BRADLEY ARANT BOULT CUMMINGS LLP **Third Quarter 2015**

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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James F. Archibald, III
Ryan Beaver (c)
Aron Beezley (d.c.)
Axel Bolvig, III
Jennifer Brinkley (h)
Lindy D. Brown (j)
Stanley D. Bynum
Robert J. Campbell
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F. Keith Covington
Joel Eckert (n)
Eric A. Frechtel (d.c.)
Amy Garber (d.c.)
Ralph Germany (j)
Daniel Golden (d.c.)
John Mark Goodman
Tony Griffin (t)
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David K. Taylor (n)
D. Bryan Thomas (n)
Darrell Clay Tucker, II
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Slates S. Veazey (j)
Paul S. Ware
Monica Wilson (c)
Heather Wright (n)

You Gotta Fight… for Your Right… to Early Completion

In *Gilchrist Constr. Co., LLC v. Louisiana Dep't of Trans. and Dev.*, a Louisiana appellate court recently confirmed that a contractor was able to demonstrate delay damages due to a critical path delay based on increased work requirements even though the contractor was ultimately able to finish the project ahead of schedule. The project involved the widening of an interstate highway for the Louisiana Department of Transportation and Development. Gilchrist, the contractor, finished the project ahead of schedule and was paid the contract price, including additional compensation for change orders and an early completion bonus. The principal issue was the recoverability of delay costs for a dispute concerning the scope of work and what the contractor alleged to be the state's gross miscalculation of the quantity of embankment required for the project. Gilchrist alleged that, but for the state's gross miscalculation, it would have bid 180 more days. The trial court rendered judgment in favor of Gilchrist, and the state appealed.

The principal issue on appeal was whether Gilchrist properly proved that it incurred delay damages because of the increased quantities of embankment and lime used for the project. A cost-plus-time bidding procedure was used to bid and award the project, which takes into account not only the contract amount but also the contract time required for completion. The contract amount bid was the summation of the quantities shown in the Schedule of Items in the contract multiplied by the unit prices. The

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records established that (1) Gilchrist placed over sixty thousand cubic yards of additional embankment material (forty percent increase) than what was advertised in the requests for proposal; (2) Gilchrist accomplished the items of work required to complete the project in less time than was bid or required under the contract; (3) the state paid Gilchrist for the additional embankment materials, and (4) Gilchrist was also paid the maximum amount possible as an early completion bonus. The state argued that under the terms of the contract, Gilchrist was fully and completely compensated for any additional work caused by the increased quantities of embankment and lime. Gilchrist, however, asserted that it had incurred damages due to the delay in the project caused by placement of extra material, despite being compensated for the extra quantities.

Critical to determining whether Gilchrist was entitled to such compensation was a determination whether Gilchrist sufficiently proved that the increased quantities actually delayed the project. As proof that a delay of the project occurred due to the forty percent increase in embankment and thirty percent increase in lime, Gilchrist used its initial, baseline Critical Path Method ("CPM") schedule to show that the placement of the extra material delayed the project by 180 days. The state argued that the way by which Gilchrist used the baseline schedule to calculate whether the project was delayed was improper and incorrect. The contract contained a provision regarding CPM scheduling requiring submission of schedules in a prescribed method. Because the CPM schedule was not updated by Gilchrist in advance of the extra quantities being incorporated into the work, one of the state's scheduling experts rejected the retroactive calculation of the time impact using the baseline schedule. The expert testified that the best and most proper evidence of the facts was the culmination of all the updated CPM schedules prepared by Gilchrist as the work progressed. The only evidence of the 180-day delay claimed by Gilchrist was the impacted CPM schedules Gilchrist generated based on modifications of the baseline schedule.

There was testimony at trial that it had always been Gilchrist's intention to finish the project early. The production rate calculated for purposes of Gilchrist's bid and the actual production rate that occurred in performing the work were quite close and both greatly exceeded the production rate projected in the baseline schedule. Gilchrist put on testimony that it performed the embankment work at the accelerated production rate because of the state's refusal to grant any extra time for the additional quantities of embankment, and that it was compelled to increase its production rate to avoid the threat of liquidated damages in the event that the extra quantities caused it to fall behind schedule.

