

Construction Group Of The Year: Bradley Arant

By **McCord Pagan**

Law360 (December 16, 2020, 8:22 PM EST) -- Bradley Arant Boulton Cummings LLP helped contractor Kiewit overturn its bid protest loss at the GAO for a \$39 million contract, and won a precedential opinion from the Fourth Circuit to enforce the terms of Turner Construction's agreement with a subcontractor in a spat over work on an FBI facility, helping it earn a place among Law360's 2020 Construction Groups of the Year.

While Bradley is a general practice firm and provides a range of services, construction is one of its primary focus areas, David Owen, head of its construction and government contracts practice said. The group has about 70 members at the firm of around 550 attorneys, he said.

While Bradley's construction group works out of all 10 of the firm's largely Southeast-located offices, its most prominent outposts are in Washington, DC, Charlotte, North Carolina, Nashville, Tenn., Birmingham, Ala., Houston, Texas and Jackson, Miss., Owen said.

The group is always open to growth, but it prefers to do so organically as it's largely done since its start in the 1970s rather than for the sake of growing, he said.

In March, the Court of Federal Claims sided with Bradley client Kiewit Infrastructure West Co. after it initially lost a bid protest at the Government Accountability Office in a dispute stemming from a withdrawn roughly \$39 million contract for a new aircraft ramp at a military base in Oregon.

Bradley partner Douglas Patin said the win for Kiewit was significant because not only did the Kiewit win its case arguing the government's decision to withdraw the contract wasn't based in fact, but the company was later again awarded the work at the Kingsley Field Air National Guard Base.

"Bid protests are hard to win," Patin said. "And when the government has discretion to do something in a bid protest, it's very hard to overturn."

"I would call it a significant opinion that said the government acted irrationally in cancelling the solicitation," he added.



In August 2019, the Department of Defense's National Guard Bureau canceled the award to Kiewit while it was finalizing the deal and sought to start the process over, even though the contractor had been publicly revealed to be the lowest bidder two months before, according to the Court of Federal Claims opinion.

While on the same day the bids were revealed the government said its own independent estimate for the project was just \$27 million, the contract moved forward with an officer finding in July that Kiewit's bid was fair and reasonable, the order said.

After the GAO in December 2019 denied Kiewit's bid protest, the Court of Federal Claims in March agreed to set the cancellation aside.

"The [contracting officer's determination and findings] failure to explain certain contradictions, within itself and within the record, prevent it from establishing unreasonable pricing as a compelling reason for cancelling the [invitation for bids]," the court said.

In another case stemming from a government contract, Patin worked on the Bradley team that helped represent Turner Construction Co. as it fended off claims from its subcontractor Modern Mosaic Ltd. in a dispute involving a \$24 million settlement with the FBI over the work for a West Virginia facility.

In a precedential 4th Circuit decision in December 2019, a unanimous panel sided with Turner and agreed not to grant Modern a portion of Turner's settlement with the federal law enforcement agency over issues from the build of the facility.

"Modern's claims are entirely inconsistent with the terms of the prime contract and the subcontract," the panel wrote. "When parties, particularly sophisticated commercial entities like Turner and Modern, negotiate and enter into written agreements, they have a right to expect the provisions of those agreements will not be cast aside when a dispute arises," it added.

Part of what made the case unique is that basic contract interpretation issues don't usually go up to the level of appeals courts like this one did, Patin said.

Furthermore, the holding in the case that subcontractors can't go beyond the plain language of the contract and refer to outside evidence such as meetings or letters to try and interpret the agreement will likely be cited in the future, he added.

"And the court says 'no, we're not going to look at all that other evidence,'" Patin said. "'The plain terms of the contract are clear. And I'm going to enforce the contract the way it's written and I'm not going to look at what this other evidence is because it's not legally relevant,'" he said.

--Editing by Amy Rowe.