@babc.com
Jonathan Cobb .....(205) 521-8614.....jcobb@babc.com
F. Keith Covington .....(205) 521-8148.....kcovington@babc.com
Rob Dodson (Jackson).....(601) 592-9918.....rdodson@babc.com
Joel Eckert (Nashville).....(615) 252 4640.....jeckert@babc.com
Edward J. Everitt .....(205) 521-8444.....eeveritt@babc.com
Eric A. Frechtel (Washington, D.C.).....(202) 719-8249.....efrechtel@babc.com
Ralph Germany (Jackson).....(601) 592-9963.....rgermany@babc.com
Daniel Golden (Washington, D.C.).....(202) 719-8398.....dgolden@babc.com
John Mark Goodman .....(205) 521-8231.....jmgoodman@babc.com
John W. Hargrove.....(205) 521-8343.....jhargrove@babc.com
Jonathan B. Head.....(205) 521-8054.....jhead@babc.com
Michael P. Huff (Huntsville) .....(256) 517-5111.....mhuff@babc.com
Rick Humbracht (Nashville).....(615) 252-2371.....rhumbracht@babc.com
David G. Hymer.....(205) 521-8289.....dhymer@babc.com
Josh D. Johnson .....(205) 521-8423.....jjohnson@babc.com
Aman Kahlon.....(205) 521-8549.....akahlon@babc.com
Michael W. Knapp (Charlotte).....(704) 338-6004.....mknapp@babc.com
Michael S. Koplan (Washington, D.C.) .....(202) 719-8251.....mkoplan@babc.com
Arlan D. Lewis .....(205) 521-8131.....alewis@babc.com
Tom Lynch (Washington, D.C.) .....(202) 719-8216.....tlynch@babc.com
Luke Martin .....(205) 521-8570.....lumartin@babc.com
Michael D. McKibben .....(205) 521-8421.....mmckibben@babc.com
David W. Owen .....(205) 521-8333.....dowen@babc.com
Douglas L. Patin (Washington, D.C..) .....(202) 719-8241.....dpatin@babc.com
Vesco Petrov.....(205) 521-8102.....vpetrov@babc.com
Steven A. Pozefsky (Washington, D. C.).....(202) 719-8210.....spozefsky@babc.com
J. David Pugh.....(205) 521-8314.....dpugh@babc.com
Bill Purdy (Jackson) .....(601) 592-9962.....bpurdy@babc.com
Alex Purvis (Jackson).....(601) 592-9940.....apurvis@babc.com
Gregory H. Revera (Huntsville).....(256) 517-5129.....grevera@babc.com
Lewis P. Rhodes .....(202) 719-8208.....lrhodes@babc.com
E. Mabry Rogers.....(205) 521-8225.....mrogers@babc.com
Walter J. Sears, III .....(205) 521-8202.....wsears@babc.com
Avery Simmons .....(704) 338-6021.....asimmons@babc.com
Eric W. Smith (Nashville).....(615) 252-2381.....esmith@babc.com
James C. Smith (Charlotte).....(704) 338-6010.....jsmith@babc.com
H. Harold Stephens (Huntsville).....(256) 517-5130.....hstephens@babc.com
Robert J. Symon (Washington, D.C.) .....(202) 719-8294.....rsymon@babc.com
David K. Taylor (Nashville) .....(615) 252 2396.....dtaylor@babc.com
Darrell Clay Tucker, II.....(205) 521-8356.....dtucker@babc.com
D. Bryan Thomas.....(205) 521-8434.....dbthomas@babc.com
Nicholas J. Voelker (Charlotte) .....(704) 338-6018.....nvoelker@babc.com
James Warmoth (Charlotte) .....(704) 338-6211.....jwarmoth@babc.com

Note: The following language is required pursuant to Rule 7.2 Alabama Rules of Professional Conduct: *No representation is made that the quality of the legal services to be performed is greater than the quality of the legal services performed by other lawyers.*

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 BABC *Construction & Procurement Law News*:

_____

_____

_____

☐ Please add the following to your mailing list:

_____

_____

_____

☐ Correct my name and mailing address to:

_____

_____

_____

☐ My e-mail address:_____

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:

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

Bradley Arant Boult Cummings LLP
One Federal Place
1819 Fifth Avenue North
Birmingham, AL 35203-2104

Axel Bolvig, Esq.
One Federal Place
1819 Fifth Avenue North
Birmingham, AL 35203-2104

BRADLEY ARANT BOULT CUMMINGS LLP **Second Quarter 2011**

CONSTRUCTION AND PROCUREMENT LAW NEWS

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

F. Wendell Allen
James F. Archibald, III
David H. Bashford (c)
Ryan Beaver (c)
Axel Bolvig, III
Joel E. Brown
Stanley D. Bynum
Robert J. Campbell
Rhonda Caviedes
Jonathan Cobb
F. Keith Covington
Joel Eckert (n)
Eric A. Frechtel (d.c.)
Ralph Germany (j)
Daniel Golden (d.c.)
John Mark Goodman
John W. Hargrove
Jonathan B. Head
Michael P. Huff (h)
Rick Humbracht (n)
David G. Hymer
Josh D. Johnson
Aman Kahlon
Michael W. Knapp (c)
Michael S. Koplan (d.c.)
Arlan D. Lewis
Tom Lynch (d.c.)
Luke D. Martin
Michael D. McKibben
David W. Owen
Douglas L. Patin (d.c.)
Vesco Petrov
Steven A. Pozefsky (d.c.)
J. David Pugh
Bill Purdy (j)
Alex Purvis (j)
Gregory H. Revera (h)
Lewis Rhodes (d.c.)
E. Mabry Rogers
Walter J. Sears, III
Eric W. Smith (n)
Frederic L. Smith, Jr.
James C. Smith (c)
H. Harold Stephens (h)
Robert J. Symon (d.c.)
David K. Taylor (n)
C. Samuel Todd
Darrell Clay Tucker, II
D. Bryan Thomas
Paul S. Ware
James Warmoth (c)

Teaming Arrangements for Small Businesses

The Small Business Administration (SBA) and Department of Defense (DoD) provide several teaming arrangements for small business contractors to compete for federal construction contracts set aside for small business entities. The term "team arrangement" generally refers to the types of strategic alliances contractors have formed to enhance efficiencies, exploit complementary capabilities, and increase competitiveness in the federal contracting marketplace. The major types of team arrangements include teaming agreements, joint ventures and mentor-protégé arrangements. The federal government recognizes the integrity and validity of these contractor team arrangements as long as the arrangements are identified and company relationships are fully disclosed in a competitive proposal or, for arrangements entered into after submission of a competitive proposal, before the teaming arrangement becomes effective.

Inside:

Teaming Agreement

The prevailing federal teaming business model, as it relates to small business, is one in which large businesses are motivated to seek out small businesses as team members. These team members act as subcontractors if the team is awarded a contract. A teaming agreement is not a subcontract for the performance of work under a prime contract. Rather, it is an agreement to work together to pursue a prime contract with the promise to work together (in good faith) to negotiate appropriate subcontracts with the team members if the team is successful in winning a contract award.

Key elements of successful teaming agreements include:

- Clearly defined proposal preparation responsibilities of all team members.
- Statement-of-work tasks clearly divided among team members.
- Protection of competition-sensitive proprietary information of all team members.

- Exclusivity provisions to ensure that team members cannot be easily replaced and that team members will not team with other firms on the same procurement proposal.

- Clear event or condition that ends the teaming agreement.

When the team members are successful in their procurement pursuit and the proposed prime contractor is awarded a contract, the team members must then negotiate in good faith to enter into appropriate subcontracts with team members acting as a subcontractor to the prime.

There are occasions when "teams" become the prime contractor—often called a "consortium." Like the Joint Venture arrangement discussed below, a consortium is a partnership, such that, to third parties, each individual entity in the "team" or the "joint venture" has complete liability for all of the team's or joint venture's debts.

Joint Venture Arrangements

Another type of team arrangement is a joint venture. A joint venture is an association of two or more individuals or entities formed to undertake a particular project. Members of the joint venture share in the profits or losses of the project, generally in proportion to each entity's contributions to the project or venture. The joint venture members may but are not required to organize and operate a separate joint venture entity. Also, the SBA may view some teaming arrangements between prime and subcontractors as constituting joint ventures and conclude that the entities are affiliated.

The joint venture itself (which includes all the members of the joint venture) contracts directly with the government. If any member of the joint venture fails to adhere to the terms and conditions of the contract, the entire joint venture entity – and not solely the joint venture member at fault – will be held responsible. For this reason, it is advisable for joint venture members to include indemnification provisions in the joint venture agreement.

In addition, the joint venture agreement should clearly define the roles of each member of the joint venture. The joint venture agreement should indicate that the members are individually and severally liable for contract performance. In addition, the joint venture agreement should indicate how profits and losses are to be distributed.

Key elements of joint ventures are as follows:

- The contract is in the name of the joint venture entity.

- The joint venture entity is responsible for contract performance.

- Joint venture members contract directly with the government.

- Joint venture members are individually and equally liable for contract performance.

- Joint venture members share profits and risk of loss.

- Indemnification provisions protect the joint venture from the negligent actions or inactions of a joint venture member.

- The agreement must have clear decision making mechanisms in the event of an impasse, to avoid an inability to act.

- The agreement must provide for "capital" assessments of JV members, to provide working capital.

Mentor-Protégé Arrangements

A third type of teaming arrangement is the mentor-protégé arrangement. A small business can enter into a mentor-protégé arrangement with a more experienced business to pursue procurement opportunities as a joint venture. Mentor-protégé programs are designed to encourage more-established businesses to provide developmental assistance to small businesses to enhance their capabilities in performing federal procurement contracts. The objectives of mentor-protégé programs include fostering long-term relationships between the more established business and the small businesses and increasing the viability of the small business entities receiving federal contracts.

There are two types of mentor-protégé programs: the SBA Mentor-Protégé Program and the DoD Mentor-Protégé Program. The SBA Mentor-Protégé Program enables businesses certified as small disadvantage businesses (SDBs) under Section 8(a) of the Small Business Act to form a joint venture with a mentor firm (either a large or small business) in pursuit of federal procurement contracts. As long as the Section 8(a) protégé qualifies as small for the procurement, the joint venture itself will be deemed small without regard to the size of the mentor.

Unlike the SBA Mentor-Protégé Program, which permits protégés to form a joint venture with mentors, the

DoD Mentor-Protégé Program contemplates that the mentor will provide subcontracting opportunities to the protégé. A mentor firm must have at least one active, approved subcontracting plan negotiated either with DoD or another federal agency and be eligible for federal contracts. Protégé firms may be an SBA-certified SDB, SBA-certified SDB owned and controlled either by an Indian tribe or a Native Hawaiian Organization, a qualified organization employing the severely disabled, woman-owned small business, SBA-certified HUBZone small business, or a service-disabled veteran owned small business.

The DoD mentor-protégé arrangement is designed to provide mutual benefit both to the small business and to the more established mentor business. The protégé business receives invaluable technical, managerial, financial, or other types of developmental assistance from the mentor business, enabling the small business to improve contract performance, while the mentor firm is eligible to receive either direct reimbursement for allowable costs of developmental assistance or credit toward the performance of subcontracting goals for acquisitions that require the submission of a subcontracting plan. Costs incurred by a mentor firm in assisting a protégé firm are allowable to the extent they are incurred in the performance of a contract identified in a mentor-protégé agreement, or are otherwise allowable in accordance with applicable cost principles.