The appellate court found that the trial court did not err in accepting the impacted baseline as evidence of delay caused by the increased quantities of embankment and lime. This holding is not found in all jurisdictions; other courts have held that because a contractor failed to follow the schedule specification, it could not support its delay claim. In this case, both the lower court and the appellate court determined that Gilchrist sufficiently proved that its planned early completion of the project was delayed due to increased quantities of material. Gilchrist was, therefore, entitled to recover the damages it incurred as a result of the delay.

The court found that whether the contractor's increased production rate was a result of trying to avoid the threat of incurring liquidated damages or was simply a manifestation of Gilchrist's intention to complete as early as possible, the fact remains that the contractor performed the work at a rate that was faster than required by contract. In the construction industry, a contractor has the right to finish early, so long as that plan is expressed in advance of performing the work, generally through a baseline schedule showing early completion. Contractors should keep this principle in mind—that even if it completes a project ahead of the requirements in a contract, it may be entitled to damages resulting from the delays caused by the Owner to an early completion schedule.

By Carly Miller

"BLACKLISTING" OR "BAD ACTOR" Executive Order 13673

Officially known as the "Fair Pay and Safe Workplaces" Executive Order, Executive Order 13673 now consists of proposed guidance from the Department of Labor ("DOL") and proposed regulations from the Federal Acquisition Regulatory Council ("FAR"). It is generally considered to be one of the broadest, most demanding, and potentially most expensive of the Executive Orders issued by President Obama in 2014. The order, guidance and regulations will require federal prime contractors and subcontractors with a construction, service or supply contract of $500,000 or more to self-report violations for the prior three years of 14 different federal labor and employment laws (and also comparable state laws).

The laws of general application to all employers are: The Fair Labor Standards Act (basic wage hour law), The Occupational Safety and Health Act ("OSHA"), The National Labor Relations Act (NLRA; union activity), The Family and Medical Leave Act ("FMLA"), Title VII of the Civil Rights Act of 1964 (race, national origin, sex, pregnancy, religion; discrimination, harassment, and

retaliation), the Americans with Disabilities Act (discrimination, reasonable accommodations), and the Age Discrimination in Employment Act ("ADEA"; discrimination, retaliation). Laws applicable to federal government contractors include: The Davis Bacon Act (area wage and benefit determinations and job classifications), The Service Contract Act, Executive Order 11246 (equal employment opportunity and affirmative action; special provisions for construction companies), Section 503 of the Rehabilitation Act of 1973, The Vietnam Era Veterans Readjustment Assistance Act, and Executive Order 13658 (establishing a minimum wage for federal contractors).

In the initial bidding process, covered contractors and subcontractors will have to check a box as to whether they have had a violation of any of the above Acts in the last three years. Once a bidder is selected as a finalist, if they indicated they had a violation, then the specifics would have to be disclosed on a publicly available website. After disclosure, the contracting officer in charge of the project would maintain responsibility for determining whether the disclosed violations qualified as a "serious, repeated, willful, or pervasive" violation to determine whether the company satisfies the requirement for having a satisfactory record of integrity and business ethics. Those terms have little meaning under most of the fourteen labor and employment laws, but are somewhat defined in the EO. For example, a violation will be considered "serious" if it affects more than 25% of the workers at a worksite; if it involves more than $5,000 in fines or $10,000 in back pay; if it involves harassment or retaliation for protected activities; or if it involves interference with a government investigation including failure to provide requested information or access to property.

A senior official from within each federal agency will be designated as a "labor compliance advisor" to assist the contracting officer in making determinations. Contractors are allowed to provide any favorable information regarding terms of settlements, remedial actions taken, and factual and legal disputes that were in existence. The contracting officer could decide to require a labor compliance agreement, or refer the company to the federal agency responsible for enforcing a particular law to consider a suspension or debarment action, or simply use the past violations as a reason for denial of an award of a government contract.

There is no bright line test for determining how many violations or how egregious the violations have to be before a particular remedial action is selected by a contracting officer to apply to a company. There appears to be little dispute that the new procedures would considerably slow the federal government bidding process and also be expensive to maintain the necessary recordkeeping and reporting systems in place, especially by large contractors. It is possible that small and midsize subcontractors could be driven out of business, or out of the federal contracting arena, if challenged repeatedly by contracting officers.

