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Bradley Arant Boult Cummings LLP

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CONSTRUCTION AND PROCUREMENT LAW NEWS

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

A Sign of the Times: Recent Updates to AAA Commercial Arbitration Rules and Mediation Procedures Embrace Efficiency and Remote Technology

Arbitration is generally considered the more efficient and less expensive alternative to litigation in court, but it doesn't always seem that way. Recent amendments to the American Arbitration Commercial Arbitration Rules and Mediation Procedures (effective September 1, 2022) ("AAA Rules") are consistent with the AAA's mission purpose from 1950, to provide parties "an orderly, economical, and expeditious procedure for the determination of their dispute." The most significant of these changes severely limit motions practice and expressly provide for the use of remote technology during proceedings.

The following rule changes provide for remote proceedings and testimony:

- R-22 expressly provides for the preliminary hearing to be conducted by videoconference.
- R-25 lists "video, audio, or other electronic means" as a method of hearing.
- R-33(c) affords the Arbitrator discretion to permit "some or all of the presentation" by "video, audio, or other electronic means other than an in-person presentation," as long as the parties have "full opportunity" to present evidence and cross-examine witnesses.

These rule changes restrict discovery and motions practice:

- R-34 affords the Arbitrator discretion to permit dispositive motions, but "only if" the moving party shows the motion is likely to succeed and/or narrow the issues in the case.
- In expedited cases, Rule E-5 prohibits any motions and discovery (other than exchanging exhibits) without a finding by the Arbitrator of "good cause."

Other changes address cybersecurity and confidentiality:

- Preliminary Hearing Procedure P-2(vi) adds "cybersecurity, privacy, and data protection" to the preliminary hearing checklist.
- R-45 (new rule) requires the AAA and the Arbitrator to keep arbitrations confidential and permits the Arbitrator to issue confidentiality/protective orders upon request.

Other notable changes to the AAA Rules include: permitting a party to request that the Arbitrator "interpret" an award (R-52); increasing the threshold for Expedited Procedures from $75,000 to $100,000 and increasing the threshold for Large, Complex Case Procedures from $500,000 to $1,000,000 (R-1(b) and (c)); and providing for consolidating existing arbitrations and joinder of parties (R-8).

These changes to the AAA Rules reflect the integration of efficiency and technology in accordance with the long-standing premise of the AAA to streamline the disputes process. These changes not only promote the efficiency that has long defined arbitration, but they also memorialize the shift that litigants have seen in recent years toward using video and other technology. Given these recent changes it is worth considering the Commercial Industry Rules in lieu of the Construction Industry Rules.

By: Amy Garber

The Limits of Third-Party Beneficiary Rights in New York

On complex construction projects, there may be multiple contractors, subcontractors, vendors, suppliers, and sub-subcontractors working along side one another. With various entities working in parallel, there are substantial risks that one contractor's work will interfere with that of another contractor on the project. When the two parties have direct contracts with one another (*e.g.*, owner and general contractor or general contractor and subcontractor), the non-interfering or non-breaching party can pursue whatever rights and remedies are available under the contract. However, it is trickier when two parties on the same job do not have contracts directly with one another (*e.g.*, multi-prime projects or conflicts between different subcontractors). In those circumstances, lacking privity, a damaged party may attempt to pursue breach claims as a third-party beneficiary or common law tort claims.

In *Greg Beeche, Logistics, LLC v. Cross Country Construction, LLC*, a New York appeals court signaled that such an approach is unlikely to have much success in the Empire State. The project in that case involved the construction of a 69-story condominium building in New York City. The project's construction manager, as an agent for the owner, hired various contractors to complete the work. The construction manager entered into a contract with Cross Country, the defendant, for the erection of the concrete superstructure for the building. The construction manager also hired a curtain wall contractor (Enclos). Greg Beeche (Beeche), the plaintiff, executed a lease agreement with Enclos to provide scaffolding for the project.

