BRADLEY ARANT BOULT CUMMINGS LLP **Second 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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Robert J. Symon (d.c.)
David K. Taylor (n)
D. Bryan Thomas (n)
Darrell Clay Tucker, II
Slates S. Veazey (j)
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Monica Wilson (c)
Heather Wright (n)

Contractor Authority Over Means and Methods

A central principle of construction contracts is that, where a contractor (a) commits to construct in accordance with plans and specifications (b) provided by the owner (c) in exchange for payment of a firm, fixed price, the contractor controls its means and methods, unless the plans and specifications clearly dictate a particular means or method. (*For example, the structural engineer may specify a particular jacking procedure for raising a space frame.)* When the owner, after contract execution, requires the contractor to perform in a different manner than the contractor planned, even though the contractor's original plan also meets the contract requirements, the contractor is due compensation for the increased costs it suffers as a result of this direction. This principle was again at play in *Columbia Construction Co. v. General Services Administration.*

In 2009, Columbia Construction Co. ("Columbia") contracted with the General Services Administration ("GSA") to upgrade an existing IRS service center in Andover, Massachusetts. The upgrade included a whole building renovation and, pertinent to this case, included an upgrade of the building's security system. Columbia subcontracted with Wayne J. Griffin Electric, Inc. ("Griffin") for Griffin to provide the electrical, communications, and security contract work.

The security system work was detailed in multiple specifications and drawings in the contract documents.

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The pre-existing building security system was an "open" system, with security cabling not run in conduit or raceways. According to the plans and specifications, in the renovated building this security wiring was required to be "concealed or in conduit (EMT) unless specifically approved in writing by the contracting officer."

The specifications defined "concealed" as follows: "covered completely by building materials, except for penetrations (by boxes and fittings) to a level flush with the surface as necessitated by functional or specified accessibility requirements." Griffin interpreted these specifications to mean that it would be permitted to install security cabling in cable trays either above the ceiling or underneath the raised access floor, because this would "cover" the security cabling "with building materials." When GSA observed Griffin installing security cable on cable trays in the raised access floor system, the GSA Contracting Officer ("CO") immediately directed Griffin to stop this work. GSA then instructed Columbia in writing to install cabling in conduit "per the contract."

Griffin noted its disagreement with this interpretation, but began installing security wiring in cable tray per the GSA direction. Griffin then submitted a request for equitable adjustment ("REA") to Columbia for the costs it claimed it would incur as a result of being forced to install security cable in conduit. Columbia passed this REA through to the GSA. After a series of meetings to discuss security cabling, GSA rejected this REA and required Griffin to continue installing security wiring in conduit.

Columbia submitted a certified claim to GSA on behalf of Griffin, which the CO denied. Columbia then appealed this decision to the Civilian Board of Contract Appeals (the "Board"), the judicial body which governs appeals from CO decisions of the GSA, Department of Veterans Affairs, and other civilian governmental bodies.

The Board ruled in favor of Columbia and Griffin. The Board noted that the contract gave the contractor the option of using conduit or another installation method that concealed the security cabling by covering it completely in building materials. The Board rejected the GSA's argument that the drop ceiling and the raised access flooring did not meet the definition of "building materials" under a plain interpretation of the contract. Considering the contract as a whole, and the various other specifications that clearly showed that "concealed" could include installation below the raised access flooring or above the drop ceiling, the Board held that it would be unreasonable to interpret the contract to exclude security cabling from this permitted installation method. Because "GSA unreasonably stopped [Griffin's] planned installation" it was required to "pay the increased price for demanding that the security cabling be installed in conduit."

This case demonstrates once again that the Government cannot require more than its plans and specifications require without paying its contractor additional compensation. It is also of interest because of what was revealed in discovery. The Government produced a document from a GSA electrical engineer that essentially admitted that the GSA requirement to use conduit exceeded the security system specifications, and noted that "if this case were to proceed forward, the government would likely be found responsible for a large portion of the stated costs…" The document also detailed a lack of consensus among GSA personnel as to whether conduit was required for this installation. The Board cited this document in its decision, although it did not state that it based its decision on it. The document was certainly harmful to the Government's position, and it brings to mind another practice point: be aware that non-privileged project documentation and correspondence is likely discoverable and could one day wind up in the hands of potential adversaries. As such, make sure that such documentation is accurate and factual, but be wary of including negative discussions of issues or "lessons learned" in such written documentation. In addition, be sure your counsel is aware of any such documentation when you seek guidance about the merits of your case.