Downstream, the prime contractor will be responsible for making a determination if a subcontractor shows a lack of integrity or business ethics sufficient to disqualify it from consideration for a subcontract.

In addition to the initial disclosures of violations, prime and subcontractors would have to update the report of violations every six months during a project. Prime contractors will have the duty to obtain the initial and six-month update reports from subcontractors, or they may be able to turn that responsibility over to the DOL, keeping in mind the potential problems that causes.

One of the principal problems with the proposed DOL guidance and FAR Council regulations is that a broad definition of "administrative merits determinations" is used requiring companies to report as violations agency findings which often are not final decisions. These are initial back pay calculations made by an investigator at the lowest level of the agency. They are often changed as a result of negotiations or additional facts being brought forward on behalf of the company. Further, companies can seek review at higher levels of the DOL and in Davis Bacon and Service Contract Act situations; seek due process hearings in front of two administrative levels, then to the federal courts. Though few cases actually go that far in the process, the proposed guidance and regulations show the importance of setting forth facts and law which support the company in any labor and employment cases. Examples: If a settlement occurs, it becomes more important than ever to make sure that the word "settlement" is used, that "waiver" of any prior government positions on debarment be stated, and that the employer is not admitting liability even though it agrees to comply with the particular law in question. Most government agencies will not sign off on such settlement letters but at least the employer can unilaterally draft such letters to go along with WH-56 forms or other government documents used in settling an investigation.

Likewise, an OSHA citation, which has not been fully developed, would be considered a reportable "violation," as well as an Equal Employment Opportunity Commission "reasonable cause" finding on a discrimination, harassment, or retaliation charge even though the underlying case may not have been litigated. The same applies to National Labor Relations Board ("NLRB")

complaints of unfair labor practices, which is, in effect, the NLRB becoming the attorney for the employee or a union. The bare allegations are heard by an administrative law judge, and then possibly reviewed by the NLRB, and ultimately by a federal Court of Appeals. Even so, in the proposed regulations and guidelines, an NLRB complaint would be considered a reportable "violation."

There are two other requirements in the proposed guidelines and regulations for employers seeking contracts of $1,000,000 or more. First, employers are barred from requiring their employees to enter into mandatory arbitration agreements to resolve disputes arising out of Title VII of the 1964 Civil Rights Act or any tort-related court action relating to sexual assault or harassment. This prohibition through an Executive Order arguably flies in the face of the Federal Arbitration Act, which has generally been given broad support by all courts, including the U.S. Supreme Court.

Second, anyone being treated as an independent contractor must be given notice of their status in writing, further fanning the flames of an issue that has already received considerable attention and is the focus of numerous investigations and lawsuits by the IRS and the DOL claiming individuals are actually employees, with wage and benefit rights, and tax liability for the employer.

The proposed regulations and guidance are not expected to take effect immediately as to all contractors and subcontractors, but likely will be phased in possibly during 2016. The purpose of this early notice is to put all companies that may be covered on alert that they need to be preparing for what is coming, unless stopped by the courts or Congressional action. If the provisions go into effect, it almost certainly will cost most government contractors fairly significant amounts to implement. At a minimum, a draft internal compliance plan should be prepared sooner rather than later, and all labor and employment law "violations" may be funneled through one person or office for tracking purposes. A company official or team may be assigned to go back at least two and a half years at this time to find and organize all paper and electronic files on labor law investigations and civil actions making sure to collect all paperwork or other evidence that puts the allegations in perspective. For any existing labor law investigations or cases which have not been finalized, consider how best to pursue and close them, keeping in mind this pending EO. This guidance applies not only to agency investigations but also arbitrations and any civil court actions that involve labor law violations in the 14 areas. A critical task will be for primes and subcontractors to work together to develop a plan for obtaining information on subcontractors, making sure that what is provided is complete, and begin assessing how to verify the subcontractor reports.

A company can also be active with its trade associations which will likely be involved in studying this EO and its implications. Finally, never underestimate the impact of a personal phone call or letter from senior company officials to your representatives in Congress. As always, be aware of what is coming and let it help guide your company's actions today.