Beeche alleged that Cross Country delayed the project more than 20 months because of its chronic negligence and dilatory performance. Beeche sought recovery of millions in lost scaffolding rent and other damages associated with designing and engineering the scaffolding specific to the project. Beeche's complaint set forth causes of action for breach of contract, negligent misrepresentation, negligence, quantum meruit, and unjust enrichment.

In support of its contract claims, Beeche asserted it was an intended third-party beneficiary of Cross Country's contract with the construction manager. With regards to its negligent misrepresentation claim, Beeche alleged that Cross Country "owed it a duty of care to supply reasonably accurate information regarding the time it would need to perform its concrete work and promptly update that information as needed, which [Cross Country] failed to do." Cross Country moved to dismiss the third-party breach claims and the negligent misrepresentation claim. The trial court agreed, and Beeche appealed.

The New York intermediate appellate court rejected Beeche's third-party beneficiary status and negligent misrepresentation claim. In upholding the trial court's decision, the appellate court noted that there was no language in Cross Country's agreement with the construction manager that expressly deemed Beeche an intended beneficiary of Cross Country's agreement with the Construction Manager or any other evidence supporting any right of Beeche to enforce that contract. In fact, the language in Cross Country's contract established the opposite: the agreement expressly provided that the only contractual relationship created was between Cross Country and the construction manager. As an incidental beneficiary, Beeche was not entitled to pursue breach claims under Cross Country's contract with the construction manager.

The appellate court, likewise, upheld the dismissal of Beeche's negligent misrepresentation claim. The appellate court agreed with the trial court that Beeche was not a "known party" that Cross Country should have expected would rely on any allegedly negligent misrepresentation. Since reliance by a "known party" is one of the criteria for imposing liability for negligent misrepresentation in the absence of contractual privity, the appellate court held the trial court correctly dismissed that cause of action.

The *Greg Beeche* case underscores the importance of considering third-party risks at the contract negotiation phase on any construction project. Because a contractor or subcontractor may ultimately be limited by the terms of its agreement in pursuing relief, allocating risk of a third-party's default and or interference in the performance of the subject contract can be important to preserving rights and remedies once construction begins. In Beeche's case, it may have been better off negotiating directly with the curtain

wall contractor for relief from any delays by other contractors or subcontractors on the project outside of its control.

By: Aman Kahlon

Florida Legislature Aims to Reduce Construction Claims

On April 13, 2023, Senate Bill 360 was signed into law by Florida Governor DeSantis. This bill makes changes to Florida Statute 95.11(3), which addresses when a lawsuit can be brought in relation to the design, planning, or construction of an improvement to real property.

The bill shortens the statute of repose for construction defect claims from ten (10) years to seven (7) years. In short, a statute of repose extinguishes a potential plaintiff's right to pursue causes of action related to the construction of an improvement after the expiration of a certain period of time. While there may be some limited exceptions, in Florida and many other states, the running of the statute of repose functions as an absolute bar for bringing a claim in any way related to the construction of an improvement. Accordingly, shortening that time frame is a meaningful change for the construction industry.

The prior version of the statute provided that the 10-year clock would not start running until the *latest* of several triggering events occurred. The new version provides that the 7-year time frame starts running at the *earliest* of the date the authority having jurisdiction issues a (1) temporary certificate of occupancy, (2) a certificate of occupancy, (3) a certificate of completion; or (4) the date of abandonment of construction if not completed. Further, if the improvement consists of the design, planning, or construction of multiple buildings, each building must be considered its own improvement for purposes of determining when the statute of repose clock starts running, as to that building.

The amendments took effect on the date the bill was signed, meaning that they apply to any cause of action commenced on or after April 13, 2023, regardless of when the cause of action accrued. One exception is for actions that would not have been barred under the old version of the law. Such actions will need to be commenced on or before July 1, 2024 or be barred.

While the scale of the impact of these changes remains to be seen, owners and contractors alike should be aware of them and plan accordingly.