Small businesses can form numerous types of team arrangements—teaming agreements, mentor-protégé agreements and various types of joint ventures—to pursue new or consolidated procurements. These various team arrangements enable small businesses to marshal complementary capabilities, enhance bondability, and, ultimately, to increase competitiveness in the federal procurement marketplace. If you have any questions about the teaming arrangement discussed above, please contact the authors or any member of our construction practice group or you own lawyer.

By Paul Ware and Frederic Smith

Multiple Schedules Lead to a Disastrous Result

In the recent case of *Bast Hatfield, Inc. v. Joseph R. Wunderlich, Inc.*, a general contractor was held to have wrongfully terminated one of its subcontractors when the general contractor tried to manage a job to two different schedules. Bast Hatfield, Inc. ("Bast") contracted to build a Lowe's Home Improvement Center in Albany County, New York. The prime contract included an October 21, 2003 substantial completion date with liquidated damages assessed after that date. The overall Project schedule, however, was expressly dependent upon the Owner's timely demolition and removal of several existing structures on the Project site.

Bast subcontracted a portion of the work to Joseph R. Wunderlich, Inc. ("Wunderlich"). The subcontract included a "time is of the essence" provision and set forth a substantial completion date of October 31, 2003 along with a final completion date of November 15, 2003. The subcontract also required Wunderlich to "coordinate its work so as to be completed by the date indicated on Bast's progress schedule in support of the overall completion date."

The owner failed to demolish the existing buildings on time and delayed the overall project completion. In addition, Wunderlich encountered numerous other delays and obstacles after work began in August 2003, which Wunderlich contended were attributable to Bast or the owner or both of them. In spite of the delays, Bast attempted to hold Wunderlich to the original substantial completion date in the subcontract and sent Wunderlich a "Notice to Cure" threatening termination for default unless certain issues were cured, including timely completion of its work. Undisputed evidence at trial indicated that Wunderlich cured some, if not all, of the issues cited by Bast, except for the timely completion of the project. Yet, Bast partially terminated Wunderlich for default shortly after the original completion date. Wunderlich responded with a mechanic's lien demanding to be paid its contract balance and other damages. Bast sued Wunderlich alleging that Wunderlich defaulted on its subcontract by not timely completing its work.

The trial court noted that Bast had been given extensions of time because of the owner delays and that Bast's overall Project schedules showed much later completion dates than the completion date in the subontract with Wunderlich. Thus, the trial court held that Wunderlich had been wrongfully terminated and was entitled to be paid by Bast. In reaching its decision, the court noted that all the provisions of a contract must be read together in construing its meaning. While the subcontract stated a specific substantial completion date, it also expressly referenced the overall Project schedule and obligated Wunderlich to coordinate its work to support the overall *Project substantial completion date*, as adjusted.

By David Pugh

Court Allows Local Regulation of Jobsite Air Pollution

Before you enter an unfamiliar jurisdiction, review the local laws and regulations affecting construction. In *National Association of Home Builders v. San Joaquin Valley Unified Air Pollution District,* the Ninth Circuit Court of Appeals upheld a local rule regulating air pollution emanating from construction sites. The rule was aimed at reducing air pollution generated by off-road construction equipment, an area of regulation usually reserved to the federal EPA that normally has only an indirect effect on construction costs.

The local rule required developers, or their contractors, to file an Air Impact Assessment ("AIA") as a condition to approval of a project. The AIA required the applicant to use an approved computer model to determine the baseline amount of pollutants and particulates that would ordinarily be generated by the project, assuming no mitigation. The rule then required the applicant to reduce certain pollutants by 20% and certain particulates by 45%, through the use of new equipment or extraordinary measures, or else pay "fees" for the right to exceed the reduced amounts.

Hence, a local entity passed regulations treating a jobsite as a "facility" and a source of air pollution. This approach fills the gap between state regulation of stationary sources of emissions and federal regulation of emissions from vehicles and other mobile sources. It is somewhat analogous to the approach taken by Clean Water Act regulation of construction sites. Consider local laws such as these when evaluating or estimating your next project in an unfamiliar jurisdiction.

By Axel Bolvig

Alabama State and Local Sales and Use Tax Issues for Contractors

Contractors doing business in Alabama face a variety of unique state and local tax issues. This article briefly summarizes recent efforts to reinstate the government contractor exemption from sales and use taxes and an alternative arrangement that allows a contractor to utilize a tax-exempt status of an owner to purchase materials tax-free if certain procedures are followed.

Repealed Government Contractor Exemption – Recent Developments

In 2000, the Alabama Legislature created a sales and use tax exemption for contractors that purchased or used materials to be incorporated into realty pursuant to a contract with a government entity. The exemption was effectively repealed in 2004, and recent efforts to reinstate the exemption have failed. However, legislation has been introduced this session (House Bill 284 / Senate Bill 200) that would allow the Department of Revenue (the "Department") to issue certificates of exemption from sales and use tax to licensed contractors and subcontractors to purchase building materials and construction materials to be used in the construction of a building or other project for a governmental entity which is exempt from Alabama sales and use tax. Both proposals are still pending committee action in their respective houses of origin, and need to move quickly if they are going to pass this session.

Purchasing Agent Appointment Form

Since the repeal of the exemption discussed above, in most (but not all) instances government contractors are allowed to purchase building and construction materials tax-free only if they have a valid purchasing agency relationship authorizing the contractor to make purchases on behalf of the governmental entity. The Department will recognize an agency relationship if there is a *written contract* between the exempt owner and the contractor-agent establishing that:

- the appointment was made prior to the purchase of materials;
- the purchasing agent has the authority to bind the exempt entity contractually for the purchase of tangible personal property necessary to carry out the entity's contractual obligations;
- title to all materials and supplies purchased pursuant to such appointment shall immediately vest in the exempt entity at the point of delivery, and
- the agent is required to notify all vendors and suppliers of the agency relationship and make it clear to such vendors and suppliers that the obligation for payment is that of the exempt entity and not the contractor-agent.

The Department has created a form agreement that may be used to satisfy the above requirements. That form is available on the Department's website at http://www.revenue.alabama.gov/salestax/ST_PAA1.pdf. Please note that most purchase orders must be amended to comply with the regulatory requirements outlined above.

These forms are widely used, with variations, in many jurisdictions as well as Alabama. Please do not hesitate to

contact the authors, any member of our State and Local Tax Practice Group, or your lawyer if you have any questions regarding the above issues.

By James E. Long, Jr. and William T. Thistle

Elevated Water Level in Dam-Controlled Lake May Constitute a Type II Differing Site Condition

In *Virginia v. AMEC Civil, L.L.C.*, AMEC contracted with the Virginia Department of Transportation ("VDOT") to construct a bridge across a dam-controlled lake. The U.S. Army Corps of Engineers regulated the lake's water levels. As such, the water levels routinely fluctuated throughout the course of the year. The contract required AMEC to study the Corps' historical records on the lake's water levels and use the information to account for days in AMEC's project schedule when water levels would prevent work on the bridge.

AMEC adhered to the terms of the contract and planned to do other work in its scope during the periods where forecasted high water levels would prevent work on the bridge. However, during the project, AMEC experinced sustained high water levels for six months, a period greatly exceeding the amount forecasted. The VDOT construction manager, a lifelong resident of the area, testified that (1) the lake had never been at such a high level for that long a period, (2) the high water levels were an unusual occurrence, and (3) he did not expect the water levels to remain that high for that length of time when he began the project. VDOT granted AMEC a schedule extension for the delays caused by the high water levels but did not award compensation. AMEC sought relief in a Virginia circuit court. On appeal, the Supreme Court of Virginia addressed, among a number of other issues, whether or not the sustained high water levels experienced by AMEC constituted a differing site condition.

The "differing site conditions" clause of the contract provided for compensation to AMEC "when either (1) subsurface or latent physical conditions encountered during the work differed materially from those indicated in the contract (Type I condition) or (2) unknown physical conditions of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in the work provided for in the contract are encountered (Type II condition)." The Court held that the abnormally elevated water level constituted a Type II condition.

According to the Court, a contractor can demonstrate a Type II condition by showing "(1) [the contractor] did not know about the physical condition, (2) [the contractor] could not have reasonably anticipated the condition from inspection or general experience, and (3) the condition varied from the norm in similar contracting work." The Court concluded, based on the "ample evidence" regarding the unusual duration and circumstances of the high water levels, that the elevated water levels constituted a Type II differing site condition. The elevated water levels were an "unknown physical condition of an unusual nature, which differed materially from those ordinarily encountered and recognized as inherent in the work." Further, AMEC could not have anticipated the duration of the high water levels from its study of the contract, the Corps' historical records, inspection of the site, or general experience as a contractor in the area.

The Virginia Supreme Court noted that the purpose of the "differing site conditions" clause is to produce competent low bids on construction projects by shifting the risk of unknown conditions to the Government. The decision demonstrates that courts will uphold this risk allocation device even when a contract accounts for fluctuations in site conditions, if that accounting mechanism later turns out to be inaccurate due to government action.

By Aman Kahlon

Subcontractor's Insurer Liable to General Contractor for Defective Work on Condominium

In a case involving the construction of a condominium complex in Louisiana, the general contractor was covered by the subcontractor's completed operations insurance, at least for damage resulting from the subcontractor's poor workmanship. In *Carinder v. BASF Corporation, and others*, an intermediate state appellate court in Louisiana decided two points: (1) Although it had concluded in an earlier suit by the same general contractor against the same subcontractor that the sub's insurance did **not** protect the general contractor for the general contractor's costs of making repairs to the sub's defective work, it held, in the second lawsuit, that the prior lawsuit did not bar the general contractor's new claim against the subcontractor, which resulted from claims by the condominium owners for "resulting damage" to their units arising from the leaky synthetic stucco; and (2) the court ruled that the "resulting damage" was covered by the subcontractor's completed

operations insurance, because "resulting damage" was not excluded by the "your work" provision in the policy.

Most courts, like the Louisiana court in this case, have decided that the exclusion for damage to "your work" does **not** exclude coverage for property damage to other work, such as interior drywall, floors, rugs, and similar items. The case is a reminder of our oft-repeated observation that general contractors and subcontractors should always check their own insurance coverage, as well as coverage at each lower tier, for possible protection when there is damage arising from defective work.

By Mabry Rogers

Virginia Court Applies Anti-Indemnity Statute to Void Indemnification Provision

In *Uniwest Construction, Inc. v. Amtech Elevator Services, Inc.*, the Supreme Court of Virginia held that an indemnification provision violated public policy because, in addition to indemnifying the general contractor for injuries resulting from the subcontractor's negligence, it also required the subcontractor to indemnify the general contractor for damages caused by the general contractor's own negligence.

Uniwest involved a contract between a general contractor and a subcontractor in which the subcontractor agreed to indemnify the general contractor from all claims, even those resulting from the general contractor's own negligence. Virginia statute, however, expressly voids any provision in which a contractor agrees to indemnify the other party in the contract against liability caused by the negligence of the other party.

The dispute arose after two of the subcontractor's employees were injured on the project. The injured employees sued the general contractor and the subcontractor. The general contractor turned to the subcontractor for indemnification, but the trial court held that the indemnification provision was void as contrary to public policy.