By Tony Griffin

One Award to Rule Them All and in the Courts Bind Them: The Finality of Arbitration Awards

The Supreme Court of Rhode Island recently handed down a decision in *Atwood Health Properties, LLC v. Calson Construction Co.*, which reaffirmed courts' reluctance to overturn arbitration awards. In *Atwood*, the owner filed suit against the general contractor and HVAC subcontractor on an office building project. The suit alleged that defective compressors required replacement of the building's entire HVAC system. After a lengthy arbitration, the arbitrator entered an award in favor of the owner.

After the owner sought and received confirmation of the award from a Rhode Island Superior Court, however, the general contractor and subcontractor appealed the confirmation of the award on a number of grounds including that (1) the arbitrator manifestly disregarded the contract and applicable law when he failed to make a finding of negligence before determining there was a breach of contract and (2) the arbitrator inappropriately relied on an indemnification provision in the contract in violation of state law.

Before addressing the contractor's and subcontractor's arguments, the court described the very narrow or limited set of circumstances by which a court could overturn an arbitrator's decision. The court noted that arbitration awards would not be overturned for mere errors of law but might be overturned if the award was shown to be irrational or if the arbitrator demonstrated a manifest disregard for applicable law.

The court then turned to the arguments of the contractor and subcontractor, and, while acknowledging that the arbitrator made errors in interpreting the contract, reasoned that none of the errors rose to a level of demonstrating a manifest disregard for the law or resulted in an irrationally derived award. Specifically, the court opined that the arbitrator's improper reliance on an indemnification provision that required a demonstration of negligence was not sufficient to warrant overturning the

award. The court noted that other provisions in the contract could be used to support the rationality and lawfulness of the arbitrator's award, and the court further concluded that the arbitrator's erroneous analysis did not invite a judicial re-examination of the contract language. In the court's view, the arbitrator's award continued to "draw its essence" from the agreement between the parties.

The Supreme Court of Rhode Island's decision in *Atwood* drives home the point that arbitration awards are final and binding on parties. Arbitration is often praised for its efficiency and economy in resolving disputes. Contractors sought arbitration as a preferred remedy beginning in the 1960's in order to obtain swift and final determinations, without lingering court appeals to undermine or delay resolution. If that is not what your company seeks as a business matter, then it must be keenly aware of the consequences of entering into arbitration. Unlike a court ruling which may be overturned on any number of legal grounds, an arbitrator's decision will rarely be set aside. Companies should be aware of this potential when agreeing to arbitration provisions in contracts, and, if the decision to arbitrate a dispute has been made, companies should be prepared to live with the finality.

By Aman Kahlon

Connecticut Court Strictly Enforces Subcontract Defenses

One-sided subcontract clauses are a technique sometimes employed by general contractors to limit the risks of subcontractor claims. Notice requirements, no damage for delay clauses, and pay if paid clauses all give the general contractor contractual defenses against a subcontractor claim. But are these clauses enforceable? The answer sometimes varies by jurisdiction. In Connecticut, a recent decision indicates that the answer is yes.

In some states, notice clauses and risk-shifting clauses are enforced as written, with predictable results for a claiming subcontractor. In *Electrical Contractors, Inc. v. Fidelity & Deposit Co. of Maryland*, for example, Electrical Contractors, Inc. ("ECI"), an electrical subcontractor working on a laboratory facility at the University of Connecticut, asserted $1.1 million in claims for extra work and labor inefficiency against the general contractor, Whiting-Turner Contracting Company ("Whiting-Turner"). A federal district court in Connecticut granted summary judgment dismissing the majority of the subcontractor's claims without a trial, finding that the claims were prohibited by the terms of the applicable subcontract.

ECI claimed that Whiting-Turner failed to manage the project schedule, interfered with ECI's access to the work, and forced ECI to work out of sequence, thereby increasing ECI's labor costs. Under the subcontract, Whiting-Turner expressly "reserve[d] the right to alter the sequencing of activities in order to accommodate project conditions…." The subcontract also contained a no damage for delay clause providing that ECI could obtain a time extension, but not delay damages, if its work was delayed, suspended, or otherwise interfered with by Whiting-Turner. The subcontract stated "[t]here is no guarantee of continuous work" and required ECI to "work in all areas as they become available and as directed by Whiting-Turner."