By: Petar Angelov

Takeover Agreements and Excusable Delays: No Good Deed Goes Unpunished

When the federal government terminates a contractor for default, the terminated contractor's sureties will often contract with another contractor to complete the work, and the government may enter into a takeover agreement with the new contractor for the project. As the Federal Circuit recently demonstrated in the non-precedential decision, *E&I Global Energy Services, Inc. v. U.S.*, the terms of the contract between the surety and takeover contractor require careful planning and consideration, particularly when the defaulted contractor has outstanding debts to subcontractors and suppliers.

In *E&I Global,* E&I entered into a contract with the sureties of a defaulted contractor to complete the work and a takeover agreement with the Government. The contract between E&I and the sureties stated that E&I would not be responsible for the original contractor's outstanding debts to subcontractors and suppliers, and it barred either party from unilaterally "enter[ing] into any settlement with respect to any Third Party Claim." Although obligated, the sureties failed to pay the defaulted contractor's outstanding debts to its subcontractors. Unsurprisingly, the subcontractors refused to return to work until paid, forcing E&I to make the payments itself. This left E&I without the funds needed to complete the contract on time, which ultimately led the government to terminate E&I for default.

E&I appealed to the Court of Federal Claims arguing that the termination for default should be converted into a termination for convenience pursuant to FAR 52.249-10(c) because the delay was excusable as it resulted from unforeseeable causes beyond the control and without the fault or negligence of E&I. The trial court rejected this argument, holding that E&I's delay was inexcusable because the contractor's voluntary payments to the subcontractors violated its contract with the sureties.

The Federal Circuit court reversed and remanded back to the Court of Federal Claims, holding in a nonprecedential decision that this situation may have constituted an excusable delay. First, the Court reasoned that the government's argument that E&I breached its contract with

the sureties was without merit because the purpose of the settlement provision was to protect the sureties, not the government, and the "breach of an obligation to third parties is not an absolute defense to the government's allegedly erroneous termination of its contract with E&I for default." Second, the Court found that the trial court ignored part of E&I's argument "that the unwillingness of its subcontractors and suppliers to work without being paid delayed things from the start, even before E&I encountered financial difficulties" from having to pay the original contractor's subcontractors. Finally, the Court noted that the government did not establish that E&I breached its contract with the sureties because E&I's payment of the subcontractor and supplier claims did not settle these claims within the meaning of the contract. Ultimately, the Federal Circuit did not decide whether the sequence of events established an excusable delay, but the Court's remand back to the Court of Federal Claims entitles it "to try and do so."

Although the Federal Circuit's decision in *E&I Global*, is nonprecedential and uncitable, and the contractor may ultimately be able to prove excusable delay, the facts of this case should serve as a cautionary tale to federal contractors: carefully plan and consider the contractual terms before signing a contract with a surety to complete a defaulted contractor's work; as always, they matter. What could E&I have done differently? It's always hard to second-guess, but could it have required proof of payment from the sureties as a condition of signing the agreement with them?

By: Erik Coon

Connecticut Supreme Court Finds No "Flow Up" Presumption of Privity

Under the principles of issue and claim preclusion, subcontractors are generally bound by the outcome of litigation between the general contractor and owner with respect to the same question. But what about the inverse situation? Does a ruling in favor of the owner against a subcontractor's claim have a preclusive effect on the general contractor in subsequent litigation? In *Strazza Bldg. & Construction, Inc. v. Harris*, the Connecticut Supreme Court held that the answer is "no."

In that case, an owner (Harris) hired a general contractor (Strazza) to perform substantial renovations to the Harris' home. Strazza then hired a subcontractor (Rozmus) to complete the plumbing and heating scope of work. After a dispute arose over the cost and quality of the work, Harris terminated Strazza's contract. Both Strazza and Rozmus filed mechanic's liens against the owner's property, claiming unpaid balances.