On appeal, the general contractor argued that statute was not implicated because the accident was not the result of the general contractor's sole negligence but was, at least partially, due to the negligence of the subcontractor. The Court, however, stated that it did not matter if the subcontractor was at fault or if the provision encompassed the negligence of other parties. Because the provision was so broad that it indemnified the general contractor from its own negligence, the entire indemnification provision was void and unenforceable.

Here, the Court's holding hinged upon the existence of the Virginia statute, and not all states have similar legislation. This is an excellent example of why contractors at all tiers should be mindful ofthe law of the particular jurisdiction during the negotiation process. Just because the party across the table will agree to a provision does not mean the courts will enforce it; you should check with your lawyer or one of our lawyers when you are entering a new jurisdiction to get some feel for the enforceability of certain significant clauses.

By Jonathan Cobb

Bradley Arant Lawyer Activities:

Jim Archibald, Axel Bolvig, Mabry Rogers, and **Wally Sears** were named Alabama Super Lawyers for 2011 in the area of Construction Litigation.

Mabry Rogers was named "Lawyer of the Year" in the area of Construction Law for Birmingham, AL.

Arlan Lewis was named an Alabama Rising Star for 2011 in the area of Construction/Surety.

Mabry Rogers is one of 318 lawyers recently named to a group of highly service-oriented lawyers in the United States. The BTI Client Service All-Stars are a group of attorneys whom clients recognize for superior client service. The only path to becoming a *BTI Client Service All-Star* is for corporate counsel and corporate-level executives to single out an attorney by name in an unprompted manner as part of independent research conducted by BTI Consulting. BTI specializes in providing high-impact client service and strategic market research regarding law firms and lawyers.

Doug Patin and **David Owen** attended Construction SuperConference 2010 in San Francisco, California in December.

David Taylor and **Bryan Thomas** spoke in Nashville, TN on January 14, 2011 as part of the Tennessee Bar Association Seminar "Tennessee Construction Law: A – Z: What You Do NOT Know Can Hurt You."

Stanley Bynum, Walter Sears, Arlan Lewis and **Rhonda Marshall** attended the ABA Forum on Construction Industry's Midwinter Joint meeting with the TIPS Fidelity and Surety Law Committee entitled "Do You Think it's

Alright: Pushing the ADR Envelope" in New York City on January 20-21, 2010.

Arlan Lewis was selected to serve as one of four judges for the ABA Forum on the Construction Industry's inaugural Law Student Writing Competition. The competition is national in scope and the winning entry will be published in one of the Forum's publications.

Nick Voelker and **James Warmoth** published an article entitled "'Buy American' Primer" for the South Carolina Bar's Construction Law Section in its Winter 2011 Edition.

Mabry Rogers, Wally Sears, and **Bill Purdy** attended the American College of Construction Lawyers annual event in February 2011. Bill was in charge of the programming for this event.

David Pugh participated in Associated Builders and Contractors' BizCon 2011 in Orlando, Florida on February 23-25, 2011.

Joel Brown presented a teleconference seminar entitled AID Document A401 on March 2, 2011.

Michael Knapp, Arlan Lewis, Rhonda Marshall, and David Deusner attended the 2011 Annual Meeting for the ABA Construction Forum in Scottsdale, Arizona. Michael Knapp presented a session entitled "Drafting Effective, Enforceable Consulting Agreements to Protect and Maintain Privileges at Various Stages of Project/Litigation."

David Pugh, Wally Sears, and **Matt Lonergan** attended the ABC Region IV Conference in Charlotte, NC on March 31 and April 1. David Pugh coordinated the programming, Wally Sears spoke on Risk Management and Allocation, and Matt Lonergan spoke on Recent Labor Law developments.

Mabry Rogers and **David Bashford** are presenting client seminars on risk management in the operations and maintenance, engineering, and construction management of power plant environments in May.

David Taylor spoke to the Tennessee Association of Construction Counsel on May 6, 2011 at their Spring meeting in Oxford Mississippi on "Innovative Arbitration Techniques."

David Taylor, David Pugh, Ralph Germany, David Bashford, Bryan Thomas, and **Ryan Beaver** are collectively presenting the "2011 Construction Contract: Legal 101 Seminar" in Nashville, TN on May 13, 2011, Birmingham, AL on May 19, 2011, and Charlotte, NC on May 26, 2011 The seminar is open to the firm's clients, and there is still room available for the Charlotte seminar on May 26. Contact any of the lawyers on the list below to learn more.

David Pugh and **Bob Symon** will present a seminar on the Pitfalls of Federal Contracting at the joint ABC/AIA Joint Conference in Sandestin, FL on June 9, 2011.

David Taylor and **Bryan Thomas** will present a session at the CONSTRUCT2011 Seminar in Chicago, Illinois on September 16, 2011.

It is with mixed emotions that we report that **Ed Everitt** has left Bradley Arant Boult Cummings to take an in house position with a firm client and a major entity in the construction industry. We are grateful for his years of service and for the time he dedicated to the firm and its construction clients. We wish him the best of luck in his new endeavors.

On Monday evening, June 13, 2011, Bradley Arant will host a cocktail reception at its Washington, D.C. office for those attending the Associated Builders & Contractors Legislative Conference 2011.

Bradley Arant attorneys have recently presented training sessions to a number of clients regarding Contract Administration and regarding Mandatory Written Ethics Compliance Programs for Federal Government Contracts. If you are interested in either of these seminars for your company, please contact one of the attorneys listed on page 8 of this newsletter.

For more information on any of these activities or speaking engagements, please contact Terri Lawson at 205-521-8210.

NOTE: YOU CAN FIND THIS NEWSLETTER AND PAST NEWSLETTERS ON OUR WEBSITE. IF YOU ACCESS THIS NEWSLETTER ON OUR WEBSITE, CASE-LINKS WILL BE AVAILABLE UNTIL THE NEXT NEWSLETTER IS PUBLISHED. WE DO NOT VIEW THIS NEWSLETTER AS WRITTEN FOR ATTORNEYS BUT RATHER FOR PRACTICING MEMBERS OF THE CONSTRUCTION INDUSTRY. IF YOU OR YOUR LAWYER WOULD LIKE TO KNOW MORE INFORMATION ABOUT A PARTICULAR ARTICLE OR WOULD LIKE THE CASE CITES, YOU MAY GO TO WWW.BABC.COM/PG_CONSTRUCT.CFM OR CONTACT ANY ATTORNEY LISTED ON PAGE 8 OF THIS NEWSLETTER.

Disclaimer and Copyright Information

The lawyers at Bradley Arant Boult Cummings LLP, including those who practice in the construction and procurement fields of law, monitor the law and regulations and note new developments as part of their practice. This newsletter is part of their attempt to inform their readers about significant current events, recent developments in the law and their implications. *Receipt of this newsletter is not intended to, and does not, create an attorney-client, or any other, relationship, duty or obligation.*

This newsletter is a periodic publication of Bradley Arant Boult Cummings LLP and should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult your own lawyer concerning your own situation and any specific legal questions you may have. For further information about these contents, please contact your lawyer or any of the lawyers in our group whose names, telephone numbers and E-mail addresses are listed below; or visit our web site at www.babc.com.

F. Wendell Allen (205) 521-8282 wallen@babc.com
James F. Archibald, III (205) 521-8520 jarchibald@babc.com
David H. Bashford (Charlotte) (704) 338-6001 dbashford@babc.com
Ryan Beaver (Charlotte) (704) 338-6038 rbeaver@babc.com
Axel Bolvig, III (205) 521-8337 abolvig@babc.com
Joel E. Brown (205) 521-8416 jbrown@babc.com
Stanley D. Bynum (205) 521-8000 sbynum@babc.com
Robert J. Campbell (205) 521-8975 rjcampbell@babc.com
Rhonda Caviedes (205) 521-8683 rcaviedes@babc.com
Jonathan Cobb (205) 521-8614 jcobb@babc.com
F. Keith Covington (205) 521-8148 kcovington@babc.com
Joel Eckert (Nashville) (615) 252 4640 jeckert@babc.com
Eric A. Frechtel (Washington, D.C.) (202) 719-8249 efrechtel@babc.com
Ralph Germany (Jackson) (601) 592-9963 rgermany@babc.com
Daniel Golden (Washington, D.C.) (202) 719-8398 dgolden@babc.com
John Mark Goodman (205) 521-8231 jmgoodman@babc.com
John W. Hargrove (205) 521-8343 jhargrove@babc.com
Jonathan B. Head (205) 521-8054 jhead@babc.com
Michael P. Huff (Huntsville) (256) 517-5111 mhuff@babc.com
Rick Humbracht (Nashville) (615) 252-2371 rhumbracht@babc.com
David G. Hymer (205) 521-8289 dhymer@babc.com
Josh D. Johnson (205) 521-8423 jjohnson@babc.com
Aman Kahlon (205) 521-8549 akahlon@babc.com
Michael W. Knapp (Charlotte) (704) 338-6004 mknapp@babc.com
Michael S. Koplan (Washington, D.C.) (202) 719-8251 mkoplan@babc.com
Arlan D. Lewis (205) 521-8131 alewis@babc.com
Tom Lynch (Washington, D.C.) (202) 719-8216 tlynch@babc.com
Luke Martin (205) 521-8570 lumartin@babc.com
Michael D. McKibben (205) 521-8421 mmckibben@babc.com
David W. Owen (205) 521-8333 dowen@babc.com
Douglas L. Patin (Washington, D.C..) (202) 719-8241 dpatin@babc.com
Vesco Petrov (205) 521-8102 vpetrov@babc.com
Steven A. Pozefsky (Washington, D. C.) (202) 719-8210 spozefsky@babc.com
J. David Pugh (205) 521-8314 dpugh@babc.com
Bill Purdy (Jackson) (601) 592-9962 bpurdy@babc.com
Alex Purvis (Jackson) (601) 592-9940 apurvis@babc.com
Gregory H. Revera (Huntsville) (256) 517-5129 grevera@babc.com
Lewis P. Rhodes (202) 719-8208 lrhodes@babc.com
E. Mabry Rogers (205) 521-8225 mrogers@babc.com
Walter J. Sears, III (205) 521-8202 wsears@babc.com
Eric W. Smith (Nashville) (615) 252-2381 esmith@babc.com
Frederic L. Smith (205) 521-8486 fsmith@babc.com
James C. Smith (Charlotte) (704) 338-6010 jsmith@babc.com
H. Harold Stephens (Huntsville) (256) 517-5130 hstephens@babc.com
Robert J. Symon (Washington, D.C.) (202) 719-8294 rsymon@babc.com
David K. Taylor (Nashville) (615) 252 2396 dtaylor@babc.com
Darrell Clay Tucker, II (205) 521-8356 dtucker@babc.com
D. Bryan Thomas (205) 521-8434 dbthomas@babc.com
C. Samuel Todd (205 521-8437 stodd@babc.com
Paul S. Ware (205) 521-8624 pware@babc.com
James Warmoth (Charlotte) (704) 338-6211 jwarmoth@babc.com

Note: The following language is required pursuant to Rule 7.2 Alabama Rules of Professional Conduct: *No representation is made that the quality of the legal services to be performed is greater than the quality of the legal services performed by other lawyers.*

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 BABC *Construction & Procurement Law News*:

_____

_____

_____

☐ Please add the following to your mailing list:

_____

_____

_____

☐ Correct my name and mailing address to:

_____

_____

_____

☐ My e-mail address:_____

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:

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

Bradley Arant Boult Cummings LLP
One Federal Place
1819 Fifth Avenue North
Birmingham, AL 35203-2104

Emily Oyama
One Federal Place
1819 Fifth Avenue North
Birmingham, AL 35203-2104

BRADLEY ARANT BOULT CUMMINGS LLP **Third Quarter 2011**

CONSTRUCTION AND PROCUREMENT LAW NEWS

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

F. Wendell Allen
James F. Archibald, III
Sabra Barnett
David H. Bashford (c)
Charlie Baxley
Ryan Beaver (c)
Aron Beezley (d.c.)
Axel Bolvig, III
Joel E. Brown
Stanley D. Bynum
Robert J. Campbell
Jonathan Cobb
F. Keith Covington
Joel Eckert (n)
Eric A. Frechtel (d.c.)
Ralph Germany (j)
Daniel Golden (d.c.)
John Mark Goodman
John W. Hargrove
Jonathan B. Head
Michael P. Huff (h)
Rick Humbracht (n)
David G. Hymer
Josh D. Johnson
Aman Kahlon
Michael W. Knapp (c)
Michael S. Koplan (d.c.)
Arlan D. Lewis
Tom Lynch (d.c.)
Luke D. Martin
Michael D. McKibben
David W. Owen
Douglas L. Patin (d.c.)
Vesco Petrov
Steven A. Pozefsky (d.c.)
J. David Pugh
Bill Purdy (j)
Alex Purvis (j)
Gregory H. Revera (h)
Lewis Rhodes (d.c.)
E. Mabry Rogers
Walter J. Sears III
Eric W. Smith (n)
Frederic L. Smith, Jr.
James C. Smith (c)
H. Harold Stephens (h)
Robert J. Symon (d.c.)
David K. Taylor (n)
C. Samuel Todd
Darrell Clay Tucker, II
D. Bryan Thomas
Paul S. Ware
James Warmoth (c)

Fundamentals of a Performance or Payment Bond

How many times have you or your company been reminded to read the bond (performance or payment) before you make a substantial alteration to a subcontract? Advice like this is fundamental, and it applies most pointedly when a bonded subcontractor is in, or may be close to, default. A recent case supplies a reminder from New York. The construction manager (not at risk) defaulted the sub in January 2007 and, by April, had executed a MOU (Memorandum of Understanding) extending substantial completion and withdrawing the default. The surety (Federal) participated in the negotiations leading to the April MOU. By August, the construction manager learned that its customer had not obtained payment authorization for the subcontractor from NYC, which was the ultimate source of the payments to the subcontractor. A superseding MOU was negotiated in August, where the subcontractor agreed to submit the paperwork to get registered with NYC, and, in the meantime, would work without pay (some $8 to $12,000,000, depending on how one reads the court opinion) and receive additional extensions of time. The surety was NOT involved in the new MOU, nor was it even informed of it; an email suggested the parties had decided expressly against telling the surety. When the sub defaulted a month later, the construction manager demanded that the surety perform, attaching the August MOU. The surety immediately objected, stating that the change to the payment terms was a material change to its obligations under the bond. The City funded the replacement contractor's costs, and the City and construction manager sued the surety for the overrun.

The federal trial court ruled in the surety's favor: the bond was materially changed when the subcontractor was asked to, and agreed to, work for free pending submission of paperwork to NYC. The court found that approval of the sub by NYC had not been an express part of its contract with the

Inside:

construction manager, so that waiting for that approval (and working for free in the meantime) was a material change to the subcontract and thus to the surety's obligation under the bonds. Because of the change, the surety was released of its obligation to perform (or pay) under the bonds.

This case serves as yet another reminder. Read the bond. Keep the surety in the loop, particularly on changes to the subcontract. And, follow any default procedures called for in the bond, as well as those in the subcontract. These fundamentals of construction contracting are simple, yet extremely important. Here, they were worth $8,000,000 to $12,000,000.

By Mabry Rogers

Alabama's 2011 Legislative Session Update

The most recent legislative session saw a number of bills passed which affect construction, and which are similar to legislation in other states, following the elections in November 2010. The design and construction industry is closely watching developments regarding Alabama's new Immigration Reform law, also passed this session, as it is likely to have an adverse impact on the industry.

Immigration Reform

The most dramatic new law is, of course, Alabama's new Immigration Reform law. While its stated purpose is to help the State combat illegal immigration, the bill could have serious adverse effects on the ability to carry on a construction business in Alabama. In addition to the immediate reduction in the available pool of skilled workers, the bill imposes several new record keeping and fact finding burdens on individuals and businesses that hire or may hire undocumented workers and also imposes potential criminal liability for violations of the bill's provisions. Many feel that the bill places too heavy a burden on an industry which is already weakened by the severe economic downturn.

Since the passage of the bill, lawsuits have been filed seeking either to enjoin the law from taking effect or to have the law declared unconstitutional or both. Several of those lawsuits have been consolidated in a proceeding pending in federal court in Birmingham. On August 29, 2011, the trial judge entered an Order enjoining the new law from taking effect for at least thirty days, at which time she has announced she will issue a more detailed ruling and opinion. Should the current litigation efforts fail to bring about changes to the law, many believe that additional legislative efforts to modify the bill will follow in next spring's 2012 session.

Statute of Repose

Another notable development was a dramatic reduction in the Statute of Repose. A statute of repose statutorily establishes a time after which no cause of action may be brought, regardless of when the basis for the cause of action is discovered. For years, Alabama has had a 13-year statute of repose with a 2-year "discovery" or statute of limitations period for filing claims against contractors for defective work and against designers for defective design. In other words, no one could sue a contractor or designer after the building was 13 years old. The only exception was for a claim which was discovered prior to the expiration of the 13-year period, in which case the claimant had up to two years after "discovery" in which to file a lawsuit, resulting in a total time period of 14 years, 364 days to file. The new law has only a 7-year statute of repose and a 2-year "discovery" period resulting in a 9-year total time in which to file a lawsuit.

Retainage

A new Alabama law limits parties to holding retainage in the amount of 10% up until a project is 50% complete with no additional retainage withheld thereafter. This results in a net total retainage of 5% for the Project. This was already the law on public projects in Alabama and now applies to private projects as well.

Post Judgment Interest Rate

For years, the post judgment interest rate in Alabama has been 12%. Economic changes which have resulted in essentially two decades of very low market interest rates resulted in this rate becoming

punitive. The new Alabama law reduces the rate from 12% to 7.5%.

Expert Witness Testimony Standards

For some time, the federal courts, and other states as well, have been imposing more strict standards on expert witnesses. These standards were intended to safeguard trials from what has been referred to as "junk science." This year, Alabama adopted the federal standards for scientific expert witness testimony which is intended to have a deterrent effect on what are otherwise "frivolous" lawsuits.

Product Liability Reform

Alabama also adopted stricter standards for suing retailers, wholesalers and distributors in a product liability lawsuit when those entities have nothing to do with the design or manufacture of the product but are passive participants in the distribution chain. The former practice was thought to be too liberal in allowing a plaintiff to name such entities as defendants even though the true target defendant was clearly the manufacturer. The impact on construction is unknown, in terms of how it may affect a claim against a subcontractor for, say, the installation of defective couplings.

By David Pugh

Government Liable When it Imposed Use of Particular Means and Method

In *Singleton Enterprises-GMT Mechanical v. Department of Veterans Affairs*, the Department of Veterans' Affairs ("VA") was held liable for its direction to a contractor to use a particular means and method to attach roofing insulation instead of allowing the contractor the opportunity to pursue whether it could use an alternative approach and still meet the warranty requirements.

The contract called for a polyisobutylene roofing system. The contract contained conflicting terms regarding how the contractor could attach the insulation to the roof deck. In one section the contract described how asphalt could be used to attach the insulation to the roof deck. In other sections the contract addressed the use of adhesives. No particular polyisobutylene roofing system manufacturer was specified, but the evidence showed that the VA expected a Republic Powdered Metals, Inc. ("RPM"), product to be used. In fact, the contractor at bid time planned to use RPM's product. But, RPM would not issue the contractually required 20-year warranty if asphalt were used to attach the insulation to the roof deck, insisting instead on RPM's own special adhesives.

The contractor provided its submittals, which included an asphalt submittal, and advised the VA that use of the RPM adhesives, to obtain the RPM warranty, would result in additional costs.

The VA eventually rejected the contractor's asphalt submittal. Further, the VA issued a directive as follows: "The adhesive to be used to secure the roofing insulation shall be RPM Insulation Primer and RPM Insulation Adhesive as manufactured by Republic Metals, Inc. Asphalt shall not be used to secure insulation to the roof deck."

The contractor filed a claim for its additional costs for using adhesives instead of asphalt. The Civilian Board of Contract Appeals awarded in favor of the contractor. The Board ruled that the contract allowed the contractor the opportunity to use either asphalt or the adhesives, so long as the contractor could ultimately provide the 20-year warranty. The Board ruled that instead of directing the contractor to use the RPM adhesives, the VA should have directed the contractor to investigate whether there was a way to use asphalt and still provide the 20-year warranty, such as by using a different manufacturer's polyisobutylene roofing system. Since the VA did not allow the contractor that opportunity, but instead directed the use of the RPM adhesives, the VA's action constituted a change to the contract that entitled the contractor to recover its additional costs for using the adhesives.

A contractor is generally permitted to determine its own means and methods unless the contract contains a specific requirement to the contrary. Where an owner, whether public or private, directs a contractor, after contract award, to use specific means and methods, the contractor is generally entitled to a

change for the increased costs incurred due to this direction.

By Ralph Germany

Will You Pay Out-Of-Pocket For Your Employees' Personal Injury?

Contractors can find themselves on the uninsured hook for injuries to employees when they fail to coordinate their indemnity obligations with their insurance coverage.

In *Transcontinental Contracting, Inc. v. Burlington Ins. Co.*, a contractor was awarded a state contract to perform work on the St. George Ferry Terminal on Staten Island. The construction contract incorporated a typical indemnification provision, by which the contractor indemnified the owner from any liability arising out of the actions, omissions, or negligence of the contractor and its subs, agents, employees and suppliers. Two of the contractor's employees were seriously injured – one by falling from scaffolding and another by a falling wrench – and sued the owner for their injuries. The owner sought indemnity from the contractor pursuant to the contractual indemnification clause and the contractor turned to its insurance company to cover the costs. When the insurance company refused coverage, the contractor sued.

Presumably because of the unusual degree of risk presented by the project, the contractor had obtained three successive one-year surplus lines of insurance policies. Each policy contained identical Cross-Liability Exclusions which stated that the insurance did not apply to personal injury to "[a] present, former, future or prospective partner, officer, director, stockholder or employee of any insured…" The contractor argued that the insurance contract was ambiguous and against public policy, but the court rejected both of these views and held that the language expressly and clearly excluded from coverage personal injury to the contractor's employees.

There are a few important points to note from this case. First, you should always read your insurance policy (while this should be obvious, the contractor in this case seemed oblivious to the Exclusion). Second, you should always coordinate indemnity provisions in a construction contract with exclusions from an insurance policy so as to make sure you have coverage for personal injury to your own employees. One way to do this is to draft a contract that only indemnifies the owner from liabilities to *third parties*, and excludes your own employees from the definition of "third party." If the contract in this case was so drafted, the owner (and its carrier) might have remained on the hook for the personal injuries because the contractor's employees would not have been third parties. Practically speaking, many owners might not agree to this because it puts them at risk if the contractor's employees get injured on the job. Another way to avoid the result in *Burlington* is to negotiate an insurance policy that covers indemnity obligations for personal injury to your own employees (CGL policies always exclude coverage for direct actions by one's own employees, as that is a worker compensation issue). Courts will not find violations of public policy and rule against the plain language of an insurance agreement just because it is a surplus policy with seemingly unfair provisions. Businesses need to be aware of gaps in their indemnity agreements and tailor their insurance policies to close those gaps – and *vice versa*.