The district court found that these provisions precluded ECI's impact and inefficiency claims, which were based on working out of sequence at Whiting-Turner's direction. Indeed, the court found that "the Subcontract unambiguously grants [Whiting-Turner] complete discretion over the scheduling and sequencing of ECI's work…." The court acknowledged, as a limitation, that "an entirely unreasonable" sequencing of ECI's work by Whiting-Turner might breach the implied covenant of good faith and fair dealing, but the court rejected that claim in this case because ECI failed to comply with the seven day notice requirement for claims set forth in the subcontract.

The court held that ECI's failure to give notice of its claims within seven days resulted in the waiver of its claims under the plain wording of the subcontract. A variety of equitable arguments advanced by ECI to circumvent the notice requirement were rejected by the court. For example, the court rejected ECI's claim that Whiting-Turner had actual notice of its claims, because the subcontract required written notice. The court was not concerned about whether the lack of timely notice caused any prejudice to Whiting-Turner, even though "no prejudice" is sometimes cited by courts who have adopted a more relaxed interpretation of notice provisions. The court also found that daily report references to inefficiencies experienced by ECI did not amount to contractual notice of a claim. Indeed, the court found that a letter from ECI concluding that ECI "will be submitting … costs … in the form of a claim as per our contract" was deemed insufficient to actually state a claim because, according to the court, the letter referred to a claim that would be made in the future. Finally, the court was not persuaded that it was too difficult to quantify ECI's claim within seven days, because that argument only excused the failure to quantify the claim but not the failure to give notice of the claim.

In addition to scheduling provisions, no damage for delay, and notice, the court also relied on a pay if paid clause to dismiss all but one of ECI's claims for extra work. The pay-if-paid clause provided that Whiting-Turner could not be liable to ECI for an extra work claim unless the Owner had paid Whiting-Turner for the extra work. For all but one of ECI's extra work claims, Whiting-Turner showed that the Owner had rejected the claim. For the one surviving claim, the court found that Whiting-Turner may not have submitted the claim to the Owner. To rely on this clause, the court reasoned that Whiting-Turner had to "act in good faith" and seek payment for the claim from the Owner. Because it was not clear whether Whiting-Turner submitted this claim to the Owner, the court refused to dismiss it.

The court acknowledged that its interpretation of the subcontract was "strict," but it reasoned that "the parties are sophisticated business entities capable of assuming such obligations knowingly." The court also noted that the subcontract recited that ECI had "carefully examined" the subcontract and had the opportunity to consult with an attorney about it. For a general contractor seeking to protect itself from late and poorly stated claims, this case is enormously helpful, but contractors should also be aware that not every court is willing to adopt such a strict interpretation of claims limitation clauses in a subcontract. Seemingly clear contract clauses can be interpreted differently by different courts in different states. Before entering a different state, you should consult with an attorney to determine whether the courts in that state tend to enforce contractual claims limitation clauses or whether they tend to look for ways around them. Armed with that information, the contractor and subcontractor can negotiate an appropriate contract and accurately price the risks of delay, labor inefficiency, and extra work under the subcontract. If the subcontractor cannot satisfy itself that the risks have been fairly allocated, it should decline the work, as difficult as that may be.

By Jim Archibald

General Contractor Assessed Significant Delay Damages Following Termination for Convenience

Perhaps the most common advice that Bradley Arant provides to clients is the need for an extensive review and understanding of the proposed terms of the contract (preferably by legal counsel) prior to signing. This is because once the contract is executed, the ability to limit and shift risk is effectively lost. In a second case from Connecticut, *Old Colony Construction, LLC v. Town of Southington*, the Connecticut Supreme Court confirms that the plain language of the parties' signed contract will be strictly enforced as written, even when the terms of the agreement may contravene common construction industry practice pertaining to the assessment of liquidated damages following termination.