Harris first initiated a lawsuit against Rozmus seeking to discharge or reduce the subcontractor's mechanic's lien (the "Rozmus action"). In the Rozmus action, the court reduced the subcontractor's lien claim from $97,469.86 to $62,040.36. The court also determined that Rozmus could recover the sum it claimed to be owed only to the extent that Strazza, the general contractor, was still owed money. After reviewing both Rozmus' and Strazza's lien claims and credits due from Strazza to Harris, the court ultimately concluded that Harris did not owe any money to Strazza. Because the lienable fund for Strazza's contract was completely exhausted, the trial court found the lien held by Rozmus was invalid and ordered it discharged.

Shortly thereafter, Strazza filed suit to foreclose its mechanic's liens against Harris (the "Strazza action"). Harris, however, sought summary judgment, arguing that the trial court should give preclusive effect to the trial court's decision in the Rozmus action that no lienable funds existed. The trial court denied Harris' summary judgment motion, stating that a genuine issue of material fact existed regarding whether there was sufficient privity between Strazza and Rozmus to preclude Strazza from pursuing its claims against Harris. The court of appeals and the Connecticut Supreme Court agreed.

When an owner and a general contractor litigate disputes or enter into a binding arbitration, the subcontractors are presumptively in privity with the general contractor with respect to the preclusive effects. The court in *Strazza Building* determined that there was no basis for concluding that this presumption of privity arises in the opposite situation, that is, when the prior adjudication is between the owner and the subcontractor. First, Rozmus had less money at stake in the Rozmus action, and therefore less of an incentive to litigate. Second, the court in the Rozmus action decided broad issues related to the renovation yet did not allow Strazza to sufficiently represent itself in the trial. Lastly, Strazza did not reasonably expect to be bound by judgment that considered only a portion of the work completed on the home renovation. Therefore, the court concluded that it would be inappropriate to apply a presumption of privity in the Strazza action.

Strazza Building affords an important protection for general contractors against the powerful effects of preclusion. In the (somewhat unlikely) event the owner and a subcontractor litigate construction disputes in the absence of the general contractor, the contractor will not be bound by the outcome

in Connecticut. However, the argument by the Owner here was a creative one, worthy of a ruling from the Connecticut Supreme Court. Parties in the construction industry in other states should be aware of it as it is always possible another court in another state could reach a different conclusion.

By: Hunter Webb

Government Does Not Warrant Performance of Specified Sources

It is not uncommon for the Government to require that its prime contractor use specific subcontractors or suppliers. When it does, a potential contractor (or "offeror") may believe that the Government guarantees or warrants the performance of such specified sources and/or that they are available to provide the required parts or services and bid the job accordingly. A recent decision from the Armed Services Board of Contract Appeals ("ASBCA") serves as an important reminder to Government contractors that there is no such warranty and that the prime contractor—*and not the Government*—is responsible for the performance of (or lack thereof) their subcontractors and suppliers, even when use of those subcontractors or suppliers is specified by the Government.

In *Metro Machine dba General Dynamics NASSCO-Norfolk*, the specifications required the contractor to have a technical representative of the original equipment manufacturer ("OEM") to be present for testing of a ship component before disassembly and during reassembly. The prime contractor's subcontractor had difficulties scheduling the OEM's technical representative's presence, and the Government agreed to allow the testing to proceed without the OEM. Inspection of the component revealed that it needed to be refurbished by the OEM. When the OEM returned the refurbished component, the subcontractor reinstalled it without the oversight of the OEM's technical representative. When the component was activated, it was badly damaged, which significantly delayed the project.

The contractor appealed the Government's assessment of liquidated damages. The ASBCA denied the appeal, finding that the Government had not participated in the contractor's (and its subcontractor's) decision to proceed without the required OEM technical representative. In addressing the contractor's argument that the performance problems it encountered were caused by the Government's specified OEM not performing the required services, the ASBCA surveyed its earlier decisions dealing with Government-specified sole sources for parts and reasoned that "with the exception of the warranty that the sole-source supplier identified by the Government is capable of performing the work, the government makes no other warranties when such a subcontractor is identified by contract, and the prime contractor is as responsible for that subcontractor's work as it would be any other subcontractor." The ASBCA continued: "[g]iven the limits of that warranty, the government is not liable for the acts or omissions of a sole-source contractor who, though capable, does not meet the performance needs of the prime and the identification of such a sole source contractor would not make a deficient specification for which the government is liable." Thus, the ASBCA found that the contractor was the only party with privity of contract with the OEM and was responsible for managing its performance appropriately.