By Luke Martin

Limits on the Implied Duty of Good Faith and Fair Dealing

In *Tug Hill Construction Inc.*, the Armed Services Board of Contract Appeals ("Board") recognized the limits of the implied duty of good faith and fair dealing. In this case, the government entered into a firm, fixed-price contract with Tug Hill Construction Inc. ("Tug Hill"), a contractor, for construction work at Fort Bliss, Texas. The contractor sought additional compensation for utility system work in excess of the original price under the contract. The Board sided with the government and held that Tug Hill was not entitled to additional compensation, and denied the appeal.

The owner of the project was the U.S. Army Corps of Engineers ("USACE"). The scope of work under the USACE's task order included the demolition of certain sections of existing utility systems, which were privately-owned, and the construction of new primary electric, water, sewer, communications, and natural gas utilities systems. The new utilities were to then be connected back to the existing main utility systems. The scope of work included the coordination of the project utility

requirements with the owners of the privatized utility systems.

The delivery order contained a Special Notice providing that the contractor was responsible for negotiating and finalizing the utility system work with the utility providers. It also stated that the contractor should include in its cost proposals the costs of work typically performed by the utility owners. In short, the USACE hired Tug Hill to coordinate, negotiate, and finalize the utility systems work with the utility providers. Tug Hill was aware of this Special Notice. Nonetheless, Tug Hill contended that the USACE breached its implied covenant of good faith and fair dealing by refusing to assist Tug Hill with negotiations with the utility providers after it was awarded the delivery order.

The implied duty of good faith and fair dealing essentially prevents a party's acts or omissions that, although not expressly proscribed by the contract, are inconsistent with its purpose and deprive the other party of the contemplated value of the contract. However, the implied duty cannot expand a party's contractual duties beyond those in the express contract. The Board concluded that the implied duty did not require the USACE to help Tug Hill perform this work, nor to help it obtain lower prices from the utility providers. Not helping Tug Hill negotiate with the utility providers was not inconsistent with the delivery order's purpose and did not deprive the contractor of the contemplated value of the delivery order.

Part of the Board's reasoning was that the language of the Special Notice was unambiguous—Tug Hill agreed to perform the delivery order work for a fixed price without having first negotiated the work with the utility providers. Tug Hill, not the USACE, assumed the risk that the work would cost more than bid in its proposal. Tug Hill also asserted a "superior knowledge" claim and a constructive change claim against the government, both of which the Board rejected.

This case touches on an important duty that both parties have in their administration of government contracts, and a duty that has come to light in several recent decisions—the implied duty of good faith and fair dealing. This case, however, recognizes the limits of that duty, in that this duty cannot expand any party's contractual duties beyond those expressed or implied in the contract. Because the contractor here knowingly entered into an unambiguous contract allocating certain risk to the contractor, it could not rely on the government to assume that risk. In a lump sum pricing situation with a public body, one way to prevent the surprise Tug Hill encountered is to inquire, in writing, about any basic assumptions your company is making in bidding. Here, the pre-bid question, "will the government use its influence to assist in obtaining the services from the providers" might have saved considerable time and treasure.

By Jessica Givens and Carly Miller

Contractor's Repeated Material Breach Excuses Subcontractor From Further Performance

The Appellate Division of the Supreme Court of New York in *U.W. Marx, Inc. v. Koko Contracting, Inc.* affirmed judgment in favor of a subcontractor, holding that the general contractor's failure to make three successive progress payments to the subcontractor resulted in a material breach, thereby relieving the subcontractor from performing its remaining work under the contract.

This case involved a school construction project in which U.W. Marx, Inc., the general contractor, subcontracted with Koko Contracting, Inc. for roofing work. Despite repeated demands for payment, Marx failed to pay Koko for three months of work. As a result, Koko stopped performance and left the site. Koko's abrupt work stoppage potentially violated a subcontract provision requiring it to give seven days notice of any suspension of work based on nonpayment. The relevant subcontract provision stated:

> "If the Contractor does not pay the Subcontractor through no fault of the Subcontractor, within seven days from the time payment should be made as provided in this Agreement, the Subcontractor may … upon seven additional days' written notice to the Contractor, stop the [w]ork of this Subcontract until payment of the amount owing has been received. The Subcontract Sum shall, by appropriate adjustment, be increased by the amount of the Subcontractor's reasonable costs of demobilization, delay and remobilization."