By Vesco Petrov

School District Properly Rejected a Low Bid Where the District Perceived the Low Bidder to be Litigious

In *Triton Services, Inc. v. Talawanda City School Dist.*, an intermediate appellate court in Ohio recently affirmed a trial court's denial of a construction contractor's motion for preliminary injunction against an Ohio school district. The contractor brought the action against the school district, seeking to enjoin it from awarding a contract to another bidder, after the school district rejected the contractor's responsive low bid because it apparently perceived the contractor to be litigious and thus as non-responsible.

Evidence was presented at a hearing before the trial court that the contractor sued the same school district in 2007 after the parties disputed the scope of the work that the contractor was to perform under a contract for the construction of an elementary school.

That particular dispute was ultimately settled by the parties. The contractor presented testimony before the trial court that it received "about 90 percent" of what it sought in the lawsuit related to the construction of the elementary school, and therefore, the litigation was not frivolous.

The contractor asserted that it was not litigious and explained the reasoning behind, and resolution of, previous lawsuits it filed involving public projects. The contractor also complained that it was the only bidder on the project that had its history of litigation closely scrutinized and that the school district developed a "scheme" to reject its bid.

The school district presented testimony that school officials were concerned when they learned that the contractor had failed to account for certain costs in its bid, which a witness for the school district estimated would add approximately $75,000 to the cost. School officials indicated they were particularly concerned about the omission because the previous litigation between the parties involved a dispute over the scope of the work that the contractor was to perform.

According to the Ohio appellate court, the trial court heard evidence that was "both favorable and unfavorable to the relationship between [the contractor] and [the school district]." After reviewing the record, however, the Court of Appeals of Ohio found that the trial court did not abuse its discretion when it denied the contractor's motion for a preliminary injunction.

This is an important reminder of three issues in public contracting: 1. Responsibility determinations include a review of a contractor's litigation history; 2. Many public owners are using a "pre qualification" procedure, where allowed by state law, which often requests litigation information; and 3. A suit to enjoin the award of a contract is a long shot, and you and your legal advisor must carefully assess the likelihood of success of a challenge before investing the legal and management costs in one.

By Aron Beezley

Bradley Arant Lawyer Activities:

Our pride and prayers follow one of our lawyers, Lt. Col. **Lewis Rhodes**, in our Washington, D.C. office, who is currently on active duty in Afghanistan.

U.S. News and World Reports' "Best Law Firms 2010" gave the **BABC Construction Group** a National Tier One Ranking in the area of Construction.

Chambers 2011 is an important recognition for the firm because it is derived independently by a London-based group. **BABC** is listed in many categories in several of the states in which it is located; below we highlight those most pertinent to our practice.

BABC is listed as Band 1 for litigation (in Alabama), and **Mabry Rogers** is listed under Litigation generally and then as a "Leading Individual" in the Construction section.

BABC is listed by Chambers as Band 1 for construction in DC, and **Doug Patin** and **Bob Symon** are listed as "leading individuals" for construction in DC.

In Mississippi, **BABC** is listed in Band 1 for litigation, and **Bill Purdy** is featured as a "leading individual."

In Tennessee, the firm is listed as a "leading firm" in litigation. (There are no separate listings for construction in Mississippi or Tennessee)

Mabry Rogers, **Doug Patin**, **Bill Purdy**, **David Pugh**, **Axel Bolvig**, **Jim Archibald**, **Fred Humbracht, Wally Sears** and **David Taylor** were among the 153 **BABC** lawyers recognized in *The Best Lawyers in America* for 2011.

Jim Archibald, Axel Bolvig, Mabry Rogers, and **Wally Sears** were named Alabama Super Lawyers for 2011 in the area of Construction Litigation.

Mabry Rogers was named "Lawyer of the Year" in the area of Construction Law for Birmingham, AL.

Arlan Lewis was named an Alabama Rising Star for 2011 in the area of Construction/Surety.

Mabry Rogers is one of 318 lawyers recently named to a group of highly service-oriented lawyers in the United States. The BTI Client Service All-Stars are a group of attorneys whom clients recognize for superior client service. The only path to becoming a *BTI Client Service All-Star* is for corporate counsel and corporate-level executives to single out an attorney by name in an unprompted manner as part of independent research conducted by BTI Consulting. BTI specializes in providing high-impact client service and strategic market research regarding law firms and lawyers.

David Taylor has been named to the legal advisory committee of the AGC of Tennessee.

Mabry Rogers, Wally Sears, and **David Bashford** presented client seminars on risk management in the operations and maintenance, engineering, and construction management of power plant environments in May, June, and July in different areas of the country.

David Taylor spoke to the Tennessee Association of Construction Counsel on May 6, 2011 at their Spring meeting in Oxford Mississippi on "Innovative Arbitration Techniques".

David Taylor, David Pugh, Ralph Germany, Bryan Thomas, and **Ryan Beaver** presented the "2011 Construction Contract: Legal 101 Seminar" in Nashville, TN on May 13, 2011, Birmingham, AL on May 19, 2011, and Charlotte, NC on May 26, 2011.

David Pugh and **Bob Symon** presented a seminar on the Pitfalls of Federal Contracting at the joint ABC/AIA Joint Conference in Sandestin, FL on June 9, 2011.

Michael Knapp taught a class on the Advanced Topics of Engineering Law as a visiting professor to UAB's Engineering Department.

John Hargrove spoke in Montgomery, Alabama on August 17, 2011 at a seminar devoted to Alabama's new immigration law. The seminar was sponsored by Associated Builders and Contractors and Alabama Employers for Immigration Reform.

Keith Covington spoke on Alabama's new immigration law on a number of recent occasions. He spoke on this issue throughout Alabama on July 25, 2011, August 3, and August 31. Keith's talks were sponsored in part by the Associated Builders and Contractors of Alabama, underscoring the concern about the law, which we address in the text.

David Taylor and **Bryan Thomas** will present a session on construction specifications at the CONSTRUCT2011 Seminar in Chicago, Illinois on September 16, 2011.

David Taylor is teaching a session for the AAA in Nashville, TN on September 20, 2011 entitled Advanced Arbitrator Training.

Ryan Beaver will be presenting at the October meeting of the Charlotte Chapter of the Construction Financial Management Association on calculating and documenting construction damages.

Bob Symon will be speaking at the Construction SuperConference in San Francisco on December 15th on Terminations of Government Contracts.

David Bashford and **Ryan Beaver** will also be presenting at the Construction SuperConference in San Francisco on December 15th on "What Can You Get? The State of Damage Law Today."

Bradley Arant attorneys have recently presented training sessions to a number of clients regarding Contract Administration and regarding Mandatory Written Ethics Compliance Programs for Federal Government Contracts. If you are interested in either of these seminars for your company, please contact one of the attorneys listed on page 8 of this newsletter.

For more information on any of these activities or speaking engagements, please contact Terri Lawson at 205-521-8210.

NOTE: YOU CAN FIND THIS NEWSLETTER AND PAST NEWSLETTERS ON OUR WEBSITE. IF YOU ACCESS THIS NEWSLETTER ON OUR WEBSITE, CASE-LINKS WILL BE AVAILABLE UNTIL THE NEXT NEWSLETTER IS PUBLISHED. WE DO NOT VIEW THIS NEWSLETTER AS WRITTEN FOR ATTORNEYS BUT RATHER FOR PRACTICING MEMBERS OF THE CONSTRUCTION INDUSTRY. IF YOU OR YOUR LAWYER WOULD LIKE TO KNOW MORE INFORMATION ABOUT A PARTICULAR ARTICLE OR WOULD LIKE THE CASE CITES, YOU MAY GO TO WWW.BABC.COM/PG_CONSTRUCT.CFM OR CONTACT ANY ATTORNEY LISTED ON PAGE 8 OF THIS NEWSLETTER.

NOTES

Disclaimer and Copyright Information

The lawyers at Bradley Arant Boult Cummings LLP, including those who practice in the construction and procurement fields of law, monitor the law and regulations and note new developments as part of their practice. This newsletter is part of their attempt to inform their readers about significant current events, recent developments in the law and their implications. *Receipt of this newsletter is not intended to, and does not, create an attorney-client, or any other, relationship, duty or obligation.*

This newsletter is a periodic publication of Bradley Arant Boult Cummings LLP and should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult your own lawyer concerning your own situation and any specific legal questions you may have. For further information about these contents, please contact your lawyer or any of the lawyers in our group whose names, telephone numbers and E-mail addresses are listed below; or visit our web site at www.babc.com.

F. Wendell Allen (205) 521-8282 wallen@babc.com
James F. Archibald, III (205) 521-8520 jarchibald@babc.com
Sabra Barnett (205) 521-8856 sbarnett@babc.com
David H. Bashford (Charlotte) (704) 338-6001 dbashford@babc.com
Charlie Baxley (205) 521-8420 cbaxley@babc.com
Ryan Beaver (Charlotte) (704) 338-6038 rbeaver@babc.com
Aron Beezley (Washington, D.C.) (202) 719-8254 abeezley@babc.com
Axel Bolvig, III (205) 521-8337 abolvig@babc.com
Joel E. Brown (205) 521-8416 jbrown@babc.com
Stanley D. Bynum (205) 521-8000 sbynum@babc.com
Robert J. Campbell (205) 521-8975 rjcampbell@babc.com
Jonathan Cobb (205) 521-8614 jcobb@babc.com
F. Keith Covington (205) 521-8148 kcovington@babc.com
Joel Eckert (Nashville) (615) 252 4640 jeckert@babc.com
Eric A. Frechtel (Washington, D.C.) (202) 719-8249 efrechtel@babc.com
Ralph Germany (Jackson) (601) 592-9963 rgermany@babc.com
Daniel Golden (Washington, D.C.) (202) 719-8398 dgolden@babc.com
John Mark Goodman (205) 521-8231 jmgoodman@babc.com
John W. Hargrove (205) 521-8343 jhargrove@babc.com
Jonathan B. Head (205) 521-8054 jhead@babc.com
Michael P. Huff (Huntsville) (256) 517-5111 mhuff@babc.com
Rick Humbracht (Nashville) (615) 252-2371 rhumbracht@babc.com
David G. Hymer (205) 521-8289 dhymer@babc.com
Josh D. Johnson (205) 521-8423 jjohnson@babc.com
Aman Kahlon (205) 521-8549 akahlon@babc.com
Michael W. Knapp (Charlotte) (704) 338-6004 mknapp@babc.com
Michael S. Koplan (Washington, D.C.) (202) 719-8251 mkoplan@babc.com
Arlan D. Lewis (205) 521-8131 alewis@babc.com
Tom Lynch (Washington, D.C.) (202) 719-8216 tlynch@babc.com
Luke Martin (205) 521-8570 lumartin@babc.com
Michael D. McKibben (205) 521-8421 mmckibben@babc.com
David W. Owen (205) 521-8333 dowen@babc.com
Douglas L. Patin (Washington, D.C..) (202) 719-8241 dpatin@babc.com
Vesco Petrov (205) 521-8102 vpetrov@babc.com
Steven A. Pozefsky (Washington, D. C.) (202) 719-8210 spozefsky@babc.com
J. David Pugh (205) 521-8314 dpugh@babc.com
Bill Purdy (Jackson) (601) 592-9962 bpurdy@babc.com
Alex Purvis (Jackson) (601) 592-9940 apurvis@babc.com
Gregory H. Revera (Huntsville) (256) 517-5129 grevera@babc.com
Lewis P. Rhodes (Washington, D.C.) (202) 719-8208 lrhodes@babc.com
E. Mabry Rogers (205) 521-8225 mrogers@babc.com
Walter J. Sears III (205) 521-8202 wsears@babc.com
Eric W. Smith (Nashville) (615) 252-2381 esmith@babc.com
Frederic L. Smith (205) 521-8486 fsmith@babc.com
James C. Smith (Charlotte) (704) 338-6010 jsmith@babc.com
H. Harold Stephens (Huntsville) (256) 517-5130 hstephens@babc.com
Robert J. Symon (Washington, D.C.) (202) 719-8294 rsymon@babc.com
David K. Taylor (Nashville) (615) 252 2396 dtaylor@babc.com
Darrell Clay Tucker, II (205) 521-8356 dtucker@babc.com
D. Bryan Thomas (205) 521-8434 dbthomas@babc.com
C. Samuel Todd (205 521-8437 stodd@babc.com
Paul S. Ware (205) 521-8624 pware@babc.com
James Warmoth (Charlotte) (704) 338-6211 jwarmoth@babc.com