While the ASBCA ultimately held that the delays were not the fault of the OEM, the decision provides an important warning to offerors that Government-specified sources do not shift all risks to the Government. Contractors need to ensure that their subcontractors—including government specified sources—will perform before competing for work. This may increase proposal costs, particularly on complex projects, but neglecting to do so comes with risk. Thus, contractors entering into contracts with government specified sole source suppliers or subcontractors should be aware that they are assuming the risk of that specified source's untimely performance and should ensure that the subcontract contains appropriate controls and remedies in the event of performance troubles. Moreover, the prime contractor should usually consider asking the Government for help with a sole-source supplier when it balks at timely performance: that may get relief, and it may also assist the prime contractor's argument that untimely performance is in fact non-performance. Furthermore, it should involve the Government in the decision to proceed without the required inspection.

By: Lee-Ann Brown

Safety Moment for the Construction Industry

Who is in charge of safety on the jobsite or in the workplace? The answer is simple: everyone. You may look for the Safety Superintendent for all things safety related. Or your company may have a Human Resources department, tasked with making sure the safety standards and practices are followed. In other companies, management and supervisors perform these roles. Regardless of how your company is structured, safety is

both a personal and a communal responsibility, and it is the resposibiltiy of each individual person to create and maintain a safe, healthy work environment.

Bradley Lawyer Activities and News

Bradley Continues Atlanta Growth with Addition of Accomplished Construction Attorneys

Bradley is pleased to announce the addition of highly regarded construction partners John I. Spangler III and Deborah Cazan to the firm's newly launched Atlanta office.

"John and Debbie are the perfect complement to our accomplished roster of Atlanta attorneys. Coming from an award-winning construction practice at their previous firm, they bring outstanding reputations and significant experience handling complex construction claims across the U.S.," said Bradley Chairman of the Board and Managing Partner Jonathan M. Skeeters. "We are proud of our position as the leading construction law firm in the nation and the top talent we continue to attract to our construction team of more than 80 attorneys."

Bradley Adds Team of Construction Attorneys to Dallas Office

Bradley is pleased to announce that Barry Brooks, Morgan Crider and Jacob A. Muñoz have joined the firm's Construction Practice Group in Dallas.

"We welcome this talented group to our Dallas team. This team's capabilities and stellar reputation will be a tremendous asset as we serve clients in construction-related matters," said Bradley Dallas Office Managing Partner Gene R. Besen. "Texas is a prime market for major construction and economic development projects, so bolstering our construction team and capabilities continues to be an important part of our strategic focus."

Accolades

Bradley is pleased to announce that Houston partners **Ian P. Faria** and **Jon Paul Hoelscher** are both serving in leadership positions for the Construction Law Section of the State Bar of Texas.

Mr. Faria was elected to a two-year term as Legislative Affairs advisor for the bar's Construction Law Section, where he previously served on the Governance Committee from 2015 to 2018. Mr. Hoelscher will continue serving as a council member for the section through 2024.

Bradley's Construction Practice ranked in the Top 5 in the Nation by *Construction Executive* in the annual *Top 50 Construction Law Firms* rankings for 2023.

Chambers USA ranked Bradley as one of the top firms in the nation in Construction and in Government Contracts for 2023. The firm was also recognized as a top firm in Construction for the following locations: Alabama, Florida, North Carolina, Mississippi, Texas, Tennessee, and Washington, DC.