In *Old Colony*, the general contractor entered into a $912,500 contract with the Town of Southington, Connecticut ("Town") for demolition work and the subsequent construction of a wet well, pumping station and above-grade garage. The Town's general conditions expressly stated that time was of the essence with respect to the contractor's performance under the contract, and provided for liquidated damages of $400 for each day of delay past the designated date of substantial completion. The conditions further contained a detailed process for requesting change orders and a broad general reservation of rights in the event of a termination for convenience by the Town: [the Town] "may, *without cause and without prejudice to any other right or remedy* of [the Town], elect to terminate the [c]ontract…". (emphasis added).

The contractor commenced work on the project, but there were repeated delays caused both by the general contractor's performance and inaccuracies with the Town's construction documents. The Town later terminated the contractor's right to proceed for convenience after previously threatening termination for cause on several occasions and repeatedly advising that liquidated damages would be assessed from the repeated delays. The contractor did not strictly comply with the contract's notice provisions for requesting additional time under the contract. The contractor sued for damages arising from the termination for convenience, and the Town asserted a setoff counterclaim for liquidated damages for the 789 days between the agreed upon substantial completion date and the date of the termination. Following a bench trial, the court found that the contractor was entitled to recover damages in the amount of $164,440.64 arising from the termination, but further ruled that the liquidated damages provision was fully enforceable at $400 per day. Because the liquidated damages assessed for the delay totaled $315,000.00, judgment was entered in favor of the Town in the amount of $150,559.36.

On appeal, the Supreme Court of Connecticut agreed with the trial court and affirmed the judgment in favor of the Town. Specifically, the Supreme Court found that the termination for convenience provision broadly reserved the Town's right to terminate "without prejudice to any other right or remedy," including the Town's ability to assess liquidated damages. The Court reasoned that the contract must be interpreted as signed, and that the parties could have agreed to limit the scope of this provision or

inserted restrictive language elsewhere in the agreement. Moreover, the Court found that the Town's comparative fault for the 789 day delay was irrelevant, because the contractor failed to comply with the contractual notice mechanism to reduce the damages for delay that were not attributable to the contractor.

Like *ECT* discussed above, the *Old Colony* case is important because liquidated damages, while frequently assessed in terminations for cause, are rarely assessed when a party's right to proceed has been terminated for convenience. The Supreme Court of Connecticut did not directly address this common construction industry practice and instead strictly enforced the language of the parties' agreed-upon contract, even when the Town was partially at fault for the very delays for which it was seeking to recover. *Old Colony* confirms the point that public contracts usually do not allow the contractor to negotiate the contract language. Hence, do not bid, or resolve, if the low bidder, to adopt practices to make certain the performance team follows the contract requirements. Sound administration may mean the difference between a $164,440.64 recovery as opposed to a $150,559.36 liability.

By Brian Rowlson

Bradley Arant Lawyer Activities

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

Mabry Rogers was recently recognized as one of only four 2015 BTI Client Service Super All-Star MVPs for consistently setting "the standard for outstanding client service."

Doug Patin, **Bill Purdy**, **Mabry Rogers** and **Bob Symon** were recently listed in the *Who's Who Legal: Construction 2015* legal referral guide. **Mabry Rogers** has been listed in Who's Who for 20 consecutive years.

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

Axel Bolvig, **Ralph Germany**, **David Owen**, **Doug Patin**, **David Pugh**, **Bill Purdy**, **Mabry Rogers, Wally Sears, Bob Symon**, and **David Taylor** were recognized by *Best Lawyers in America* in the area of Construction Law for 2016.

Mabry Rogers and **David Taylor** were recognized by *Best Lawyers in America* in the area of Arbitration for 2016. **Keith Covington** and **John Hargrove** were recognized in the area of Employment Law – Management. **Frederic Smith** was recognized in the area of Corporate Law.

Tony Griffin was recently selected (for the 18th consecutive year) for *Best Lawyers in America* for 2015 in the following areas: Employment Law-Management, Labor Law-Management, and Litigation-Labor and Employment.

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

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

Mabry Rogers was recently selected as Birmingham's *Best Lawyers* 2016 Lawyer of the Year in the area of Arbitration.

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

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

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

Bill Purdy and **David Taylor** were recently recognized as *2014 Mid-South Super Lawyers* in the area of Construction Litigation. **Alex Purvis** was selected as a *2014 Mid-South Rising Star* in the area of Insurance Coverage. The Mid-South region includes Arkansas, Mississippi and Tennessee.