Note: The following language is required pursuant to Rule 7.2 Alabama Rules of Professional Conduct: *No representation is made that the quality of the legal services to be performed is greater than the quality of the legal services performed by other lawyers.*

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 BABC *Construction & Procurement Law News*:

_____

_____

_____

☐ Please add the following to your mailing list:

_____

_____

_____

☐ Correct my name and mailing address to:

_____

_____

_____

☐ My e-mail address:_____

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:

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

Bradley Arant Boult Cummings LLP
One Federal Place
1819 Fifth Avenue North
Birmingham, AL 35203-2104

Emily Oyama
One Federal Place
1819 Fifth Avenue North
Birmingham, AL 35203-2104

BRADLEY ARANT BOULT CUMMINGS LLP **Fourth Quarter 2011**

CONSTRUCTION AND PROCUREMENT LAW NEWS

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

James F. Archibald, III	Jonathan Cobb	Rick Humbracht (n)	Vesco Petrov	Frederic L. Smith, Jr.
Sabra Barnett	F. Keith Covington	Aman Kahlon	Steven A. Pozefsky (d.c.)	H. Harold Stephens (h)
David H. Bashford (c)	Joel Eckert (n)	Michael W. Knapp (c)	J. David Pugh	Robert J. Symon (d.c.)
Charlie Baxley	Eric A. Frechtel (d.c.)	Michael S. Koplan (d.c.)	Bill Purdy (j)	David K. Taylor (n)
Ryan Beaver (c)	Ralph Germany (j)	Arlan D. Lewis	Alex Purvis (j)	C. Samuel Todd
Aron Beezley (d.c.)	Daniel Golden (d.c.)	Tom Lynch (d.c.)	Jerry Regan (d.c.)	Darrell Clay Tucker, II
Axel Bolvig, III	John Mark Goodman	Luke D. Martin	Lewis Rhodes (d.c.)	D. Bryan Thomas
Joel E. Brown	John W. Hargrove	David W. Owen	E. Mabry Rogers	Paul S. Ware
Stanley D. Bynum	Jonathan B. Head	Douglas L. Patin (d.c.)	Walter J. Sears III	James Warmoth (c)
Robert J. Campbell	Michael P. Huff (h)		Eric W. Smith (n)	Monica Wilson (c)

Proposed Legislation Gives Teeth to Small Business Self-Performance Requirements

On September 21, 2011, the U.S. Senate passed the Small Business Contracting Fraud Prevention Act of 2011. While this bill has several hurdles to clear before it becomes law, this proposed legislation nonetheless is noteworthy because, as currently written, it contains several provisions that could have a significant impact on small and disadvantaged federal contractors.

One aspect of the proposed legislation that has received remarkably little attention is that the bill provides that each payment application submitted by a contractor or subcontractor to the Government will be deemed a certification of compliance with applicable self-performance requirements on contracts managed by the Small Business Administration. If implemented, this aspect of the proposed legislation would broaden the "deemed certification" provision in the Small Business Jobs Act of 2010, which provides, among other things, that submission of a bid or proposal for a federal contract is deemed to be "affirmative, willful, and intentional certification of small business size and status." Under the September 21, 2011 version of the proposed legislation, contractors and subcontractors who violate applicable self-performance requirements could be subject to the following penalties and remedies:

- A fine up to $500,000 or imprisonment of up to ten years, or both;
- Administrative remedies under the Program Fraud Civil Remedies Act of 1986;
- Suspension and debarment per FAR subpart 9.4; and
- Ineligibility for participation in various small business programs for a period not to exceed three years.

Specifically, the proposed legislation provides that a person shall be subject to the foregoing penalties and remedies if the person:

- Uses the services of a business other than the business awarded the contract or subcontract to

Inside:

perform a greater percentage of work under a contract than is permitted by regulations issued by the Small Business Administration; or

- Willfully participates in a scheme to circumvent regulations issued by the Small Business Administration governing the percentage of work that a contractor is required to perform on a contract.

This proposed legislation gives the Government a clear-cut way to penalize contractors and subcontractors who violate the self-performance requirements of SBA regulations - authority that did not previously exist. And the penalties are very substantial. We will continue to monitor this important piece of legislation.

By Eric A. Frechtel and Aron C. Beezley

Developer's Label of Residential Project as 'Condominium' Proves Disastrous Due to Contractor's CGL Policy Exclusion

A recent case in California proves a useful reminder that the decisions made during the planning and development phase of a project can have a substantial, and sometimes negative, impact on later phases of the project. As seen in *California Traditions, Inc. v. Claremont Liability Ins., Co.*, the failure to coordinate such decisions can result in potential liability without the protection of indemnity.

California Traditions, Inc. was the developer and general contractor of a housing development. California Traditions contracted with Ja-Con Systems, Inc. to perform the rough framing for thirty residential units in phases six through eight of the development. Ja-Con was insured under comprehensive general liability (CGL) policies in effect during the time Ja-Con performed its work.

The CGL policy provided coverage for amounts the insured became legally obligated to pay because of property damage or bodily injury arising out of the insured's work. However, the policy contained an exclusion for "work product or products that are incorporated into a condominium . . . or townhouse project."

Despite the fact that the 146 residential units within the development were freestanding units with no shared walls, roofs, halls, or utility lines, California Traditions chose to develop, market, and sell the housing development as a condominium. This was principally due to the less restrictive "set-back" requirements applicable to condominiums, which allowed California Traditions to build a higher density development.

In August 1999 California Traditions sold one of the units to the Wood family (the "Homeowner"). Both the purchase documents and the grant deed described the unit as a condominium. In August 2003 the Homeowner filed a complaint against California Traditions alleging property damage and bodily injury caused by the defective construction of the unit. California Traditions then brought Ja-Con into the suit to defend and indemnify it against the Homeowner's claims. However, the CGL insurer denied Ja-Con coverage because of the exclusion.

Generally, the interpretation of an insurance policy is a question of law decided by the court. While insurance contracts have special features, they are still contracts and therefore the basic rules of contract law apply. The court's ultimate goal in construing a parties' agreement is to give effect to the mutual intention of the parties. The court will infer such intent, if possible, solely from the written provisions of the contract. Therefore, clear and unambiguous language will govern.

California Traditions argued that there was ambiguity in the CGL policy because the term 'condominium' was not defined. After examining the CGL policy at issue, the court concluded that the only reasonable interpretation of the exclusion language was that it did not cover liability arising from work incorporated into a condominium project. The court granted the CGL Insurer judgment on the argument, without allowing a jury to hear the evidence, leaving California Traditions solely responsible for any damages awarded to the Homeowner.

California Traditions serves as a good reminder that parties involved in the planning and development phase of a project should communicate with those charged with construction of that project. Additionally, it highlights the importance of reviewing the insurance program of those performing work on a project before construction. We recommend review of the policy itself and not only the certificate of insurance.

By Charlie G. Baxley

Exceptions to the Preclusive Effect of Broad Release Language in Contract Modifications

In July 2011, the U.S. Civilian Board of Contract Appeals (CBCA) issued an important decision in *Walsh/Davis Joint Venture v. General Services Administration* reaffirming certain exceptions to clear release

language in contract modifications on federal procurements. This is a very instructive decision, particularly in light of the 2009 *Bell BCI Co. v. United States* decision in which the Federal Circuit rejected cumulative impact claims as having been waived under broad release language in an earlier contract modification. A summary of the 2009 decision can be found in our Fourth Quarter 2009 newsletter, found at the 'Construction and Procurement Newsletters' link on the Construction Practice Group homepage, www.babc.com/construction.

In *Walsh/Davis*, the CBCA considered whether general contractor Walsh/Davis Joint Venture (WDJV) could prosecute subcontractor Freestate's pass-through inefficiency claim based on the cumulative impact of General Services Administration ("Government") directed changes, even though WDJV and the Government had signed contract modifications for changes affecting Freestate's work that included the following language: "Settlement of this change includes all costs, direct, indirect, and impact and delay associated with this change." Agreeing with the Government that differences between such language and the release language in the pertinent modification in *Bell BCI* were immaterial, the Board stated: "If nothing more were at issue here, we would follow in the course of the many board of contract appeals decisions – both before and after *Bell BCI* – which have enforced similarly-phrased releases." But, the CBCA continued its analysis, citing precedent that there are "special and limited situations" in which a contractor may prosecute claims despite broad releases, including (a) where neither party intended a release to cover certain claims and the use of broad language suggesting otherwise was simply a "mutual mistake," and (b) where the conduct of the parties in continuing to consider claims after the execution of a release demonstrates that they did not intend the language in the release to preclude such claims. Finding evidence supporting both of these exceptions, the CBCA denied the Government's motion for summary relief. Among other evidence, the CBCA noted that Freestate had included reservation-of-rights language in every change order proposal and cover letter, and that WDJV and the Government had continued to negotiate – and even settle – subcontractor inefficiency claims despite the earlier modifications containing the broad release language.

The CBCA's decision seems to contradict the typical refusal of courts and boards to consider evidence of the parties' intentions if a contract, including a modification or even a separate release, contains clear and unambiguous language. Indeed, *Bell BCI* stands for that very proposition. In any event, the *Walsh/Davis* decision is very instructive, reinforcing that contractors must: (a) consider, for each change, whether one or more subs are, or could allege they are, affected, directly or indirectly; (b) seek to reserve their rights in writing; (c) document their negotiations with the Government, especially concerning claims that the Government might argue later were waived; and (d),when involved in litigation, search for ways to prosecute valid claims despite broad language in prior modifications or releases, because there are exceptions to the enforceability of such language.

By Eric A. Frechtel

Conduct Constituted Waiver of Change Order Requirement

In *Tripoli Management, LLC v. Waste Connections of Kansas, Inc.*, the federal trial court for Kansas held that a contractor could pursue a claim for extra work despite the contractor's failure to obtain a written change order prior to performance as required by the contract.