After Koko left the site, Marx sent Koko a notice to cure, demanding Koko cure its failure to provide workers on site within three days. Koko responded three days later, by providing its seven days' notice of its suspension of work based on nonpayment. Marx subsequently declared Koko to be in default, terminated Koko's right to proceed under the subcontract, and sued Koko for damages for its alleged breach of contract based on Koko's removal of workers.

Although Koko violated the subcontract by providing notice of its intent to suspend work after it had already stopped working, the Supreme Court of New York (New York's trial courts) found that Marx's reasons for

withholding the three progress payments were "unsubstantiated and unjustified." As such, the Supreme Court held and the Appellate Division confirmed that "Marx had materially breached the contract and that Marx's prior breach was an uncured failure of performance that relieved Koko from performing its remaining obligations under the contract." Thus, Koko's failure to give notice prior to ceasing performance was not a bar to Koko's recovery, and the Appellate Division upheld the Supreme Court's judgment in favor of Koko. In short, Koko's subsequent breach was excused by the prior material breach by Marx.

Under the facts in *U.W. Marx*, the subcontractor's decision to stop work did not cause it to incur any negative repercussions. However, the decision to proceed with a work stoppage should only be done after careful consideration, because an improper stoppage could result in damaging consequences, such as a termination for default. Contact legal counsel prior to stopping work to thoroughly consider the basis for and the potential consequences of making such a decision.

By Jasmine Kelly

Access to Pre-Solicitation Information without Mitigation Plan: A Recipe for Rescission

The Court of Federal Claims ("CFC") recently made clear that mere access to pre-solicitation information creates a potential Organizational Conflict of Interest ("OCI") that can invalidate an award. In *Monterey Consultants, Inc. v. U.S. and Loch Harbour Group, Inc.*, the CFC upheld the rescission of a Department of Veterans Affairs ("VA") task order award based on a contractor's possible access to pre-solicitation documents.

The potential OCI arose in 2013, when the VA awarded Monterey Consultants, Inc. ("Monterey") a blanket purchase agreement ("BPA") to perform processing and verification services for the VA's Center for Verification and Evaluation ("CVE") and the Office of Small and Disadvantaged Business Utilization ("OSDBU"). After the BPA expired, the VA replaced some of the BPA services with two task orders: the subjects of the underlying bid protest in *Monterey*. The Request for Quotes ("RFQ") for the task orders sought "administrative, paralegal, project management, and professional support" services in support of the CVE's verification processing.

In compliance with Federal Acquisition Regulations ("FAR") – which require Contracting Officers to preclude OCIs before award – the RFQ identified as a presumed OCI, and provided for the ineligibility of, contractors who were performing on other contracts in support of verification. In addition, offerors were required not to participate in an acquisition if 1) the contractor participated in the analysis and recommendation leading to the acquisition decision to acquire such services; or 2) the contractor may have an unfair competitive advantage resulting from information gained during performance of the contract. If an OCI was possible, the bidder was required to disclose the OCI and present a mitigation plan.

Despite the forgoing requirements, Monterey bid on the task orders without disclosing an OCI, and the VA awarded it the contract. Loch Harbour Group, Inc. ("Loch Harbour") filed a bid protest and, after the Contracting Officer's investigation, the VA rescinded the award.

The CFC deferred to the Contracting Officer's findings, emphasizing Monterey's access to solicitation documents, lack of disclosure, and lack of a mitigation plan. Regarding the solicitation documents, employees of Monterey and its subcontractor (CACI) had access to, and worked with, solicitation documents, including the requirements, independent government cost estimates, acquisition plan, market research, and evaluation criteria. To the CFC, "the problem [was] clear: prior to public availability, Monterey had access to information that could give it a competitive edge in crafting its proposal for the follow-on procurement. The CFC distinguished a prior case, *IBM Corp. v. U.S.*, where the CFC declined to find an OCI, because in that case, the employee's access to proprietary competitive information was speculative, and the information was three years old and stale by the time of the solicitation in question.

In addition, the Contracting Officer found with respect to Monterey that there was an actual OCI because a subcontractor employee working under the BPA was involved with Monterey's proposal in response to a similar solicitation for work in support of the OSDBU.

"Compounding" the clear OCI was the fact that Monterey did not have a mitigation plan, in violation of the FAR and the RFQ. The court emphasized that nondisclosure agreements were not, by themselves, sufficient. While Monterey offers little guidance on what a sufficient plan would look like, it is likely that a firewall would have been a starting point. Note that while a firewall is a good starting point for access-to-information issues, contractors should take care to craft a plan that is tailored to specifically resolve the nature of the OCI – for example, a firewall would have little value if the OCI involved potential bias.