Axel Bolvig, **Stanley Bynum**, **Keith Covington**, and **Arlan Lewis** were recently recognized by *Birmingham's Legal Leaders* as "Top Rated Lawyers." This list, a partnership between Martindale-Hubbell® and ALM, recognizes attorneys based on their AV-Preeminent® Ratings.

Mabry Rogers was one of three U.S. construction lawyers recognized for outstanding client service in London on February 26, 2015 by the publishers of *Lexology* based on a survey of its in-house counsel subscribers, as well as all members of the Association of Corporate Counsel.

On September 30, 2015, **David Taylor** and **Bridget Parkes** will speak at the Construction Specifications Institute's National "construct" meeting in St. Louis, Missouri on the topic of "Issues and Myths on Payment and Performance Bonds."

Keith Covington co-authored an article with **John Rodgers** entitled "Employee or Independent Contractor: the DOL Weighs in on Worker Misclassification" that was published in the Bloomberg BNA Daily Labor Report on September 1, 2015.

Michael Knapp presented on proper techniques and procedures for "Project Documentation" at the Federated Electrical Contractors annual project manager meeting in Las Vegas, NV, on August 21, 2015.

Bryan Thomas presented at the Construction Law 101 seminar in Nashville on May 29 and in Charlotte on June 12.

Bryan Thomas and **David Taylor** presented "The Great Debate: Do You Arbitrate?" in Nashville on May 26 and 27.

On May 21, **Keith Covington** presented a seminar entitled "The NLRB's New Quickie Election Rule and its Impact on Union Organizing Efforts" for the DeKalb County, Alabama Human Resource Professionals Group.

On May 15, 2015, **Brian Rowlson** presented to the International Concrete Repair Institute of the Carolinas Chapter's Spring Conference on the topic of "Design-Build Liability."

On May 15, **Bryan Thomas** and **David Taylor** conducted a training session entitled "Handling Changes in Nashville" for one of the firm's healthcare general contractor clients.

Carly Miller, **David Pugh**, and **Michael Knapp** presented at the Construction Law 101 seminar for clients in Birmingham on May 15.

Bryan Thomas presented "The Allocation of Fees and Costs: Creative Approaches, Opinions, and Strategies" on May 8 in Memphis, Tennessee.

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

Christopher Selman joined the 2015 class of the ABC Future Leaders in Construction.

David Pugh has been named to the lawyer position on the Jefferson County Board of Code Appeals, which governs issues concerning the interpretation and application of the International Building Code in Jefferson County. He replaces **Mabry Rogers,** who served on the Board for over a decade.

The City Council of Birmingham, AL, has re-appointed **Mabry Rogers** to a 6 year position on the City's Board of Code Appeals.

Eric Frechtel recently spoke in New York at the American Conference Institute's 2nd Forum on Construction Claims and Litigation on "Duty of Good Faith and Fair Dealing in Administering a Contract, Interpreting the Court's Ruling in *Metcalf*, Level of Proof and Breach of Contract Issues."

Michael Knapp was recently asked to serve as an adjunct faculty member for University of Alabama at Birmingham to teach Construction Liability and Contracts in its Engineering Department's graduate level Construction Management program.

David Taylor was named to the 2014 AGC of Middle Tennessee Legal Advisory Council.

Brian Rowlson was recently named co-chair of the newly formed Ethics and Legislative Affairs Committee of the North Carolina Bar's Construction Law Section **and Brian** was recently named vice chair of the Associated Builders and Contractors of the Carolinas (Charlotte Division) Education Committee for 2015.

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

Bryan Thomas and **Carly Miller** recently presented seminars to a client's construction management teams (legal and operations) in Chile.

It is with mixed emotions that we report that **Wilson Nash** recently left the firm to go in-house with one of our construction clients, where he joins the staff of one of our former lawyers, who is General Counsel for the client. Wilson will be missed, but we are pleased that we will be able to continue working with him in a new capacity and that the client will receive his sound advice in years to come.

NOTES

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

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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.*

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READER RESPONSES

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

Your Name:

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

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

_____

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

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

Comments:

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