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:

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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.

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NOTES

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READER RESPONSES

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

Your Name:

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

_____

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

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

Comments:

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