Here, it is unclear whether a robust mitigation plan would have saved Monterey. In recent cases, the CFC has taken a strict stance on mitigation plans, even when it

requires the challenging of a Contracting Officer's administration of such a plan. This case serves as a reminder that access to competitive information – regardless of whether that information is proprietary – should be treated as a potential OCI and trigger a mitigation plan if your company is bidding or proposing on a federal contract.

By Amy Garber and Lee-Anne Brown

Contractor Barred from Using the "Total Cost" or "Modified Total Cost" Approach to Establish Delay Claim

In a recent ruling, *Hill York Service Corporation v. Critchfield Mechanical, Inc.*, the U.S. District Court for the Southern District of Florida held that a contractor may not establish damages for delay under either the "total cost" approach or the "modified total cost" approach when there is evidence attributing some of the delay to the contractor, and no apportionment of the costs has been made for the contractor's delays.

Critchfield Mechanical, Inc. ("CMI") was a mechanical contractor on the Air Force Technical Applications Center project ("the Project") at Patrick Air Force Base in Florida. The Project involved the design and construction of four separate facilities at the Base, including a headquarters building, a process support and laboratory building, a central utility plant, and an underground utility vault. CMI was responsible for creating and delivering to the Project certain major mechanical equipment, including air handling units that were to be set on the roofs and in the interiors of the headquarters building and the process support and laboratory building.

In May 2012, Hill York was awarded the piping subcontract by CMI. Hill York installed the pipe, valves, fittings, and appurtenances in the CMI equipment. Hill York claimed that it was forced to incur substantial extra labor and materials costs as a result of a number of delays caused by CMI. It alleged that CMI had delayed by several months the delivery of the air handling units for the headquarters building and the process support and laboratory building and that several of those late-delivered units were misfabricated, incomplete, and contained radical design changes. Hill York also claimed that its piping work on both the central utility plant and the underground vault was delayed for various reasons attributable to CMI, including late equipment deliveries, design changes, a premature storage of materials at the worksite, and a floor failure in the central utility plant.

Hill York sued CMI, claiming that CMI breached the parties' contract, "in part by knowingly 'failing to compensate Hill York for the impacts, inefficiencies of labor and extended performance due to changes in design, late equipment deliveries and limited access to work areas that Hill York encountered on the Project.'" Hill York sought to recover damages including labor costs and material/subcontract costs. CMI denied liability, asserting, among other things, that Hill York itself had caused significant delays on the Project.

CMI filed a motion for summary judgment, seeking to prevent Hill York from using either the total cost approach or the modified total cost approach to establish its delay damages at trial.

In analyzing CMI's summary judgment motion, the Court noted that "[t]he best proof of [a] delay claim is actual cost information taken from the [plaintiff] company's accounting books and records and accumulated in such a way that the damage calculation presents a direct cost for each item of delay." The Court, however, recognized that, in certain limited situations, a contractor may prove delay damages through other methods that are less precise than establishing the specific increased costs. Two of these recognized methods are the total cost approach and the modified total cost approach. Under the total cost approach, the difference between actual cost of the entire project and the original bid cost, after various adjustments and modifications, is the amount of damage incurred by the contractor. The modified total cost approach is a variant of the total cost approach that allows for an adjustment of the damage amount to compensate for bid errors, costs resulting from the contractor's own actions, and costs resulting from the actions of third parties.

The District Court noted that both the total cost approach and the modified total cost approach were available to prove delay damages only if the contractor could establish, as an initial matter, a number of specific elements. Among other things, in order to use the total cost approach, a contractor first has to show that it "is not responsible for any of the additional expense." Similarly, under the modified total cost approach, the contractor initially has to establish that it has "reasonably accounted for" that portion of the total costs for which it is responsible.

The District Court granted summary judgment for CMI, holding that Hill York was precluded from using either the total cost or the modified total cost approach to present its claim for delay damages to the jury. In ruling for CMI, the Court noted that CMI had presented unrebutted evidence of several problems attributable to Hill York, including late and incomplete shop drawing submittals, failing to have the materials necessary to do the

piping work, hiring unnecessary workers, and performing an exorbitant number of punch list items after its work was substantially finished. Because Hill York could not show that it was not responsible for any of the extra costs sought and could not reasonably account for the extra costs it had caused, the Court held that Hill York could not avail itself of either the total cost or the modified total cost approach to prove its claim for delay damages.