The prime contract in this case, as is common, stated that a written change order must be obtained for the contractor to be paid for extra work. The contractor never obtained a written change order for the work at issue. The contractor did send some e-mail notices regarding its potential claims, but those e-mails were largely met with denials. Despite those denials, the contractor nevertheless proceeded with the extra work. At one point the contractor attempted to bill for the extra work despite the absence of a written change order.

When the contractor filed suit to collect for the extra work, the owner filed a motion to dismiss the claims based on the lack of a written change order. The contractor countered by arguing that the owner knew the work was being done and that the contractor thought it was entitled to additional payment for this work. However, the court focused on evidence presented by the contractor showing that the custom and practice had been to work out change orders after the fact. The court found that the right to insist on written change orders had potentially been waived or otherwise modified out of the contract by the parties' course of conduct in handling change order issues. Therefore, the court allowed the contractor to continue pursuit of its claims, where a jury would hear the claims (and damages) on the merits.

It must be emphasized that this decision was based on the particular facts involved in the *Tripoli* case. The court found a sufficient number of instances in which the written change order requirement had been ignored to justify

finding a waiver or modification of the change order requirement. The court in *Tripoli* acknowledged prior caselaw where the facts of other cases had not established a sufficient history of ignoring the written change order requirements to constitute waiver. The *Tripoli* court distinguished the earlier cases, emphasizing instead the central role the facts will play in determining whether there has been enough conduct to justify a finding that the written change order requirement has been waived.

What are the lessons from this case? One cannot assume that the written contract terms regarding change orders will necessarily control the outcome. What the parties do after the contract has been signed can render contract language ineffective. Further, one should not assume that "enough" has been done to waive the change order requirement because, as the *Tripoli* case recognized, this is a subjective determination based on the facts of the particular case.

By Ralph Germany

Beware Joint-Check Agreements: When a Sub Sues an Owner for Breach of Contract

Joint-check agreements have become common in today's construction market. For the subcontractor, joint checks are useful tools to ensure payment when the general contractor appears financially unstable. For the general contractor or owner, joint checks can be useful to ensure proper payment to lower-tier contractors.

However, owners and contractors should be aware that joint checks may also expose them to increased liability. A recent opinion issued by the United States Court of Federal Claims demonstrates the danger (or advantage, for subcontractors) of joint-check agreements creating an intended third-party beneficiary relationship between the owner and subcontractor. In *FloorPro v. United States*, a subcontractor (FloorPro) completed flooring work on a military base pursuant to a contract with the general contractor. During the project, the financial situation of the general contractor began to deteriorate. FloorPro's work was completed on time and under budget, but FloorPro remained unpaid.

FloorPro notified the contracting officer of its outstanding invoice, and the contracting officer suggested that the government and the general contractor agree to a two-party check to FloorPro and the general contractor. The general contractor agreed and entered into a contract modification with the government in which the government promised to issue payment jointly to FloorPro and the general contractor. However, the government failed to do so, and instead paid the general contractor directly.

FloorPro sued the government for breach of contract, claiming the contract modification was directly intended to benefit FloorPro and thus made FloorPro a third-party beneficiary entitled to bring an action based on the contract. The government argued that FloorPro could not sue for breach of contract because a contract modification intended to benefit a third party must be a condition precedent to further performance (and FloorPro's work on the project was completed at the time of the contract modification).

The court agreed with FloorPro. It held that the government entered into the contract modification with the intent to benefit FloorPro, and that the modification resulted in a direct benefit to FloorPro. Therefore, FloorPro was a third-party beneficiary entitled to bring an action under the contract. The government breached the contract by paying the general contractor directly, and FloorPro was damaged by the government's breach.

FloorPro v. United States serves as an important reminder to the construction industry that joint-check agreements may do more than simply ensure payment to a subcontractor. They may also create a direct relationship between the party issuing the joint check and the party to receive payment under the joint check agreement. Owners and general contractors should use caution when entering into joint-check agreements, because a subcontractor promised payment by joint check may be able to bring an action as a third-party beneficiary for breach of the agreement.

By Monica L. Wilson

Read and Follow Your Contract Carefully

When deciding to terminate a contractor or sub-contractor, read your contract carefully. A recent case from the Court of Appeals of Indiana, *Town of Plainfield v. Paden Engineering Co., Inc.*, reminds us that it is critical to follow all requirements in a termination clause.

In July, 2002, the Town of Plainfield contracted with Paden Engineering, Co. Paden provided an AIA A312 Performance Bond, which was expressly incorporated by reference in the contract. The contract's termination clause required seven days written notice to the contractor and a certification by the architect stating sufficient cause existed to justify termination. The contract included an example architect's certificate. The performance bond also incor-

porated certain conditions precedent before the surety's obligations arose, providing the surety with options for exercising its obligations.

Although Plainfield produced an email from the architect whereby the architect raised concerns about Paden's work and alluded to termination, the court found that the email did not constitute a "rendering" of an architect's certificate. The appeals court held that public policy favors the enforcement of contracts and therefore requires conditions precedent to be performed. The court rejected Plainfield's argument that by enforcing the condition precedent, the court was denying Plainfield its common law rights under breach of contract claims. Instead, the court stated that once an owner contractually agrees to comply with specified requirements for termination, its failure to abide by those requirements prevents it from rescinding the contract and taking charge of the work unless it abides by those requirements.

Further, Plainfield's failure to provide written notice to the surety or permit the surety to elect which of its contractual options would be exercised prevented Plainfield from collecting from the surety for Paden's default. In light of this decision, it is important to remember that you are bound by the terms of your contract and must satisfy all conditions precedent in order to collect for a breach by your contractor or subcontractor. If you have any questions about whether you can terminate, it is extremely important to check your contract and make sure that you have complied. In a termination situation, where a bond is involved, you must read the bond carefully to comply with its terms if you plan to call on the surety to perform or pay.

By Sabra M. Barnett

Bid Protests on the Rise in Current Economic Climate

The number of federal government related bid protests being filed at the Government Accountability Office (GAO) and the U.S. Court of Federal Claims (COFC) has been on the rise. The growing number of bid protests reflects the convergence of two realities: federal government contract spending generally has increased, while the economy generally has declined. In the past, companies were reluctant to file bid protests due to customer relation concerns, but today contractors are recognizing that not pursuing their protest rights can have long term, negative effects, especially as federal agencies seek to meet their needs through multiple award contracts that can last several years. Contractors are also realizing the importance of the federal bid protest system as a tool to maintain the integrity of the federal procurement process.

Bradley Arant has experienced first-hand this upward trend in the filing of bid protests. With this upward trend, we have encountered an extraordinary success rate for our clients – a success rate which far surpasses the average success rate for bid protests as reflected in published statistics. Indeed, in several consecutive protests recently filed on behalf of our clients, the procuring agency took corrective action in response to the protest grounds. For example, we recently challenged a "best value" analysis conducted by the U.S. Marine Corps Logistic Command. In response, the Marine Corps took corrective action and canceled the contract award, modified the solicitation, and re-evaluated proposals. The award result is pending. We also recently challenged the National Oceanic and Atmospheric Administration's (NOAA) elimination of a client from the competition and failure to refer its effective non-responsibility determination to the Small Business Administration (SBA). Again, the agency recognized the errors of its way and took corrective action. In this particular case, NOAA cancelled the award, reinstated our client in the competition, conducted discussions, and then re-evaluated offerors' proposal. While the client in this protest did not end up with the award, the fact remains that it was able to obtain a "second bite at the apple." But for exercising statutory and regulatory rights to protest, a second chance to be fairly evaluated and compete for the award is not possible.

Contractors should also recognize the importance of intervening in bid protests lodged by their competitors. The importance of intervening in protests cannot be understated, as this ensures that awardee-companies' interests are adequately represented and that their contract award is vigorously defended. Intervenor's counsel can make sure that agencies stay the course regarding original award decisions and do not simply take corrective action to avoid the lengthy protest process thereby subjecting the awardee to a different evaluation result.

The two primary forums that decide bid protests are GAO and the COFC. An advantage of pursuing a bid protest at GAO is the automatic stay of contract performance required by the Competition in Contracting Act (CICA). This law prohibits the procuring agency from awarding a contract or continuing performance pending resolution of a timely filed protest. In contrast to the automatic stay at GAO, if a protester files its protest at the COFC, it must meet the standards for a preliminary injunction to obtain a stay. Often, this is a very costly

process so most contractors seek to assert their protests at the GAO.

While an advantage to filing a bid protest at GAO is the CICA stay, GAO's timing requirements for filing bid protests are very strict. GAO's bid protest regulations require that protests based upon "alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals" must be filed prior to bid opening or the time set for receipt of initial proposals. A protest based on improprieties in a solicitation that is filed prior to bid opening or the time set for receipt of initial proposals is timely regardless of how long the protester was aware of the improprieties. Any other protest must be filed "not later than 10 days after the basis of protest is known or should have been known (whichever is earlier)." In the case of negotiated procurements, unsuccessful offerors must timely request a debriefing before protesting. Once this debriefing is conducted, the offeror has ten (10) days after the date on which the debriefing is held to file a timely protest. However, more germane to an effective remedy is the CICA stay. In the case of negotiated procurements, the protest must be filed within five (5) days of the debriefing in order for the protester to obtain an automatic stay of contract performance pending GAO's protest decision. Thus, it is critical in the cases of negotiated procurements to file the protest within five (5) calendar days of the debriefing in order to obtain an effective remedy. Otherwise, the agency has no legal obligation to suspend performance of the awarded contract even if the protest is timely filed between six and ten days after the debrief. The lesson here to remember is that under negotiated procurements, the contractor really only has five (5) days from the date of deadline to file a protest at GAO and guaranty an effective remedy if successful.

The COFC, on the other hand, generally has less stringent filing deadlines than are imposed in GAO protests. For example, GAO's ten (10) day filing requirement does not exist at the COFC. However, the U.S. Court of Appeals for the Federal Circuit (the COFC's appellate court), essentially has adopted GAO's timeliness rule for a COFC protest of errors apparent on the face of a solicitation so that such errors must be protested at the COFC prior to the closing date for receipt of proposals. And, in terms of complaints over evaluation errors, delaying a protest for an extended period will likely impact your ability to obtain injunctive relief and stop the procurement from proceeding. Remember, the automatic stay of performance does not apply to protests filed at the COFC.

Whether considering a protest or defending a contract award – and regardless of the bid protest forum – having knowledgeable and experienced legal counsel is essential. Bradley Arant Boult Cummings LLP has an active bid protest team (on federal and state procurements) which offers advice to increase the likelihood of a successful outcome whether you are protesting or defending an award.

By Robert J. Symon and Aron C. Beezley

Bradley Arant Lawyer Activities:

Bob Symon will be speaking at the Construction SuperConference in San Francisco on December 15th on Terminations of Government Contracts.

David Bashford and **Ryan Beavers** will also be presenting at the Construction SuperConference on "What Can You Get? The State of Damage Law Today."

Arlan Lewis co-authored an article featured in the Fall 2011 issue of *The Construction Lawyer* entitled "Subrogation Waivers."

Bill Purdy, **Mabry Rogers**, and **Wally Sears** are members of the American College of Construction Lawyers.

David Taylor spoke in Phoenix on October 27th at the International Council of Shopping Centers Legal Conference on "Using Arbitration and Mediation to Resolve Construction Disputes."