Chambers USA 2023 also ranks lawyers in specific areas of law based on direct feedback received from clients. **Jim Archibald, Ryan Beaver, Lee Ann Brown, Debbie Cazan, Ben Dachepalli, Ian Faria, Tim Ford, Ralph Germany, Jon Paul Hoelscher, David Owen**, **Doug Patin, David Pugh, Bill Purdy, Mabry Rogers, John Spangler, Bob Symon,** and **David Taylor** are ranked in Construction. **Aron Beezley** is ranked in the area of Government Contracts.

In *Best Lawyers in America* for 2023, **Jim Archibald**, **Michael Bentley**, **David Taylor**, and **Bryan Thomas** were named Lawyer of the Year in Litigation – Construction, and Construction Law in their respective markets.

Ben Dachepalli and **Tim Ford** were named 2023 *Florida Super Lawyers.*

The following Bradley attorneys are recognized as 2023 *Washington, D.C. Super Lawyers:* **Aron Beezley**, (Government Contracts), **Doug Patin** (Construction Litigation), Lee-Ann Brown (Rising Star: Construction Litigation), **Lisa Markman** (Rising Star: Construction Litigation, Government Contracts), and **Kevin Mattingly** (Rising Star: Construction Litigation, Government Contracts).

Ryan Beaver was named *2023 North Carolina Super Lawyers* in Construction Litigation.

Matt Lilly was named 2023 *North Carolina Super Lawyers* "Rising Stars" in Construction Litigation.

Saira Siddiqui was named 2023 *Texas Super Lawyers* "Rising Stars" in Construction Litigation.

Mason Rollins was recognized as an AGC Alabama "40 Under 40" in Commercial Construction for 2023, recognizing the top 40 individuals demonstrating a high level of leadership, excellence and commitment to the industry.

Ryan Beaver and **Anna-Bryce Hobson** were named to Business North Carolina's Legal Elite for 2023. Ryan was

named in the category of Construction Law, and Anna-Bryce was named as a rising star.

Aron Beezley was named as Law360's 2022 MVP of the Year in Government Contracts. **Aron** was also recognized by *JD Supra* in its 2022 Readers' Choice Awards for being among the top authors and thought leaders in government contracts law. *(If you haven't read Aron's blogs, go to our website: www.buildsmartbradley.com to read them and all of our other construction related blogs.)*

Mason Rollins attended the Annual Alabama AGC Convention June 22-25 in San Destin, Florida.

In June, **Monica Dozier** and **Matthew Flynn** published a whitepaper entitled "Bonus Points: Evaluating Pre-Regulatory Guidance for the Domestic Content ITC Bonus Qualification," analyzing the current state of compliance with the domestic content tax credit bonus pursuant to the Inflation Reduction Act of 2022. (If interested, contact Monica Dozier for a copy).

David Owen and **Mason Rollins**' article "Documents Can Be a Claim Maker or Claim Breaker" was published in the Summer Edition of the Alabama AGC BuildSouth Magazine.

In March, **Monica Dozie**r, **Stephanie Gaston**, and **Amy Puckett** published a whitepaper entitled: "The New Normal for Renewable Energy Projects: An Overview of Prevailing Wage and Apprenticeship Requirements under the Inflation Reduction Act," analyzing the requirements to pay prevailing wages and use registered apprentices to obtain investment tax credits for qualifying facilities pursuant to the Inflation Reduction Act of 2022. (If interested, contact Monica Dozier for a copy).

Bradley is pleased to announce that 12 of the firm's Dallas and Houston attorneys have been named to the 2023 *Lawdragon 500 X – Next Generation* list, including:

- Melissa Broussard Carroll, Construction, Oil & Gas and Litigation
- Eve L. Pferdehirt, Construction and Litigation
- Saira S. Siddiqui, Construction, Energy, Commercial Litigation and Personal Injury
- Sydney M. Warren, Construction and Commercial Litigation

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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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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

You may also email your ideas to Emily Oyama at eoyama@bradley.com.

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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 #Streaming for later view

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