The ruling means that, if and when the case goes to trial, Hill York will be required to prove its delay claim by presenting a specific accounting of the direct cost for each claimed item of delay. This case reiterates the principle that a contractor can recover only those damages for delay that it did not cause. To sustain a total cost claim, the contractor usually must show that its bid was reasonable, that there is no feasible or practicable way to allocate delays to specific items (because of the pervasive and interwoven nature of the delays), and that critical delays are attributable to the other party. Even though often criticized, the total cost method is often accepted when the contractor makes this showing. If a contractor cannot show these elements, it will have difficulty recovering for such delay under a total cost or modified total cost approach.

By Keith Covington

Are You Covered? The "Care, Custody, or Control" Exclusion

Spring weather systems, such as the storms that have recently produced significant flooding in Texas, frequently create the necessity for restoration and remediation work. In performing such restoration work, it may be necessary to remove and store personal property contained within the physical structure that is being repaired. If you routinely perform such work, it is important to ensure that you have adequate insurance protection in the event any of that stored personal property is damaged.

For example, assume a hypothetical restoration company, Alpha Restoration, Inc., is hired to remediate flood damage to the walls and floors of a warehouse facility for an after-market auto parts manufacturer, APM Co. To complete the repair work, it is necessary to remove the manufacturing equipment from the warehouse. While the equipment is being stored, an Alpha employee negligently throws a cigarette into a trashcan containing paper. The ensuing fire destroys APM's equipment. APM then asserts a claim against Alpha, and Alpha tenders the claim to its commercial general liability ("CGL") company. Alpha's CGL insurer issues a reservation of rights letter and cites the "Care, Custody, or Control Exclusion" in the general liability insurance policy.

Contractors and subcontractors purchase a CGL policy to provide insurance coverage in the event the contractor accidently causes bodily injury or property damage to a third party. Many contractors and subcontractors may not be aware, however, that their CGL policy does not provide coverage for damage to property of a third party while that property is in the "care, custody, or control" of the contractor or subcontractor. Those kinds of damages are usually covered, in a classic construction situation, by a Builder's Risk policy.

The question that will arise in Alpha's insurance claim is whether APM's manufacturing equipment was in Alpha's "care, custody, or control." This is a question that may eventually be decided by a court in a lawsuit between Alpha and its insurers. In making this determination, courts will consider whether the property of the third person is "under the supervision of the insured" and is a necessary element of the work the contractor is performing. In some cases, "care, custody, or control" is determined just by physical possession of the property.

How could Alpha ensure that it will have insurance to protect against claims of property damage to property that is in its "care, custody or control" but no longer at the construction site? Depending on the type of the contractor's operations, there are various policies that should cover the exposure. One option is to inquire as to the availability of an endorsement to the CGL policy that will replace the coverage otherwise removed by the "care, custody, or control" exclusion. In addition, a contractor could purchase a bailee policy, which covers the exposure of holding another's property. A Builder's Risk policy will provide coverage for property on which the contractor is performing work – so long as the project is under construction and the other entity's property is at that site. However, these issues must be considered at the time of considering risks in connection with a particular project. If it is not a part of your company's usual portfolio of risks, you will want to discuss it with your lawyer or risk manager or broker.

By Heather Wright

Bradley Arant Lawyer Activities

Bradley Arant has recently opened a new office in Tampa, Florida, with the addition of twelve lawyers from Glenn Rasmussen, P.A. The firm and our construction and procurement practice group are excited about this significant step into Florida. Our group has always had a strong Florida presence, and we are confident this addition allows our group to even better service our many clients in Florida.

U.S. News recently released its "Best Law Firms" rankings for 2014. **BABC's Construction and Procurement Practice Group** received a Tier One National ranking, the highest awarded, in both Construction Law and 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 2014.

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 2014.

Mabry Rogers and **David Taylor** were recognized by *Best Lawyers in America* in the area of Arbitration and Mediation for 2014. **Keith Covington** and **John Hargrove** were recognized in the area of Employment Law – Management. **Frederic Smith** was recognized in the area of Corporate Law.

Jim Archibald, Ryan Beaver, Ralph Germany, Bill Purdy, Mabry Rogers, Wally Sears, Bob Symon, David Taylor, and **Darrell Tucker** were named *Super Lawyers* in the area of Construction Litigation. **Arlan Lewis** and **Doug Patin** were similarly recognized in the area of Construction/Surety. **Frederic Smith** was also recognized in the area of Securities & Corporate. 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.