Jim Archibald, Axel Bolvig, Frederick Humbracht, Doug Patin, David Pugh, Bill Purdy, Mabry Rogers, **Wally Sears** and **David Taylor** were recognized in *The Best Lawyers in America* for 2011.

David Taylor and **Bryan Thomas** spoke on September 16th in Chicago at the National Construction Specifications Institute annual meeting on "Using Mediation to Resolve Disputes" and jointly presented a mock mediation on an actual case involving a performance versus design specification dispute.

Jim Archibald, Axel Bolvig, Mabry Rogers, John Hargrove, Joe Mays, and **Wally Sears** were named Alabama Super Lawyers for 2011 in the area of Construction Litigation.

David Taylor has been named a vice-president of the Tennessee Association of Construction Counsel.

Mabry Rogers was named "Lawyer of the Year" in the area of Construction Law for Birmingham, AL.

Ryan Beavers presented at the October meeting of the Charlotte Chapter of the Construction Financial Management Association on calculating and documenting construction damages.

David Taylor has been named to the Legal Advisory Council for AGC of Tennessee

David Taylor will speak in Nashville on December 1st at the firm's latest In-House Counsel Seminar on "Using Arbitration to Resolve Disputes." **Ralph Germany** will also speak at the event on "How to Avoid Turning Arbitration into Litigation."

Mabry Rogers and **Bill Purdy** were recognized in *Chambers 2011* edition in the area of Construction Litigation, while **Doug Patin** and **Bob Symon** were recognized in the area of Construction.

David Taylor and **Bryan Thomas** attended the Tennessee Association of Construction Counsel Annual Meeting on November 11, 2011.

Arlan Lewis was named an Alabama Rising Star for 2011 in the area of Construction/Surety.

David Taylor taught an Advanced Construction Arbitrator Training seminar for the American Arbitration Association in Nashville on September 20th.

David Taylor will present a webinar on December 2nd for the Construction Specifications Institute on Arbitration

David Pugh spoke in Birmingham on November 4th at the ABA Forum on the Construction Industry's regional program entitled "*The Construction Contracts Program: Understanding and Negotiating the Critical Clauses in the Industry Form Documents*" on contract termination, claims handling, and dispute resolution. **Arlan Lewis** served as the regional coordinator for the program.

Keith Covington spoke on the new Alabama Immigration Act at the September 20, 2011 meeting of the Birmingham Chapter of the Construction Financial Management Association (CFMA).

Bob Symon sat on a panel as a part of a presentation for the ABA Contract Claims and Dispute Resolutions Committee entitled "Claims Preparation and the Calculation of Damages" on October 12th in Washington, D.C.

Chambers 2011 recognized Bradley Arant Boult Cummings' **District of Columbia Construction Practice Group** as a Leading Firm (Band One).

U.S. News and World Report's "Best Law Firms 2010" gave the **Bradley Arant Boult Cummings Construction Practice Group** a National Tier One Ranking in the area of Construction.

Charlie Baxley was sworn in as a licensed attorney by the Supreme Court of Alabama.

Bradley Arant attorneys have recently presented training sessions to a number of clients regarding Contract Administration and regarding Mandatory Written Ethics Compliance Programs for Federal Government Contracts. If you are interested in either of these seminars for your company, please contact one of the attorneys listed on page 8 of this newsletter.

For more information on any of these activities or speaking engagements, please contact Terri Lawson at 205-521-8210.

NOTE: YOU CAN FIND THIS NEWSLETTER AND PAST NEWSLETTERS ON OUR WEBSITE. IF YOU ACCESS THIS NEWSLETTER ON OUR WEBSITE, CASE-LINKS WILL BE AVAILABLE UNTIL THE NEXT NEWSLETTER IS PUBLISHED. WE DO NOT VIEW THIS NEWSLETTER AS WRITTEN FOR ATTORNEYS BUT RATHER FOR PRACTICING MEMBERS OF THE CONSTRUCTION INDUSTRY. IF YOU OR YOUR LAWYER WOULD LIKE TO KNOW MORE INFORMATION ABOUT A PARTICULAR ARTICLE OR WOULD LIKE THE CASE CITES, YOU MAY GO TO WWW.BABC.COM/PG_CONSTRUCT.CFM OR CONTACT ANY ATTORNEY LISTED ON PAGE 8 OF THIS NEWSLETTER.

Disclaimer and Copyright Information

The lawyers at Bradley Arant Boult Cummings LLP, including those who practice in the construction and procurement fields of law, monitor the law and regulations and note new developments as part of their practice. This newsletter is part of their attempt to inform their readers about significant current events, recent developments in the law and their implications. *Receipt of this newsletter is not intended to, and does not, create an attorney-client, or any other, relationship, duty or obligation.*

This newsletter is a periodic publication of Bradley Arant Boult Cummings LLP and should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult your own lawyer concerning your own situation and any specific legal questions you may have. For further information about these contents, please contact your lawyer or any of the lawyers in our group whose names, telephone numbers and E-mail addresses are listed below; or visit our web site at www.babc.com.

James F. Archibald, III, Attorney ..... (205) 521-8520 ..... jarchibald@babc.com
Sabra Barnett, Attorney ..... (205) 521-8856 ..... sbarnett@babc.com
David H. Bashford (Charlotte), Attorney ..... (704) 338-6001 ..... dbashford@babc.com
Charlie Baxley, Attorney ..... (205) 521-8420 ..... cbaxley@babc.com
Ryan Beaver (Charlotte), Attorney ..... (704) 338-6038 ..... rbeaver@babc.com
Aron Beezley (Washington, D.C.), Attorney ..... (202) 719-8254 ..... abeezley@babc.com
Axel Bolvig, III, Attorney ..... (205) 521-8337 ..... abolvig@babc.com
Abby Brown, Construction Researcher ..... (205) 521-8511 ..... cpgrecords@babc.com
Joel E. Brown, Attorney ..... (205) 521-8416 ..... jbrown@babc.com
Stanley D. Bynum, Attorney ..... (205) 521-8000 ..... sbynum@babc.com
Robert J. Campbell, Attorney ..... (205) 521-8975 ..... rjcampbell@babc.com
Jonathan Cobb, Attorney ..... (205) 521-8614 ..... jcobb@babc.com
F. Keith Covington, Attorney ..... (205) 521-8148 ..... kcovington@babc.com
Jeff Dalton, Legal Assistant ..... (205) 521-8804 ..... jdalton@babc.com
Joel Eckert (Nashville), Attorney ..... (615) 252 4640 ..... jeckert@babc.com
Eric A. Frechtel (Washington, D.C.), Attorney ..... (202) 719-8249 ..... efrechtel@babc.com
Ralph Germany (Jackson), Attorney ..... (601) 592-9963 ..... rgermany@babc.com
Daniel Golden (Washington, D.C.), Attorney ..... (202) 719-8398 ..... dgolden@babc.com
John Mark Goodman, Attorney ..... (205) 521-8231 ..... jmgoodman@babc.com
John W. Hargrove, Attorney ..... (205) 521-8343 ..... jhargrove@babc.com
Jonathan B. Head, Attorney ..... (205) 521-8054 ..... jhead@babc.com
Anne Henderson, Legal Assistant ..... (205) 521-8371 ..... ahenderson@babc.com
Michael P. Huff (Huntsville), Attorney ..... (256) 517-5111 ..... mhuff@babc.com
Rick Humbracht (Nashville), Attorney ..... (615) 252-2371 ..... rhumbracht@babc.com
Aman Kahlon, Attorney ..... (205) 521-8549 ..... akahlon@babc.com
Michael W. Knapp (Charlotte), Attorney ..... (704) 338-6004 ..... mknapp@babc.com
Michael S. Koplan (Washington, D.C.), Attorney ..... (202) 719-8251 ..... mkoplan@babc.com
Arlan D. Lewis, Attorney ..... (205) 521-8131 ..... alewis@babc.com
Tom Lynch (Washington, D.C.), Attorney ..... (202) 719-8216 ..... tlynch@babc.com
Luke Martin, Attorney ..... (205) 521-8570 ..... lumartin@babc.com
David W. Owen, Attorney ..... (205) 521-8333 ..... dowen@babc.com
Emily Oyama, Construction Researcher ..... (205) 521-8504 ..... eoyama@babc.com
Douglas L. Patin (Washington, D.C..), Attorney ..... (202) 719-8241 ..... dpatin@babc.com
Vesco Petrov, Attorney ..... (205) 521-8102 ..... vpetrov@babc.com
Steven A. Pozefsky (Washington, D. C.), Attorney ..... (202) 719-8210 ..... spozefsky@babc.com
J. David Pugh, Attorney ..... (205) 521-8314 ..... dpugh@babc.com
Bill Purdy (Jackson), Attorney ..... (601) 592-9962 ..... bpurdy@babc.com
Alex Purvis (Jackson), Attorney ..... (601) 592-9940 ..... apurvis@babc.com
Jeremiah S. Regan (d.c.), Attorney ..... (202) 719-8221 ..... jregan@babc.com
Lewis P. Rhodes (Washington, D.C.), Attorney ..... (202) 719-8208 ..... lrhodes@babc.com
E. Mabry Rogers, Attorney ..... (205) 521-8225 ..... mrogers@babc.com
Walter J. Sears III, Attorney ..... (205) 521-8202 ..... wsears@babc.com
Eric W. Smith (Nashville), Attorney ..... (615) 252-2381 ..... esmith@babc.com
Frederic L. Smith, Attorney ..... (205) 521-8486 ..... fsmith@babc.com
Michele Smith, Legal Assistant ..... (205) 521-8347 ..... msmith@babc.com
Winston Smith, Legal Assistant ..... (205) 521-8756 ..... wsmith@babc.com
H. Harold Stephens (Huntsville), Attorney ..... (256) 517-5130 ..... hstephens@babc.com
Robert J. Symon (Washington, D.C.), Attorney ..... (202) 719-8294 ..... rsymon@babc.com
David K. Taylor (Nashville), Attorney ..... (615) 252 2396 ..... dtaylor@babc.com
Darrell Clay Tucker, II, Attorney ..... (205) 521-8356 ..... dtucker@babc.com
D. Bryan Thomas, Attorney ..... (205) 521-8434 ..... dbthomas@babc.com
C. Samuel Todd, Attorney ..... (205 521-8437 ..... stodd@babc.com
Paul S. Ware, Attorney ..... (205) 521-8624 ..... pware@babc.com
James Warmoth (Charlotte), Attorney ..... (704) 338-6211 ..... jwarmoth@babc.com
Loletha Washington, Legal Assistant ..... (205) 521-8716 ..... lwashington@babc.com
Monica L. Wilson, Attorney ..... (704) 338-6030 ..... mwilson@babc.com

Note: The following language is required pursuant to Rule 7.2 Alabama Rules of Professional Conduct: *No representation is made that the quality of the legal services to be performed is greater than the quality of the legal services performed by other lawyers.*

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 BABC *Construction & Procurement Law News*:

_____

_____

_____

☐ Please add the following to your mailing list:

_____

_____

_____

☐ Correct my name and mailing address to:

_____

_____

_____

☐ My e-mail address:_____

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:

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

Bradley Arant Boult Cummings LLP
One Federal Place
1819 Fifth Avenue North
Birmingham, AL 35203-2104

Emily Oyama
One Federal Place
1819 Fifth Avenue North
Birmingham, AL 35203-2104