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 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."

Bryan Thomas presented at the Construction Law 101 seminar in Nashville on May 29 and will be presenting 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, **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.

Bryan Thomas presented "Dealing with Tenant Build-Out and Resulting Claims and Liens" on May 7 in Nashville.

On April 22, **Bryan Thomas** presented a seminar entitled "Risk Management and Project Documentation" to a client in Nashville.

In April 2015, *Law360* published an Expert Analysis article authored by **Aron Beezley** titled "When JV Partners Disagree about Whether to Protest."

On April 15, 2015, **Brian Rowlson** presented to the Hispanic Contractors Association of the Carolinas' Business Management Program on the topic of "North Carolina Construction Contracts, and Lien and Bond Claims."

Arlan Lewis was elected to the 12-member Governing Committee of the American Bar Association's Form 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.

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."

In February, *Law360* published an Expert Analysis article authored by **Aron Beezley** titled "GAO Clarifies Task Order Project Jurisdictional Issues."

Mabry Rogers joined the risk management and project management teams at their quarterly meeting at a construction client's HQ in Arizona on February 26 to present a Risk Management and Avoidance interactive slide show.

On February 25, **Bryan Thomas** and **Bridget Parkes** presented "Construction Law for Residential Brokers" for the Tennessee Association of Realtors in Nashville, Tennessee.

On January 21, **Keith Covington** spoke on Employer Strategies for Union Avoidance at the Associated Builders and Contractors of Alabama's Board of Directors Installation Luncheon.

David Taylor coordinated and spoke at a CLE seminar in January in Nashville sponsored by the Tennessee Bar Association's Construction Law committee on "Managing Legal Risks in Construction Projects."

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 coordinated and spoke at a CLE seminar in January in Nashville sponsored by the Tennessee Bar Association's Construction Law committee.

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

Bryan Thomas and **David Taylor** presented a seminar on claims avoidance on December 5 for a client's executive team in Nashville.

On December 11, 2014, **Keith Covington** spoke on Recent Developments at the National Labor Relations Board at a seminar held at the firm's Birmingham office.

Jim Archibald spoke on the "Grounds for Challenging Unfavorable Arbitration Awards" on December 5, 2014 at the Construction Law Summit sponsored by the Construction Law Section of the Alabama State Bar, in Montgomery, Alabama.

In December 2014, **David Taylor** and **Bryan Thomas** presented an update on legal issues and liens for a general contractor in Nashville, Tennessee.

On December 4, 2014, **Bob Symon** served as a panelist on a presentation sponsored by the Board of Contract Appeals Bar Association (BCABA) entitled "The Duty of Good Faith and Fair Dealing - Litigants' Perspective on Recent Federal Circuit Jurisprudence from *Precision Pine* to *Metcalf* and Beyond."

Doug Patin and **Eric Frechtel** spoke at the 2014 ABA Construction SuperConference in Las Vegas, Nevada on December 2, 2014, about the *Metcalf* Decision from the Federal Circuit regarding the implied covenant of good faith and fair dealing in government contracts.

Jim Archibald spoke as part of a panel discussion on "Resolving the Dispute without Ruining the Project: Managing Mid-Project Disputes" at the same Construction SuperConference in Las Vegas on December 3, 2014.

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.

Ryan Beaver recently presented to the American Society of Civil Engineers in Uptown Charlotte on the topic of risk management and claims avoidance for engineers.

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*.

Jasmine Kelly recently passed the South Carolina bar exam. We congratulate Jasmine on this accomplishment.

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

BABC recently welcomed a new attorney to its Construction and Government Contracts practice groups in February 2015 – **Jennifer Brinkley** (Huntsville). We are very excited about this addition to our practice groups.

It is with mixed emotions that we report that **Wilson Nash** has left the firm to go in-house with one of our construction clients, where he joins the staff of one of our former partners, 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.

CPPG lawyers have again presented the complimentary "Construction Law 101" morning seminar for clients in various cities during 2015. There are still two remaining seminars upcoming: Jackson, MS on June 19, and Tampa, FL on June 26. If interested, contact any CPPG lawyer or **Terri Lawson (205) 521-8210.**

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

This newsletter is available on-line on the publications link of our group's website, which can be found at http://www.babc.com/construction_and_procurement/

The online version will allow access to the cited cases or regulations

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

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